

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 09 2018

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

S.C. SUPREME COURT

Appellate Case No.: 2018-001561

The State,

Respondent,

v.

Courtney Ray Mitchell,

Petitioner.

REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI

October 3, 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

Joshua A. Edwards
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
(864) 467-8282

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENTS

 I. THE COURT OF APPEALS ERRED IN OVERLOOKING
 THE LAW ON WITNESS INTIMIDATION AND PROCEDURAL
 LAWS WHEN IT AFFIRMED THE TRIAL COURT’S DECISION..... 1

 II. THE COURT OF APPEALS ERRED IN AFIRMING THE TRIAL
 COURT’S DECISION ADMITTING THE BREACH OF PEACE
 AS EVIDENCE UNDER RES GESTAE THEORY..... 5

 III. PETITIONER WAS DENIED THIS RIGHT TO DUE PROCESS
 AND A SPEEDY TRIAL..... 7

CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases:

State v. Cress, 112 Ohio St., 3d72, 2016-Ohio-6501 7

State v. Hamilton, Op. No. 3317, S.C. Ct. App., (2001) citing
State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928) 1

State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (2005)..... 1

State v. Walker, Op. No. 25442, S.C. Sup. Ct. (2002) 1

Statute:

S.C. Code Ann. § 16-9-340(A) 1

PRELIMINARY STATEMENT

Petitioner makes the instant submission in response to Respondent's Return to Petition for Certiorari. Petitioner adopts and incorporates by reference the Statement of Case and Facts presented in his Petition for Certiorari.

ARGUMENTS

I.

THE COURT OF APPEALS ERRED IN OVERLOOKING THE LAW ON WITNESS INTIMIDATION AND PROCEDURAL LAWS WHEN IT AFFIRMED THE TRIAL COURT'S DECISION.

Respondent, in its Return, contends that this Court has no jurisdiction to overturn a jury's factual determination as this is not reviewable by the Court. Petitioner, however, does not assert the same. Petitioner seeks the review of the Court of Appeal's decision affirming the wrongful application of law by the trial court.

It is well-established that a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Walker, Op. No. 25442 (S.C. Sup. Ct. filed April 8, 2002). For evidence to be admissible, it must be relevant to the subject matter of the case. (State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928) as cited in State v. Hamilton, Op. No. 3317, (S.C. Ct. App., filed March 12, 2001).

Petitioner was charged with Witness Intimidation. The elements of this offense are: (1) an unlawful threat or 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).

The evidence presented by the Respondent are: (1) the testimony of Keith McNeel, who only testified to a video showing a man carrying a leaf blower and envelope into the building; (2)

testimony of Derrill Bailey, who confirmed the leaf blower was his; he was handed an opened envelope; he brought the same envelope to his car when he deposited his leaf blower; and he proceeded to give the envelope to Velma Jones; (3) testimony of Velma Jones, who received the envelope containing the following items: (a) 3 cellphones (b) a check to self (c) two (2) letters, dated June 22, 2013 addressed separately to Ken Baca and Dwight Inman (hereinafter referred as Notice of No Trespass, (d) handwritten address of Derrill Bailey, (e) 7-eleven receipt, (f) Whitten's Nursery business card, and (g) an expired weapons permit. Taken individually and collectively, these items do not establish the criminal offense of intimidation of a witness. None of these items can inflict physical injuries to Jones or her colleagues. No reasonable person could, or would interpret the leaf blower was a bomb, the cellphones as detonators, nor the receipt as proof of Jones' residence. She specifically said she came to that conclusion by watching tv.

Respondent contends that the combination of the previous threat regarding a co-worker and the contents of the envelope were enough to cause Jones to feel threatened. (Return to Petition for Certiorari, p. 11). Petitioner insists that Jones' testimony was fraught with inconsistencies. She testified that Petitioner knew her where she and her mother lives because of the 7-11 receipt, but she testified:

- 8 Q. Did he know where your mother lives?
9 A. Yes I know where my mother lives.
10 Q. No. Did he?
11 A. No. He's never—I've never talked about my mother,
12 where she lives to Ray, so I do not know what Mr. Mitchell
13 knows as far as my mother's.
14 Q. So he went to the 7-Eleven and got beer. What's the
15 relevance of your mother if he doesn't know where she
16 lives?
17 A. Because it's down the street from my house—my
18 my mother's house.

