

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

 ORIGINAL

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JERMAINE WELLS,

PETITIONER

APPELLATE CASE NO 2016-000950

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2017-UP-417

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SC Court of Appeals

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Christopher Jermaine Wells petitions the Court for rehearing. Counsel respectfully submits that the Court misapprehended the prejudicial impact of the trial judge erroneously admitting evidence that the non-testifying co-defendant was found guilty by another jury. There is a difference between properly arguing that a co-defendant was the shooter and improperly arguing that Petitioner should be found guilty because another jury found the co-defendant guilty. Petitioner respectfully submits that this Court correctly found that the trial court erred in admitting testimony that another jury found a non-testifying co-defendant guilty of the murder for which Petitioner stood trial. Petitioner respectfully

submits, however, that this Court erred in finding the error harmless because Petitioner argued that the non-testifying co-defendant, David Walker, was the shooter. The error was not harmless.

On October 31, 2013, officers with the Laurens County Sheriff's Department answered a 911 call in reference to shots fired on River Hill Road in Enoree. When the officers arrived at the scene they found David Lee Walker outside of the trailer and Johnny Lee Cheeks inside of his trailer. Both men had been shot. (R. pp. 160-166). Investigator Marty Crain testified that Cheeks told him that Walker shot him. (R. p. 174, lines 7-16). According to Investigator Bryant Cheek, Walker stated that he had been attacked by two guys he did not know. (R. p. 276, lines 5-20). Cheeks later died as a result of blood loss from a gunshot wound to the abdomen. (R. p. 263, lines 2-4). Walker survived.

Kelly Ball testified that sometime between 10:30 PM and 11:00 PM on the night of October 31, 2013, she was with Cheeks inside of his trailer when someone knocked on the door. (R. pp. 118-119). Ball testified that Cheeks sold drugs and liquor from his trailer. (R. p. 114, lines 1-11). Cheeks answered the door and went outside when Ball heard a verbal altercation and then gunshots. (R. p. 119, line 9 – p. 120, 121, lines 1-6). Ball called 911 and then went outside to check on Cheeks. (R. p. 122, lines 6-10). Ball found Cheeks lying on the ground and noticed another person on the ground by Cheeks' Suburban SUV. (R. p. 123, lines 22-25). At trial she identified that person as Walker. (R. p. 124, lines 1-9). Ball claimed to have seen another individual standing in the driveway that night. (R. p. 124, lines 12 – 25). She told police that the person in the driveway resembled Ty, a large, dark skinned black male. (R. p. 292, lines 7-11). Ball, however, identified the individual as Petitioner. (R. p. 125, lines 13-21). Investigator Cheek admitted that Petitioner was not dark skinned. (R. p.

292, line 20- p. 293, lines 1-5). Petitioner's complexion on the Department of Corrections website is noted as medium brown.

Ball claimed that when she pulled Cheeks inside the trailer after the shooting that he handed her his gun from his holster and she put the gun under the mattress. (R. p. 132, lines 19 – p. 133, lines 1-3; p. 140, line 5 – p. 141, lines 1-16). The gun found inside the trailer under the mattress was a revolver with two live rounds and two spent rounds. (R. p. 199, lines 1-24): A Lorcin 380 semi-automatic handgun was found outside in the yard. (R. p. 196, lines 3 – p. 197, lines 1-4). Officers additionally found three 380 shell casings in the yard and a slug inside the trailer. (R. p. 197, lines 6-25). The firearms examiner from the South Carolina Law Enforcement Division [SLED] testified that the casings came from the same gun but he could not conclusively say that the casings were fired by the 380 found in the yard. (R. p. 250, lines 9 – p. 251, lines 1-10). The examiner was, however, able to testify that the slug found inside the trailer was fired by the 380 found in the yard.

Ball testified that the individual she saw in the driveway turned, ran up the hill and got into the back passenger seat of a brown older model box style car and left. (R. p. 125, line 23 – p. 126, 127, lines 1-25). Despite Balls' description of the car as brown, Officer Ashley with the Laurens City Police Department claimed that he received information that an older model dark blue car had been involved in a shooting. (R. p. 205, lines 7-14). Based on the blue car description, Officer Ashley followed a blue car and eventually found it parked at Petitioner's girlfriend's house. (R. p. 210, line 2 – p. 211, lines 1-6). Petitioner consented to a search of his vehicle and nothing of evidentiary value was found. (R. p. 211, lines 11-21).

Toris Moore testified that she saw her uncle, co-defendant David Walker, Petitioner and Johnny Lee Saxon together on Halloween night. (R. p. 100, line 20 – p. 101, 102, lines 1-

5). According to Moore, Walker told her they needed another gun because they were going to rob an old man who stayed with a white lady and sold liquor and drugs from his house. (R. p. 102, lines 6- 24).

