STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
G. Thomas Cooper, Circuit Court Judge

THE STATE,

Respondent,

vs.

JEFFREY BOYD COOPER,

Appellant.

Appellate Case No. 2016-000189

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I.

The Magistrate did not err in denying the motion to vacate judgment where the evidence before the Magistrate indicated that notice was mailed to both Appellant and his counsel well in advance of trial.

II.

Evidence supported the conviction for breach of peace and the sufficiency of evidence was never raised to the Magistrate, so it is not preserved for review.

STATEMENT OF THE CASE

On March 5, 2014, Appellant Cooper was tried by jury in absentia for Breach of Peace before the Honorable Magistrate James Davis. Neither Cooper nor his attorney were present. Cooper was found guilty, and Magistrate Davis sentenced Cooper to thirty days imprisonment suspended to a $262 fine.

Cooper's counsel (Counsel) moved to vacate the judgment and a retrial on March 17, 2014, arguing Counsel failed to receive notice of the trial. Magistrate Davis denied the motion at the conclusion of the hearing, finding the Magistrate's Office met its obligations to provide notice. In the Magistrate's Return dated May 21, 2014, Magistrate Davis explained, "[N]otice was sent to the address listed at that time with the South Carolina Bar Association for all appearance dates and was mailed in a sufficient amount of time for the Attorney, the Camden Law Firm, and the Defendant, Jeffrey Boyd Cooper, to be present." R. 27.

Cooper appealed to Common Pleas. The Honorable G. Thomas Cooper, Jr., heard oral argument on November 20, 2015. Judge Cooper affirmed the conviction and sentence by order dated December 23, 2015, finding, "After considering the record in this case, this Court finds no reason to reverse Judge Davis' sentence or his denial of Mr. Cooper's Motion to Vacate Judgment and For a Retrial." R. 47. Judge Cooper denied the subsequent motion to reconsider by order dated January 12, 2016. R. 52.

STATEMENT OF FACTS

At trial, the only witness was Officer Corbett, who also prosecuted the case. Officer Corbett testified he and Deputy Willhoit were serving a warrant on David Dukes, who was hiding underneath the truck Cooper and a passenger were sitting in. The two men were drinking beer. The Officers placed Dukes in the patrol car. Meanwhile, Cooper became verbally aggressive and used lots of profanity. Officer Corbett noticed ammunition on the dashboard and in the tail of the truck. Officer Corbett also noticed Cooper seemed defensive about a sweatshirt on the driver's seat next to him. Officer Corbett told Cooper he was going to check under the sweatshirt for possible weapons. When Officer Corbett reached for the sweatshirt, Cooper lunged for his arm. Officer Corbett told Cooper he was under arrest. Cooper responded with more profanity and exclaimed no one was taking him to jail, he was not going anywhere. R. pp. 67-69.

Cooper continued to refuse to cooperate despite Officer Corbett informing him he was under arrest several times. Finally, Officer Corbett put his shoulder on Cooper in an attempt to have Cooper exit the vehicle and be handcuffed. Cooper swung his elbows toward Officer Corbett and grabbed the steering wheel with both hands. Officer Corbett pried Cooper's hands loose and placed him on the ground. R. p. 69. Only at this point did Cooper complain he was a paraplegic and he had two colostomy bags on him. R. p. 69.

Cooper complained one of the bags had broken and also claimed he was injured, but would not give any specific injury. Officer Corbett called EMS, but when EMS arrived, Cooper said he did not want medical care. Officer Corbett issued him a courtesy summons in lieu of taking him to jail. Officer Corbett left Cooper with an individual known as Bobo Jackson, Cooper said he was going to stay the night there because he was too drunk to drive home. R. pp. 69-70.

ARGUMENT

I.

The Magistrate did not err in denying the motion to vacate judgment where the evidence before the Magistrate indicated that notice was mailed to both Appellant and his counsel well in advance of trial.

At the hearing on motion to vacate, counsel noted it appeared the Magistrate sent notice for trial to the right address on January 31, 2014, but attested the office did not receive notice. Counsel surmised the next door neighbor may not have been passing on the mail. R. pp. 20-21. No explanation was provided to the Magistrate why Cooper failed to appear: Counsel indicated he was unaware whether or not his client received the paperwork and argued it did not matter because counsel needs to be served with notice. R. p. 19, lines 13-19. Magistrate Davis ruled on the record as follows: "After consideration and after hearing the Motion from Mr. Butcher, this is going to be my ruling: Mr. Butcher, I think the Court has met their obligation of sending this information to your law firm, so I'm going to respectfully deny your Motion, Sir." R. 21, lines 16-23.

At oral argument before Judge Cooper, Counsel admitted his client received notice, explaining: "My client was in the hospital at the time. He is a paraplegic. He has bed sores, and he didn't give me – he didn't tell me that he had gotten notice." R. p. 35, lines 9-11.

In criminal cases the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Parker, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. Parker at

611-12, 707 S.E.2d at 801. A defendant may waive the right to be present and tried in the defendant's absence if the defendant receives notice of the right to be present. State v. Goode, 299 S.C. 479, 385 S.E.2d 844 (1989).

