

RECEIVED
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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

HERBIE VAL SINGLETON, JR.

PETITIONER

APPELLATE CASE NO 2016-002079

Appeal from Charleston County

Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5722

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Herbie Val Singleton, Jr. petitions the Court for rehearing and respectfully submits that this Court, in affirming the conviction for obstruction of justice, misapprehended the holding in State v. Needs, 333 S.C. 134, 141, 508 S.E.2d 857, 860 (1998). Respectfully, the Needs case does not stand for the proposition that a private citizen can commit the common law offense of obstruction of justice by lying to the police outside of the context of a judicial proceeding. Additionally, counsel respectfully submits that in finding the issue of whether a judicial proceeding is required in order for a private individual to obstruct justice is not preserved for appellate review, this Court overlooked the fact that Petitioner's

argument at trial that obstruction of justice requires an intentional failure to perform a **duty** included the argument that obstruction of justice by a private citizen, as opposed to an appointed or elected official, must take place in the context of a judicial proceeding with an oath and a **duty** to tell the truth. The issue is preserved for appellate review.

The trial judge erred in refusing to direct a verdict of acquittal for obstruction of justice where the State presented no direct or substantial evidence that Petitioner, by lying to the police while being questioned as a suspect, obstructed the administration of justice.

There is no question that Petitioner lied to police when he was questioned, as a suspect, about the shooting of Dontaviha Patterson. There is no question Petitioner named Antonio Barrett as the shooter knowing that Lamont Gregg was the actual shooter. Lying to the police, however, outside of the context of a judicial proceeding, does not constitute obstruction of justice. The trial judge erred in refusing to direct a verdict of acquittal for obstruction of justice.

Prior to trial defense counsel moved to quash Petitioner's indictment for obstruction of justice. Counsel argued that the State was attempting to circumvent the prohibition on charging a principal with misprision of a felony. (R. pp. 54– 58). Counsel correctly stated that South Carolina retained common obstruction of justice despite the codification of several specific acts that would have constituted obstruction of justice. (R. p. 55, line 18 – p. 56, lines 1-4).

Looking to the elements of obstruction of justice under the common law, defense counsel argued:

It's common sense that obstruction of justice should not be applied to a principal in a case in this kind of situation where the allegation is not threatening jurors, not threatening a policeman, but lying, because [it's] truly – misprision where he's trying to [end around] the misprision [of a felony] by calling it obstruction of justice.

(R. p. 58, lines 1-6).

Citing State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979), counsel argued that obstruction of justice required an intentional failure to perform a duty stating:

I think *Cogsdale* also, going into my second argument, is a element that's assumed, that's talked about in the case. It doesn't list it quote/unquote as an element and it's -- but it's very clear -- and I want to get to that. It says -- and in quoting *Cogsdale*, the Trial Judge, in instructing the jury as to the elements necessary to make up the offense of obstructing justice said -- and this first sentence I think is real important even though it's not seemed to be called an element -- there is an obstruction of justice, there must be an intentional failure to perform a duty which would constitute obstruction of justice. And I would argue that that duty is when someone takes an oath to administer justice, whether it is a lawyer, whether it's a judge, whether it's a magistrate, whether -- it is someone who is a part of the administration of justice, a public official, whether appointed or elected. It, it -- I would argue the constitution does not provide that there is a duty on the ordinary citizen to come forward when they are charged with a crime and give a truthful statement.

(R. p. 58, lines 17-25). Defense counsel noted that every reported obstruction of justice case in South Carolina involved a lawyer, public official, or person who had “a duty towards the administration of justice. . . rather than an ordinary citizen sitting in front of a police officer at the station.” (R. p. 59, line. 20 – p. 61, lines 1-3).

The State countered that since police arrested Barrett based on information Petitioner supplied them that he knew was false, Petitioner had obstructed justice. (R. p. 61, lines 21-24). “It is germane because that's justice. That's what -- that's why it's so broadly written. [Barrett] spent three weeks in jail. I indicted him for attempted murder based solely off of [Petitioner's] statement and nothing else. (R. p. 61, lines 21-24).

