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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2017-002355
Lower Case No. 2015-CP-46-2859

Kenneth D. Morris, #334303 ..... Respondent,

vs.

State of South Carolina ..... Petitioner.

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Statement of Issues Presented

Question I: Is there some evidence in the record to support the finding of the Post Conviction Relief Court that trial counsel was ineffective for failing to effectively cross-examine Brandon Nichols concerning the punishment he faced prior to making a deal with the State, where counsel impeached the credibility of Mr. Nichols through other means?

Question II: Did the record below contain probative evidence to support the finding of the Post Conviction Relief judge that trial counsel was ineffective for failing to request a charge of the lesser included offense of possession of ecstacy with intent to distribute when the statute included a charge of possession of ecstacy with intent to distribute as a lesser included of trafficking ecstacy?

Question III: Is there probative evidence to support the finding of the Post Conviction Relief judge that trial counsel was ineffective for failing to introduce the sworn statement of the co-defendant of Kenneth Morris when the State had urged trial counsel to introduce the statement notwithstanding the provisions of Rule 613(b) of the South Carolina Rules of Evidence?

Question IV: Did the Post Conviction Relief judge err in finding the constructive possession charge violated Article V, § 21 of the Constitution of the State of South Carolina and the case law?

Question V: Did the record below contain probative evidence to support the finding of the Post Conviction Relief judge that trial counsel was ineffective in failing to differentiate between a "Phillies Blunt" and a "Black and Mild" when the trial court and the two appellate court decisions relied upon the item found in the automobile as being a "Phillies Blunt"?

Question VI: Should cumulative error be recognized in South Carolina where the Post Conviction Relief Court has found trial counsel ineffective on several ground?

STATEMENT OF THE CASE

Kenneth Morris agrees with the statement of the case as set forth in the brief of the State.

ARGUMENT

Question I

Is there some evidence in the record to support the finding of the Post Conviction Relief Court that trial counsel was ineffective for failing to effectively cross-examine Brandon Nichols concerning the punishment he faced prior to making a deal with the State, where counsel impeached the credibility of Mr. Nichols through other means?

The record in this case is undisputed that defense counsel did not cross-examine Brandon Nichols about his possible mandatory minimum three year sentence. In this respect, the record supports the claim that trial counsel was ineffective in failing to do so. The State simply argues this was not prejudicial to Kenneth Morris. On this point the State is wrong.

The jury was only told that Mr. Nichols had previously been given a statement that is inconsistent with his trial testimony. The jury was told he changed that testimony. What the jury was not told is that under the original charge, Mr. Nichols was facing at least a mandatory three years in prison. This fact could easily have explained why Mr. Nichols went back to his original statement.

In *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) this Court ruled that a defense attorney may cross-examine and impeach the credibility of a testifying co-defendant as to the possible sentence the testifying co-defendant is facing. The Court said:

> The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the

> witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency. *Id.* at 333, 563 S.E.2d at 318.

The *Mizzell* case was decided over seven years before the trial of this case.

In *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) this Court held trial counsel was ineffective and the applicant prejudiced by the failure of trial counsel to cross examine a witness named Green about a dismissed carjacking charge. "The trial court ruled Green's convictions for distribution of crack cocaine, use of vehicle without owner's consent, and possession of a stolen motor vehicle were admissible. *Id.* at 182, 810 S.E.2d at 840. Thus, in *Smalls,* the witness was impeached with other convictions, but this Court still found the failure to cross examine about the dismissed charge was prejudicial to the applicant. Had the jury known Mr. Nichols was avoiding a three year mandatory sentence in exchange for his testimony they easily could have given additional scrutiny to his testimony. The record reflects the jury was concerned about Mr. Nichols testimony as they specifically asked for a copy of his prior inconsistent statement. App. at 329, ll 5-6. At the very least, the Post Conviction Relief judge had evidence in the record to establish Mr. Morris was prejudiced. This Court should decline to review the ruling of the Post Conviction Relief judge on this issue as there was evidence to support his ruling .

Question II

Did the record below contain probative evidence to support the finding of the Post Conviction Relief judge that trial counsel was ineffective for failing to request a charge of the lesser included offense of possession of ecstacy with intent to distribute when the statute included a charge of possession of ecstacy with intent to distribute as a lesser included of trafficking ecstacy?

This issue is a question of law and therefore is properly reviewed by this Court on a *de novo* standard of review. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). This issue is a question of statutory interpretation.

