The State Of South Carolina

In The Court Of Appeals

Appeal From Jasper County

Hon. Carmen T. Mullen, Circuit Judge

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SC Court of Appeals

State Of South Carolina,

Respondent,

vs.

Casey K. Jones, Jr.,

Appellant,

2017-002307

Appellant Pro Se Brief

Casey K. Jones, Jr., #335084
Lieber Correction Institution
136 Wilborn Drive/Edisto A8
Ridgeville, South Carolina 29472

Questions Presented

Question One:

Does State v. Tripp impermissibly allow Law Enforcement lay opinion testimony of after-the-fact review of case video and still Photos unreasonably extend reach of South Carolina Rules Of Evidence 701, or invade the Province of Jury when law enforcement did not Participate or observe the crime, or did. State v. Tripp consciously or unconsciously allow Prosecution and trial court to accept lay Law Enforcement knowledge and Professional experience as basis for their opinions?

Question Two:

Was trial court denial of appellant motion to sever trials on Grounds State law Provides appellant no substantial right to closing argument error, or does, co-defendant alibi defense deprive appellant of substantial right to closing argument constitute Grounds for Severance under State v. Gellis when appellant Presents no evidence?

Question One:

> Does State v. Tripp impermissibly allow Law Enforcement lay opinion testimony of after-the-fact review of case video and still Photos unreasonably extend reach of South Carolina Rules Of Evidence 701, or invade the Province of Jury and Provide an unfair advantage to the Prosecution when law enforcement did not Participate or observe the crime, or did. State v. Tripp consciously or unconsciously allow Prosecution and trial court to accept lay Law Enforcement knowledge and Professional experience as basis for their opinions?

Before trial defense moved to suppress identification of law enforcement after-the-fact review of video and still Photos, from victim surveillance cameras at his residence at time of incident. The trial court conducted a hearing to determine admissibility of identification evidence

At hearing, Prosecution Presented testimony under South Carolina Rules Of Evidence rule 701, from SLED Agent McCallister, Agent Croft, and Deputy Coleman, Chief Collins of Estill Police Department. (App. Pg 58-147)

Trial court heard closing arguments from all Parties and denied defense motions to suppress identification (App. Pg 246-257)

Agent McCallister

> Q: Pursuant to that investigation, did You come into contact with a surveillance video?
> A: I did
>
> App. Pg 58; lines 20-22

Q: Okay. who did You, Yourself, Personally show these images and videos to?

A: Special Agent Jeff Croft with SLED, Ms. Starsheika Scott, Mr. Craig Proctor King, Chief Collins with Estill Police department, Deputy Dominique Coleman with the Estill Police Department.

App. Pg 60; lines 16-21

Q: And why are You showing the video?

A: We didn't know who they were

Q: Okay, how did You initially disseminate this video?

A: Initially, we had stills taken and Put on a flier, and disseminated to law enforcement throughout the State as a request for information.

App. Pg 61; lines 23-25; Pg 62; lines 1-4

Agent Croft

Q: And did You assist in this investigation we're here for today?

A: Yes, ma'am, I did.

Q: At some Point during the investigation, did Agent McCallister show You some Photographs as well as a video?

A: Yes, ma'am, She did.

App. Pg 89; lines 2-7

Q: Okay. Did You also identify an individual on the video as being Jarod Bostick?

A: Yes, ma'am, I did

Q: Were You able to identify the other two individuals shown on the video?

A: No, ma'am, I do not know them.

Q: How do You know Jarod Bostick?

A: I had Previous dealings with Jarod Bostick.

Q: Can You Go into a little bit of detail Just for this hearing, Your Prior involvement?

A: Yes, ma'am. I Previously worked for Barnwell County Sheriff's office, and back in 2007 we had an incident took Place, it was a homicide, where I assisted with the investigation, actually did the investigation, and Mr. Bostick was ultimately charge with that homicide.

Q: Okay. Based on that. You had interactions with Mr. Bostick back then during that investigation?

A: Yes, ma'am.

App. Pg 91; lines 4-21

Deputy Coleman:

Q: When You viewed that video, who showed it to You?

A: Agent McCallister.

Q: What did she say Prior to showing You this video?

A: They were attempting to identify the subjects that were seen in the video.

Q: Okay. Did she supply You with a name?

A: Yes

Q: And what was that name?

A: It was three names Given to me.

Q: Okay. Did You know these names?

A: I knew two of them, actually, in dealing with them. And the other one I heard as well in town.

App. Pg. 112; lines 9-24

Q: Okay. And what--how--- can you go into a little bit more of your prior dealings with both Junior and Senior?
A: Well, Estill is a small town. We get to know a lot of our people pretty well. And I recognize both of them from more so just seeing them around town. I have not had any criminal dealings, per se, with any of them, but I do know both of them.

App. Pg 114; lines 5-11

Chief Collins:

Q: Did you have an opportunity on July 2nd, 2016, to review a video at the request of Agent McCallister?
A: I did.

