

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable John C. Hayes, Circuit Court Judge

ORIGINAL

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JUN 24 2019

Opinion No. 5642 (S.C. Ct. App. filed April 17, 2019) S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

DEAN ALTON HOLCOMB,

PETITIONER

APPELLATE CASE NO 2016-001927

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 23, 2019.

QUESTION PRESENTED

Did the Court of Appeals err in finding that the trial judge did not err in refusing to direct a verdict of acquittal for breach of trust when the State failed to prove that a check, written to a business for work to be done pursuant to a contract, constituted a trust relationship?

STATEMENT OF THE CASE

In May of 2013, the Greenville County Grand Jury indicted Petitioner Holcomb for breach of trust, indictment #2013-GS-23-5223. (R. p. 494). This indictment was amended in August of 2016. In June of 2015, an indictment for obtaining money by false pretenses was directly presented to the Greenville County Grand Jury and Petitioner was additionally indicted for this charge, indictment #2015-GS-23-4600A. (R. p. 497). On September 6, 2016, Petitioner proceeded to jury trial on both indictments¹ before the Honorable John C. Hayes, III. Matthew W. Shealy represented Petitioner at trial. Russell D. Ghent and Bratton S. Todd prosecuted the case. The jury returned verdicts of guilty on both charges. Judge Hayes sentenced Petitioner to two concurrent five-year sentences.

A timely notice of intent to appeal was served on September 14, 2016, and the direct appeal perfected. On April 17, 2019, the South Carolina Court of Appeals affirmed in part, reversed in part and remanded for a new trial. State v. Holcomb, 827 S.E.2d 367 (S.C. Ct. App. 2019). (App. pp. 1 – 8). The Court of Appeals found that the trial judge erred in refusing to direct a verdict of acquittal for the obtaining money by false pretenses charge and erred in refusing to grant a mistrial based on the improper remarks made by the solicitor during closing argument. The Court of Appeals found that the trial judge did not err in refusing to direct a verdict of acquittal for the breach of trust charge. Both the State and the Petitioner filed petitions for rehearing. (App. pp. 9-32). The Court of Appeals denied both petitions on May 23, 2019. (App. p. 33). This petition for writ of certiorari follows.

¹ No motion was made to require the State to elect between the two charges.

ARGUMENT

The Court of Appeals erred in finding that the trial judge did not err in refusing to direct a verdict of acquittal for breach of trust when the State failed to prove that a check, written to a business for work to be done pursuant to a contract, constituted a trust relationship.

Petitioner went to trial for both breach of trust and obtaining money by false pretenses. The South Carolina Court of Appeals correctly found that the trial judge erred in refusing to direct a verdict of acquittal for obtaining money by false pretenses because the State failed to prove a fraudulent representation of an existing or past fact. The Court of Appeals also correctly found that the trial judge erred in refusing to grant a mistrial when the solicitor referenced the grand jury in closing argument. This petition challenges only the failure to direct a verdict of acquittal for the breach of trust charge.

Both the breach of trust charge and the obtaining money by false pretenses charge involved a contract between Carolina Home Renovators and Robert McGinn to install a Green Tree metal roof on the McGinn home in Travelers Rest, South Carolina and make exterior repairs – stain deck and paint door - after a hail storm caused damage. (R. p. 448). The contract was signed by Mr. McGinn and the Petitioner on May 25, 2012, and called for a payment of \$4,295.03 to start the work and an additional payment of \$2,885.96 upon completion for a total cost of \$7,180.00. Although not specified in the contract, Mr. McGinn testified that the new metal roof was going to be green. (R. p. 187, lines 4-8). As provided in the contract, on May 29, 2012, Mr. McGinn wrote check #1040 to Carolina Home Renovators in the amount of \$4,295.03. (R. p. 449). Mr. McGinn testified that the deck was stained and doors painted but the roof was never installed. (R. p. 166, lines 4-10; p. 171, lines 15-18).

The State introduced in evidence an invoice to Carolina Home Renovators from Green Tree Metals in the amount of \$3,179.16. (R. p. 462). The invoice listed Hawaiian blue metal

roofing to be delivered to an address in Lyman, South Carolina. The invoice was stamped as paid on May 29, 2012, the same day Mr. McGinn wrote the check to Carolina Home Renovators. The owner of Green Tree Metals testified that Petitioner paid the invoice with a Visa card. (R. p. 220, lines 1-13). The State failed to introduce any financial records from Carolina Home Renovators or from Petitioner's personal accounts. Susan and Kenneth Clark testified that Petitioner installed a Hawaiian blue metal roof on their home in Lyman, South Carolina in June of 2012. (R. pp. 234-242; 245-247). There were no other invoices billed from Green Tree Metals to Carolina Home Renovators after May 29, 2012. (R. p. 221, lines 9-13).

