THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Appellate No.: 2017-000281

The State of South Carolina — Respondent

Vs.

Jawan Rayel White — Appellant,

FINAL BRIEF OF APPELLANT

Thurmond Brooker, Esq.
P. O. Box 1450
Florence, SC 29503-1450
(843) 679-0056 – telephone
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A NEW TRIAL WAS AN ABUSE OF DISCRETION AND CONTROLLED BY AN ERROR OF LAW ON THE GROUND THAT THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY THAT APPELLANT'S GUILT COULD BE FOUND ON EITHER THE LEGAL THEORY OF CONSPIRACY TO PURCHASE HEROIN OR ATTEMPT TO PURCHASE HEROIN.

2. THE TRIAL COURT'S DENIAL OF APPELLANTS MOTION FOR A NEW TRIAL WAS AND ABUSE OF DISCRETION ON THE GROUND THAT APPELLANT WAS DENIED THE RIGHT TO CONFRONT HIS ACCUSORS UNDER THE CONFRONTATION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

STATE OF THE CASE

On June 14, 2013 a jury returned a verdict of guilty against Appellant in his absence on a single count indictment for trafficking in heroin, more than twenty-eight grams. (R. p. 174, lines 10-14). The sentence was sealed by the trial court. (R. p. 178, lines 20-22). On July 18, 2014 the trial court unsealed and published the sentence in Appellant's presence. (R. p. 183, lines 1-3). Contemporaneously, the trial court granted Appellant's motion for leave to file post-trial motions after Appellant's new counsels had opportunity to obtain the trial transcript and other trail materials. (R. p. 183, lines 4-15).

In April 2016 Appellant served upon the trial court and counsel for Respondent his Memorandum in Support of Defendant's Motion for New Trial. (R., pp. 10-27). On September 14, 2016 the trial court heard oral arguments on Appellant's motion for new trial. The trial court issued an order deny Appellant's motion for a new trial on or about November 21, 2016. (R. pp. 3-9).

Appellant filed with the trial court a motion seeking reconsideration of the court's denial of his motion for a new trial on December 9, 2016. (R. pp. 28-33). Oral arguments on Appellants motion to reconsider was heard on January 18, 2017. On February 7, 2017 the court issued an order denying Appellant motion for reconsideration.

On February 16, 2017 Appellant filed a notice of appeal with the South Carolina Court of Appeals.

STATEMENT OF THE FACTS

In 2011 the United States Drug Enforcement Agency (hereinafter "DEA") was actively pursuing a reverse drug buy operation against Appellant through the use of one of their confidential informants (hereinafter "Federal CI"), whom was acquainted with

Appellant. For an unknown reason, the DEA decided to abandon their operation against Appellant; however, the DEA contacted the Fifteenth Circuit Drug Enforcement Unit (hereinafter "DEU") to see if they had an interest in resuming the reverse drug buy operation against Appellant, which they did. (R. p. 7, line 9-18). The DEA informed the DEU that Appellant was interested in purchasing a large quantity of heroin, and that the Federal CI had negotiated a deal with Appellant for the purchase of four ounces of heroin for Ten Thousand and 00/100 ($10,000.00) Dollars. The plan was for the Federal CI to introduce Appellant to a confidential informant produced by the DEU (hereinafter "State CI"), whom would enter the operation as the supplier for the drug buy. (R. p. 110, lines 19-25).

On August 16, 2011 the Federal CI, the State CI, and Appellant meet at Broadway at the Beach, through a meeting arranged by the Federal CI. (R. pp. 81-83). Prior to the meeting, the State CI and Federal CI meet with DEU Agent Randy Miller (hereinafter "Agent Miller") so that the State CI could be fitted with an audio and video recording devise to secretly record the meeting with Appellant. (R. pp. 83-84, 118).

At the meeting between Appellant, Federal CI and the State CI Appellant informed the State CI he didn't have the $10,000 needed for the drug buy. (R. pp. 109, 120). The State CI and Appellant agreed that Appellant would call the State CI once he had acquired the $10,000. (R. p. 120). On August 19, 2011 Appellant informed the State CI that he had raised the money, and they agreed to meet the next day in the parking lot of the Coastal Grande Mall to execute the drug buy. (R. pp. 90-91, lines 19-25 and 1-3; pp. 120-121, lines 25 and 1-4; p. 124, lines 6-14).