In support of a broad interpretation of obstruction of justice, the State cited State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), for the proposition that a person can be charged with obstruction of justice solely based on lying to the police. (R. p. 62, lines 1-10). As will be discussed below, the State's reliance on Needs is misplaced. The trial judge refused to quash Petitioner's indictment for obstruction of justice. (R. p. 66, lines 14-16).

At the close of the State's case, the defense moved for a directed verdict of acquittal on the obstruction of justice charge. R. p. 363, l. 14 – 366, l. 3. Defense counsel incorporated by reference his previous arguments during the pre-trial motion to quash. R. p. 364, ll. 16-17. Counsel reiterated that the State failed to produce any evidence that Petitioner's statements to law enforcement "prevented, obstructed, impeded, or hindered the administration of justice." R. p. 364, ll. 16-25. Counsel stressed that the investigators admitted that Petitioner's false information had not ended or delayed their investigation. R. p. 365, l. 2 – 366, l. 3. The trial judge denied Petitioner's motion for a directed verdict. R. p. 367, ll. 21-23. The trial judge erred.

In South Carolina obstruction of justice is defined as "any act which prevents, obstructs, impedes, or hinders the administration of justice." Cogdell, 373 S.C. at 567, 257 S.E.2d at 750-751 (quoting 67 C.J.S. Obstructing Justice §§ 2 and 3). South Carolina has no statutory or precise common law definition of what "the administration of justice" entails. Despite the codification of several specific crimes under the title "Interference with Judicial Process," obstruction of justice remains a common law offense. Id.; see also S.C. Code Ann. § 16-9-380. "Although the statute codifies 'various common law crimes' its does not purport to codify or supersede *all* of them." State v. Lyles-Gray, 328 S.C. 458, 492 S.E.2d 802 (Ct. App. 1997) (*emphasis original*).

Obstruction of justice requires an intentional failure to perform a duty. In Cogdell the judge charged the jury in part, "But in an obstruction of justice there must be an intentional failure to perform a duty which would constitute obstruction of justice." 273 S.C. at 568, 257 S.E.2d at 750. That duty may derive from an individual's role as an elected or appointed official or some other role that requires a duty to the administration of justice. A private individual does not have such a duty to the administration of justice. A similar duty, however, may derive for a private individual from an oath and duty to tell the truth during the course of a judicial proceeding. As

noted by defense counsel, every reported obstruction of justice case in South Carolina involved a lawyer, public official, or person who had “a duty towards the administration of justice. . . .”(R. p. 59, line 20 – p. 61, lines 1-3). In the present case Petitioner had no role that required a duty to the administration of justice. Petitioner, a private individual, lied to police outside the context of a judicial proceeding. Petitioner had no duty, as required for obstruction of justice, to tell the truth while he was being questioned by police. Petitioner committed the crime of providing false information to a police officer, not obstruction of justice. See S.C. Code §16-17-725.

In Cogdell, the Mayor of Landrum, South Carolina was convicted on twenty-one counts of obstruction of justice arising from his intentional failure to perform his statutory **duty** to report traffic convictions to the Department of Transportation. 273 S.C. at 565-566, 257 S.E.2d at 749-750. His deliberate failure to report traffic adjudications prevented the Department of Transportation from imposing license suspensions. The mayor appealed his convictions arguing, among other grounds, that his failure to report the traffic convictions could not constitute obstruction of justice. *Id.* The South Carolina Supreme Court rejected the Mayor’s argument:

Petitioner was charged and convicted for the intentional failure to perform his statutory duty to report convictions of the traffic laws. These reports followed the judicial determination of the traffic violation and constituted a necessary step in the proceedings designed by the General Assembly for the enforcement of the traffic laws. The failure of the proper official to make the reports prevented the imposition of the penalties mandated by statutory law.

The trial judge properly held that the intentional failure of Petitioner to report convictions of traffic violations, as required by the foregoing statutes, constituted the common law offense of obstruction of justice.