App. 79.

She could not get her story right about the cellphones neither.

- 1 Q. Do you remember saying that you went and powered up
2 the phones?
3 A. I did not power up phones. One phone was powered up,
4 sir. Two were powered down.
5 MR. SMITH: Yes, ma'am. One moment, please.
6 May I approach the witness, Your Honor?
7 THE COURT: Yes, sir.
8 BY MR. SMITH:
9 Q. You said you didn't power up the phone.
10 A. I did not power up the phone.
11 Q. Would you read line 11, please.
12 A. Which line 11, sir? There's four.
13 Q. Page 22.
14 A. Here? "I went and powered up the phones because being
15 that it was a leaf blower I was like, you know, this thing
16 could be a bomb." Do you want me to keep reading.
17 Q. No. That's fine. Thank you.

App. 80.

Jones also testified about a text she received from the Petitioner, which read:

"I hope you have the balls to give us a call, that any sister of mine would have loved the shark. By the way, please send my f'king belongings to Pecan Drive in Abbeville."

App. 73.

Under no circumstances can any person interpret the above-mentioned texts as a threat nor an act of force. It was an instruction for Jones to return Petitioner's belongings as he was prevented by UPS from their property.

She first represented to law enforcement that the nursery card was relevant because she lived near the nursery. However, during the trial, she admitted that she lived 20-30 miles away

from the nursery at the time of the incident. She lived near the nursery ten (10) years prior to this incident.

- 10 Q. Yes, ma'am. The nursery card, where is that from?
11 A. Whitten's in Anderson.
12 Q. Where do you live, county?
13 A. Currently?
14 Q. Yes.
15 A. Brooksville, Florida.
16 Q. Where did you live at the time of this incident?
17 A. Anderson County.
18 Q. How far away from that nursery did you live?
19 A. At the time of the incident?
20 Q. Yes.
21 A. 15, 30—20, 30 miles.
22 Q. So you're not trying to tell us that because you lived
23 next to it, what ten years prior to that?
24 A. Yes.
25 Q. And that 's part of the message?
1 A. Absolutely.
2 Q. I know where you lived ten years ago?
3 A. Absolutely.
4 Q. So is there anyplace he could have gone and not been
5 close to you
6 A. Sure.

App. 72, 10.25 & App. 73, 1.6

Respondent anchored its case of Witness Intimidation on Jones' testimony, which proved weak, inconsistent and misleading. The arrest warrant was issued in part because of her claims that he was targeting her and her mother, when the nursery and 7-Eleven receipts were simply pieces of irrelevant garbage. Without these statements that were closely negated by her testimony, Petitioner would not have been arrested, let alone convicted.

The offense of Witness Intimidation is an intentional crime. An offender must be shown to have a specific intent to coerce a witness or victim not to testify or report Respondent failed to present evidence to show Petitioner (1) knew Jones was involved in the Breach of Peace

charge; (2) knew Jones was a potential witness to that case; (3) performed violent or threatening acts; (4) resorted to emotional manipulation, pressure or intimidation; nor, (5) specifically intended to coerce or persuade a witness from testifying or reporting. That Jones testified that she felt intimidated or scared is not sufficient to convict Petitioner when the State and its witnesses failed to show his criminal intent.

Petitioner insists that Respondent has not presented substantial evidence of Witness Intimidation. As such, the court erroneously denied Petitioner's motion for directed verdict, and the Court of Appeals erroneously upheld such decision of the trial court.

II.

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

Contrary to Respondent's claim that Petitioner did not object on the issue of Breach of Peace during the trial, counsel for Petitioner raised in his argument that "nothing ties the Breach of Peace to Witness Intimidation. App. 27. He argued specifically that the Breach of Peace should not have been made part of the intimidation charge. App. 27. Counsel for Petitioner believed that at the trial stage, the introduction of the testimony of Jones with regards to the Breach of Peace was a mere attempt by Respondent to introduce prior bad acts. App. 30.

On Appeal, Petitioner also argued against the inclusion of the Breach of Peace in the Witness Intimidation case by showing that the (1) the elements of the offense did not apply to the facts of the case; (2) that there was no basis for the Breach of Peace charge; and, (3) for this reason, the arrest made for the Breach of Peace charge was unconstitutional. App. 139. In his Petition for Rehearing, Petitioner specifically asserted that Respondent failed to establish any act by the Petitioner that is tantamount to inciting violence; that there was no neutral party that

corroborated Jones' testimony; or, that the arrest of Petitioner was based solely on testimonies of biased witnesses. App. 194.