Before the meeting with Appellant on August 20, 2011, the State CI meet with Agent Miller and was fitted with an audio and video recording device to record the events of the drug buy. (R. p. 92, lines 5-24). The State CI was also provided four ounces of imitation heroin to make the drug buy, which had been prepare by Agent Miller with no illegal substances or properties. (R. p. 93, lines 8-25; p. 121-122, lines 21-23 and 2-17). Immediately after the imitation drug buy was made between the State CI and Appellant, DEU agents converged on the buy location and arrested both Appellant and the State CI. (R. pp. 125-126, lines 22-25 & 1-17). Appellant was charged with trafficking in heroin, twenty-eight grams or more in violation of 44-53-370(e) (3) (c) of South Carolina drug laws.

Appellant's case was called to trial on June 13, 2013. Appellant failed to appear for court, and the trial proceeded in Appellant's absence after a hearing and presentation of evidence on Respondent's motion to proceed in absentia. (R. pp. 17-23). At the conclusion of evidence and closing arguments, the trial court charged the jury on one count of trafficking in heroin, twenty-eight grams or more, as follows:

> Now the Defendant is charges with trafficking in heroin. The State must prove, beyond a reasonable doubt, that the Defendant knowingly sold, manufacture, cultivate, delivered, purchased, brought into this State, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, manufacture, cultivate, deliver, purchase or bring into this State, and was knowingly in actual or constructed possession, knowingly attempted to become in actual or constructive possession of heroin.
>
> In order to find the Defendant guilty the State must also prove, beyond a reasonable doubt, that the amount of heroin, or any mixture containing heroin, was twenty-eight grams or more. Under trafficking in heroin, twenty-eight grams or more, *the presence of only imitation heroin at the transaction is irrelevant if the State proves, beyond a reasonable doubt that the Defendant conspired or attempted to purchase more than twenty-eight grams of real heroin.*

(R. p. 170, lines 4-20). The jury was given a general verdict form with the options of guilty or not guilty. (R. p. 172, lines 3-16). The jury returned a verdict of guilty at the conclusion of deliberation. (R. p. 174, lines 10-14).

At the hearing on Appellant's motion for a new trial and in Appellant's memorandum in support of his motion for new trial, Appellant argue that a new trial should be granted because: (1) the jury charge of conspiracy was erroneous, and had the potential to confuse the jury because no conspiracy can exist between a defendant and a state agent; (2) the right of confrontation under the Confrontation Clause was violated where statements from the Federal CI, whom did not testify at trial, was entered into evidence through Agent Miller, the State CI, and an audio and video recording of the meeting between the Federal CI, State CI, and Appellant; and (3) Appellant's trial in his absence was in violation of his right to be present under the Sixth Amendment of the United States Constitution. (See, R. p. 15).

The trial court denied all of Appellant's arguments for a new trial. (R. p. 6). The trial court reasoned that the jury charge was not erroneous nor had the potential to confuse the jury because the court instructed the jury on the laws of trafficking in heroin, twenty-eight grams or more, as it was written by the legislature; the Confrontation Clause argument was not preserved because Appellant make no objection to the entry of statements made by the Federal CI into evidence at trial; and Appellant had waived his right to be present under the Sixth Amendment where he failed to appear for trial after notice. (R. pp. 7-9).

In Appellants motion to reconsider the trial court's denial of his motion for a new trial, Appellant's sole argument was that the rule established in Stromberg v. People of

State of California, 283 U.S. 359, 51 S. Ct. 532 (1931), requires that a general verdict be set aside where the jury was instructed on two or more disjunctive grounds of guilt and at least one of the instructed grounds was unconstitutional or legally impermissible. (R. pp. 29-32). The trail court denied Appellant's argument on his motion to reconsider without explanation.

ARGUMENT

"'[T]he grant or refusal to grant a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion.' (Citation omitted). 'An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law.'" State v. Smith, 642 S.E.2d at 630 (S.C. App. 2007) (Citations omitted). "To warrant reversal, an error must result in prejudice to the appealing party." State v. Black, 400 S.C. 10, 16-17, 732 S.E.2d 880 (S.C. 2012) (citations omitted).

I. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A NEW TRIAL WAS AN ABUSE OF DISCRETION AND CONTROLLED BY AN ERROR OF LAW ON THE GROUND THAT THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY THAT APPELLANT'S GUILT COULD BE FOUND ON EITHER THE LEGAL THEORY OF CONSPIRACY TO PURCHASE HEROIN OR ATTEMPT TO PURCHASE HEROIN.

In State v. McCluney, the South Carolina Supreme Court reversed the Court of Appeals' ruling that the circuit court error in failing to grant McCluney's motion for directed verdict at trial, where he was charged with trafficking in cocaine as result of purchasing 400 grams of imitation cocaine from a law enforcement agent posing as a drug supplier during a reverse-buy operation. 361 S.C. 607, 608, 606 S.E.2d 485 (S.C. 2004). In its opinion the McCluney Court reasoned that:

> Trafficking is not limited to the substantive offenses of purchasing, possessing, and selling large amounts of controlled substances. *Conspiring and attempting to do those acts also constitute trafficking. The part of the trafficking statute pertinent to this case is as follows: "Any person who knowingly... attempts[] or conspires to ... purchase ... ten grams or more of cocaine ... is guilty of a felony which is known as trafficking in cocaine.*
>
> The Court of Appeals errantly focused on the facts that only imitation cocaine was present at the transaction and that purchasing imitation cocaine does not constitute trafficking. In doing so, the court relied heavily on *Murdock v. State of South Carolina,* 311 S.C. 16, 426 S.E.2d 740 (1992), which is irrelevant to Respondent's case.
>
> *The court should have focused on the State's evidence that Respondent conspired and attempted to purchase real cocaine.* Section 44-53-370(e) (2) plainly states that conspiring and attempting to purchase ten grams or more of real cocaine constitute trafficking. *The presence of only imitation cocaine [361 S.C. 610] at the transaction is irrelevant to Respondent's intent and thus irrelevant to the State's conspiracy and attempt arguments.*

State v. McCluney, 361 S.C. at 609-610.

In the case at hand, the trial court instructed the jury as follows:

> Under trafficking in heroin, twenty-eight grams or more, *the presence of only imitation heroin at the transaction is irrelevant if the State proves, beyond a reasonable doubt that the Defendant conspired or attempted to purchase more than twenty-eight grams or real heroin.*

(Trial Tr., p. 163). The trial court correctly recognized that the only section of the trafficking in heroin statute applicable to Appellant's conduct was the language that makes it illegal to conspire or attempt to purchase heroin because Appellant's case involved the purchase of imitation drugs, as the defendant in State v. McCluney. However, the trial court's charge on conspiracy and attempt was confusing and misleading to the jury because the jury was erroneously instructed that Appellant's guilt could be based upon the theory that Appellant either "conspiracy or attempt" to purchase heroin. (Id.). No evidence was presented at trial to support a charge of conspiracy.

"A conspiracy is defined as the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003), See also, State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (S.C. 1963). However, a conspiracy can never be achieved between a defendant and an informant. "This would contradict the rule that one cannot enter into a conspiracy with another who only feigns acquiescence in a crime; such as an informer or undercover agent." State v. Holmes, 277 S.C. 232, 233, 285 S.E.2d 353 (S.C. 1981) (citation omitted); See also, State v. Crocker, 621 S.E.2d 890, 366 S.C. 394 (SC, 2005); State v. Adams, 462 S.E.2d 308, 319 S.C. 509 (S.C. App., 1995); United states v. Chase, 372 F.2d 453 (4th Cir. 1967). However ... "participation of an undercover agent '[i]n conjunction with more than one person to violate a law...will not preclude a conviction of the others for a conspiracy among themselves.'" State v. Holmes, 243 S.C. at 234; Citing, State v. Wilkins, 34 N.C. App. 392, 238 S.E.2d 659, 665 (1977).

In the case at hand, the sole parties to the reverse drug buy were Appellant and the Federal CI and the State CI. (Trial Tr. p. 98, 11, 113). Appellant was the sole non-law enforcement agent involve in the drug buy. As a result, his conduct coupled with that of the State CI or the Federal CI could not have formed a conspiracy. Therefore, it was error when the jury was instructed that Appellant's guilt could be found on the theory of conspiracy to purchase or attempt to purchase heroin.

