

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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DEC 18 2018

Appeal from York County
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-000157
Lower Case No. 2017-CP-46-00689

Francis Victor Larmand, Jr., # 00337635 Petitioner,

vs.

The State Respondent.

PETITIONER'S REPLY TO RETURN

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Question I

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective in his failing to properly prepare for trial when the additional evidence would have undermined the theory of the State's case?

The fact that the evidence produced by trial counsel did present an explanation for the activities of Mr. Larmand and Mr. Lemire, does not mean a more forceful presentation of the same or additional evidence would not have changed the result of the trial. Obviously as the jury convicted Mr. Larmand, the approach taken by trial counsel was not sufficient to establish the case in favor of Mr. Larmand.

The Respondent addresses individually each of the allegations of Mr. Larmand that trial counsel was not properly prepared. At the hearing below trial counsel also admitted that each of those factors individually could have affected the out come of the trial.

Medical Records

During the closing argument trial counsel argued that Mr. Lemire had a bad back and no person would take such a disabled person on trip to join in beating up a third person. App. at 631, ll 13-18. The State argued in reply that he was not disabled as he was able to walk down a street with a firearm. App. at 654, ll 18-22. The medical records would have supported the argument of trial counsel and refuted the argument of the State. Simply put, there would have been no credibility issue for the jury to resolve as they would have had the evidence. They would have known the undisputed facts and they would have known that Mr. Lemire was in fact disabled. This certainty would have made it unlikely that Mr. Larmand would have conspired with Lemire to attack a third person. The evidence would have supported Mr. Larmand's

position and failing to produce it prejudiced Mr. Larmand.

Trial counsel further admitted that the admission of the medical records could have made a difference in the verdict as this was a very close case. App. at 64, ll 13-25. “Here, by counsel’s own admission, the testimony of Wilson may have made the difference in obtaining an acquittal. We find ineffective assistance.” *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991)

Black Clothing

As noted by the trial counsel in his testimony, the State attempted to make the black clothing worn by Mr. Larmand as being evidence of pre-planning the alleged attack on Mr. Lochbaum. When evidence existed that Mr. Larmand on a daily basis has worn black clothing for over 10 years, the probative value of the black clothing as being sinister is simply lost. While the black clothing may have been only one of several factors listed by the South Carolina Supreme Court, due to the closeness of the facts of this case, no court can objectively say the elimination of any one factor would not have created a different result. As with the black clothing, none of the other factors are direct proof of a plan to harm Mr. Lochbaum. For each factor listed, the defendants gave an explanation that was as equally consistent with innocence. Even the South Carolina Supreme Court admitted that the testimony of Mr. Larmand and Mr. Lemire was “plausible.” *State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) (“Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties’ competing explanations.”). Trial counsel admitted proving that Mr. Larmand had always worn black would have been helpful to his case. App. at 62, ll 2-6.

Lemire's Intoxication

The Respondent misconstrues the purpose of the introduction of the video tape at the Post Conviction Relief hearing. Mr. Larmand testified that Mr. Lemire was very intoxicated on the night of the incident. App. at 14, l 21 to 15, l 20. At the trial, neither defendant introduced evidence of Mr. Lemire's intoxication. On the video disk introduced, the officer who arrested Mr. Lemire can be heard attesting to the intoxication of Mr. Lemire. The disk simply proves there was additional testimony other than Mr. Larmand to verify that Mr. Lemire was intoxicated. The officer could have been asked and if he did not remember, the video disk could have been used to refresh his testimony. The video would have been admissible for that purpose, even if it were inadmissible for other purposes. This is the principle established in *Pauling v. State*, 331 S.C. 606, 611, 503 S.E.2d 468, 471 (1998) ("At the PCR hearing, petitioner presented evidence as to the nature of the nurse's testimony by introducing her triage notes. This evidence is sufficient under *Glover*.")

The fact that Mr. Lemire was very intoxicated simply makes the idea that any assault was pre-planned much less likely. Trial counsel agreed with this statement. App. at 76, ll 14-24. "Here, by counsel's own admission, the testimony of Wilson may have made the difference in obtaining an acquittal. We find ineffective assistance." *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991)

Pop-A-Lock was a Cash Business

As noted in the opening brief, Mr. Lochbaum, the chief witness for the State, had testified that Pop-A-Lock did very little cash business. At the Post Conviction Relief hearing this was proven to be false. Trial Counsel admitted that the proof of the amount of cash business

conducted by Pop-A-Lock would go to the crux of their case. App. at 69, ll 13-16. He further opined that the evidence would have impeached the testimony of Mr. Lochbaum. App. at 69, ll 10-12. The Respondent now argues that testimony which goes the “crux of the case” would not have been helpful in securing an acquittal. Trial counsel disagreed. “Here, by counsel's own admission, the testimony of Wilson may have made the difference in obtaining an acquittal. We find ineffective assistance.” *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991)

All of the above errors were errors in failing to properly prepare for the trial as to the evidence to be presented. Therefore, the prejudice in failing to present this evidence should be considered collectively. If they are not, then the review in Post Conviction Relief hearing would be on each individual error in obtaining evidence and not on the impact as a whole on the case. In virtually any case, the State could argue the failure to produce an individual piece of evidence is not prejudicial when collectively they paint an overwhelming picture of innocence.

Question II

The Post Conviction Relief judge erred in failing to find trial counsel was ineffective in his failure to object to the inference charge on the lynching charge as being a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina.

