STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001928

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEAN NELSON SEAGERS,

PETITIONER.

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUE ON APPEAL

The trial court erred, and thereby violated Petitioner's right to due process of law, by instructing Petitioner's jury on the law as it relates to accomplice liability where there was no evidence adduced at trial which tended to establish that Petitioner acted in concert with anyone in the crime charged.

STATEMENT OF THE CASE

Petitioner, Dean Seagers, was indicted by the Charleston County grand jury during the November 2012 term for Distribution of Cocaine Base (2012-GS-10-06779). He was represented in the trial court by Cameron L. Marshall, Esquire. The Petitioner proceeded to trial by jury on July 6-9, 2015 before the Honorable Kristi Lea Harrington. The State was represented at trial by J. Whit Sowards, Assistant Solicitor, and Lauren L. Mulkey, Assistant Solicitor. At the conclusion of this trial, the Petitioner was found guilty as charged and was subsequently sentenced on July 9, 2015 to Life without Parole for Distribution of Cocaine Base.

The Petitioner served and filed a timely Notice of Appeal from his judgment and sentence. The South Carolina Court of Appeals subsequently issued its opinion affirming Petitioner's conviction and sentence. *The State v. Dean Nelson Seagers*, 2017-UP-263 (S.C. Ct. App. Dated June 28, 2017). Petitioner filed his Petition for Rehearing, pursuant to Rule 221(a), SCACR, on July 13, 2017. Said petition was denied by Order filed August 18, 2017. Certiorari was granted by Order of this Court entered March 7, 2018. Certiorari was granted on Petitioner's Question III and denied on Questions I and II.

ARGUMENT

STATEMENT OF FACTS

Petitioner was alleged to have sold a confidential informant crack cocaine on June 20, 2012. The confidential informant, who was subsequently identified as Robert Drayton, was working with Detective Mike Burke. According to Burke's trial testimony, Drayton was being paid to conduct undercover drug buys. Burke ultimately admitted, however, that Drayton had himself been the target of a drug investigation and that his office had ultimately recruited him as a paid informant after determining that he would be more valuable to them as a resource. His testimony clearly establishes that there were charges that would have been brought against Drayton had it not been for his agreement to work with the police. App. p. 281, l. 4 – p. 284, l. 12. Burke admitted that at the time he made the decision to offer Drayton money to make buys as a confidential informant he was aware that this individual had a prior conviction for providing false information to law-enforcement. App. p. 267, ll. 11-16.

According to Burke's trial testimony Petitioner used his own telephone to set up a purchase from Petitioner. The drug deal that supposedly followed was monitored with audio surveillance and Drayton was outfitted with a camera on his clothing. Tr. p. 234, l.8 – 236, l. 10. There was no live video feed being monitored by law-enforcement contemporaneous with this alleged drug transaction. Detective Burke testified in camera that when the video surveillance feed was subsequently downloaded it did not show Petitioner and in fact did not show who had lowered the small quantity of crack cocaine to Drayton from a second-story window. App. p. 30, l. 20 – p. 32, l.14.

Prior to jury selection, Petitioner made a motion to suppress his identification by Drayton during a pretrial identification procedure and during the trial. App. p. 4A, ll. 16-22. When Drayton was called as a witness for the state during the *in camera* proceeding on that

motion, Drayton invoked his Fifth Amendment rights and declined to answer questions concerning the events of June 20, 2012. He did however acknowledge having known Petitioner for a couple years and indicated that he knew him through his family. He further testified that he knew Petitioner by the nickname Baby Dean. App. p. 12, l. 13 – p. 13, l. 2. Drayton did acknowledge having been shown one photograph by Burke which Drayton acknowledged identifying as Baby Dean. App. p. 14, l. 24- p.15, l.7.

As previously noted, during the *in camera* proceeding Drayton denied seeing Petitioner at all on the date this drug sale allegedly took place and expressly denied buying drugs from Petitioner that day. When Drayton subsequently testified before the jury, however, he claimed that the statement he had given to Burke immediately after the transaction was truthful. That statement was introduced into evidence as State's Exhibit No. 2. App. p. 10, ll. 19-24 (marked for ID) and App.p. 158, ll. 12-20 (introduced). Drayton claimed he had not testified truthfully in the *in camera* proceeding because he had received a threatening phone call from someone that morning before the trial began. He did not claim the call was made by Petitioner. He likewise did not testify that the call was made by anyone he knew to be affiliated with Petitioner. App. p. 197, l. 8 – p. 198, l. 21.

