

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of General Sessions

R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2015-000517
2018-UP-147

RECEIVED

APR 30 2018

SC Court of Appeals

The State of South Carolina,

Respondent,

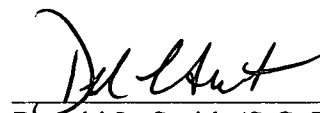
v.

Courtney Ray Mitchell,

Petitioner.

PETITION FOR REHEARING

April 26, 2018



Donald L. Smith (S.C. Bar #6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

Points of Arguments

- I. On whether the state submitted sufficient and relevant evidence that established the offense of Witness Intimidation 1
- II. On Petitioner’s Arrest for Breach of Peace Charge 4
- III. On the charge of Witness Intimidation as Fruit of Poisonous Tree 5
- IV. On the Denial of Due Process 5
- V. On the violation of Petitioner’s Right to Speedy Trial 7

Conclusion 8

TABLE OF AUTHORITIES

CASES

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	5
<i>State v. Cherry</i> , Op. No. 25902 (S.C. Sup. Ct. filed Nov. 29, 2004) (Shearouse Adv. Sh. No. 46 at 28)	1
<i>State v. Logan</i> , S.C. Op. No. 27296	2
<i>State v. McLauren</i> , 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002)	1
<i>State v. Preslar</i> , 364 S.C. 466, 613 S.E.2d 381 (2005)	2
<i>State v. Wilds</i> , 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003)	1

STATUTES

American Bar Association Model Rule 3.8(d)	6
S.C. Code Ann. § 16-9-340(A)	2
S.C. Code § 22-3-560 (2012)	7

ARTICLES

Nathan M. Crystal, “ <i>Disclosure Obligations of Prosecutors</i> ”, South Carolina Lawyer 8, September 2010.....	7
--	---

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of General Sessions

R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2015-000517
2018-UP-147

The State of South Carolina,	v.	Respondent,
Courtney Ray Mitchell,		Petitioner.

PETITION FOR REHEARING

Pursuant to the provision of Rule 221 (a), Appellant (hereinafter Petitioner), through his undersigned counsel, respectfully petitions this Court for a rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein.

On whether the state submitted sufficient and relevant evidence that established the offense of witness intimidation.

When ruling on a motion for directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. *State v. Cherry*, Op. No. 25902 (S.C. Sup. Ct. filed Nov. 29, 2004) (Shearouse Adv. Sh. No. 46 at 28); *State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003); *State v. McLauren*, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). However, this evidence must be relevant to the subject matter of the case.

Petitioner is charged with Intimidation of Witness. The elements of this offense are: (1) an unlawful threat of force to (a) intimidate or impede a witness in the discharge of his duty, or

to (b) destroy, impede, or attempt to obstruct or impede the administration of justice in any court. S.C. Code Ann. § 16-9-340(A); State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (2005).

Petitioner contends that the State failed to introduce substantial and relevant evidence that he is guilty of the offense, beyond reasonable doubt. In State v. Logan, S.C. Op. No. 27296, the Court held:

“ There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant’s behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.”

The evidence that the State presented to charge Petitioner are the following: a handgun license, a leaf blower, three cellphones, a receipt of beer from a convenience store. Taken individually and collectively, these items do not directly establish the criminal offense of intimidation of a witness. None of the aforementioned items can inflict physical injuries to Jones or her colleagues. No reasonable person could, and would interpret the leaf blower was a bomb, the cellphones as detonators, nor the receipt as proof of Jones’ residence.

Neither can these items be considered circumstantial evidence.

Petitioner submits the State failed to establish the elements of the crime of intimidation of witness.

Firstly, the Petitioner was not even aware that Jones, whom he considered as a friend, would be a witness in a case against him. Without this prior knowledge by Petitioner, the motives attributed by Jones as to the reason for the returned items, are not substantiated.

Secondly, the State failed to allege specific overt acts that may be interpreted as an intent to hurt, intimidate, threaten or scare Jones. The State failed to introduce any letter, note nor any message in whatever form, that contained any threatening statement. Thus, the first element of the offense was not established.

The State also failed to present evidence to show that Petitioner performed acts of physical violence, verbal or non-verbal communication of threats, emotional manipulation, pressure or intimidation to attempt to or did prevent, dissuade or influence Jones from testifying. Intimidating a witness requires the offender to have the specific intent to coerce the witness or victim not to testify or report, without this intent, there is no criminal intimidation.