At the close of the State's case, Petitioner moved for a directed verdict of acquittal on both the breach of trust and the obtaining money by false pretenses charges. (R. pp. 418-426). Petitioner argued in regard to the breach of trust charge, "And, quite frankly, Judge, you can't have – there simply wasn't a trust because there was nothing in the document that says that four thousand, two hundred and eighty-eight dollars (\$4,288.00), I believe, or whatever the figure was was to go solely to this particular job, to purchase this particular metal." (R. p. 346, lines 24 – p. 347, lines 1-5). Petitioner argued that there was no requirement that the money received from Mr. McGinn, pursuant to the contract, be placed in a trust account where the proceeds of that account were to be used only for the McGinn job. (R. p. 347, lines 6-15). Petitioner argued that the facts of the present case may form the basis for a civil breach of contract action but it was not a criminal case. (R. pp. 348 – 349). The judge denied the motion and stated:

I will sort of – this is not the traditional breach of trust case we see, quite frankly. Usually that is somebody who works for a company and takes the company till and supposed to take it to the bank and instead of taking it to the bank, takes it home. That's what we usually see in breach of trust cases. The clerk at Hardee's doesn't take the night deposit, they take it home instead. So this is not the traditional case as far as one that I've tried, but I do believe that the evidence is sufficient to get it to the jury.

(R. p. 357, lines 8-17). The trial judge erred in refusing to direct a verdict of acquittal on the breach of trust charge when the State failed to prove that Petitioner received money from Mr. McGinn in trust. The State failed to prove the existence of a trust relationship.

In State v. Parris, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005), the South Carolina Supreme Court wrote:

In State v. Shirer, 20 S.C. 392, 408 (1884), the Court stated, “the object of our [breach of trust] act was simply to enlarge the field of larceny, removing what before might have been a defense for those who received property in trust and afterwards fraudulently appropriated it. The question under our act is, whether the party received the property in trust, which he afterwards violated....” Therefore, the State must prove the existence of a trust relationship to sustain a charge of breach of trust with fraudulent intent. See State v. LeMaster, 231 S.C. 321, 98 S.E.2d 756 (1957). Failure to prove the existence of a trust relationship will result in a directed verdict of acquittal for the defendant. Id.

The trial judge erred in refusing to grant a directed verdict of acquittal for the breach of trust charge because the State failed to prove the existence of a trust relationship.

The indictment in the present case alleges:

That in Greenville County on or about May 25, 2012, the Defendant, Dean Alton Holcomb, did enter into a contract to replace the damaged roof at the home of the victim Robert McGinn, with some additional repairs that included staining a deck and siding and painting the door of said home at ** Beaver Dam Road in Travelers Rest. The contract called for an initial payment by the victim of \$4,295.03 and a final payment of \$2,885.96 upon completion.

The victim on May 29, 2012 paid \$4,295.03 to Defendant Dean Alton Holcomb for the partial payment of the repairs. The Defendant did not ever repair the roof as agreed upon and instead misappropriated the monies paid to him by the victim, in whole or in substantial part for other uses in his business and otherwise acted with unlawful and fraudulent intent in dealings with the victim, Robert McGinn, all of this constituting the crime of breach of trust with fraudulent intent in excess of \$2,000 but less than \$10,000 in violation of Section §16-13-0230(A),(B)(2) of the South Carolina Code of Laws (1976, as amended).

(Indictment #2013-GS-23-5223, R. p. 495). The indictment fails to allege a trust relationship. Accepting payment, pursuant to the contract in this case, for work to be done does not establish a trust relationship.

In the present case the State failed to prove that Petitioner received money in trust. Mr. McGinn paid Petitioner to install a roof and make exterior repairs pursuant to a contract. Petitioner received the money as a payment, not in trust. Once Petitioner received the payment from Mr. McGinn, there was nothing to prevent him from using it for his own benefit. There is nothing in the contract or otherwise in the record to establish that the particular funds Mr. McGinn paid were to be used exclusively for the McGinn job. There was no breakdown in the contract between materials and labor. Petitioner started work pursuant to the contract but failed to complete the work as outlined in the contract. The case presents the classic example of a case that should be decided in civil court as a civil breach of contract action rather than a criminal breach of trust.

The present case is distinguished from Parris where the South Carolina Supreme Court found there was sufficient evidence to present the jury with the issue of whether a trust relationship existed between the buyers of a mobile home and a mobile home dealer. When the buyers paid the dealer, they trusted that he would use that money to their benefit and deliver the mobile home with a clear title. As the dealer did not have a title to the purchased mobile home, he took the buyers' money in trust and had a duty to pay the bank who held the title in order to deliver the mobile home to the buyers with a clear title. Instead, the dealer took the money and used it for his own benefit. In the present case, Petitioner accepted payment not money in trust. Petitioner had no duty to hold the money in trust and was free to use the money for his own benefit.

In State v. Jackson, 338 S.C. 565, 569, 527 S.E.2d 367, 369 (Ct. App. 2000) this Court wrote:

The State is required to prove every element of a charged offense to obtain a conviction. State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct.App.1993). In reviewing the denial of a motion for directed verdict, the appellate court must view the evidence in the light most favorable to the State. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). However, where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted. See State v. Lee, 294 S.C. 461, 365 S.E.2d 734 (1988).

In Jackson the defendant traded his 1990 Mazda toward the purchase of a 1993 Nissan. The dealership, by mistake, sent the payoff check for the Mazda to the defendant rather than the Mazda lien holder. The defendant was able to cash the check and when informed of the mistake refused to return the money. Jackson was convicted a breach of trust. This Court reversed finding that Jackson received the money by mistake not in trust. While Petitioner in the present case did not receive the money by mistake, he did not receive the money in trust. Petitioner received the money as payment. As in Jackson, the facts of the present case do not constitute breach of trust because the State failed to prove a trust relationship. As in Jackson, because the State failed to prove an essential element of the crime charged, the existence of a trust, the conviction must be reversed and the case remanded for the entry of a judgment of acquittal.

In finding that the trial judge did not err in refusing to direct a verdict of acquittal for the breach of trust charge the Court of Appeals wrote:

A trust is an 'arrangement whereby property is transferred with [the] intention that it be administered by trustee for another's benefit.'" State v. Jackson, 338 S.C. 565, 570, 527 S.E.2d 367, 370 (Ct. App. 2000) (quoting *Black's Law Dictionary* 1047 (6th ed. 1991)). "Thus, the transferor of the property must intend that the trustee will act for the transferor's benefit instead of on his own behalf." State v. Parris, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005).

The Court of Appeals noted that Parris was factually comparable to the present case and then wrote:

In this case, McGinn intended for the majority of his payment to go toward a new roof. The first check McGinn wrote, in the amount of \$4,295.03, had "partial payment, roof" written on the memo line. McGinn testified the substance of the contract was for the roof to be replaced. McGinn expected Holcomb to use his payment to purchase a new roof and install it. McGinn never received a new roof. Accordingly, we find the State presented sufficient evidence taken in the light most favorable to the State for the trial court to deny a motion for directed verdict. See Brandt, 393 S.C. at 542, 713 S.E.2d at 599 ("When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State."). Therefore, we affirm the trial court's ruling on this issue.

The Parris case is not factually comparable and can be distinguished from the present case. In Parris a portion of the buyers' money was to be held in trust by the mobile home dealer to pay off the lien the bank held on the mobile home. The dealer breached that trust when he failed to pay the lien held by the bank. The dealer did not have clear title to the mobile home he was selling. Specific funds were to be used to pay off the lien and gain clear title. The buyers transferred the money to the dealer with the understanding that the dealer would pay the bank lien. The buyers intended the dealer to act on their benefit by paying off the lien instead of acting on his own behalf.

Unlike the dealer in Parris who did not have clear title to sell the mobile home outright, Petitioner was free to enter into the contract with McGinn in exchange for the funds contained in the check. Petitioner was free to use those funds as he saw fit for the business. Petitioner did not hold the check in trust and the contract did not specify that the money was to be used solely for the purchase of material and labor for the McGinn job. The fact that McGinn expected Petitioner to use his payment to purchase a new roof and install it does not create the trust relationship required for breach of trust. The check in the present case was not transferred to Petitioner for McGinn's sole benefit. Pursuant to the contract, the check was transferred and an agreement

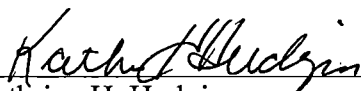
reached which was to the mutual benefit of both parties to the contract. The fact that McGinn did not receive the benefit of his bargain is not a breach of trust but a breach of contract. The State failed to prove the existence of a trust relationship.

The Court of Appeals misapprehended what constitutes a trust relationship in finding that a check, written to a business to begin work pursuant to a contract creates a trust relationship. The check in the present case was not held in trust but rather was given in exchange for work to be done pursuant to a contract. Some of that work was completed. The ruling by the Court of Appeals opens the floodgate to allowing contractual disputes to be litigated through the criminal justice system by the issuance of an arrest warrant rather than by filing suit in civil court for breach of contract. The trial judge erred in refusing to direct a verdict of acquittal for the breach of trust charge because the State failed to prove that the check, written to a business pursuant to a contract, created a trust relationship as required for breach of trust.

CONCLUSION

Based on the above argument, this Court should reverse the finding by the Court of Appeals and find that the trial judge erred in refusing to direct a verdict of acquittal for the breach of trust charge.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of June, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 24 2019

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable John C. Hayes, Circuit Court Judge

S.C. SUPREME COURT

Opinion No. 5642 (S.C. Ct. App. filed April 17, 2019)

THE STATE,

RESPONDENT,

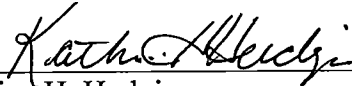
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DEAN ALTON HOLCOMB,

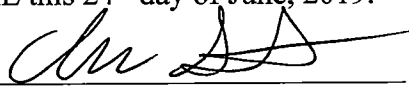
PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; Russell D. Ghent, Esquire, at the Seventh Circuit Solicitor's Office, 180 Magnolia Street, 3rd Floor, Spartanburg, SC 29306; and Dean Alton Holcomb, #369696, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 24th day of June, 2019.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 24th day of June, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019