At the start of the case the judge stated:

I also indicated in chambers the State had hoped to get into the fact that the co-defendant had already been convicted and I just explained in chambers that we just need to stay away from that. Obviously, it's standard provision of law that every – the evidence against each defendant must stand on its own. And the fact that a co-defendant has previously been found guilty of murder in this case, obviously, is not evidence that the gentleman did anything wrong. That's simply proof that somebody else in front of a different jury was found guilty of the offense of murder. Obviously, the prejudicial effect to Mr. Wells [Petitioner] would outweigh any probative value of allowing the prior conviction.

(R. p. 74, line 23 – p. 75, lines 1-10).

After Petitioner's cross examination of Investigator Cheek, the State, outside the presence of the jury, stated:

Your Honor, at this point, since Mr. Richey is casting speculation on other people that might have done the shooting, I think it would be appropriate for the jury to know that 12 jurors in Laurens County have found David Walker guilty beyond a reasonable doubt of murder of Johnny Lee Cheeks. And I would submit that the State should be allowed to enter into evidence the certified copy of the indictment and sentencing sheet in his case.

(R. p. 296, lines 16-24). Petitioner argued, "Judge, I didn't open the door. I just said these people shoot. I said nothing about any other person. I was talking about Walker and this individual, who we've all said – he put in evidence – there's no way I even remotely opened the door to let that conviction in." (R. p. 297, lines 1-5). After a short break the judge determined that the door was opened to a degree by the "last series of questions concerning drug dealers and isn't it possible that this is a drug-on –drug-type of a thing." (R. p. 298, line 25 – p. 299, lines 1-2). The judge ruled, "I will allow you to ask this witness is it your

understanding that Mr. Walker is currently in the Department of Corrections serving a sentence for murder in this incident.” (R. p. 299, lines 12-15). After a brief explanation the judge told Petitioner, “And you do not need to contemporaneously object, you are covered.” (R. p. 301, lines 18-19).

On re-direct examination, the prosecutor asked Investigator Cheek, “Are you familiar with the fact that David Walker is in the South Carolina Department of Corrections serving time for this homicide?” (R. p. 304, lines 12-14). Investigator Cheek answered, “Yes, sir.” In closing argument the prosecutor referenced Walker’s conviction stating, “Mr. Richey has also talked about an anonymous phantom rival of Johnny Cheeks doing the killing when we know David Walker has been convicted of this homicide. David Walker, who was with the other two, Saxon and Wells, that night planning out the robbery.” (R. p. 333, lines 21-25). At the close of the case Petitioner renewed all objections and the judge again denied the motions. (R. p. 378, lines 16-25). The judge erred in allowing Investigator Cheek to testify that Walker had been convicted of the murder of Johnny Lee Cheeks.

In regard to reference to the guilty plea of a non-testifying co-defendant, the Fourth Circuit Court of Appeals in United States v. Blevins, 960 F.2d 1252, 1260 (4th Cir. 1992) wrote:

Courts have generally agreed that evidence of a non-testifying co-defendant's guilty plea should not be put before the jury. See, e.g., United States v. Leach, 918 F.2d 464, 467 (5th Cir.1990); United States v. De La Vega, 913 F.2d 861, 866 (11th Cir.1990). The reason for this prohibition is twofold. First, by not having the opportunity to cross-examine the co-defendant who entered the guilty plea, the defendant on trial is unable to probe the motivations for entry of the plea. This significantly undercuts the defendant's right to have a jury's verdict based only upon evidence that is presented in open court and is thereby subject to scrutiny by the defendant. See United States v. Griffin, 778 F.2d 707, 711 (11th Cir.1985) (citing Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965)). Second, introduction of such guilty pleas raises the concern that a defendant might be convicted based upon the

disposition of the charges against the co-defendants, rather than upon an individual assessment of the remaining defendant's personal culpability. See Griffin, 778 F.2d at 711.

In regard to reference to a conviction after jury trial of a testifying co-conspirator, the Fourth Circuit Court of Appeals in United States v. Mitchell, 1 F.3d 235, 240 (4th Cir. 1993)

wrote:

It is a well-accepted principle that “evidence about the conviction of a co-conspirator is not admissible as substantive proof of the guilt of a defendant.” United States v. Leach, 918 F.2d 464, 467 (5th Cir.1990), cert. denied, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed.2d 976 (1991). In criminal cases, it is the province of the defendant's jury to resolve questions of credibility; referring to what another jury may have done is clearly improper because the defendant's jury cannot permissibly rely on what they may assume a previous jury to have found. See United States v. Samad, 754 F.2d 1091, 1100 (4th Cir.1984) (observing that a prosecutor may not argue evidence not presented to the jury). Such conduct “raises the concern that a defendant might be convicted based upon the disposition of the charges against the [co-conspirator], rather than upon an individual assessment of the remaining defendant's personal culpability.” Blevins, 960 F.2d at 1260. Indeed, improper use of a co-conspirator's conviction infringes on the principle that the “central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.” Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

In the present case Walker was a non-testifying co-defendant, like the co-defendant in Blevins, but was convicted after jury trial like the co-conspirator in Mitchell. As in Blevins and Mitchell, it was improper to allow testimony that Walker had been convicted of the murder of Johnny Lee Cheeks. Petitioner's jury had to make their own decisions in regard to credibility without reference to what they may have presumed another jury found in regard to Walker's conviction. As in Blevins and Mitchell, the improper testimony raises the concern that Petitioner's conviction was based on Walker's conviction rather than an individual assessment of Petitioner's guilt. The prosecutor, in effect, argued to the jury that Walker's

conviction should be used as substantive evidence of Petitioner's guilt. The argument was improper. The judge erred in allowing the testimony about Walker's conviction.