As to the trespass notices that the State presented, these notices were sent to Mr. Ken Baca and Michael Battista, respectively, whom he thought were responsible for the breach of peace charge. The content of the trespass notice was non-threatening, just informing the Baca and Battista, that they were in trespass notice and to not come near him. Jones did not even receive any trespass notice, a clear indication that Petitioner did not know that Jones was the person who reported on him to the management. Petitioner was unaware of the direct participation of Jones in the filing of the breach of peace charge, much less of her potential role as a witness against him.

The critical factor to the admissibility of evidence of witness intimidation is whether the totality of the evidence creates an inference that the Petitioner had knowledge that Jones was a witness to a case, and that he intended to prevent or dissuade her from performing her duties as a witness. That Jones testified that she felt intimidated or scared is not sufficient to charge Petitioner with witness intimidation when the State and its witnesses failed to show Petitioner's intent. In summary, the State's failure to establish intent and to present relevant evidence to prove the elements of the crime of witness intimidation, entitles the Petitioner with a reversal of his conviction.

On Petitioner's Arrest for Breach of Peace Charge

The issue of breach of peace was raised in this case, initially during the hearing for Petitioner's motion to quash (R. 106) and subsequently during the February 12, 2015 trial. (R.106). The State itself sought the inclusion of this issue and the trial court allowed the witnesses to testify as to facts regarding the incident. (R. 107).

Petitioner's arrest for Breach of Peace was based solely on testimonies of biased witnesses, all agents/employees of the company. The arrest was effected without investigating employees and management of the restaurant where the acts of breach of peace allegedly occurred. The State presented no witnesses other than the UPS employees. And none of these UPS employees made any comments to him about her alleged erratic or violent behavior at lunch.

Petitioner contends that the State failed to show reasonable grounds for Petitioner's arrest as it was not able to establish any act by the Petitioner that is tantamount to inciting violence. Petitioner avers that his arrest was unlawful and in violation of his constitutional rights.

On the charge of witness intimidation as fruit of poisonous tree

On the hearing for Petitioner's Motion to Stay, Petitioner's counsel sought to have the charge of witness intimidation deferred pending the resolution of the breach of peace charge. Petitioner believed that the State had insufficient evidence to prove the breach of peace and Petitioner's arrest was unconstitutional. As such, Petitioner asserted that the mention of the breach of peace charge was prejudicial in his trial for the case on witness intimidation. Despite objections from the Petitioner, the judge allowed the introduction of evidence and witness testimonies for the breach of peace charge in the trial hearing. Petitioner insists that in objecting to the inclusion of the breach of peace charge, that it raised the present issue to the trial court, which the latter ruled against him.

In this case, Petitioner avers that the breach of peace charge as well as testimonies of witnesses establishing the same, was considered as an evidence in the witness intimidation charges. The breach of peace charge having been instituted without basis, was illegal, and any thing that was derive from the same was illegal. Without the illegal breach of peace charge, there would be no "witness" to intimidate.

On The Denial Of Due Process

Petitioner reiterates that the State's failure to produce, on time, Jones' and Petitioner's personnel files, the video of the July 25, 2013 incident and the Supplemental Incident Report, denied him of his right to due process.

The Brady doctrine provides that prosecutors have the obligation to disclose exculpatory evidence that is material to the guilt or sentencing of the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963).

Petitioner has succinctly shown that the requested materials were relevant to his case. Petitioner believes that Jones' personnel file would show motive on her part, to resort into concocting the baseless allegations against Petitioner. Jones has been in the company for years and has been passed for up for promotions. Petitioner contends that subsequent to Jones' testifying against Petitioner, she was promoted by the company.

Petitioner's personnel file was relevant in the light of the Court allowing Jones to testify on his alleged ineptitude. Jones was allowed to cast aspersion on his work performance and to paint a negative impression of Petitioner. His personnel file, when presented, would show that he had received commendations for his performance in the years prior to this incident.

Petitioner demanded the complete video of the July 25, 2013 incident, which the company presented as evidence to the law enforcement for Petitioner's arrest on the breach of peace charge. The video was roughly three minutes and fifty seconds long. The video provided to him had blank areas that were forty-eight and forty-nine seconds long, respectively—nearly half of the video was missing. The UPS Company, through the State, has an obligation to produce the video at the early stage of the case to afford the Petitioner time to formulate its defense.

The same thing happened with the Supplemental Incident Report, which the State presented on February 10, 2015, two days before the trial (a year and a half after the incident).

