

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

TIMIYA RASHAD MASSEY,

PETITIONER.

APPELLATE CASE NO 2017-002348

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2020-UP-020

PETITION FOR REHEARING

RECEIVED

FEB 12 2020

SC Court of Appeals

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court in its summary parenthetical opinion correctly cited See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) for the proposition that the sentencing exposure of an alleged accomplice or co-defendant is legitimate fodder for cross-examination to expose bias or reason to misrepresent. However, this Court overlooked the fact that the correct application of that precedent to facts of this case dictates a different result, reversal.

Applicable law

It is well settled law in South Carolina that it is error to refuse to allow the defendant to cross-examine his co-defendant, co-conspirator, or co-accomplice on the possible sentences he faced, where that witness had not pled guilty or reached a plea agreement with the state. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006).

In Mizzell, the limitation on cross-examination involved a co-conspirator witness's potential sentence if he was convicted of the same crimes as the defendants. The Supreme Court in Mizzell noted that the lack of a plea agreement, if anything, suggests the witness will testify more favorably to the state's position. State v. Mizzell, 349 S.C. 326, 332, 563 S.E.2d 315, 318 (2002).

In Mizzell, the Supreme Court held that a criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" State v. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 *citing* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

Applicable facts

Here, alleged accomplice Nyerere Williams testified for the state. The solicitor immediately upon calling him as a witness had Williams testify that he had pending charges, "*the same charges that the defendant has.*" Upon questioning by the solicitor, Williams said the solicitor had not made him "any promises regarding those charges." R. 270, ll. 12-23.

On cross-examination, Williams admitted he was charged “with exactly the same thing that Timiya Massey is charged with.” Williams admitted those charges included murder, kidnapping, attempted armed robbery, “and all the others.” R. 287, ll. 16-21.

Williams said the only reason he was testifying against petitioner was because it was “*the right thing*” to do. Williams boldly asserted he did not have any expectation that his testimony against petitioner would help him at all at sentencing. R. 288, ll. 3-24.

Again, Williams was aware he was charged with murder in this case. Defense counsel then asked Williams if he was also aware he could get a life sentence for murder. The solicitor immediately objected, without stating a ground, and that objection was immediately sustained. R. 290, ll. 9-20.

S.C. Code § 16-3-20 provides, where the state does not seek the death penalty for murder, that a person who is convicted of or pleads guilty to murder *can receive a sentence of life imprisonment* or a mandatory minimum term of thirty years.

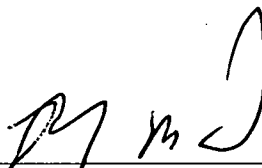
The legal error

The defense cross-examination of Williams on murder carrying a possible life sentence was legally correct sentencing exposure, and proper under well settled precedent.

The judge therefore erred by refusing to allow it. The judge improperly reasoned that the potential sentence a witness was facing was not relevant to the jury’s deliberations, which obviously involve witness credibility determinations. That was error since it was relevant cross-examination as to bias. R. 294, ll. 8-25. Again, the scope of cross-examination in South Carolina for bias is broad. See State v. Brewington. The cross-examination limitation error by the trial court here was reversible error without the necessity of any Confrontation Clause or other Constitutional analysis. That is true because “on cross-examination, any fact may be elicited

which tends to show interest, bias, or partiality of the witness.” State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976).

A manifest abuse of discretion occurred in the erroneous exclusion of this most basic cross-examination of the witness to expose bias and motive to misrepresent. Respectfully, nothing is more elementary for a jury to understand than the witness is facing a life sentence himself or herself if he or she does not play ball with the state. The essence of fundamental fairness demands that such cross-examination be allowed. This Court correctly did not find any error to be harmless in State v. Timiya Rashad Massey, 2002-UP-020 (filed January 29, 2020), and rehearing should be granted.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

February 12, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT

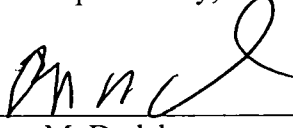
V.

TIMIYA RASHAD MASSEY,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Timiya Rashad Massey, #322913, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of February, 2020.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 12th day of February, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: December 31, 2029.