The trial judge initially and correctly found that evidence of Walker's conviction was inadmissible and more prejudicial than probative. (R. p. 74, line 23 – p. 75, lines 1-10). Later, however, the trial judge ruled that Petitioner's questioning of Investigator Cheek in regard to the possibility that the shooting may have been a "drug-on –drug-type of a thing" opened the door to allow testimony about Walker's conviction. The trial judge erred. Petitioner had every right, and counsel for Petitioner had a duty to challenge the State's evidence.

In affirming the sentence and conviction this Court wrote, "We find the trial court erred in admitting testimony about Walker's sentence because Wells did not open the door to that testimony when he questioned Investigator Cheek about whether the victim's status as a drug dealer exposed him to heightened levels of danger." State v. Wells, Op. No. 2017-UP-417 (S.C. Ct.App. filed November 8, 2017). This Court, however, found the error harmless writing, "Wells introduced to the jury during opening statements that Walker was the shooter. Additionally, the trial court instructed the jury members to consider Wells's guilt 'separate and apart' from the guilt of Walker. Accordingly, evidence Walker was serving time for murder did not prejudice Wells." State v. Wells, Op. No. 2017-UP-417 (S.C. Ct.App. filed November 8, 2017) (fn #2 omitted). Respectfully, Petitioner submits that he was prejudiced by the error in admitting evidence that another jury convicted Walker of the murder. The error was not harmless.

The State's case was based on the testimony of Toris Moore who placed Petitioner with Walker and another on the night of the incident. Moore testified about her conversation

with Walker about robbery plans. The other State's evidence consisted of a questionable identification of Petitioner by Kelly Ball. The State's evidence was not overwhelming.

In Blevins the Fourth Circuit found that the minimal discussion of the guilty plea of non-testifying co-defendants did not warrant reversal and wrote, "If for whatever reason the jury does learn that co-defendants have pleaded guilty, the court upon request should issue a limiting instruction to jurors stating that the evidence of such guilty pleas is not to be taken as substantive evidence of guilt of the remaining defendants." 960 F.2d at 1260. In the present case the State was allowed to directly question the investigator about Walker's conviction and the State relied upon that testimony in closing argument. In closing the prosecutor argued, "Mr. Richey [defense counsel] has also talked about an anonymous phantom rival of Johnny cheeks doing the killing, when we know that David Walker has been convicted of this homicide. David Walker, who was with the other two, Saxon and Wells, that night planning out the robbery." (R. p. 333, lines 21-25).

Additionally, in the present case, the only limiting instruction to the jurors is found in the judge's final instructions on the law when he stated:

Now, ladies and gentlemen, you've heard testimony that three individual were charged in connection with this incident. I emphasize to you that only Mr. Wells is on trial in this case. Therefore, the evidence against Mr. Wells must be considered separately and apart from the cases against any other defendant and the manner in which the case against any other defendant has been resolved. In short, you must consider the evidence in this case in its totality only as it relates to Mr. Wells without regard to the case of any other co-defendant for the manner in which that case against that other co-defendant was resolved.

(R. p. 358, lines 8-19). The instruction does not adequately tell the jury that evidence of Walker's conviction is not to be taken as substantive evidence of Petitioner's guilt. Even if the judge had directly instructed the jury that evidence of a co-defendant's conviction is not to

be taken as substantive guilt of the Petitioner, the error in the present case cannot be deemed harmless in light of the weakness of the State's evidence.

Based on the above argument in regard to the prejudicial non-harmless nature of the error in allowing the State to argue that Petitioner should be found guilty because another jury found the co-defendant guilty, Petitioner seeks rehearing and a reversal and remand for a new trial.

Respectfully Submitted,

  
KATHRINE H. HUDGINS  
Appellate Defender

This 22nd day of November, 2017.

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IN THE COURT OF APPEALS

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Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

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RESPONDENT,

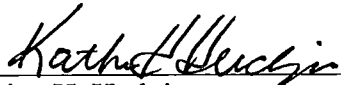
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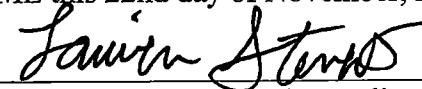
PETITIONER

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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Ranee Saunders, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Christopher Jermaine Wells, #193588, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 22nd day of November, 2017.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE  
ME this 22nd day of November, 2017.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.