Furthermore, Petitioner believed that prosecutors have an independent ethical obligation with respect to disclosure. Under ABA Model Rule 3.8(d), which has been adopted in South Carolina, a prosecutor shall "make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating

information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal”. cited in Nathan M. Crystal, “*Disclosure Obligations of Prosecutors*”, South Carolina Lawyer 8, September 2010.

This article explained that the ethics rule for disclosure does not require that the exculpatory information be material, nor be admissible in evidence. American Bar Association, Formal Opinion #09-454, July 8, 2009, as cited in *Crystal*, Id. p. 9. This rule also requires “timely” disclosure. Id.

Thus, Petitioner believed that in denying Petitioner’s motion to compel the production of the requested materials, the trial court abused its discretion, and denied Petitioner his right to due process.

On the violation of Petitioner’s Right to Speedy Trial

The State instituted the breach of peace charge knowing it has no leg to stand on. It dragged this case, despite a motion for speedy trial, for the sole purpose of being able to try the witness intimidation case, which imposes a more severe penalty. Two days into the hearing for the witness intimidation case, the prosecutors dismissed the breach of peace charge. While this goes into the matter of prosecutorial discretion, this was clearly abused in this case to the detriment of Petitioner. The State knew that the breach of peace will not hold. It refused to resolve the same because it knew that if exonerated of said charges, then its witness intimidation charge would have fallen apart. Petitioner is presently serving a sentence of 10 years for a crime the basis of which was a charge of misdemeanor, which is penalized with fines or imprisonment for thirty-days. *SC Code § 22-3-560 (2012)*. Petitioner is serving a harsh penalty for a crime, which would have no basis had the court allowed him a speedy trial for the breach of peace

charge. Appellant was extremely prejudiced in his defense of the witness intimidation charge, and in the interest of justice, this Court should reverse his conviction of the same.

Conclusion

The totality of the evidence presented by the State did not create an inference that the Petitioner had knowledge that Jones was a witness to a case, and that he intended to prevent or dissuade her from performing her duties as a witness. As such, the State failed to prove the elements of the crime of witness intimidation, beyond reasonable doubt. Taken together with the denial of his right to a speedy trial for the underlying charge of breach of peace, it is clear that he was denied his right to due process. Petitioner's conviction should be reversed.

Based upon the foregoing, the Court should grant the petition for rehearing, vacate the opinion dated April 11, 2018, and either reverse Petitioner's judgment of conviction or schedule the case for re-argument.

April 26, 2018



Donald L. Smith, (S.C. Bar #6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner

**FORM 7
PROOF OF SERVICE
PETITION FOR REHEARING**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of General Sessions

Keith Ralph Kelly, Circuit Court Judge

Appellant Case No.: 2015-000517
2018-UP-147

RECEIVED
APR 30 2018
SC Court of Appeals

The State of South Carolina,

Respondent,

v.

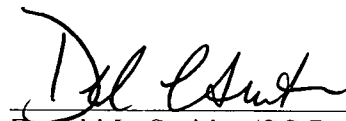
Courtney Ray Mitchell,

Petitioner.

PROOF OF SERVICE

I certify that I have served copies of Petitioner's Petition for Rehearing and a proof of service of the same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, PO Box 11629, Columbia SC 29211 and, Mr. Alan McCrory Wilson, Attorney General and Ms. Jennifer Ellis Roberts, Assistant Attorney General, at the Office of the Attorney General, located in PO Box 11549 Columbia SC 29211, and Mr. William Walter Wilkins, III, Solicitor, Thirteenth Judicial Circuit, at 305 East North Street, Suite 325, Greenville, SC 29601, by depositing a copy in the United States Mail, postage prepaid, on April 26, 2018 to the addresses listed above.

April 26, 2018



Donald L. Smith, (SC Bar#6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner

FORM 8
LETTER TO THE APPELLATE COURT CLERK
FILING PETITION FOR REHEARING

April 26, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

RE: The State v. Courtney Ray Mitchell
Appellate Case No. 2015-000517
2018-UP-147

RECEIVED

APR 30 2018

SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed the following materials for filing in the above-referenced Appellate matter:

- (1) An Original and Six (6) copies of Petition for Rehearing; and,
- (2) Proof of Service for same.

Sincerely,



Donald L. Smith, (SC Bar#6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner

cc: Mr. Alan McCrory Wilson, Attorney General
Ms. Jennifer Ellis Roberts, Assistant Attorney General
Mr. William W. Wilkins, Solicitor, Thirteenth Judicial Circuit