As a result, there are only three possible scenarios that could explain the jury's general verdict of guilt: (1) all twelve jurors could have individually concluded beyond a reasonable doubt that Appellant "conspired" to purchase twenty-eight grams or more of heroin with no reliance on the attempt language in the jury instructions; (2) all twelve

jurors could have individually concluded beyond a reasonable doubt that Appellant "attempted" to purchase twenty-eight grams or more of heroin, with no reliance on the conspiracy language in the jury instructions; or (3) all twelve jurors could have individually conclude beyond a reasonable doubt Appellant was guilty, with some having been persuaded by the conspiracy language of the jury instructions and some having been persuaded by the attempt language in the jury instructions. If scenarios one or three occurred, the jury verdict was based upon an erroneous conclusion of law. Therefore, there is at least a two-thirds (2/3) or sixty-six percent (66%) chance that the verdict was based upon an error or law.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Cole v. Raut, 663 S.E.2d 30, 33, 378 S.C. 398 (S.C., 2008). "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jurys [sic] confusion affects the outcome of the trial." (Id.). In Wertz v. State our Supreme Court explained it best:

> A verdict should be certain and import a definite meaning free from ambiguity. (Citations omitted)
>
> * * *
>
> *A verdict of a jury should be upheld when it is possible to do so, and carry into effect what was clearly the intention of the jury. When a verdict is so confused, however, that it is not absolutely clear what the jury intended to do, the safest and best course for the court to pursue is to order a new trial. Judges and parties should not be required to guess as to what verdict a jury sought to render.* (Emphasis added).

349 S.C. 291, 296, 562 S.E.2d 654 (S.C. 2002). (Citations omitted).

The trial court conceded this issue in its order deny Appellant's motion for a new trial: "Additionally, Defendant argues, correctly, conspiracy between an undercover informant and the Defendant cannot constitute as a conspiracy." However, the trial court ruled that its decision to charge the jury on conspiracy was not erroneous because, "...the Court instructed the jury on the law as it was written by the legislature." (Order, p. 5). To the contrary, simply charging the law as it is written verbatim will not excuse the confusion created in the jury by instructing them that they may base guilty upon a theory of criminal liability that is not support by evidence or law.

In Stromberg v. People of State of California, the defendant was charged with violating a state statue which made it illegal to display a red flag, badge or banner in a public or private place for any of the following purposes: (1) displayed, as a sign, symbol, or emblem of opposition to organized government; or (2) was an invitation or stimulus to anarchistic action; or (3) was in aid to propaganda that is of a seditious character. 283 U.S. 359, 361, 51 S. Ct. 532, (1931). The trial court instructed the jury as follows:

> [I]t is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for only one or more of the three purposes alleged in said information, and it is not necessary that the evidence show, beyond a reasonable doubt, that said red flag was displayed for all three purposes charged in said information. Proof, beyond a reasonable doubt of any one or more of the three purposes alleged in said information is sufficient to justify a verdict of guilty under count one of said information.'

Stromberg, 283 U.S. at 364. The defendant's challenge to the constitutionality of the statute was denied by the trial court, and the jury returned a general verdict of guilty.

On appeal, the California appellate court concluded that the first of the three unlawful purposes for displaying a red flag was unconstitutionally overbroad because it could prohibit constitutional protected speech. However, the appellate court concluded

that the remaining two unlawful purposes for displaying a red flag were constitutional. The appellate court affirm the defendant's conviction on the ground there was sufficient evidence presented at trial to support the defendant's conviction on any one of the two remaining constitutionally, prohibited purposes for displaying a red flag. The California Supreme Court declined to hear the case on petition.

On appeal to the United States Supreme Court, the court reversed the judgment affirming the defendant's conviction and remanded the case for further consideration. The Stromberg Court reasoned that:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.
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> * * *
>
> The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside.