First, the reliance of the State upon *Sellers v. State,* 362 S.C. 182, 607 S.E.2d 82 (2005) is entirely misplaced. The provision of the code relevant to this case was added in 2000 under Act 355. Mr. Sellers was tried before 2000. This Court noted in the Opinion "This Court affirmed his convictions and sentences on direct appeal. *State v. Sellers*, Op. No. 99-MO-79 (S.C. Sup. Ct. filed November 15, 1999)." *Id.* at 187, 607 S.E.2d at 84. As the *Sellers* case was tried before the statute was amended to add the provision about possession with intent being a lesser included of trafficking, it has no application to this case.

A principle of statutory interpretation is that the legislature is presumed to know the decisions of the appellate courts. *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.") When originally passed the statute involving the trafficking in drugs did not contain a provision that possession with an intent to distribute was a lesser included offense. Over the years after its passage the courts of our state have consistently held that possession with intent to distribute is not a lesser included offense unless the unique facts of the case require it. As this Court stated, "Therefore, when there is conflicting evidence as to whether the amount of marijuana involved is sufficient to invoke the trafficking statute, both charges should be submitted to the jury. Where, however, the undisputed evidence is that the amount involved exceeds the minimum trafficking amount, then only the trafficking charge should be submitted to

the jury." *Matthews v. State*, 300 S.C. 238, 241, 387 S.E.2d 258, 260 (1990).

For at least ten years the South Carolina legislature has known that South Carolina Code § 44-53-370 had been interpreted exactly as the State now urges it should be in its brief. In 2000, knowing that the appellate courts of South Carolina had precluded possession with intent to distribute from being charged in a drug trafficking case, elected to amend the statute. They added this provision "The offense of possession with intent to distribute described in Section 44-53-370(a) is a lesser included offense to the offenses of trafficking based upon possession described in this subsection." S.C. Code § 44-53-370. The only possession the amendment could have meant was the possession sufficient to include a trafficking offense. To accept the argument of the State, this Court would have to assume the legislature added the sentence for no purpose. "It is presumed that no unnecessary words or provisions were used by the legislature." *Cleco Evangeline, LLC v. Louisiana Tax Comm'n, 2001-0561* (La. App. 1 Cir.), 808 So. 2d 740, 745, (2001) *see also, State ex rel. Ballard v. Vest*, 136 W. Va. 80, 87, 65 S.E.2d 649, 653 (1951) ("We cannot assume in the absence of wording clearly indicating contrariwise that the Legislature would use words which are unnecessary, and use them in such a way as to obscure, rather than clarify, the purposes which it had in mind in the enactment of the statute."); *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 860 So. 2d 1112, 1119 (La. 2003) ('It is also presumed that every word, sentence or provision in a statute was intended to serve some useful purpose, that some effect be given to each such provision, and that the Legislature used no unnecessary words or provisions.")

The obvious intent of the legislature is to give the jury the discretion of lessening the harshness of a drug trafficking offense. The record in this case demonstrates that the jury

convicted Mr. Morris of the lesser included of possession of marijuana. The error of the trial court was a matter of law in failing to request the lesser included. As the legislature intended for possession with intent to distribute be charged, then trial counsel was ineffective and Mr. Morris was prejudiced. The decision of the Post Conviction Relief judge was clearly supported by a proper interpretation of the statute. This Court should decline to review this issue.

Question III

Is there probative evidence to support the finding of the Post Conviction Relief judge that trial counsel was ineffective for failing to introduce the sworn statement of the co-defendant of Kenneth Morris when the State had urged trial counsel to introduce the statement notwithstanding the provisions of Rule 613(b) of the South Carolina Rules of Evidence?

The error of trial counsel in this case is the fact that the state at trial urged defense counsel to admit the statement. Defense counsel refused to admit the statement. This exchange is found at App. 198, l 6 to 199, l 8. Defense counsel at trial was given the opportunity to introduce the contradictory statement and he refused. This issue does not come under Rule 613(b) of the South Carolina Rules of Evidence. This statement was obviously important to the jury as they requested to see the statement. App. at 329, ll5-6. The importance of the question is that they made specific reference to the statement being "signed at the notary." Because the statement was never introduced, the jury never had the opportunity to see for themselves that the notary did in fact notarize the signature of Brandon Nichols.

As the jury asked the see the statement, there is evidence in the record to support the finding of the Post Conviction Relief judge that Mr. Morris was prejudiced by the failure to

introduce the written statement.