In his trial testimony Drayton admitted that he did not see the person who lowered the drugs down to him, in a cup on a string, from a second floor window. He did initially claim that he got a quick glimpse of Petitioner through a window *after* the drugs were delivered to him in the cup. He subsequently admitted, however, that he only saw the person he identified as Petitioner for a split second and that he could have been mistaken about the individual being Petitioner. App. p. 191, l. 12- p.193, l. 18. There were other things about the account given by Drayton that were questionable. For example, both law enforcement officers who testified about this operation, Gill and Burke, testified that Drayton was thoroughly searched prior to being sent out to make this purchase. Gill, testified that when

he arrived on the scene, Burke was in the process of searching Drayton. He described in detail how thoroughly a CI was always searched before an operation. App. p. 169, l. 8 – 170, 1. Burke's testimony described a very thorough search of Drayton's person before the undercover Bonnie. While Drayton confirmed that he was searched by Burke, he vehemently denied that the police searched the crack in his buttocks. App. p. 199, l. 5 – p. 200, l. 24.

The drugs ultimately attributed to this drug transaction were eventually identified by state witness , Renee Hilton, a forensic chemist, as testing positive as crack cocaine, not powder cocaine as Burke had supposedly made arrangements to but from Petitioner. The drugs in question were said to have weighed only 2.03grams. App. p. 334, l. 25 – p. 340, l. 25. Thus, the amount of drugs allegedly purchased from Petitioner was extremely small and could easily have been concealed on Drayton's body in intimate areas not searched by Burke prior to the sting operation.

Burke admitted in his in camera testimony that he never even printed out his report on Drayton's debriefing and that as of the date of the trial that report was on the hard drive in his police vehicle in his new position in Indianapolis. App. p. 24, l. 21- p. 25, l. 13. In another interesting twist, Burke ultimately admitted that when Drayton was searched and sent out Petitioner was not the individual Drayton was supposed to be buying drugs from on that date. Burke indicated that the intended buy fell apart for some reason and they out Drayton then called Petitioner and arranged a different deal. App. p. 232, l. 3- p. 234, l. 3. Burke's testimony indicated that he talked to Drayton twice by phone after he left him. App.p. 284, l.13- p.285, 18. Drayton on the other hand, denied speaking to Burke at all after he was searched and before he returned to where Burke was waiting for him. App.p.204, ll. 18-21. Drayton did it knowledge that he talked on the telephone while riding the bicycle to the by location and indicated that the person he was talking to was his girlfriend. App.p.203, l.20- p. 204, l. 2. Although Drayton was equipped with a camera hidden on the front of his shirt,

and a live feed audio device, there were multiple blackouts in the recordings in question resulting in a significant amount of time when it was impossible to know exactly what Drayton was doing. The transcript of Petitioner's trial reveals that neither Burke nor Drayton revealed where the *original* buy was to have taken place or what caused that buy to fall through. In fact, while Burke testified that Petitioner was not the original target that day, Drayton never acknowledged that there was a change in the plan and that he supposedly called Petitioner to set up a buy as a fall back plan when the deal he was supposed to be making fell apart.

At trial the state introduced testimony from Detective Charles Jacob Grill. He was not the case agent in this case, however according to his testimony, he had some involvement in this case. Hey was in fact the first witness to be called by the state after the jury was sworn. After a lengthy discussion of his law enforcement experience, he was qualified as an expert in narcotics investigations without objection by the defense. App.p.107, ll.10 -14. Grill was permitted, without objection by the defense, to testify at length concerning how many of the facts in this case were typical of the actions of a drug dealer. App.p. 108, l. 5-p.128, l. 13. He went on to testify that on the date in question he observed a gray Dodge charger down the street from the target location and recognized it to be a vehicle that law-enforcement new Petitioner to drive. Grill resisted numerous attempts by the defense to get him to answer questioning concerning whether he had ever personally seen Petitioner driving or riding in the car in question. App.p. 139, ll. 1 – p. 143, l. 17. Ultimately he admitted that he did not take pictures of the automobile or record its tag number. He acknowledged that his testimony that Petitioner was "known to" use that vehicle was based on "Intel", that he had no idea the source of. He even testified that he "wanted to say" the car had tags from NC or Virginia which lead him to believe it was a rental car. App. p. 166, l. 9 – p.167, l. 22. Gill next stated that someone might have told them that was a car Petitioner had been seen in.