Id. at 566-567, 257 S.E.2d at 749. The Mayor’s convictions for obstruction of justice were dependent on the existence of a **duty** to the administration of justice.

Similarly, in State v. Love, a former Richland County Magistrate Judge appealed his conviction for two counts of obstruction of justice on the grounds that the State failed to present

sufficient evidence to support the convictions. 275 S.C. 55, 60-61, 271 S.E.2d 110, 113 (1980). Magistrates are judicial branch officers. S.C. Const. Art. V, § 26 and as such have a **duty** to the administration of justice.

The obstruction of justice charges in Love stemmed from the Magistrate's efforts to secure an invalid driver's license and "fix the prosecution" of William Dennis, who facing his fourth DUI charge. 275 S.C. at 60-61, 271 S.E.2d at 113. The Supreme Court affirmed the Magistrate's convictions. In upholding his conviction for securing an invalid driver's license, the Court found there was evidence the Magistrate "told a driver's license examiner that, if he could get a driver's license for Dennis, it would be beneficial to the examiner." Id. The Magistrate then gave Dennis an invalid temporary license he would not otherwise be entitled to during the pendency of his case given his prior DUIs. Id.

With respect to the second count of obstruction of justice, the Court held that "the record shows that [Magistrate] asked an investigator for the Public Defender's office if he knew anyone who could stop an indictment; and that [Magistrate] later admitted he had paid money to a public employee to obtain help in **preventing the prosecution** against Dennis for driving under the influence." Id. at 62, 271 S.E.2d at 113 (*emphasis added*). In both counts of obstruction of justice the Magistrate breached his duty to the administration of justice.

The vast majority of reported obstruction of justice cases, like Cogdell and Love, concern either an elected official, a judicial branch official, or a public employee who had a **duty** to the administration of justice and breached that **duty**. See Lyles-Gray, 328 S.C. at 460-464, 492 S.E.2d at 803-803 (affirming conviction of police officer for obstruction of justice where officer knowingly obtained a false arrest warrant and failed to timely hand over evidence during the pendency of a criminal case in a condition that would have allowed the evidence to be admitted at

trial.); see also State v. Caskey, 273 S.C. 325, 256 S.E.2d 273 (1979) (affirming attorney's conviction for obstruction of justice and conspiracy to obstruct justice where attorney conspired with a magistrate to improperly dismiss client's pending DUI charge).

Petitioner was not a public official and as a private individual had no duty to the administration of justice outside of a judicial proceeding. At trial the State cited State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), for the proposition that a person can be charged with obstruction of justice solely based on lying to the police. R. p. 62, ll. 1-10. The Needs case, however, does not stand for that proposition. The private individual witness in the Needs case who was charged with obstruction of justice did not solely lie to the police. Instead, she additionally lied during a pre-trial hearing, a judicial proceeding in which the witness had a duty, under oath, to tell the truth, a duty to the administration of justice.

Needs was convicted of murder and first degree burglary arising out of the killing of his step-father, Lawrence Warmoth. 333 S.C. at 140, 508 S.E.2d at 859-860. During the investigation into Warmoth's death, Needs' "young girlfriend" Nancy Smith initially provided him with an alibi for the time of the murder. However, four months into the investigation Smith told police that Needs had confessed to her that he killed Warmoth. She also admitted to police that her alibi for Needs was a lie.

A month later, Smith attempted to walk back in her second statement to law enforcement by claiming that Needs' confession was couched in hypothetical terms. Critically for her impending obstruction of justice charge, Smith testified at a **pretrial hearing** as an alibi witness for Needs. She also produced a diary entry recalling how she and Needs spent the night of the murder together. .

After her testimony at the pretrial hearing, a grand jury indicted Smith for obstruction of justice, accessory after the fact, and misprision of felony. *Id.* at 144, 308 S.E.2d at 862. Unsurprisingly, Smith changed her story again at Needs' trial and testified for the State. On cross-examination, Smith admitted that "her testimony directly conflicted with the testimony" she gave at the pretrial hearing. Needs was convicted on both charges. Smith later pled guilty to misprision of a felony. *Id.*

On appeal, Needs argued that the solicitor committed misconduct by indicting Smith for her testimony at the pretrial hearing. *Id.* at 142, 508 S.E.2d at 862. Needs alleged that the indictments were an effort to intimidate Smith. Our Supreme Court rejected Needs' arguments and affirmed his convictions.