The State ignores *Yarborough v. Southern Ry*, 78 S.C. 103, 58 S.E. 936 (1907) and *Atlanta & Air Line Ry.*, 87 S.C. 190, 69 S.E. 208 (1910). These two case hold that charging the jury that they may infer a fact from the proof of other facts violates Article V, § 21 of the Constitution of the State of South Carolina. Neither the State in its brief nor the Court below ever explained how the two cases are not applicable to this case. The Constitution of our state applies to the acts passed by the legislature as well rulings of the judiciary. The legislature can

not order a judge to violate the State Constitution and make a charge on the facts. One can only assume the jury followed the instruction and inferred the guilt of Mr. Larmand from his being present at the scene.

In refuting the argument of the Applicant on this issue, the State argues the evidence is “overwhelming.” Such a statement flies in the face of the nine justice of the South Carolina Court of Appeals, who honestly seeking to do justice in this case, concluded the evidence was not overwhelming and the conviction of Mr. Larmand should be reversed.

Question III

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective in his failure to raise double jeopardy argument as to the conviction for both conspiracy and lynching when both charges involved the same facts?

The State is correct that a substantive crime may be charged with a crime of conspiracy. But this case is different. Here, the substantive crime is in essence a conspiracy. To be guilty of lynching, from the perspective of Mr. Larmand, no act other than an agreement is required. Mr. Larmand need not participate in the actual attack as long as he is present. And he need not be present if the plan to lynch someone involved at least three people and two were present at the scene.

Under *Blockburger v. United States*, 284 U.S. 299 (1932) the court focuses on the facts that are proven and not the elements. The word “element” only appears in the case one time. Under the lynching statute the jury is required to find an agreement to commit an assault as part of the crime. This is a fact that must be proven in any conspiracy violation. Thus, in essence, the conspiracy charge contains a fact that must be proven in both cases and no other different fact.

Thus, the conspiracy is a lesser included of a violation of the lynching statute and therefore violates double jeopardy. “The greater offense is therefore by definition the ‘same’ for purposes of double jeopardy as any lesser offense included in it.” *Brown v. Ohio*, 432 U.S. 161, 168 (1977).

The State has also argued that the issue was argued below. At the trial there was no reference to even a constitutional violation much less a double jeopardy violation. This Court would not deem the double jeopardy issue to be preserved.

Question IV

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective in his failure to Request a Charge on Circumstantial Evidence when the entire case of the State was based on circumstantial evidence?

The State has argued that trial counsel invoked a trial strategy in not requesting a charge on circumstantial evidence. The records suggest to the contrary. Trial counsel testified that a circumstantial evidence charge can “cut both ways.” App. at 66, ll 7-17. He firmly stated he did not know why he did not request such a charge in this particular case. App. at 80, ll 10-20. At the hearing below he never articulated a reason under the facts of this case why a circumstantial evidence charge would “cut both ways.” For a trial strategy to be valid it must be related to the particular case involved and not just some vague philosophy.

In this case, even if this Court finds trial counsel articulate a trial strategy, this Court is required to find it reasonable. No reasonable reason was articulated below for not requesting a charge on circumstantial evidence that would tell the jury “to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when

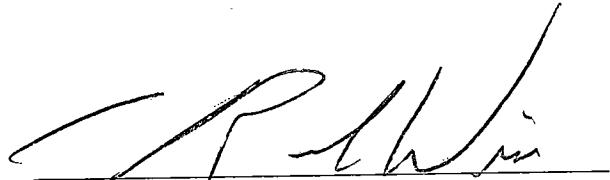
taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.” *State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). Such a charge would have been beneficial to the Applicant.

Applicant recognizes that *Logan* was decided after the trial in this case and that at the time of trial *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997) was the controlling law. Had trial counsel followed *Grippon*, which cited with approval *Holland v. United States*, 348 U.S. 121 (1954), he would have been entitled to a charge that the State had the burden of disproving the defense raised by Mr. Larmand. In *Holland*, while holding in federal court a circumstantial evidence charge is not required, the Court noted “The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads.” *Id.* at 139. Thus, the jury under *Grippon* and *Holland* would have been instructed that the government had the obligation to check out the information obtained from both defendants. This they failed to do. Arguably such a charge would have been more favorable to Mr. Larmand than the circumstantial evidence charge in *Logan*.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the opening brief, this Court should grant the Petition for Writ of Certiorari and reverse the conviction of Francis Larmand and remand this matter for a new trial.

December ^{14th}, 2018



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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on December 14, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petitioner's Reply to Return in the above case addressed to Janell H. Gregory, SC Attorney General Office, P.O. Box 11549, Columbia, SC 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 14 day

of December, 2018.

C. Rauch Wise (L.S.)

Notary Public for South Carolina

My Commission expires: 12/7/2019

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December 14, 2018

Hon. Daniel E. Shearouse, Clerk
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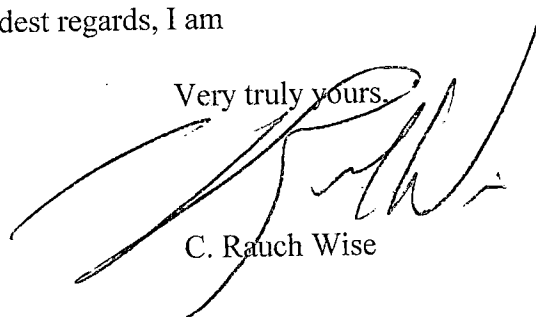
Re: Francis Victor Larmand, Jr. v. State, Case No. 2018-000157

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Petitioner's Reply to Return with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/slt

cc Janell H. Gregory