App.p. 174, l. 12 – p. 176, l. 15. Burke on the other hand, eventually admitted that he did check out the ownership of the gray car in question but claimed he did not document his findings because The car did not "come back" as registered to a pallet and she attributed no significance to the fact that the vehicle would be registered to someone other than Petitioner using a car that was not registered in his name was not significant. App. p. 279, l. 8 – 281, l. 3.

Gill offered testimony that he recognized Petitioner's voice on the audio recording of the transaction. Trial counsel objected to this testimony on two grounds. First, Petitioner argued that Gill was not an expert in voice identification and secondly, Petitioner noted that no proper foundation had been laid for his voice identification testimony. App.p. 132, l. 23 – p. 135, l. 8. The court overruled Petitioner's objection to this line of testimony indicating that it disagreed with trial counsel's analysis, but not indicating a ruling on the two separate grounds upon which the objection was raised. The court did however note that Petitioner's objections were preserved for the record. Tr. p. 135, ll. 9-20. Only *after* the courts ruling did the prosecution ask Grill questions designed to lay a foundation for his voice identification testimony. App.p. 136, l.14- p. 138, l. 10. In this testimony, he claimed to have spoken with Petitioner on several occasions prior to the date of the alleged buy. He also testified that he was present when Petitioner was arrested at the same location where the buy was alleged to have occurred and had spoken with him after his arrest. Based upon that exposure, he claimed to be certain that the voice on the audio recording was that of Petitioner.

On cross-examination Gill acknowledged that his law enforcement training had taught him to document matters that were significant in his police reports. Notwithstanding that training, he asserted that he didn't document the fact that he supposedly recognized Petitioner's voice in this case, noting that he "just didn't write it down". App. p.139, l.24- p. 141, l. 15.

With regard to his previous opportunity to observe Petitioner's voice, on cross-examination Gill admitted that on the two occasions when he had previously spoken with Petitioner, ***"I believe it was just kind of a hey, how are you doing – type deal as we were on the street working either doing – – executing warrants in this area or just – – just an encounter."*** App. p. 157, 1-6. He asserted, however, that after Petitioner was arrested ***"we did have a long conversation with the defendant. Yes, sir, I did."*** App.p. 157, ll. 6-9. When asked if he could remember when these two brief encounters with Petitioner before his arrest took place, Gill indicated that he did not remember when they occurred, but that he just knew that he had spoken to Petitioner in the past. When defense counsel asked him if these encounters were ***"said hello on the street?"***, Gill repeated, ***"Yes sir, just an encounter."*** App. p. 157, ll. 10-16.

DISCUSSION

Issue III in Petition for Writ of Certiorari.

The trial court erred, and thereby violated Petitioner's right to due process of law, by instructing Petitioner's jury on the law as it relates to accomplice liability where there was no evidence adduced at trial which tended to establish that Petitioner acted in concert with anyone in the crime charged.

During the charge conference held before jury instructions were issued, the trial judge asked defense counsel if he objected to "hand of one charge." Trial Counsel noted his objection to a charge on the law of accomplice liability at that time. App.p. 418, ll. 4-9. The trial judge then stated that she would be "charging hand of one based upon the testimony that was presented." App.p. 418, ll. 7-9. Petitioner now respectfully submits that the trial court erred in issuing a jury instruction on the law of accomplice liability where there was no evidence presented at trial which established that Petitioner was acting in concert with anyone.

Indictment as a principal does not in itself preclude a finding of guilt on an alternative theory of accomplice liability. *State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id.* at 479, 697 S.E.2d at 584. *See also*, *State v. Batchelor*, 377 S.C. 341, 661 S.E.2d 58 (S.Ct. 2008).

