THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
R. Keith Kelly, Circuit Court Judge

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

The State, Respondent,

v.

Courtney Ray Mitchell, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

August 23, 2018

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

Other Counsels of Record:

Alan McCrory Wilson
Attorney General

William M. Blitch, Jr.
Senior Assistant Attorney General
Post Office Box 11549 Columbia, SC 29211
(803) 734-3727

William W. Wilkins, III
Solicitor, Thirteenth Judicial Circuit
305 East North Street, Suite 325
Greenville, SC 29601
(863) 467-8282

Attorneys for Respondents

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on May 25, 2018.

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in affirming appellant's conviction despite failure of the respondent to establish the elements of the offense of witness intimidation.

(2) Whether the Court of Appeals erred in affirming the trial court's decision admitting the breach of peace as evidence under the theory of res gestae?

(3) Whether the Court of Appeals denied Petitioner's rights to due process and speedy trial by affirming the trial court's decision?

JURISDICTION

The South Carolina Court of Appeals decided this case on April 11, 2018 and denied Courtney Ray Mitchell's Petition for Rehearing by Order dated May 25, 2018. Petitioner did not receive a copy of said Order, and as such, failed to file a Petition for Certiorari. Petitioner filed a Motion to Relax the time for filing a Petition for Certiorari, but before the said motion reach the Supreme Court, the Court of Appeals sent the Remittitur to the lower court on July 6, 2018. Petitioner, thereafter moved to recall the remittitur and reinstate his appeal on July 11, 2018. On July 31, 2018, the Court of Appeals ordered the return of the remittitur to the appellate court. ON August 6, 2018, the Court of Appeals received the remittitur from the lower court.

This Court has jurisdiction under Rule 242(a) of the South Carolina Rules of Civil Procedure.

STATEMENT OF THE CASE

This case was an offshoot of a Breach of Peace charge filed against herein Petitioner by a supervisor in his former workplace, UPS. On June 21, 2013, Petitioner, while having lunch with four of his co-workers, stated that he wanted to see Ken Baca, a manager at UPS, "leave in a box". He immediately corrected himself and said that he wanted to see Baca "carrying his box of stuff walking out beside me." At the time, none of the four co-workers nor anyone in the restaurant or its management interpreted Petitioner's words or actions during lunch as disruptive or violent to call his attention, or even request for police intervention. In fact, Petitioner parted ways with his co-workers in a civil manner, shaking hands with some and saying "Love you guys".

Upon returning to their office however, Ms. Jones, one of the four (4) co-workers, took it to herself to report to Ken Baca about Petitioner's remarks, alluding to his (mis)statement as a threat. Mr. Baca, taking Ms. Jones' words as holy grail, called the police to file a complaint. Without any investigation, a warrant for Breach of Peace was immediately issued and Petitioner was arrested a few hours after his lunch with his co-worker.

Petitioner, who had been put on a no trespass, had to return a co-worker's leaf blower that he had in his possession. The same was not working and had to be repaired. Based on the no trespass issued by UPS, Petitioner had to return the leaf blower prematurely. So, on July 25, 2013, Petitioner decided to send the leaf blower to Derrill Bailey, along with a partially torn envelope containing three cellphones, and a number of non-descript items. There was nothing within the envelope that was directed to Ms. Jones. The items were brought inside the UPS building by a courier, also working for the UPS. No evidence was provided with regards to the purpose of the contents of the envelope.

Ms. Jones apparently had perceived something different with the harmless items in the partially torn envelope, because she believed that based on tv shoes she has watched in the past, the leaf blower could be a bomb capable of being detonated by the cellphones. (App. 76, lines 1.7), and that the business card from a nursery and the receipt from a convenience store, were Petitioner's way of making known to her that he knew where she and her mother lived. Ms. Jones claimed that Petitioner threatened her because of the breach of peace charge against him.