The Court held there was no misconduct because probable cause existed to indict Smith on all of the charges, including obstruction of justice. *Id.* at 146, 508 S.E.2d at 863. The Court found that evidence showed Smith concealed information, lied to investigators, and lied in her testimony at the pretrial hearing. Further, Smith ultimately admitted to doing all of these things during her testimony at Needs' trial. Therefore, probable cause existed to charge her with the specified crimes. *Id.* The Needs case does not stand for the proposition that a private citizen can commit the common law offense of obstruction of justice solely by lying to the police outside of the context of a judicial proceeding. The private citizen witness in Needs lied during a pre-trial hearing, a judicial proceeding.

In affirming the conviction in the present case this Court wrote, "Most South Carolina obstruction of justice cases have involved public officials; however, this does not preclude a private citizen from being charged with the offense. For example, in *State v. Needs*, our supreme court recognized the existence of probable cause for an obstruction of justice charge brought

against a private citizen after she lied to police and at a pretrial hearing by providing a false alibi for her boyfriend. 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998).” State v. Singleton, No. 2016-002079, 2020 WL 2182244, at *3 (S.C. Ct. App. May 6, 2020). A private citizen is not precluded from being charged with obstruction of justice. The private citizen, however, cannot obstruct justice unless that citizen has a duty to the administration of justice. That duty for the private citizen arises in the context of a judicial proceeding with an oath and a **duty** to tell the truth. The Court in Needs found probable cause existed for an obstruction of justice charge to be brought against a private citizen because the private citizen lied at a pre-trial hearing, a judicial proceeding. In the present case Petitioner had no duty to the administration of justice. Petitioner did not lie during a pre-trial hearing or any other judicial proceeding with an oath and a duty to tell the truth. Counsel respectfully submits that this Court misapprehended the holding in Needs.

This Court additionally cited State v. Samuel, 422 S.C. 596, 813 S.E.2d 487 (2018) writing:

See also State v. Samuel, 422 S.C. 596, 608 & n.8, 813 S.E.2d 487, 494 & n.8 (2018) (Kittredge, J., dissenting) (emphasizing the importance of trial court discretion in the analysis of a criminal defendant’s right to proceed pro se and noting that although the charge was nolle prossed after his murder conviction, Samuel “was also charged with obstruction of justice for repeatedly giving false statements to police in which he identified an uninvolved person as the shooter; for snatching one of his written statements from an investigator’s hand and ripping it up; and for lying to police when he claimed to have thrown a gun involved in the murder into a nearby pond—a lie that caused three separate law enforcement agencies, including a dive team from Lexington County, to expend time and resources over several days searching the pond for a non-existent gun” (footnotes omitted)).

State v. Singleton, No. 2016-002079, 2020 WL 2182244, at *4 (S.C. Ct. App. May 6, 2020).

Counsel respectfully submits that any reliance on the Samuel case is misplaced as the obstruction of justice charge in that case was never challenged and ultimately nolle prossed.

After discussing the Needs and Samuel cases this Court wrote:

Similarly, Singleton knowingly and intentionally lied to law enforcement to prevent Gregg's arrest. *See Cogdell*, 273 S.C. at 567, 257 S.E.2d at 750 ("At common law it is an offense to do *any act* which prevents, obstructs, impedes, or hinders the administration of justice." (emphasis added)). However, Singleton did more than simply lie to law enforcement—he intentionally misidentified someone he knew to be innocent and caused that person to be jailed and indicted. Although Singleton knew first-hand that Gregg shot Victim—because he was driving the car from which Gregg fired the shots—he falsely named Barrett as the shooter. During his police interview, Singleton provided Barrett's name and physical description; he later signed a picture of Barrett, on which he wrote "shot fired from my car."