App. Pg 131; lines 11-13

Q: Okay. And how certain were you of your identification of those two individuals?
A: Of Mr. Jarod Bostick, we had a case with him that was going through General Sessions and I had just looked at his warrant that had his picture on it probably about a week prior, so I was certain on him. Mr. Casey Jones Junior, I was absolutely certain of him. I have had many dealings with him and been in court with him.

App. Pg 133; lines 8-15; Pg 134; lines 10-25; Pg 135; lines 1-2

This question explores the decision in State v. Tripp, 392 S.C. 434 (2012) less clear-cut scenario where a police officer who possess knowledge of the case investigation, gained largely or entirely from an after-the-fact review of investigation materials, is asked to testify as a lay witness about

specifics of their identification of defendants. Three approaches to this type of situation will emerge for this court to determine the desireability of its continued use during trial.

Appellant contends, that decision in Tripp is a reflection of the 10th, 11th circuits which have embraced the broadest reading of 701, those circuits like Tripp allow law enforcement officers to testify about specifics of an investigation based solely on after-the-fact review of the investigation materials. The Pertinent lay opinion decisions of these courts, have allowed law enforcement officers to testify about specific aspects of investigation where the officers after-the-fact knowledge of the event in question was combined with first hand knowledge of related information. See, United States v. Bush, 405 F.3d 909 (10th Cir. 2005); United States v. Pierce, 136 F.3d 770 (11th Cir. 1998)

1. Broad Reading

These courts interpretation of Rule 701 allow lay opinion testimony from law enforcement officers who have General knowledge of the investigation in question, without requiring Personal Perception of the actual events about which the witness is testifying. Tripp, id; Pierce, id; Bush, id

Courts argued that the testimony in these cases satisfied the requirements of 701(a) because the testimony was rationally based on the witness Perception. Emphasizing further the Police cummulative knowledge of the investigation.

2. Moderate Reading

Other circuits have taken a somewhat different approach than 10th, 11th circuits to lay opinion testimony based on after-the-fact reviews, where a law enforcement officers after-the-fact knowledge of the event in question is combined with related first hand knowledge. Despite this, the 7th, 9th circuits allow officer to testify. See, United States v. Godson,

763 F.3d 1189 (9th Cir. 2014); United States v. Stormer, 938 F.2d 759 (7th Cir. 1991)

3. Narrow Reading

Finally, the 2nd, 4th, and 8th circuits have refused to admit law enforcement officers lay opinion testimony, where the testimony was not based on personal, first hand knowledge of the specific event in question that extended beyond simply reviewing investigation record.

These courts have limited admissible lay opinion by more narrowly interpreting the definitions of first hand knowledge and helpfulness. First hand knowledge in these circuit, and unlike Tripp, requires a substantial personal relationship to the event in question, such as, through observation or participation. See, United States v. Johnson, 617 F.3d 286 (4th Cir. 2014) United States v. Garcia, 413 F.3d 201 (2nd Cir. 2005); Maynard v. Sayles, 817 F.2d 50 (8th Cir. 1987)

Briefly, appellant contends that despite these federal court decisions interpret federal rules of evidence. Our State Supreme Court construes the state rule in accordance with federal court decisions interpreting federal rule. See, Maybank v. BB&T Corporation, 416 S.C. 541 ( )

Thus, Tripp and other federal court of appeals permit law enforcement to provide lay opinion testimony even where the officer possess only after-the-fact knowledge of the specific event in question. Admitting such testimony constitutes a very broad interpretation of 701(a) personal perception and 701(b) helpfulness.

Such a reading of 701 results in a overly inclusive lay opinion rule. More specifically,

the approaches of these courts wrongly ignore the preference for providing the jury with facts over opinion whenever possible, thereby admitting lay opinion that unreasonably extends the reach of 701 threatens the province of the jury and provides an unfair advantage to the prosecution.

Accordingly, these decisions conflict with the purpose of 701. Based on the court's interpretation, it appears according to courts language and tone, any investigating officer is qualified to offer lay opinion testimony if he/she merely reviews materials that pertain to the investigation. Moreover, prosecution argument after hearing likewise supports appellant argument herein (App. Pg 249; lines 3-18)

An interpretation with this result wholly ignores the reason for requiring first hand knowledge for lay opinion testimony, which is to ensure that only individuals who actually perceived incident are permitted to give opinions about it.

Tripp court, approach to police lay opinion testimony also provides an unfair tool for the prosecution. As contended herein, by effectively eliminating the first hand knowledge requirement of 701, it appears that law enforcement officer need only review an investigation case file to then offer opinion testimony about the case.

Providing the prosecution with this type of tool unfairly advantages the prosecution, as the defendant's are unlikely as herein to provide a similarly situated police officer to testify to an alternative interpretation of investigation.

Tripp should not be followed because it invades the province of jury. While Tripp has rejected the argument that lay opinion testimony will unsure the function of the jury, this concern deserves greater attention particularly where the witness in question is a law enforcement

officer providing opinions based on after-the-fact review of the investigation.