It should be noted that as of July 25, 2013, Petitioner had no idea of Ms. Jones' involvement in the breach of peace charges against him. He believed that Mr. Ken Baca and Dwight Inman were responsible for the complaint, and thus, sent them trespass notices. In sending the trespass notice, Petitioner informed Mr. Baca and Inman that they were not to come near him, and that they "were no longer friends". (App. 19, lines 4.8). There was nothing threatening in the said notice. Ms. Jones did not even receive a trespass notice, an indication that Petitioner did not know that Jones was the one who reported on him to the management. Petitioner was unaware of Ms. Jones participation in the filing of the breach of peace charge, much less of her potential role as a witness against him.

Petitioner was charged with the crime of intimidation of witness. The breach of peace charge was removed from the municipal court's jurisdiction and was never tried. Petitioner was convicted of the witness intimidation and sentenced to ten years of imprisonment. On appeal, the Court of Appeals affirmed his conviction. Thus, this Petition for Certiorari.

ARGUMENTS

I.

THE COURT OF APPEALS ERRED IN AFFIRMING APPELLANT'S CONVICTION DESPITE RESPONDENT'S FAILURE TO ESTABLISH THE ELEMENTS OF THE OFFENSE OF WITNESS INTIMIDATION.

Respondent alleged that Petitioner's threat stemmed from a breach of peace charge filed by UPS Company, Petitioner and Ms. Jones' employer. In establishing the alleged witness intimidation, Respondent submitted the following evidence:

(1) A video surveillance showing an individual, who turned out to be a UPS employee, carrying a leaf blower and an envelope in the building premises;
(2) An open envelope, with Jones name written on it;
(3) Three (3) cellphones;
(4) A Check worth $50.00 to "Cash";
(5) Trespass notice to Ken Baca;
(6) Trespass Notice to Dwight Inman;
(7) A piece of paper with Derrill Bailey's address written on it;
(8) A note written in the Hunt Club letterhead;
(9) A receipt from 7-11;
(10) A business card from a nursery in Anderson, SC: and,
(11) A10-year old expired weapon's permit in the name of Petitioner.

The entire case of witness intimidation rested largely on Ms. Jones' testimony as she attempted to tie all these evidences together and related how these have made her fearful of her life and her mother's.

According to Jones, the leaf blower was a bomb, which can be detonated by the three cellphones. (App. 76, lines 1-7). But when asked if she knew that the leaf blower was a bomb, she answered in the negative.

02 *Q. I thought it was a bomb. Was it a bomb?*
03 *A. To my knowledge, it was not a bomb.* (App. 76, lines 2.3).

Jones testified that she believed that the receipt and the nursery business card were Petitioner's way of telling her that he knew where she and her mother lives. (App. 78, lines 22.25). But when asked if Petitioner knew where she or her mother lives, she answered in the negative. Petitioner has never been to her nor her mother's house. (App. 79, lines 8.13). But Jones knew Petitioner's house, having visited him during a cook-out. (App. 72, lines 3.5).

Ms. Jones convinced the jury that the nursery business card is proof that Petitioner knew where she lived. She testified however that she lived in the vicinity of that nursery some ten (10) years prior to this incident. (App. 76, lines 15.18). At the time of the incident, she was living 30 miles from the nursery. (App. 72, lines 18.21). At the time of the trial, Jones and her mother were already based in Florida. (App. 72, lines 12.15 and App. 74, lines 11.14).

The concealed weapons permit that Respondent submitted, had expired ten years prior to this incident. Respondent has not submitted any evidence that Petitioner has any gun at any time prior to and during the filing of the two charges.

An objective analysis would yield a conclusion that there is nothing from the evidence presented that would warrant fear from, nor can be interpreted as threatening to, Ms. Jones. How she came up with the conclusion that Petitioner was sending her a message is suspect considering the following facts:

(1) She has never seen the leaf blower. (App. 75, lines 2.25).
(2) Mr. Bailey carried the leaf blower AND the envelope to his car before returning to the building and presenting the envelope to Ms. Jones. (App. 58, lines 6.14).
(3) The last communication between Ms. Jones and the Petitioner was a text message, 30 days after the lunch incident, where he referred to her as like a sister. (App. 62, lines 17.22).
(4) There was no reference to the breach of peace charges in the aforesaid text message.
(5) Ms. Jones did not receive any trespass notice, unlike Inman and Baca. (App. 74, lines 23.25).
(6) An incident report where Jones stated she does not feel that Petitioner is attempting to single her out.

