

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Bentley Price, Circuit Court Judge

RECEIVED

Jun 25 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

YOLANDA SHATTEN,

APPELLANT

APPELLATE CASE NO 2019-000825

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to reopen the record, where Appellant obtained a tax return prepared by the state's main witness which directly contradicted a claim by the witness during the state's case-in-chief that she had not prepared the return, where the inclusion of the return would have impeached the witness's credibility?

STATEMENT OF THE CASE

Appellant was indicted on three charges: two counts of forgery, value of less than \$10,000, and one count of unauthorized practice of law. R. ___ (Indictments). She proceeded to trial before the Honorable Bentley Price on May 6, 2019. Tr. 1. Joseph Henry represented Appellant; Joel Kozak and James Haarsgaard appeared on behalf of the state.

The jury found Appellant guilty as indicted. Tr. 321, ll. 8 – 20. Judge Price sentenced her to five years, suspended to five years' probation terminable upon payment. Tr. 330, l. 22 – Tr. 331, l. 10.

This appeal follows.

STANDARD OF REVIEW

The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct.App.1991). The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case. Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co., 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993), overruled on other grounds, Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997).

ARGUMENT

The trial court erred in refusing to reopen the record, where Appellant obtained a tax return prepared by the state's main witness which directly contradicted a claim by the witness during the state's case-in-chief that she had not prepared the return, where the inclusion of the return would have impeached the witness's credibility.

Relevant facts

Marilyn Kirkland saw a listing for a house for sale in Richland County in the website Zillow in November or December 2014. Tr. 100, ll. 15 – 21. Appellant co-owned the home. Tr. 226, l. 21 – Tr. 228, l. 7. Kirkland contacted Appellant, who was listed on the website, about purchasing the home. Tr. 101, ll. 7 – 12. The two negotiated a purchase price for the house via e-mail. Tr. 102, l. 2 – Tr. 103, l. 10. Kirkland recalled signing an Intent to Purchase and providing Appellant with a cashier's check for \$5,000. *Id.* Appellant described the situation as a "lease with the option to purchase." Tr. 230, ll. 14 – 20.

Kirkland and her family moved into the house in early April 2015. Tr. 109, ll. 14 – 15. Soon thereafter, Kirkland and Appellant began discussing closing. Tr. 109, ll. 16 – 18. Appellant provided a closing statement to Kirkland in advance. Tr. 111, ll. 2 – 6. Closing was held on-site on April 30, 2015. Tr. 113, ll. 2 – 9. Kirkland received the closing statement and a quit claim deed. Tr. 113, ll. 18 – 21.

Kirkland stopped paying Appellant after only two payments. Tr. 118, l. 5 – Tr. 119, l. 7. She admitted to having breached the terms of the contract. Tr. 163, ll. 24 – 25. At that point, Appellant began the eviction process by filing a rule to vacate in magistrate's court. Tr. 119, ll. 8 – 15. Kirkland alleged that Appellant removed her belongings from the home. Tr. 119, l. 16 – Tr. 121, l. 21.

Kirkland filed a complaint with law enforcement. She met with Cannon Fulmer, an investigator with the City of Columbia Police Department. Tr. 23, l. 4 – Tr. 24, l. 17. Fulmer, in turn, interviewed Appellant. Tr. 69, l. 20 – Tr. 79, l. 25.

Kirkland, during cross-examination, testified that she had experience preparing tax returns. Tr. 146, ll. 6 – 25. She outright denied having ever prepared a tax return for someone who owned a home, however. Tr. 147, ll. 1 – 18. As such, she professed a lack of knowledge regarding real estate in general. Tr. 146, ll. 14 – 20. When questioned in particular about Tony Baker, Kirkland denied having ever prepared his taxes. Tr. 169, l. 16 – 170, l. 1. During Appellant's testimony, she presented a deed prepared by Tony Baker which showed that he and Appellant had an ownership interest in the house. Tr. 226, l. 5 – Tr. 228, l. 7. Baker was Appellant's business partner and co-owner of the property in dispute. Id.