Respondent also contends that a Witness Intimidation case does not depend on the outcome of the underlying charge, in this case, the Breach of Peace. However, Petitioner is concerned, not with establishing whether Petitioner was guilty or innocent of the underlying charge, but whether the same has any basis at all. Petitioner maintains that he should not have been charged with Breach of Peace in the first place, because the State did not establish the elements of the offense. This is the underlying reason why Petitioner questions the validity and/or constitutionality of his arrest.

Petitioner was undeniably prejudiced. The mere mention of the Breach of Peace charge, painted him as an erratic, violent person, willing to blow up UPS and/or Jones. App. 63, 83-86. Derrill Bailey testified to being a reasonable man. He illustrated it by taking the leaf blower to his car without hesitation.

Petitioner was charged with an offense, the evidence of which was illegally obtained. Since the Breach of Peace charge was brought without proper investigation and lack of probable cause, Petitioner's arrest was unconstitutional. The Breach of Peace charge, used as evidence in the Witness Intimidation, should have been suppressed and declared inadmissible in court.

Furthermore, Respondent admitted that they did not plan to pursue the said case. App. 7. In affirming the trial court's conviction of Petitioner, the Court of Appeal sends a message that the State can charge anybody without evidence and without reasonable grounds. A much more chilling effect of this decision is that it normalizes the State's propensity to arrest and charge individuals with a lesser offense, with no intention of pursuing it, but only to bind the individual to a much graver offense.

Finally, while there is a scarcity of decided case law addressing this situation in South Carolina, this Court may take cognizance of the ruling in State v. Cress, 112 Ohio St., 3d72, 2016-Ohio-6501. The Third District Court of Ohio reversed and vacated Cress' conviction of Witness Intimidation because the State failed to introduce evidence demonstrating the elements of any predicate offense.

Thus, the inclusion of the Breach of Peace charge as evidence of *res gestae* was raised by Petitioner in the trial and appellate court, and as such is a proper subject of this review.

III.

PETITIONER WAS DENIED THIS RIGHT TO DUE PROCESS AND A SPEEDY TRIAL.

Respondent asserts that Petitioner has not raised denial of speedy trial at the trial or at the pre-trial hearing. Admittedly, in terms of specific motion for speedy trial, Petitioner brought the same in the context of the State's deliberate act of removing the Breach of Peace charge from the municipality, dragging the case for the sole purpose of being able to try the Witness Intimidation case. This was raised by the counsel for Petitioner in this case on appeal at the start of its trial. App. 5 & 17.

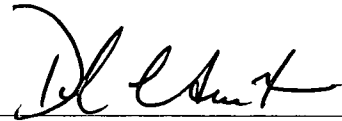
However, Petitioner asserts that he was also denied a speedy trial when the trial court refused to enforce subpoenas and a Brady request that sought materials critical to Appellant's defense. App. 150. By serving a subpoena upon UPS, Petitioner sought his and Ms. Jones' employee records to substantiate defense' theory of Jones' motives in bringing this intimidation case. Respondent also withheld other crucial evidence, such as a supplemental incident report and snippets of the video that showed a man coming into UPS with the envelope and a leaf blower. The video also showed the lack of concern on the part of Derrill Bailey when he was handed out the envelope and the leaf blower. These were crucial matters that were not

incorporated as material evidence in Appellant's defense. In denying Petitioner's motion to compel the production of the requested materials and allowing the Respondent to intentionally delay their duty to submit discovery requests on time, the trial court denied him his right to a speedy trial and due process.

CONCLUSION

Based upon the foregoing, Petitioner has properly raised the aforementioned issues for review by this Honorable Court. Petitioner respectfully requests this Honorable Court to grant this petition for certiorari.

October 3, 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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of General Sessions

R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2018-001561

The State,

Respondent,

v.

Courtney Ray Mitchell,

Petitioner.

PROOF OF SERVICE

I certify that I have served copies of Petitioner's Reply to Respondent's Return to 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. Joshua A. Edwards, 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 October 3, 2018 to the addresses listed above.

October 3, 2018


Donald E. 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