

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No.: 2015-002435

RECEIVED

MAR 23 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

v.

GREGORY FIELDER,

Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on February 23, 2018.

QUESTIONS PRESENTED

1. Did the South Carolina Court of Appeals err in finding that the issue of whether the Trial Judge abused his discretion by failing to order an examination to determine if Mr. Fielder was competent to stand trial was not preserved for appellate review?
2. Did the South Carolina Court of Appeals err in finding that that the issue of whether the Trial Judge unreasonably restricted Mr. Fielder's ability to testify was not preserved for appeal?
3. Did the South Carolina Court of Appeals err in finding that the Trial Court did not abuse its discretion by refusing to sequester James Bryan?

STATEMENT OF THE CASE

Procedural History

Gregory Fielder (hereinafter, “Mr. Fielder” or “Petitioner”) was charged, in Laurens County, South Carolina, with Exploitation of a Vulnerable Adult, and Breach of Trust (Greater than \$10,000) in the above-referenced matter. The victim in this matter was Virginia Montgomery (hereinafter, “Ms. Montgomery”). A jury trial was held from November 2, 2015 through November 5, 2015. The Honorable Eugene C. Griffith, Jr. (hereinafter, “Judge Griffith”) presided over the case during pre-trial matters, and, due to a scheduling conflict, the Honorable Frank Addy (hereinafter, “Judge Addy”) subsequently took over as presiding judge for the jury trial. Mr. Fielder represented himself during the entirety of the proceedings. After the trial concluded, the jury returned a verdict finding Mr. Fielder guilty of both charges. On November 13, 2015, Mr. Fielder, through counsel, filed a timely notice of appeal with the South Carolina Court of Appeals, and served all parties of record with a copy of the same. On January 10, 2018, the South Carolina Court of Appeals issued an opinion affirming the convictions. (App. pp. 313-315) On January 25, 2018, Mr. Fielder, through counsel, filed a timely petition for rehearing, and served a copy of the same on all parties of record. (App. pp. 316-321) On February 23, 2018 Mr. Fielder’s petition for rehearing was denied. (App. p. 322) This petition for writ of certiorari follows.

Factual Background

On November 2, 2015, Judge Griffith observed that Mr. Fielder did not appear to be well. (App. p. 61, lines 12-15) Mr. Fielder informed Judge Griffith that Mr. Fielder was under medical care. (App. p. 62, lines 12-14) Throughout the initial conversation between Judge Griffith and Mr. Fielder, Mr. Fielder frequently indicated that he did not understand what was

taking place. (See App p. 63, lines 17-21; App. p. 65, line 14; App. p. 72, lines 19-20) Judge Griffith informed Mr. Fielder that he believed Mr. Fielder was “fanning” his condition, and Judge Addy would evaluate Mr. Fielder. (App. p. 67, lines 17-18)

After Judge Addy began presiding over the case, Mr. Fielder provided Judge Addy with a physician’s note from Fountain Inn Family Practice, indicating that Mr. Fielder was to be evaluated and referring Mr. Fielder to a neurosurgeon for radiating back pain from injuries that he sustained after he fell from his porch. (App. p. 82, lines 21-25) Mr. Fielder also provided Judge Addy with a prescription bottle, dated October 19, 2015, for Alprazolam, for Mr. Fielder’s anxiety. (App. p. 82, lines 21-25; App. p. 83, lines 1-4) Despite failing to inquire as to whether Mr. Fielder was under the influence of any medication or substances, Judge Addy found that Mr. Fielder was fit to stand trial.

During pre-trial matters, Mr. Fielder requested that the Trial Court sequester James Bryan (hereinafter, “Mr. Bryan”), who was the attorney for Raymond Johnson, the personal representative of Ms. Montgomery’s estate. (App. p. 101, lines 4-6) Over Mr. Fielder’s objection, Judge Addy refused to sequester Mr. Bryan. Consequently, Mr. Bryan was privy to testimony from witnesses who had personal knowledge of Ms. Montgomery’s mental competency. During Mr. Bryan’s testimony, Mr. Bryan frequently made reference to testimony from previous witnesses regarding Ms. Montgomery’s mental competency. (App. p. 240, lines 16-17; App. p. 239, lines 9-11; App p. 241, lines 8-12; App. 243, lines 9-23)

During Mr. Fielder’s case-in-chief, Mr. Fielder advised the Trial Court that he wished to testify on his behalf, but, that he needed additional time to organize his documents. (App. p. 294, lines 11-15) The trial court gave Mr. Fielder five minutes to prepare himself, and the jury was excused for a break. (App. p. 294, lines 20-22) After the break, Mr. Fielder maintained his

desire to testify, but he was still preparing his documents. Subsequently, Judge Addy informed Mr. Fielder that he only had five more seconds to get prepared. (App. p. 296, lines 3-7) A bench conference ensued, and, subsequently, Judge Addy informed the jury that Mr. Fielder would not be testifying. (App. p. 296, lines 21-25; App. p. 297, lines 1-7)

ARGUMENT

I. The South Carolina Court of Appeals erred in finding that the issue of whether the Trial Judge abused his discretion by failing to order an examination to determine if Mr. Fielder was competent to stand trial was not preserved for appellate review.