However, an instruction on the alternative theory of accomplice liability must be supported by the evidence. *State v. Dickman*, 341 S.C. 293, 534 S.E.2d 268 (2000) (accomplice liability charge was proper when there was evidence that the defendant and a second person planned the murder and the second person was the shooter). "Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) (citing *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) (lesser-included offense charge properly refused where no evidence supported it), and *Dickman, supra*). *See also, Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); *State v. Foxworth,* 269 S.C. 496, 238 S.E.2d 172 (1977); *State v. Fields*, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003). The fact that a jury may have believed some of the evidence adduced at trial, and disbelieved other portions of the evidence produced by the State, does not suffice as a foundation for charging accomplice liability as an alternate theory of guilt. *Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct.App. 2014).* In the case before this Honorable Court there simply was no evidence that Petitioner acted in concert with anyone else. Drayton did testify that there were three people in the apartment at the time of the deal. App. p. 185, l.9. He did not explain how he knew that fact since he was claiming that he had not gone inside at the crime scene, but rather had conducted this deal with someone who lowered the drugs out the

second story window. Neither did he testify to have having seen three different individuals in the windows during this transaction. He expressly testified that he did not see the person who lowered the drugs out the window in a cup on a string. App. p. 184, l. 25 – p. 185, l. 7. There was no testimony concerning who rented the apartment or who lived there. There was no testimony from the confidential informant, Drayton, that Petitioner was known to sell drugs with others from that location. Simply put, there was no evidence that Petitioner was acting with partners in a mutually agreed upon plan to sell drugs. For that reason, it was error for the Court to issue a jury instruction on the law in this state concerning accomplice liability. Drayton actually admitted that he may have been mistaken about having seen Petitioner *at all at the scene of this drug deal.* App. p. 193, ll. 1 – 18.

Under the legal concept of accomplice liability, commonly referenced as, "the hand of one is the hand of all theory"

> [O]ne who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" *State v. Thompson*, 374 S.C. 257. 261-62. 647 S.E.2d 702, 704-05 (Ct. App. 2007) (alteration in original) (quoting *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." *Id.* at 262, 647 S.E.2d at 705. "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" *Id.* (alteration in original) (quoting *State v. Hill*, 268 S.C. 390, 395-96. 234 S.E.2d 219, 221 (1977))." *State v. Harry*, 420 S.C. 290, 298, 803 S.E.2d 272, 276-277 (S. Ct. 2017).

Where there was no direct evidence that Petitioner acted in concert with co-defendants in the furtherance of a plan to sell drugs to this undercover operative, the State could have relied upon substantial circumstantial evidence to establish that he and an accomplice planned to commit this drug offense. It is well established that, "in order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by prearrangement, the State need not prove a formal expressed agreement, but rather can prove

the same by circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010). The State presented no such evidence at Petitioner's trial.

Clearly, the trial court erred in charging the Petitioner's jury on the theory of accomplice liability. This error violated Petitioner's right to due process of law. The State argued in the Court of Appeals that the errors in the State's case all went to the weight of the evidence against petitioner. To the contrary, on the facts of this case, Petitioner asserts that the record verifies a complete lack of any evidence which supported a jury charge on accomplice liability. This error can not be harmless where Drayton admitted in his testimony that he may have been mistaken about even seeing Petitioner at the scene at the time of this transaction. App. p. 193, ll. 1 – 18.

This error was highly prejudicial to Petitioner and requires reversal of his conviction and sentence and the remand of his case for a new trial.

CONCLUSION

Based upon all the foregoing arguments and authorities, the Petitioner's conviction and sentence should be reversed and his case remanded to the Court of General Sessions for a new trial.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

This 23rd day of April, 2018.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Brief of Petitioner the Appendix was not served on Respondent inasmuch as the State was previously served with the Appendix at the time the Petitioner for Writ of Certiorari was filed in the above-entitled case has been served upon opposing counsel by depositing in the U.S. Mail, postage prepaid, this 23rd day of April, 2018, addressed as follows:

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ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 23rd day of April, 2017.
Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24