State v. Singleton, No. 2016-002079, 2020 WL 2182244, at *4 (S.C. Ct. App. May 6, 2020). The critical factor that distinguishes the present case from the Needs case is the duty to the administration of justice in the context of a judicial proceeding. Intentionally misidentifying someone, outside the context of a judicial proceeding, and causing them to be jailed and indicted is clearly wrong but these actions do not meet the elements of obstruction of justice.

In finding that the trial judge did not err in refusing to direct a verdict of acquittal for obstruction of justice, this Court wrote:

Viewing this evidence in the light most favorable to the State, we find evidence existed to reasonably prove Singleton's lies obstructed the administration of justice by temporarily preventing Gregg's arrest, hindering the police's investigation of Patterson's attempted murder, and causing Barrett to be indicted and jailed for an attempted murder with which he had no involvement.

State v. Singleton, No. 2016-002079, 2020 WL 2182244, at *5 (S.C. Ct. App. May 6, 2020).

Counsel respectfully submits that in misapprehending the holding in Needs, this Court overlooked the fact that obstruction of justice requires a duty to the administration of justice. For a private individual, that duty only arises in the context of a judicial proceeding. Questioning by the police is not a judicial proceeding. The trial judge erred in refusing to direct a verdict of acquittal for obstruction of justice where the State presented no direct or substantial evidence that

Petitioner, a private individual, had a duty to the administration of justice. Lying to the police is not obstruction of justice.

In footnote 3 this Court wrote:

To the extent Singleton now argues that for a private individual to be properly charged with obstruction of justice, the obstructive act must occur in the context of a judicial proceeding, we find this argument unpreserved for appellate review. *See State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) (“In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.”); *id.* (“A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below.”). However, we note Singleton’s false accusation resulted in Barrett’s being jailed for two months on an attempted murder indictment prior to his posting of bond. Thus, as a direct result of Singleton’s deliberate misidentification, Barrett was subjected to the imposition of judicial proceedings.

State v. Singleton, No. 2016-002079, 2020 WL 2182244, at *3 (S.C. Ct. App. May 6, 2020).

Counsel respectfully submits that this Court overlooked the fact that at trial Petitioner, relying on State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979), argued obstruction of justice required an intentional failure to perform a **duty**. (R. p. 58, lines 7-25). Petitioner specifically stated, “I would argue the constitution does not provide that there is a duty on the ordinary citizen to come forward when they are charged with a crime and give a truthful statement.” (R. p. 58, lines 22-25). Petitioner’s argument at trial that obstruction of justice requires an intentional failure to perform a **duty** included the argument that obstruction of justice by a private citizen, as opposed to an appointed or elected official, must take place in the context of a judicial proceeding with an oath and a **duty** to tell the truth. Petitioner did not lie to police under oath in the context of a judicial proceeding. Instead, he lied to the police in the context of being questioned as a suspect. Petitioner did not obstruct justice. The issue is preserved for review.

The State failed to present any evidence that Petitioner had a duty to the administration of justice, an element of common law offense of obstruction of justice. Some appointed, elected or public officials, by virtue of their roles, have a duty to the administration of justice and commit the offense of obstruction of justice when that duty is breached. The duty to the administration of justice for private individuals, however, only arises in the context of a judicial proceeding with an oath and a duty to tell the truth. Petitioner, a private individual, lied to the police outside of the context of a judicial proceeding. Petitioner's act of lying to the police does not constitute obstruction of justice. The trial judge erred in refusing to direct a verdict of acquittal for obstruction of justice. Counsel for Petitioner respectfully requests rehearing and reversal of the conviction.

Respectfully Submitted,

s/ Kathrine H. Hudgins

KATHRINE H. HUDGINS
Appellate Defender

This 21st day of May, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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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 Petition for Rehearing in the above-referenced case have been served upon William M. Blich, Jr., Esquire at the primary e-mail address listed in the Attorney Information System (AIS); and Herbie V. Singleton, Jr., 1514 Evergreen Street, Charleston, SC 29407-6647, this 21st day of May, 2020.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER