

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Sep 03 2020
SC Court of Appeals

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Tracking No. 2017-001406

State of South Carolina,

Respondent,

vs.

Antwuan L. Nelson,

Appellant.

PETITION FOR REHEARING

On August 19, 2020, this Court reversed and remanded Appellant’s convictions for voluntary manslaughter and possession of a weapon during the commission of a violent crime, finding the trial court abused its discretion in failing to grant Appellant’s motion for a continuance or mistrial made on the fourth day of trial based on the unavailability of a witness. This Court further found Appellant complied with Rule 7(b), SCRCrimP—including the requirement that he act with due diligence in attempting to procure the testimony of Lillian Brockington—and that Brockington’s testimony was not cumulative to other evidence presented.

This Court overlooked the explicit language of Rule 7(b) of the South Carolina Rules of Criminal Procedure and its own case law—“All components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are **strictly** required, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief.” State v. Colden, 372 S.C. 428, 438, 641 S.E.2d 912, 918 (Ct. App. 2007) (emphasis added). This Court ignored multiple

instances of defense counsel's failure to strictly comply with the requirements of Rule 7(b) and ignored facts of this case which support mutual combat. This Court failed to recognize that the only relevance of Brockington's testimony would be to support Appellant's self-defense claim although the facts clearly demonstrate a charge of self-defense was not warranted due to mutual combat. This Court ignored our Supreme Court's recent holding in State v. Williams—that a person who brings a gun to a drug deal is not without fault in bringing on the difficulty—which further supports the conclusion that a self-defense charge was not warranted. 427 S.C. 246, 830 S.E.2d 904 (2019). Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the State's petition for rehearing and affirm Appellant's convictions because the trial court did not abuse its discretion in denying the motion for continuance where Appellant failed to exercise due diligence in procuring the absent witness's testimony, and Appellant was not prejudiced because the absent witness's purported testimony was cumulative to evidence already presented.

Motion to Continue

This Court compares the present case to State v. McMillan and State v. Williamson. Williamson held that a continuance should have been granted based on Appellant's pregnant wife being unable to testify or be present at his trial. State v. Williamson, 115 S.C. 315, 105 S.E. 697 (1921). This Court, however, failed to note several important differences between Williamson and this case. As an initial matter, in Williamson, the absent witness was Appellant's wife. See Id. ("Ordinarily a person tried for a capital felony **has a right** to have his wife present at trial, and the wife has the right to be present." (emphasis added)). Most importantly, the appellant in Williamson moved for a continuance **before his trial began**, provided the court with notice of his wife's absence, the reason for her absence, what she would testify to, and the significance of her testimony. Id. This Court next compares this case to McMillan, and again fails to recognize that

the appellant in McMillian moved for a continuance at the outset of the trial. State v. McMillian, 349 S.C. 21, 561 S.E.2d 604 (2002). These two cases are significantly distinguishable from Appellant's, not only because Appellant's motion was not made pre-trial—or even on the second or third day of trial—but because Appellant waited until after the State presented its case to seek to end his trial based on his own counsel's failure to secure a witness's testimony prior to trial commencing.

This Court next cites our Supreme Court's opinion in State v. Grueling which held that “[g]enerally, a motion for continuance should be made at the time the underlying reason for such becomes known.” State v. Grueling, 257 S.C. 515, 520, 186 S.E.2d 706, 708 (1972). However, this Court later states that “defense counsel could not have sought a continuance prior to the commencement of trial because no grounds existed for such at that time.” State v. Nelson, Op. No. 5768 (filed August 19, 2020) (Shearouse Adv. Sh. No. 32 at 19). This Court notes that defense counsel approached the trial court on the first day of trial upon finding out that Brockington was not there, yet fails to address that the continuance motion could have been made at that time. Id. at 18. This Court also notes that defense counsel subpoenaed Brockington at the hospital on the second day of trial, but again fails to address that the continuance motion could have been made at any point on the second day once he became aware she was hospitalized. Id. Finally, this Court notes that the State rested on the third day of trial and that defense counsel informed the court that Brockington was hospitalized, but again fails to address that the continuance motion could have been made then. Id. Three separate times “grounds existed” and “the underlying reason” for a continuance became known to defense counsel, yet this Court came to the puzzling conclusion that “[o]nce defense counsel became aware that Brockington was not going to be available to testify at the appropriate time, he made the proper motion and complied with Rule 7(b).” Id. at 19.

Compliance with Rule 7(b), SCRCrimP

Next, this Court overlooked the requirements of Rule 7) of the South Carolina Rules of Criminal Procedure, which states:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and **has made use of due diligence to procure the testimony of the witness** or of such other circumstances as will satisfy the court that his motion is not intended for delay.

- (1) When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.
- (2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief.

Rule 7(b), SCRCrimP (emphasis added). This Court concluded Appellant complied with Rule 7(b) despite Appellant's failure to subpoena his "key witness" prior to trial. Specifically, this Court notes that Appellant "did not feel the need to subpoena Brockington prior to trial because she was going to appear voluntarily" State v. Nelson, Op. No. 5768 (filed August 19, 2020) (Shearouse Adv. Sh. No. 32 at 19). This Court recognizes Appellant waited until the day after he realized Brockington was not present to subpoena her until the next day. Id. Black's Law Dictionary defines due diligence as "the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACKS LAW DICTIONARY 523 (9TH Edition 2009). Not only did defense counsel not subpoena their most important witness before trial but waited another day after he found out she was missing.

When defense counsel eventually did subpoena Brockington on the second day of trial, he was still not compliant with Rule 7(b) requiring that if a subpoena had been issued, that subpoena be provided to the court and if proof cannot be provided, the reason for why it cannot be, neither of which were provided by defense counsel. Further, the requirement that an affidavit be provided to the court in regards to what witness would testify to was not satisfied until the **fourth** day of trial.

In Seay v. Cannon, the Fourth Circuit Court of Appeals considered whether the state court erred in granting a mistrial based on the State’s critical witness failing to appear during the course of the trial. Seay v. Cannon, 927 F.3d 776 (4th Cir. 2019). In that case, the State—unlike Appellant—subpoenaed the witness **prior to trial**. The subpoena directed her to appear on the morning of each day of the term of court. Id. The State was in communication with the witness prior to trial and was under the impression that she would appear. Id. When the witness did not appear at trial, the State moved for a mistrial on the basis of surprise in her nonattendance, which the lower court granted. Id. In reversing, the Fourth Circuit reasoned:

“[T]he government relies on the state trial court’s finding that the government was ‘caught by surprise’ when [the witness] failed to appear in response to the subpoena. According to the government, this factual finding and the lack of any fault on the government’s part support the state trial court’s determination that a mistrial was warranted for reasons of manifest necessity. We disagree with the government’s position.”

Id. at 781. The Fourth Circuit determined a “foreseeable possibility that [the witness] would not appear in time to testify” existed because she had not appeared for two days despite being subpoenaed. Id. The State chose to go forward anyway. In concluding the mistrial was improperly granted, the Fourth Circuit found that “the government’s allegation of surprise fails to support the state trial court’s finding of manifest necessity.” Id. at 783.

The Fourth Circuit properly found a continuance or mistrial was not warranted—even when counsel had his witness under subpoena—because the Government should not have been surprised. This Court refused to hold defense counsel accountable, finding he acted with due diligence despite his failure to subpoena Brockington until after trial began and failure to take any steps to prevent the trial from going forward knowing his witness was not present. This Court is wrong in concluding that defense counsel acted with due diligence when looking at the evidence they were presented.

Further, this Court previously held that “all components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are **strictly required**, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief.” State v. Colden, 372 S.C. 428, 438, 641 S.E.2d 912, 918 (Ct. App. 2007)(emphasis added). This Court now seems to suggest whether or not to comply with the South Carolina Rules of Criminal Procedure is discretionary to counsel. This Court seems to turn on the fact that it would not have mattered whether defense counsel had subpoenaed Brockington prior to trial because she would have been unavailable due to her hospitalization. This is mere speculation, as there is nothing in the record indicating that the hospitalization was unavoidable. The only information provided by defense counsel was that Brockington was hospitalized for a blood transfusion for sickle cell anemia. Defense counsel did not indicate whether the procedure was emergent or a previously-scheduled treatment that could be postponed. Defense counsel failed provide the trial court with any information regarding when Brockington may be available to testify. This Court nonetheless concludes that she would have been unavailable, which is simply not supported by the record. This conclusion is further determined by the fact Appellant’s counsel provided no information to the

trial court regarding an estimation of when she would be available to testify so the Court would know the possible length of the requested continuance.

Cumulative Testimony

This Court further held that Brockington's testimony would have supported Appellant's claim of self-defense. However, Brockington's testimony is cumulative to the evidence presented at trial. The only new information that the jury would have received by hearing Brockington's testimony is who fired their weapon first. This Court overlooks the fact that the limited new testimony would not have been material or relevant because self-defense was not properly charged. It is uncontested that both men were armed and looking for each other as established by evidence presented and Brockington's testimony. At best, we have a mutual combat case and who fired first is irrelevant. "South Carolina law has long recognized that criminal liability may be imposed on all combatants for the death of one of the participating parties because all are presumed to know and intend the consequences that naturally flow from their unlawful acts. State v. Young 429 S.C. 155, 150, 838 S.E.2d 516, 518 (2020). Brockington's statement clearly indicates that Appellant armed himself and there was a mutual willingness to fight.

Further, Appellant was not entitled to a self-defense charge, so allowing testimony solely related to supporting a self-defense claim would be well within the trial court's wide discretion.

A person is justified in using deadly force when:

- (1) the defendant was without fault in bringing on the difficulty;
- (2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or he actually was in such imminent danger;
- (3) if the defense is based upon the defendant's actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and
- (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Sims, 426 S.C. 115, 131, 825 S.E.2d 731, 739 (Ct. App. 2019).

Appellant had multiple opportunities to leave the scene. The State produced evidence that Appellant had fled from victim's apartment and instead of going to his car to leave the scene he remained in the apartment grounds. The State also produced evidence that showed Appellant went to his car, opened his trunk, and armed himself with a rifle and then shut the trunk. Brockington's testimony also supports the fact that Appellant went to his car and armed himself. During the time it took for Appellant to get his gun out of the trunk he could have gotten into his car and left. Appellant cannot claim self-defense if he had other probable means of avoiding the danger. Further, Appellant cannot claim self-defense if he was not without fault in bringing on the difficulty. Our Supreme Court has recently ruled that someone who brings a gun to a drug deal is not without fault in bringing on the difficulty. State v. Williams 427 S.C. 246, 830 S.E.2d 904 (2019). There is little doubt Appellant arrived at the scene of what was a drug deal that turned south with a gun in the trunk of his vehicle. This is the same gun he went and retrieved instead of leaving the premises. In State v. Slater, 373 S.C. 66, 69–70, 644 S.E.2d 50, 52 (2007), our Supreme Court found the defendant was not without fault in bringing on the difficulty of a shooting and thus was not entitled to a self-defense charge because defendant's decision to approach an altercation underway with a loaded weapon by his side was the proximate cause of the ensuing gunfight which led to him "accidentally" shooting the victim. Although Slater testified that his purpose for approaching the altercation was to stop what he believed to be a robbery-in-progress, the Court specifically noted the defendant's actions "could be reasonably calculated to bring the difficulty that arose in [that] case." Id.

It is uncontested that Appellant was at the victim's apartment for a drug deal. In fact, Appellant's actions represent an extreme of behavior similar to that in both Williams and Slater.

Appellant arrived at a drug deal with a gun, but left it in the vehicle. After that situation escalated, Appellant went to his car, retrieved his weapon, and returned to the confrontation. However—unlike the defendants in Williams and Slater—Appellant was confronted with the potential of a violent confrontation, left, and elected to return. Accordingly, the undisputed evidence shows that Appellant’s actions could not, under any scenario and even with the testimony of the missing witness, have been considered self-defense. Thus, this Court ignores that Brockington’s testimony would not have assisted Appellant in this regard and was cumulative to other testimony.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find that the trial court did not abuse its discretion denying the motion for continuance and affirm Appellant’s convictions.

Respectfully submitted,

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September 3, 2020

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the State's Petition for Rehearing on David Alexander, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of September, 2020.



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Subject: State v. Antwuan Nelson - Petition for Rehearing
Date: Thursday, September 3, 2020 11:08:00 AM
Attachments: [Nelson Antwuan - Petition for Rehearing \(02370993xD2C78\).pdf](#)

Dear Mr. Alexander,

Attached to this email is a copy of the State's Petition for Rehearing in the above matter. This document will be filed with the Court later today through AIS One Drive.

Please acknowledge receipt of this email and the attachment by Return email.

Thank you for your cooperation.

Anne Mueller, Legal Assistant for

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