Petitioner submits that Respondent failed to establish the criminal offense of witness intimidation. 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 (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 281 (2005).

The term "threat" is defined as "a communicated intent to inflict harm or loss on another." Black's Law Dictionary 1519 (8th ed. 2004). Further, "intimidation" has been defined as "caused by an act knowingly and intentionally done or statement knowing and intentionally made by the defendant, which was done or made in such a manner or under such circumstances that would produce such a reaction or such fear of bodily harm in a reasonable person." *U.S. v. Crosby*, 416 Fed. Appx. 776 (10th Cir. 2011).

Intimidation in the constitutional sense is a type of true threat, where a speaker directs a threat to a person with the intent of placing the victim in fear of bodily harm or death; true threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Virginia v. Black*, 538 U.S. 343, 360 (2003). To support a conviction under § 16-9-340, there must be evidence that a defendant's actions were an attempt to prevent the purported victim from continuing her activity. *Tucker v. Cherokee Cty. Veterans Affairs Office*, No. 7:09-cv-193-HMH, 2009 U.S. Dist. LEXIS 66749, at *6 (D.S.C. 2009).

To find the Petitioner guilty of this offense, the following must be proven beyond reasonable doubt:

First, that a person was summoned as a witness.

Second, that the Petitioner intimidated, attempted to intimidate, interfered with or attempted to interfere or prevent any person who was summoned as a witness in the petitioner's case.

Third, that the Petitioner acted intentionally.

Petitioner submits that until his arrest and indictment for the witness intimidation charge, he had no knowledge that Jones was (1) the one who reported to Ken Baca about what transpired during the lunch; (2) a witness in the breach of peace charge; and, (3) the one who accused him of witness intimidation. The fact that Petitioner sent the trespass notices to Mr. Baca and Mr. Inman, and not Ms. Jones, shows that Petitioner believed that only the two men were responsible for the charge against him. This is reinforced by the text message where Petitioner did not mention anything about the breach of peace charge, hearing or trial and even referred to Jones as a sister to him. When asked why she was certain that Petitioner knew that she was a witness, she replied because she was with him during the fateful lunch. Yet, she believed she was not singled out. If her statements were to be given credence and weight, then why was it that she was the only one, among all employees present during the luncheon, who received the "message"? And if Petitioner really knew where she lived, would it not be more 'threatening' and frightening if he sent the envelope to her or her mother's house instead of sending it to the Company which just filed a complaint against him?

Petitioner was unaware that Jones, whom he considered as a sister, would be a witness against him. Without this prior knowledge, Respondent failed to establish any motive for the returned items. Ms. Jones was merely speculating. Her baseless fears are irrelevant to the crime for which Petitioner was tried. It was about Appellant's intent. It was about whether he knew of the web weaved by Ms. Jones. There is not one single piece of objective piece of objective evidence that supports that he knew she was involved. Ms. Jones defines the State's lack of evidence relating to intent when her responses to how she knew that Mr. Mitchell knew that she had ratted on him was simple because she was there. In other words, her mere presence

illustrated his knowledge and his intent to impede her progress in her quest to have him convicted.

The State failed to allege specific overt acts that may be interpreted as an intent to hurt, intimidate, threatened, instill fear upon Ms. Jones. There was no message, note, nor letter that contained any threatening statements. Thus, the first element of the offense was not established.

Respondent 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, there is no criminal intimidation.

The only overt act by Petitioner is returning the leaf blower to its owner, Mr. Bailey. The envelope and its contents as alleged by the Respondent are questionable. Considering the following facts, the integrity of these evidence is compromised: (1) an employee of the very company who fired Petitioner and was now leading the prosecution; (2) Mr. Bailey brought the envelope with him to his car, where there is no video surveillance; and, (3) the envelope was open.

Time and again, Ms. Jones was found to have contradicted her own statements. (e.g. Petitioner no knowledge of: (a) Jones' nor her mother's residence, and (b) Jones supposed participation as a witness in the breach of charge case; (c) her not being closed to Petitioner and not being singled out, (whereas Respondent argued in the closing statement that it was there close relationship that made Petitioner single her out).

Taken individually and collectively, the evidence does not directly establish the criminal offense of witness intimidation. None of the aforementioned items can inflict physical injuries to

Jones (or her colleagues). No reasonable person could, and would interpret the leaf blower as a bomb, the cellphones as detonators, nor the receipt or business card as proof of residence. Jones prevarications and inconsistent statements are far from being competent evidence.

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. This witness intimidation case hinged entirely on Jones' perception of what the items meant to her. This was purely subjective. To rely on the interpretation of a "reasonable man" of what a threat is, without taking into consideration defendant's specific intent, would have a chilling effect on the First Amendment right. Petitioner believes that some form of objective approach should be applied, wherein the State must prove by material evidence, Respondent's specific intent to threaten or harm Jones.

In summary, the Respondent's failure to establish intent and to present relevant evidence to prove the elements of the crime of witness intimidation, entitles the Petitioner to a reversal of his conviction.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION ADMITTING THE BREACH OF PEACE AS EVIDENCE UNDER RES GESTAE THEORY.

The issue of breach of peace was raised in this case, initially during the hearing for Petitioner's motion to stay (App. 6) and subsequently during the February 12, 2015 trial. (App. 27). The State itself introduced the breach of peace charge as part of res gestae.

The Supreme Court had an occasion to expound the res gestae theory in the case of State v. Adams:

> *"One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged."*

State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), as cited in State v. Preslar, S.C. 466, 613 S.E.2d 381 (Ct. App. 2005)

But to be admissible, the evidence of prior bad acts must be clear and convincing. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). And even though evidence is clear and convincing and falls within the Lyle exception, trial judge must exclude it if the probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Alexander,* 303 S.C., 401 S.E.2d 146 (1991).

Petitioner submits that the trial judge erred in admitting the evidence of breach of peace charge in the instant case.

The evidence is not clear and convincing.

Breach of peace is a violation of public order, a disturbance of tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order. State v. Poinsett. 250 S.C. 293, 297, 157 S.E. 2d 570, 571 (1967). Before one may be punished for spoken words, there must be evidence that the words tended to incite a

person to respond in a violent manner. *Downs v. State of Maryland*, 366 A.2d 41, 46 (Md. Ct. Spec. App. 1976).

Petitioner was charged with breach of peace for making allegedly threatening statements against a member of management at UPS, Mr. Ken Baca. Allegedly, he expressed his displeasure with Baca, and stated that he "would like to see him go out in a box." He immediately corrected himself and said that he would like to see his things go out in a box, with Baca walking next him. Petitioner and his co-workers finished their lunch without any evidence of concern about Petitioner's behavior. Nowhere in the entire proceeding was it ever presented that Petitioner's actions caused any person in the restaurant to become violent or to think about becoming a violent. None of the four co-workers expressed or voiced out their discomfort regarding Petitioner's conduct. They did not move from the table. They did not comment on the volume with which Petitioner spoke or his irrational behavior. No neutral, third party, nor any restaurant staff or management complained of the alleged "loud and boisterous" Petitioner. There was no violence, no disruption of peace. In fact at the end of their lunch, Petitioner hugged and bid his co-workers with the words "*Love you, guys*". Petitioner's words and actions did not incite, nor can it be interpreted to have incited violence. Simply put, Petitioner did not commit breach of peace.

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 during the lunch. (App. 83, lines 16.20).

The danger of unfair prejudice to the Petitioner was overwhelming.

Petitioner contends that the Respondent failed to show reasonable grounds for his arrest since it was unable 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.

Petitioner sought to have the trial for the witness intimidation charge deferred pending the resolution of the breach of peace. Petitioner asserted that the mere mention of the breach of peace charge during the trial was prejudicial for the witness intimidation case. Despite these objections, the judge allowed the introduction of evidence and witness testimonies and denied Petitioner's Motion to Stay.

Furthermore, the trial for the breach of peace was delayed, and the Respondent eventually removed the same from the municipal court's docket. Petitioner was entitled to and could have moved for a directed verdict in the breach of peace charge because the Respondent's evidence does not reasonably tend to establish Petitioner's guilt. This was denied the Petitioner when Respondent dismissed the case.