Mr. Morris admits that the reason defense counsel elected not to introduce the statement was to preserve last argument. This position was not urged by the State at the Post Conviction Relief hearing nor in their brief. "An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000).

The Post Conviction Relief judge had evidence in the record to support the conclusion that Mr. Morris was prejudiced by the failure to introduce the written statement of Mr. Nichols. This Court should deny review in this matter.

Question IV

Did the Post Conviction Relief judge err in finding the constructive possession charge violated Article V, § 21 of the Constitution of the State of South Carolina and the case law?

The Post Conviction Relief judge ruled that the inference charge given as to constructive possession violated Article V, § 21 of the Constitution of the State of South Carolina. The Constitutional issue was not addressed in *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987). In support of his decision the Post Conviction Relief judge cited to cases from this Court that held that charging the jury that if certain facts are proven to their satisfaction, they may then infer

another fact is a charge on the facts. The Post Conviction Relief judge cited *Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907) and *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907) for the proposition that a charge of an inference is a charge on the facts in violation of the State constitution. The State has not briefed this question of constitutional law nor has it attempted to distinguish the two cases cited by the Post Conviction Relief judge.

The Order of the Post Conviction Relief judge sets forth the position of Mr. Morris on this issue. The Order points out the manner in which the inference charge can, and did, improperly influence the jury. If the case before a jury consisted of a case where there were two equally plausible hypotheses, why should the jury be told to infer the version favoring the state is the correct version? This obviously lessens the burden on the state. This is in violation of *In Re Winship*, 397U.S. 358 (1970).

No doubt eliminating a charge that the jury may infer knowledge, dominion and control of the drugs from control of the premises where the drugs are found will result in some guilty individuals not being convicted. But it will also assure that some innocent defendants will not be convicted. As was said by the Pennsylvania Supreme Court:

> It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent. If such a trade-off is acceptable, why not suspend the hearsay rule entirely when the Commonwealth introduces evidence in a criminal case? More defendants, guilty and innocent alike, would undoubtedly be convicted. The same result would obtain if we allowed the Commonwealth to introduce coerced confessions.
>
> However, such a trade-off is not acceptable. It is a fundamental precept of law in Pennsylvania that one charged with crime, be it murder, child abuse, or keeping a public nuisance, comes to trial clothed in the presumption of innocence. If we bear

> this in mind, we will be less tempted to distort the law of evidence in favor of the Commonwealth in order to increase the conviction rate. The Commonwealth should be bound by the same rules of evidence, including the hearsay rule, as other litigants. *Commonwealth v. Bujanowski,* 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992).

The Post Conviction Relief judge properly concluded that the inference charge given in this case was not based on sound law. The judge properly granted a new trial to Mr. Morris based upon this improper charge.

Question V

Did the record below contain probative evidence to support the finding of the Post Conviction Relief judge that trial counsel was ineffective in failing to differentiate between a "Phillies Blunt" and a "Black and Mild" when the trial court and the two appellate court decisions relied upon the item found in the automobile as being a "Phillies Blunt"?

As noted by the Post Conviction Relief judge, the fact that the item allegedly seen in the automobile was a Phillies Blunt was in fact crucial to the opinion of the trial judge and the appellate court decisions. Both decisions made specific references to "Phillies Blunt." At the Post Conviction Relief hearing Mr. Morris introduced both two Phillies Blunt and a Black and Mild. App. at 761, ll 1-12. They are not similar. One cannot be confused with the other. A Phillies Blunt can easily be hollowed out and have marijuana inserted into it. The Black and Mild, which is slightly larger in diameter than a regular cigarette, could not be as easily hollowed out. The South Carolina Court of Appeals has previously recognized "Swisher-Sweet cigar is commonly known as a 'blunt,' which refers to a cigar that has been hollowed and refilled with marijuana. The term 'blunt' was originally derived from the preferred brand of cigars for

this operation, Phillies Blunts, but can refer to any brand of store-bought cigars. *See* Urban Dictionary, available at http:// www.urbandictionary.com." *State v. Odom*, 376 S.C. 330, 333, 656 S.E.2d 748, 750 n1 (Ct. App. 2007). A Black and Mild is not a cigar similar to either a Swisher-Sweet or a Phillies Blunt. *See also Norman v. State*, 452 Md. 373, 402, 156 A.3d 940, 957 (2017)(' The law enforcement officer testified that, almost all of the hundreds of times that he had encountered boxes of Phillies Blunt cigars-which are often used to roll marijuana cigarettes-there had been evidence of marijuana.")

