STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2017-UP-417 (S.C. Ct. App. Filed November 8, 2017)

15-GS-30-00503-00505

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JERMAINE WELLS,

PETITIONER

APPELLATE CASE NO 2016-000950

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 18, 2018.

QUESTION PRESENTED

Did the Court of Appeals err in finding harmless the trial judge's error in finding that Petitioner's cross examination of an investigator opened the door to allow testimony from the investigator that another jury found a non-testifying codefendant guilty of the murder for which Petitioner stood trial?

STATEMENT OF THE CASE

On April 10, 2015, the Laurens County Grand Jury indicted Petitioner Wells for armed robbery, criminal conspiracy and possession of a weapon during the commission of a violent crime, indictments #2015-GS-30-503, 504, 505. On July 24, 2015, the Laurens County Grand Jury indicted Petitioner for murder, indictment #2015-GS-30-1162. On April 25, 2016, Petitioner proceeded to jury trial on all indictments before the Honorable Frank R. Addy, Jr. Rodney Richey represented Petitioner at trial. Warren Mowry and Ruston Neely prosecuted the case. The jury found Petitioner not guilty of murder but guilty of armed robbery, conspiracy and the weapon charge. Judge Addy sentenced Petitioner to life in prison without the possibility of parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was served on May 2, 2016, and the direct appeal perfected. On November 8, 2017, the South Carolina Court of Appeals affirmed the conviction. State v. Wells, Op. No. 2017-UP-417 (S.C. Ct. App. Filed November 8, 2017). A petition for rehearing was filed and denied on January 18, 2018. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals err in finding harmless the trial judge's error in finding that Petitioner's cross examination of an investigator opened the door to allow testimony from the investigator that another jury found a non-testifying codefendant guilty of the murder for which Petitioner stood trial.

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. p. 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 theory of the case by challenging the State's evidence that Walker was the shooter.

The Court of Appeals agreed that the judge erred in admitting the testimony about Walker's conviction because Petitioner 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. The Court of Appeals 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. See State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." (quoting State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981))). Wells's cross-examination of Investigator Cheek did not explicitly or implicitly question the fact that Walker was the shooter. On the contrary, the questioning was consistent with Wells's theory of the case that Walker shot the victim over a drug-related dispute. Thus, evidence that Walker was serving time for murder did not "explain or rebut" Investigator Cheek's testimony. Further, the testimony about Walker's sentence was not used to refute testimony by Wells. See State v. Murphy, 270 S.C. 642, 643-44, 244 S.E.2d 36, 36-37 (1978) (allowing the admission of co-defendant's guilty plea into evidence in trial for housebreaking to refute defendant's contention that co-defendant never communicated an intent to commit a crime once inside); State v. Moore, 337 S.C. 104, 108, 522 S.E.2d 354, 357 (Ct. App. 1999) (finding Murphy

> stood only for "the narrow proposition that a co-defendant's guilty plea may, in some cases, be admissible to impeach the credibility of a testifying defendant").

State v. Wells, Op. No. 2017-UP-417 (S.C. Ct.App. filed November 8, 2017). (App. p. 2).

The Court of Appeals, however, found the error to be harmless writing:

> However, we find the trial court's error was harmless beyond a reasonable doubt. See State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result."); State v. Tapp, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012) ("Engaging in [a] harmless error analysis . . . requires [this court] not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."). 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). (App. p. 2). The Court of Appeals erred in finding that the error was harmless. There is a difference between Petitioner properly arguing that a co-defendant was the shooter in opening statement and the State improperly arguing that Petitioner should be found guilty because another jury found the co-defendant guilty. The instruction to the jury was inadequate, especially in light of the weak State's evidence and the State's closing argument.

The error was not harmless. The State's case was based on the testimony of Toris Moore placing Petitioner with Walker and Saxon on the night of the incident and her conversation with Walker about robbery plans and the questionable identification of Petitioner and the car by Kelly Ball. The State's evidence was not overwhelming. In Blevins the Fourth Circuit found that the minimal discussion of the 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 contrast, 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. 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:

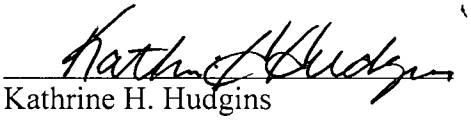
> Now, ladies and gentlemen, you've heard testimony that three individuals were charged in connection with this incident. I emphasize to you that only Mr. Wells is on trial in this case. Therefore, the evidence against Mr. Wells must be considered separately and apart from the cases against any other 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. 350, 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 guilt, Petitioner seeks review by this court and a reversal and remand for a new trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of February, 2018.

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PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 20th day of February, 2018.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 20th day of February, 2018.

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