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

In the instant case, the evidence before the Magistrate showed Cooper was personally provided notice and no explanation was provided why he was not present. Further, the evidence before the Magistrate indicated notice was properly sent to Counsel and Counsel offered no explanation for why he did not receive notice. A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In the instant case, the Magistrate's decision to deny the motion to vacate judgment was supported by evidence and not controlled by an error of law.

Counsel alleged in a supplemental notice of appeal to circuit court that the Magistrate's Office was using an old address on the envelopes and that counsel failed to receive notice in several other cases. The only evidentiary basis for this is a letter Counsel wrote to Chief Magistrate Roderick Todd, not Magistrate Davis, who presided over trial. R. pp. 29-32. The supplemental notice of appeal was not supported by affidavits or any other acknowledgement of the error by the Magistrate's Office. Further, this explanation was never brought to Magistrate Davis' attention at

the motion to vacate and counsel did not seek a remand or leave for the Magistrate to consider this argument. The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). Given that Magistrate Davis was never confronted with the contention that the Magistrate's Office was sending notice to the wrong address, Judge Cooper was constrained by the standard of review to affirm the Magistrate's denial of the motion to vacate.

II.

Evidence supported the conviction for breach of peace and the sufficiency of evidence was never raised to the Magistrate, so it is not preserved for review.

Cooper argues there was insufficient evidence to support the verdict for breach of peace and the Magistrate should have granted directed verdict. However, this issue was never raised to the Magistrate, even in the motion to vacate judgment. "A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below." State v. Kennerly, 331 S.C.442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999).

Cooper argued to Judge Cooper on appeal that directed verdict should have been granted because the incident occurred on private property. However, events occurring on private property may still constitute breach of peace. See State v. Byrnes, 100 S.C. 230, 84 S.E. 822, 824 (1915) (finding that evidence supported verdict for breach of the peace when defendant "uttered the profane language" from his house).

Cooper made a more generic statement that directed verdict should be granted because all the elements of the offense were not met. In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001)

(finding more than a general directed verdict motion is required to preserve a directed verdict ruling).

Further, the Magistrate did not err in allowing the jury to determine the proper verdict. When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016).

"The term 'breach of peace' is a generic one embracing a great variety of conduct destroying or menacing public order and tranquility. . . . In general terms, it is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence." State v. Peer, 320 S.C. 546, 552, 466 S.E.2d 375, 379 (Ct. App. 1996) (citations omitted). "Although it includes acts likely to produce violence in others, actual violence is not an element of breach of peace." Id. (citations omitted). Peer quotes American Jurisprudence in part as follows: "[I]t is not necessary that the peace actually be broken; commission of an unlawful and unjustifiable act, tending with sufficient directness to breach the peace is sufficient." Id. (quoting 12 Am.Jur.2d Breach of Peace, etc. § 4.).

In the instant case, the evidence indicates Cooper was loud, boisterous, and cursing when law enforcement was seeking to serve a valid warrant on a fugitive hiding under his truck in the front yard of a residence. He attempted to grab the officer's hand and flailed his elbows in resistance to the officer's lawful orders. Cooper was drinking and admitted he was unable to drive home after his arrest. Despite being advised he was under arrest, Cooper resisted by locking his hands on the

steering wheel so that it became necessary for the officer to forcibly remove Cooper and place him on the ground. A reasonable juror could find Cooper claimed to be injured in an attempt to cause further commotion, and his ruse was exposed when Cooper refused treatment after it became necessary due to Cooper's claims of injury for an ambulance to respond to the scene. Cooper's decision to cry "wolf" caused further disturbance to public tranquility. These actions, taken together, are sufficient evidence for a reasonable juror to believe Cooper attempted, and succeeded, to menace or destroy public order and tranquility by his outrageous behavior. Peer supra.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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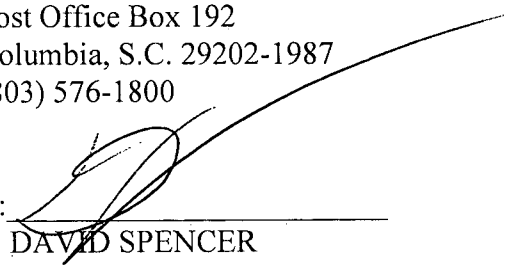

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September 16, 2016

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Final Brief of Respondent in the above-referenced case has been served upon Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his counsel of record, Robert J. Butcher, Esquire, The Camden Law Firm, PA, PO Box 486, Manning, SC 29102, this 16th day of September, 2016.

Anne Mueller

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(5)

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RECEIVED
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SC Court of Appeals

September 16, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Jeffrey Boyd Cooper
Appellate Case No: 2016-000189

Dear Ms. Kitchings:

Enclosed please find an original and fourteen (14) copies of the Final Brief of Respondent, including proof of service, in the above-referenced case.

Sincerely,

David Spencer
Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: Robert J. Butcher, Esquire (with two copies)
Ms. Trisha Allen