The South Carolina Court of Appeals erred in finding that the issue of whether the Trial Judge abused his discretion by failing to order an examination to determine if Mr. Fielder was competent to stand trial was not preserved for appellate review. "[A]n issue must have been raised to and ruled upon by the trial court to be preserved for appellate review." S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 658, 667 S.E.2d 7, 14 (Ct. App. 2008). "[I]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992); State v. Singleton, 322 S.C. 480, 482, 472 S.E.2d 640, 641 (Ct.App. 1996). "Whenever a judge ... has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall: (1) Order examination of such person by two examiners designated by the

Department of Mental Health or the Mental Retardation Department or both...” State v. Burgess, 356 S.C. 572, 590 S.E.2d 42 (Ct.App.2003).

Here, the Trial Judge first observed that Mr. Fielder did not appear to be good condition. Judge Griffith asked Mr. Fielder, “[y]ou seem to be kind of drowsy, what is going on?” (App. p. 61, lines 14-15) Thereafter, Mr. Fielder informed Judge Griffith that Mr. Fielder was under medical care. (See App. p. 62, lines 12-14) However, the Trial Judge made no inquiry as to the following matters: all of the types of medication that Mr. Fielder was taking; whether or not Mr. Fielder was taking his medications as prescribed; whether or not Mr. Fielder was under the effects of any medications, or other substances, that would impair his ability to stand trial and represent himself; and other questions that would assist the Court in determining whether or not Mr. Fielder was fit to stand trial.

In addition to the fact that Mr. Fielder’s demeanor suggested that he was not fit to stand trial, Mr. Fielder made several statements indicating that he did not understand what was happening during the proceedings. (See App. p. 63, lines 17-21; App. p. 65, line 14; App. 72, lines 19-20) Furthermore, Mr. Fielder made the following statements to the court in response to the Trial Judge’s indication that Fielder was fit to stand trial, and that the trial would proceed:

“...I do want to put on the record that if I am forced to go forward, I will go forward but I will do it under duress, under terrorism, under threat, and under coercion.” (App. p. 82, lines 11-14); “I will repeat, this forces me to go forward, I will do it, but under duress, but under duress, under terrorism, under threats, under coercion.” (App. p. 84, line 25; App p. 85, lines 1-2)

After the above statements, the Trial Judge indicated that he believed Fielder was lucid and fit to stand trial. Therefore, the issue of whether or not Mr. Fielder was fit to stand trial was raised and ruled upon, and, thus, preserved for appeal. Subsequently, Mr. Fielder, again, stated

to the Court that he was being forced to proceed. As stated in the *Final Brief of Appellant*, the following important exchange took place between Mr. Fielder and the Trial Judge:

Mr. Fielder: “First motion, wanted to be on the record that I am being forced to move forward under duress, terrorism, threat of coercion.”

The Court: “Appreciate your position, I have already addressed that. What is your next motion.”

Mr. Fielder: “The next motion is that I reject the fact that Your Honor has made a medical determination that I do not and cannot have anxiety...”

The Court: Your next motion.

Mr. Fielder: Have you ruled on it[?]

The Court: I will do them one at a time. As far as the Court making a medical determination that you do not have medical anxiety. I am not making any such determination, I am simply stating that whatever medical or mental conditions you suffer from is not so acute or severe as to warrant the delay of these proceedings or to affect your ability to present your case.” (App. p. 89, line 18-p. 90, line 13)

The aforementioned statements further illustrate that the issue of whether the Trial Judge should have ordered an examination to determine whether Mr. Fielder was fit to stand trial was raised and ruled upon by the Trial Court. Mr. Fielder’s demeanor in court, along with the prescription that he provided to the Trial Judge, gave the Trial Judge reason to believe that Mr. Fielder was not fit to stand trial, because he lacked the capacity to understand the proceedings, and could not assist in his own defense. Nevertheless, the Trial Court failed to order an

examination to determine if Mr. Fielder was competent to stand trial. For the above-reasons, this matter has been preserved for appeal.

II. The South Carolina Court of Appeals erred in finding that that the issue of whether the Trial Judge unreasonably restricted Mr. Fielder's ability to testify was not preserved for appeal.

The South Carolina Court of Appeals erred in finding that issue of whether the Trial Judge unreasonably restricted Mr. Fielder's ability to testify was not preserved for appeal. "[A]n issue must have been raised to and ruled upon by the trial court to be preserved for appellate review." S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 658, 667 S.E.2d 7, 14 (Ct. App. 2008). "[I]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52 (1987). Restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. Id. at 55-56.