When a law enforcement officer did not actually participate or observe the situation, prosecutors as herein, may present the officers general knowledge of the case or professional experience as basis for their opinion. In many ways Tripp suggest, that all things being equal, this framing dresses up a lay witness in an expert witness clothes, suggesting, all things being equal, that the witness has substantial knowledge of the case that he or she is qualified to testify about an aspect of which he/she was not involved.

Despite prosecution at trial asserting Tripp does not invade province of jury, it is this myopia which, this form of testimony threatening to invade the province of jury in the same way that some have argued expert does requires more consideration. Analogizing authoritative lay witnesses with expert witness, jurors may, consciously or unconsciously accept authoritative lay witness opinions without performing a proper independent assessment of the evidence. Under a proper reading of 701, however, this form of first hand knowledge does not enhance an officers qualification to testify. To provide lay opinion testimony about a specific aspect of this investigation, thus Tripp court, should require officers to personally perceive the subject of the testimony.

Accordingly, special care should be paid to the Tripp decision to admit police officer lay opinion testimony.

Question Two

Was trial court denial of appellant motion to sever trials on Grounds State law Provides appellant no substantial right to closing argument error, or does, codefendant alibi defense deprive appellant of substantial right to closing argument constitute Grounds for Severance under State v. Gellis when appellant Presents no evidence?

Before trial, appellant filed motion to sever trial of codefendant who wanted to Present alibi defense (App. Pg 22-42) and after all Parties Presented arguments court denied motion (App. Pg 42; lines 22-25; Pg 43; line 1)

Criminal defendants who are jointly tried are not entitled to severance as a matter of right. See, State v. Allen, 266 S.C. 175 (1976) A defendant who alleges he was improperly tried jointly must show Prejudice before this court will reverse his conviction. Allen, id

The General rule allowing joint trials applies with equal force when a severance motion is based upon the likelihood and codefendant will Present mutually antagonistic defenses, accusing one another of the crime. A severance should be Granted only when there is a serious risk a joint trial would compromise a specific trial right of codefendant.

This case Presents a novel question of law, under Allen and State v. Gellis, 158 S.C. 471 (1930) Giving appellant a substantial right to closing argument. At hearing appellant argued that, closing argument in joint trial would be denied due to co-defendant alibi defense (App. Pg 37; lines 1-17) and no State appellate has addressed this question.

The development of mutually exclusive defenses doctrine began with the decision in Allen, and evolved in State v. Dennis, 337 S.C. 275 (1999). Similarly, Allen, Dennis was not concerned with (1) whether a co-defendant in a joint trial has a right to closing argument, but rather the interconnected question of (1) mutually antagonistic defenses, i.e., accusing one another of the crime; (2) Severance as a matter of right; (3) Prejudice from joint trial;

Accordingly, trial court failed to properly consider the head-on-collision between defendants right to present alibi defense, and chief among them, appellant substantial right to closing argument and lost of that right. In a joint trial when co-defendant presents no evidence and co-defendant alibi defense, causing lost of right to closing was maginified when court denied motion.

Thus, the majority opinions in Allen, Dennis stand for various core propositions (1) mutually antagonistic defenses; (2) to gain severance a defendant must articulate any specific instances of prejudice or show a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence" and mutually antagonistic defenses do not alone constitute any of these grounds; (3) mutually antagonistic defenses and cross accusations by antagonistic defendants do not create sufficient prejudice to justify severance where the prosecution offers sufficient evidence for conviction of each defendant; (4) even where there is a risk of prejudice from mutually antagonistic defenses, jury instructions are usually sufficient to cure it;.

Aside from colloquy at hearing, noting each defendant unlike other state precedents do not blame each other. Only that a joint trial, prohibits co-defendants from making closing arguments, is supportive of reference to head-on-collision.

These factors are cummulative, rather than separate, independent grounds for severance. Furthermore, Allen, Dennis say nothing about irreconcilable defenses, how to define such irreconcilability, or whether severance is automatically required, inter alia. For more important to the case at bar is (1) actual Prejudice

Allen, Dennis courts offer no broad exceptions to the General Rule favoring Joint trials of defendants herein, and rely on Jury instructions to cure Potential Prejudice. As such, herein those decisions in Allen, Dennis combined with Gellis create serious actual Prejudice and whether or not the Allen, Dennis were mutually antagonistic, as noted herein, the right under Gellis to make closing was lost.

Therefore, the mutual inconsistency between the theories and evidence of defenses was not Part of decision making Process in Allen, Dennis, and for defendants to see the face of they should be tried Separately.

Wherefore, it is Prayed court will Grant new trial on Question one, OR in the alternative, Grant new trial on question two, and OR remand. for new trial on both questions Presented in WRIT.

Date: ___ day of _____, 20___.

Respectfully Submitted;

s/ _____

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March , 2019

Honorable Jenny Abbott Kitchings, Chief Clerk
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RE: State v. Jones, # 2017-002309
Subject: Filing Pro Se Brief

Hon. Chief Clerk

Enclosed find for filing my Pro Se brief, and ask that a stamped filed copy be returned to serve respondent herein with brief.

With kind Regards;

s/
Casey Jones / Pro Se

cc: file
encls.

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