The jury entered a guilty verdict on the witness intimidation charge, while the breach of peace charge was dismissed. The breach of peace charge was instituted without basis and was illegal. Without resolution on breach of peace charge, there is no established predicate acts for the witness intimidation charge. Without the illegal breach of peace charge, there would have been no "witness to intimidate".

The admission of the baseless charge of breach of peace as evidence in this matter has caused irreparable damage to herein Petitioner. He has been convicted of intimidating a witness to a common law offense of breach of peace, which the State has not even established. Petitioner is presently serving a sentence of ten (10) years for a crime, the basis for which was a charge of

misdemeanor that is penalized with fines or imprisonment for thirty days. S.C. Code §22-3-560 (2012).

The evidence was obtained illegally and therefore, must be excluded.

Petitioner contends that the witness intimidation charge is a "fruit of the poisonous tree" that is the breach of peace charge. Since the breach of peace charge was brought without proper investigation and with lack of probable cause, Petitioner's arrest is unconstitutional. The breach of peace charge, used as evidence in the witness intimidation case, should have been suppressed and should not have been admitted in court.

The trial court convicted Petitioner of Witness Intimidation without ruling on the predicate case of breach of peace.

While there was no case law in South Carolina that addresses this kind of situation, the case of *State v. Cress,* 112 Ohio St.3d72, 2006-Ohio-6501, will shed some light on this case. In Cress, the Ohio Court required a showing that the defendant engaged in a predicate underlying criminal offense in making the threat. The Court held that Cress was wrongfully convicted because the prosecution failed to show that he had made an unlawful threat.

The language in R.C. 2921.04 defined intimidation by an "unlawful threat of harm" is satisfied only when the very making of the threat is itself unlawful because it violates established criminal or civil law.

In Cress, Shawn Cress was charged with burglary, retaliation, extortion and intimidation, which was later on amended into felony intimidation of witness, by his wife in one of their heated exchanges. The State submitted recorded phone conversations made by Cress to his wife, his parents and his brother. Cress gave instructions to his mother and brother to tell his wife that he will release scandalous photos of her, evict her from the apartment, lose custody of her children, and disclose of her past drug use and possession of stolen property if she did not drop

her charges. The trial court acquitted him of the other charges, except for the witness intimidation. On appeal, the Third District Court of Ohio reversed and vacated his conviction, ruling that the state failed to prove that Cress made an unlawful threat of harm, i.e. it did not introduce evidence demonstrating the elements of any predicate offense.

Applying such ruling in this case, Respondent failed to prove the elements of breach of peace, the predicate offense for the witness intimidation case. There is no evidence that Petitioner was violent or committed acts or uttered statements that will incite violence. There was simply no breach of peace.

III.

PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESSS AND A SPEEDY TRIAL.

Respondent 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. Petitioner is serving a harsh penalty for crime, which would have no basis had the court allowed him a speedy trial for the breach of peace.

Petitioner submits that Respondent's actions in failing to produce on time his and Jones' personnel files, the video surveillance introduced as State's Exhibit 1, and the Supplemental Incident Report, deprived him of the opportunity to formulate his defense. In denying Petitioner's motion to compel the production of the requested materials, the trial court abused its discretion and denied Petitioner's right to due process.

CONCLUSION

Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted or, in the alternative, that the Court review and summarily reverse the erroneous decision of the South Carolina Court of Appeals affirming the trial court's judgment.

Respectfully submitted,

August 23, 2018

Donald L. Smith, Esquire
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
Counsel for Petitioner

FORM 7
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PROOF OF SERVICE

I certify that I have served copies of Petitioner's Petition for Certiorari and Proof of Service of same, upon The Honorable Daniel Shearouse, Clerk of Court South Carolina Supreme Court, PO Box 11330, Columbia SC 29211, Mr. Alan McCrory Wilson, Attorney General and Mr. William M. Blitch, Jr, Senior Assistant Attorney General, at the Office of the Attorney General, at 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 August 23, 2018 to the addresses listed above.

August 23, 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