Stromberg, 283 U.S. at 367-370. (Emphasis added) See also, Zant v. Stephen, 462 U.S. 862, 881, 103 S.Ct. 2733 (1982) ("*One rule derived from the Stromberg case requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the*

verdict may have rested exclusively on the insufficient ground.). The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested. See, Street v. New York, 394 U.S. 576, 585-588, 89 S.Ct. 1354 (1969) (A general verdict of guilty must be set aside if it can not be satisfied from the record that the verdict was not based upon the unconstitutional theory.); Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207 (1942) ("It therefore follows here as in Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained."); Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064 (1957) ("Further, in order to convict, the jury was required, as the court charged, to find an overt act which was 'knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment,' and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy.... *In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.*").

Yates is also important because it was the first time that the court extended the Stromberg rule beyond unconstitutionally charged grounds. In Yates, the Stromberg rule was applied where one of the charged theories was not unconstitutional, but merely legal impermissible.

The Stromberg rule is applicable to the case at hand: a general verdict must be set aside where (1) the jury was instructed that it could find guilty on any of two or more disjunctive grounds; (2) one of the grounds charged to the jury was legally impermissible or unconstitutional; and (3) it cannot be satisfied from the record that the verdict was not based upon the impermissible or unconstitutional ground.

Here, the jury was instructed that they could find Appellant guilty if they found beyond a reasonable doubt that the Appellant conspired to traffic in heroin or attempted to traffic in heroin of twenty-eight grams or more. A general verdict was issued, finding Appellant guilty, with no indication as to whether the verdict was based upon the admitted, impermissible conspiracy theory of criminal liability or the attempt theory of criminal liability. All three elements of the Stromberg rule are present in this case.

II. THE TRIAL COURT'S DENIAL OF APPELLANTS MOTION FOR A NEW TRIAL WAS AN ABUSE OF DISCRETION ON THE GROUND THAT APPELLANT WAS DENIED THE RIGHT TO CONFRONT HIS ACCUSORS UNDER THE CONFRONTATION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

In State v. Davis our State Supreme Court thoroughly explain the jurisprudence of the Confrontation Clause to the Sixth Amendment of the Constitution of the United States. The Court explained as follows:

> Among other protections, the Sixth Amendment assures: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Sixth Amendment was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct.App.2004). The primary interest secured by the Confrontation Clause

is the right to cross-examination. Gillian at 450, 602 S.E.2d at 71 (citing State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1991)); see also State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994) (observing that specifically included in defendant's Sixth Amendment right to confront a witness is the right to meaningfully cross-examine an adverse witness).

Certain hearsay statements traditionally have been admissible against a defendant even though the declarant was unavailable at trial and even though the defendant did not have a prior opportunity to cross-examine the declarant. Under Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980), abrogated by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), hearsay statements were admissible if they bore "adequate `indicia of reliability' " — a test that could be met by showing the evidence (1) fell within a firmly rooted hearsay exception, or (2) bore particularized guarantees of trustworthiness. Roberts at 66, 100 S. Ct. 2531; State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct.App.2003). However, in Crawford, the United States Supreme Court broke away from Roberts and radically changed the Confrontation Clause landscape.

* * *

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), Michael Crawford was convicted of assault for stabbing Kenneth Lee, who allegedly tried to rape Crawford's wife, Sylvia. At trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing. Sylvia did not testify at trial due to Washington's marital privilege, which "generally bars a spouse from testifying without the other spouse's consent." Id. at 40, 124 S. Ct. at 1357 (citing Wash. Rev. Code § 5.60.060(1) (1994)). This privilege, however, does not extend to a spouse's out-of-court statements admissible under a hearsay exception. Whether Crawford saw a weapon in Lee's hands was a critical fact for his claim of self-defense. Because Sylvia was unable to testify at trial, Crawford claimed the admission of Sylvia's statement was a violation of his federal constitutional right under the Sixth Amendment to be confronted with the witnesses against him.

Following Roberts, the trial court allowed Sylvia's statement on the ground that it bore guarantees of trustworthiness. The Washington Court of Appeals reversed. The Washington Supreme Court then reinstated the conviction, and the Supreme Court of the United States granted certiorari.