Here, Mr. Fielder advised the Trial Court that he wished to testify on his behalf. However, Mr. Fielder advised the Trial Court that he required additional time to organize his documents. (App. p. 294, lines 11-15) This was a reasonable request, due to the fact that Mr. Fielder had been representing himself during the course of the trial. The trial court gave Mr. Fielder only five minutes to prepare himself. Subsequently, the jury was excused for a brief break. (App. p. 294, lines 20-22) Upon return, Judge Addy confirmed with Mr. Fielder that Mr. Fielder still wanted to testify. Mr. Fielder maintained his desire to testify, but he was still

preparing his documents. Judge Addy then informed Mr. Fielder that he only had five more seconds to get prepared. (App. p. 296, lines 3-7) Thereafter, a bench conference took place, and, subsequently, Judge Addy informed the jury that Mr. Fielder would not be testifying. (App. p. 296, lines 21-25; App. p. 297, lines 1-7) It is unknown exactly what was discussed between the Trial Judge and Mr. Fielder in the bench conference. However, what is known is that Mr. Fielder clearly wanted to testify on his own behalf. The unreasonable restrictions placed on Mr. Fielder by the Trial Judge stripped Mr. Fielder of one of the most fundamental constitutional rights given to citizens of the United States of America. Mr. Fielder never waived his constitutional right to testify on his own behalf. The sole reason for Mr. Fielder not testifying was due to the unreasonable restriction placed upon him by the Trial Court. Therefore, the issue of whether the Trial Judge unreasonably restricted Mr. Fielder's ability to testify was raised and ruled upon by the Trial Court, and, thus, was preserved for appeal.

III. The South Carolina Court of Appeals erred in finding that the Trial Court did not abuse its discretion by refusing to sequester James Bryan.

The South Carolina Court of Appeals erred in finding that the Trial Court did not abuse its discretion by refusing to sequester Mr. Bryan. An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support. Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118 (Ct.App.2003). "The purpose of the exclusion rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial..." State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781, 785 (S.C. App., 2010).

Despite Mr. Fielder's request to have Mr. Bryan sequestered, the Trial Court allowed Mr. Bryan to remain in the courtroom during the entirety of the trial. Consequently, Mr. Bryan was

able to observe testimony from witnesses who had personal knowledge of Ms. Montgomery's mental competency. One such witness was Dr. Joanne Brownlee (hereinafter, "Dr. Brownlee"). Dr. Brownlee testified that Ms. Montgomery had a very low hemoglobin level, and low hemoglobin can affect cognitive and mental ability. (See App. p. 201, lines 1-15; App. p. 202, lines 1-4)

During Mr. Bryan's testimony, Mr. Bryan made several statements regarding Ms. Montgomery's competency, although he clearly lacked any personal knowledge on the subject matter. It is clear that Mr. Bryan used Dr. Brownlee's testimony to shape his own. As stated in the *Final Brief of Appellant*, Mr. Bryan made the following statement regarding Ms. Montgomery's mental competency during his testimony: "I question whether or not she was competent at the time." (App. p. 237, lines 17-19) Mr. Bryan further testified, in pertinent part, "I have talked to some people concerning a competency and I was here when the testimony of the hospice people and Dr. Brownlee was given about her competency in February of 2011." (App. p. 237, lines 22-25) Lastly, Bryan testified "[a]nd the competency would be the mind, the part they talked about the...low hemoglobin making a person confused and everything, that...would be the mental capacity there." (App. p. 252, lines 14-17)

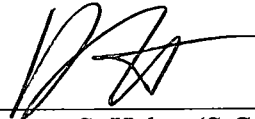
The purpose of the exclusion rule is to prevent the exact type of testimony that Mr. Bryan gave in the trial at issue. Had Mr. Bryan been sequestered, he would not have been able to use the testimony of other witness to bolster his own. Mr. Bryan's testimony was clearly shaped by the testimony of previous witnesses. A substantial portion of Mr. Bryan's testimony was merely recited from testimony that he had previously heard from witnesses with actual knowledge of Ms. Montgomery's mental competency. Mr. Bryan was not a party to this case, and there was no justifiable reason for Mr. Bryan to have been permitted to be present during the entirety of the

trial. Furthermore, Mr. Fielder was unfairly prejudiced by Mr. Bryan's testimony, as it amounted to de facto expert testimony from an individual lacking the requisite knowledge. Therefore, the South Carolina Court of Appeals erred in finding that the Trial Court did not abuse its discretion by refusing to sequester Mr. Bryan.

CONCLUSION

Based on the aforementioned argument, Petitioner requests that this Court grant the petition for writ of certiorari to allow further briefing on this issue.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served a copy of the *Petition for Writ of Certiorari to the Court of Appeals* on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 22, 2018, addressed to J. Benjamin Aplin, Esq., P.O. Box 11549, Columbia, SC 29211-1549, and Alan McCrory Wilson, Esq., P.O. Box 11549, Columbia, SC 29211-1549.



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