The error of the misidentification of the item found continued in the brief of appellate counsel. As noted by the Order of the Post Conviction Relief judge, the appellate counsel continued to make this error. Mr. Morris does not suggest no court has ever found that a Black and Mild has not been used to smoke marijuana. *See*, *State v. Sullivan*, 49 S.W.3d 800, 803 (Mo. Ct. App. 2001) ("Detective Grubb had been informed that individuals at the McCombs residence were using this type of cigar [a Black and Mild] to make 'blunts,' a hollowed-out cigar in which the tobacco is replaced with marijuana.") In this case the officer was very specific that the word "blunt" was a brand name. App. at 366, ll 15-16. If any cigar can be used to smoke marijuana then the finding of a cigar in an automobile is not as probative of marijuana use and does not support probable cause. In the present case Mr. Nichols originally told the officer that he was smoking a Black and Mild and not marijuana. App. at 398, l 16 to 399, l 16. The officer never testified that based upon his experience he had ever known a Black and Mild to be used for smoking marijuana. Interestingly, no evidence was ever presented that any type of cigar found in the automobile had remnants of marijuana in it. Therefore, the failure to distinguish between the two types of cigars was prejudicial to Mr. Morris. Both the Court of Appeals and this Court by

making specific reference to Phillies Blunts in the opinion believed the item found in the car was in fact a Phillies Blunt.

The record below contains evidence to support the finding of the Post Conviction Relief judge that the failure of trial counsel to distinguish between a Black and Mild and a Phillies Blunt was ineffective in arguing before trail judge and further prejudiced Mr. Morris in his appeal. This Court should decline to review this matter.

Question VI

Should cumulative error be recognized in South Carolina where the Post Conviction Relief Court has found trial counsel ineffective on several ground?

The State correctly recognizes that the issue of cumulative relief is an unsettled question in South Carolina. Br. of App. at 24. *Lorenzen v. State*, 376 S.C. 521, 657 S.E.2d 771 (2008). To cite a case that says the doctrine has not been recognized by this Court should not lead one to the conclusion that this Court does not recognize the doctrine in a proper case. In *Fisher v. Angelone,* 163 F.3d 835 (4th Cir. 1998) the Court failed to find any constitutional violation by trial counsel. When none of the several grounds upon which relief was found to be error, it is difficult to argue that cumulatively there should be error.

The position urged by Mr. Morris here is that as there was error by the trial counsel as found by the Post Conviction Relief judge, the judge properly examined the prejudice aspect on a cumulative error basis. As cumulative error has not been specifically rejected by this Court, the Post Conviction Relief judge made a finding on cumulative error that is supported by the fact at the hearing below.

The Post Conviction Relief judge has found that cumulatively the errors were prejudicial

even if each individual error was not. The record contains evidence to support this finding. This Court should decline to review this matter.

CONCLUSION

As the record in this case contains some evidence to support the findings of the Post Conviction Relief judge, this Court should deny the Petition for Writ of Certiorari filed in this matter.

May 30, 2018

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THE STATE OF SOUTH CAROLINA
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Kenneth D. Morris, #334303 ..... **Respondent,**

v.

State of South Carolina ..... **Petitioner**

I hereby Certify that I am the attorney for the Respondent in the above entitled case. That on May 30, 2018, I did deposit in the United States Mail with proper postage affixed thereto, a copy of the Brief of Respondent in the above case addressed to Megan Harrigan Jameson, Senior Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

May 30, 2018

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May 30, 2018

Hon. Daniel E. Shearouse, Clerk
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P.O. Box 11330
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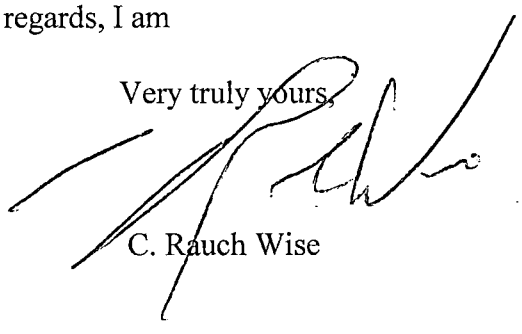
Re: Kenneth Morris vs. State of South Carolina, Appellate Case No. 2017-002355

Dear Hon. Shearouse:

I am enclosing herewith the original and six copies of the Brief of Respondent together with the original Certificate of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,



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CRW/slt
Enclosure

cc Megan Harrigan Jameson