Justice Scalia, writing for the seven-Justice majority, announced a fundamental change in Confrontation Clause jurisprudence:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendments protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." ... To be sure, the Clauses ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Id. at 61, 124 S. Ct. at 1370 (emphasis added). Crucial to the Courts decision was its emphasis on testimonial hearsay. "[I]f the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Id. at 53, 124 S. Ct. at 1365 (footnote omitted). Thus, [w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers design to afford the States flexibility in their development of hearsay law — as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

State v. Davis, 613 S.E2d 760, 764-766, 364 S.C. 364 (S.C. 2005).

Here, the Federal CI was allowed to testify at trial in Appellant's case through the introduction and publication to the jury the video recorded meeting between Appellant, the State CI, and Federal CI on August 16, 2011 at Broadway at the Beach. Furthermore, the State CI testified before the jury about conversations he had with the Federal CI:

Q. You and he (Federal CI) spent a good deal of time talking with one another; is that correct?

(Trial Tr., p. 95-96).

A. From the station to Broadway.

Q. Right. The part that was skipped was you and him talking?

A. Yes.

Q. And he didn't tell you what caused him to be an informant for the government?

A. He was working for the government.

* * *

Q. He was working for the Government; do you know why?

A. No.

Q. He was not an employee of the government?

(Trial Tr., p. 96).

A. What he told me was, he was working for the money.

Q. For the money?

A. That the government pays him.

* * *

Q. At the point in time that you met him he knew that it was four ounces for Ten Thousand Dollars; isn't that true?

A. That's what he told me.

Q. Right. The guy who the government paid told you that it was four ounces of heroin for Ten Thousand Dollars?

A. That's what he told me.

(Trial Tr., p. 97).

* * *

INTERPRETER: He wanted only four ounces to begin.

Q. But it was the government-paid informant who told you that?

INTERPRETER: He gave the price because he didn't want to give me the four ounces.

Q. He was - - the government informant, the paid government informant was the one who had talked to Mr. White initially, is that true?

A. Yes.

Q. And he only brought you in to do the deal?

A. Yes, basically.

Q. And before any of this was done he had already gone and got his money and left town?

A. He is not from here. Somebody had to be there, so that's why they put me there.

(Trial Tr., p. 98).

Furthermore, Agent Miller testified before the jury about conversation he had with persons in violation of Appellant's right of confrontation under the Sixth Amendment:

Q. The very first time that you knew anything about this case it was a Ten Thousand Dollar Four-ounce deal; isn't that true?

A. The information that I had received was that there was a subject, Jawan White, looking for - - to purchase a large quantity of heroin. I was advised that - - it was explained - - I don't believe anybody knew what that large quantity was, but it's my understanding that the third party that introduced Adrian (State CI) to the - - to Jawan White, has stated that he does not deal less than four ounces of heroin. We had information that a subject was looking for a large quantity of heroin, which would have been

Jawan White, and the informant was instructed to just advise that he does not deal in less than four ounces of heroin.

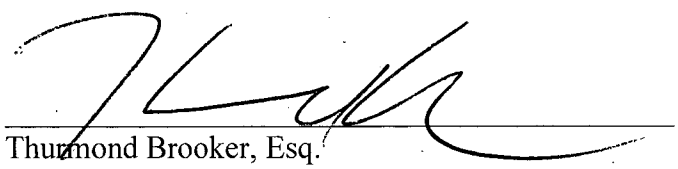
(Trial Tr. p. 129-130).

The hearsay testimony given by both the State CI and Agent Miller were in violation of White's rights under the Confrontation Clause, because the declarant of the testimony were not available for cross examination by Appellant, either before or at the time of trial. Furthermore, the testimony was not permissible under an exception to the hearsay rule or otherwise admissible. See, Rules 801-806, SCRE.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the trial court to deny Appellant's motion for new trial and remand the case back to the circuit court for a new trial.

Respectfully submitted,



March 21, 2018

Florence, SC

Thurmond Brooker, Esq.
The Brooker Law Firm
P. O. Box 1450
Florence, SC 29503-1450
(843) 679-0056 - telephone

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Appellate No.: 2017-000281

The State of South Carolina — Respondent

Vs.

Jawan Rayel White — Appellant,

CERTIFICATE OF COUNSEL

Counsel for Appellant hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

March 23, 2018

Florence, SC

Thurmond Brooker, Esq.
Brooker Law Firm
P. O. Box 1450
Florence, SC 29503-1450
(843) 679-0056
Attorney for Appellant