After the case was submitted to the jury, counsel for Appellant located a tax return prepared by Kirkland on behalf of Tony Baker. Tr. 311, l. 8 – Tr. 316, l. 25. Counsel sought to impeach her credibility and noted the relevance of the document:

Because the credibility of the witness is very important. She's the lead witness in the case about someone else supposedly committing fraud and here she is committing fraud on the Court.

Tr. 313, ll. 8 – 14.

In response, the trial judge questioned Appellant's counsel as to his proposed course of action. The trial judge suggested that he was unable to make it part of the record or even a court's exhibit. Tr. 314, ll. 4 – 21. Counsel repeatedly asked that the record be amended to include the tax return. Tr. 316, ll. 1 – 4. The trial judge denied that request.

The jury deliberated without the knowledge that Kirkland had lied under oath and therefore rendered a verdict without all of the available evidence.

Discussion

“The generally understood definition of the practice of law ‘embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.’ ” State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). The practice of law, however, “is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability.” State v. Buyers Service Co., Inc., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). For this reason, this South Carolina Supreme Court has consistently refrained from adopting a specific rule to define the practice of law. In re Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124 (stating “it is neither practicable nor wise” to formulate a comprehensive definition of what the practice of law is). Instead, the definition of what constitutes the practice of law turns on the facts of each specific case. Id.

In Wright v. Strickland, 306 S.C. 187, 410 S.E.2d 596 (Ct. App. 1991), this Court affirmed the trial judge’s refusal to reopen the record. In that instance, the moving party did not proffer any testimony or show that the evidence could make a difference to the outcome of the case. Id. Wright was a civil suit for enforcement of a promissory note. Id. at 188, 410 S.E.2d at 597. The defendant, Strickland, gave the note as consideration for a tobacco lease. Id. Representing himself at trial, Strickland testified that he was not obligated to pay the note because he never received the benefit of the tobacco lease. Id. *After the trial was over*, Strickland hired an attorney who moved to supplement the record. Id.

The matter *sub judice* can be distinguished from Wright in several ways. Firstly, counsel for Appellant attempted to proffer the tax return; the record was established and showed that a

tax return which directly refuted Kirkland's testimony was available. Secondly, the trial was not over when the document was discovered and offered. As a result, Appellant made a showing that the document would have made a difference in the outcome in the case.

The tax return was material and relevant; it showed that the state's main witness and complainant was aware of Appellant's business partner and had even prepared a tax return on his behalf. The latter fact was in direct contravention to unambiguous testimony from Kirkland. Her credibility would have been impeached outright, and the jury may have reached a different decision in the case. As noted by counsel for Appellant, he was not aware that Kirkland was going to lie. Tr. 315, ll. 4 – 5. Counsel made a specific request that the record be amended:

Just say that the record is being amended by proffer offered by the attorney from evidence that was unavailable during the time of testimony.

Tr. 316, ll. 2 – 4.

Because the unauthorized practice of law is not strictly defined, further impeaching the credibility of the state's main witness by proving outright that she did not tell the truth under oath would have been of paramount importance to Appellant. Counsel made this point to the trial judge:

It goes to the issue of her credibility as a witness in the trial. It is a material issue because credibility is always a question when you take the witness stand. And if you come in and intentionally lie to the Court, that's a punishable offense and it affects the administration of justice in this trial, so it's perpetration of a fraud.

Tr. 312, l. 20 – Tr. 313, l. 1.

The tax return was relevant, material, and impactful. It directly contradicted an important claim made by the state's main witness and weighed heavily on her lack of credibility. The record should have been reopened in order to add the tax return and prove to the jury that Kirkland was not telling the truth under oath.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse her convictions and remand for a new trial.

s/Taylor D. Gilliam _____
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of June, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter has been served upon opposing counsel this 25th day of June, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Yolanda Shatten, at 141 Peiham Drive, Suite 114.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT