STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2020-UP-198 (S.C. Ct. App. filed July 1, 2020)

2014-GS-26-01121

THE STATE,

RESPONDENT,

V.

SIDNEY STCLAIR MOORER,

PETITIONER

APPELLATE CASE NO. 2017-001876

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 September 28, 2020.

QUESTION PRESENTED

Did the Court of Appeals err by affirming the trial judge's denial of Petitioner's directed verdict motion based upon its conclusion that Petitioner's lies and omissions to police constituted obstruction of justice where the undisputed evidence showed no change in the police investigation as a result and no impact on any judicial proceedings?

STATEMENT OF THE CASE

From June until early November of 2013, Petitioner and Heather Elvis "were in a normal boyfriend/girlfriend relationship." R. 208, ll. 11-14; R. 208, ll. 21-24; R. 237, ll. 14-18; R. 238, ll. 1-2; R. 238, ll. 13-15. Initially, Elvis had difficulty with their break-up, but "towards the end she was doing fine." R. 210, ll. 9-11; see also R. 238, ll. 6-10. In fact, in December, Elvis was "[h]appy" and "was starting to get out there again, talking to new men." R. 210, ll. 12-14. On December 17, 2013, Elvis went on a date with Steven Schiraldi. R. 216, ll. 1-6; R. 216, ll. 10-17; R. 218, ll. 8-14; R. 220, ll. 1-6; R. 221, ll. 4-7. After their date, the two communicated through text messages until 2:43 a.m. R. 85, ll. 16-23; R. 90, ll. 20-24; R. 223, ll. 9-19.[1]

On December 19, 2013, a police officer noticed "a suspicious vehicle at a landing." R. 18, ll. 2-21. Thereafter, the officer's supervisor, Danny Furr, began "looking for Heather Elvis." R. 19, ll. 5-11. After learning of the prior relationship between Petitioner and Elvis, Furr spoke to Petitioner by phone very early in the morning on December 20, 2013. R. 20, ll. 20-24; R. 31,

[1] Schiraldi was first contacted by police on December 20, 2013. R. 225, ll. 6-9. Schiraldi never went to the police to discuss Elvis's disappearance, despite knowing he was the last person to see Elvis. R. 226, ll. 7-10; R. 227, ll. 1-9.

ll. 10-13; R. 429, ll. 9-11. Furr asked if Petitioner "had any information on the whereabouts of Heather Elvis." R. 21, ll. 4-7; R. 31, ll. 10-13. Despite the police report indicating that Petitioner told Furr that he had not *seen* Elvis in six weeks, Furr insisted at trial that Petitioner indicated he had not "spoken to her in approximately six weeks." R. 21, ll. 8-10; R. 30, l. 24 – R. 31, l. 5; R. 31, ll. 19-20; R. 1077-1088. Nevertheless, Furr was forced to admit that during that *same* conversation, Petitioner said "he had spoken to her the night before." R. 21, ll. 20-23; R. 1077-1088.

At Furr's instruction, Casey Cantebury and Brian Scales, went to Petitioner's house on December 20. R. 21, l. 24 – R. 22, l. 3; R. 36, ll. 5-7; R. 40, ll. 11-22; R. 54, ll. 3-5. At the time, the police "were investigating a missing person" and "believed" Petitioner was "the last person to have spoken to her." R. 41, ll. 8-14.[2] Petitioner told police about his romantic relationship with Elvis. State's Exhibit #1. After the break-up, the two had little contact until recently, when Elvis phoned him repeatedly. State's Exhibit #1. Petitioner told the officers that the last time he spoke to Elvis was either last night or the night before. State's Exhibit #1. According to Cantebury, records showed there were 360 text messages and over twenty calls between the two during the last month. R. 58, ll. 18-22; State's Exhibit #1.

Although Petitioner never told the officers that he had called Elvis that night or that he used a pay phone, he did say that she had left a voicemail for him. R. 49, ll. 10-20; State's Exhibit #1. Petitioner indicated the last time he saw Elvis was several weeks prior to December 20, but he did not mention seeing Elvis around his house the week prior December 20. R. 49, ll.

[2]While Cantebury and Scales spoke to Petitioner, Scales' in-car camera recorded the interaction. R. 41, l. 15 – R. 42, l. 10; State's Exhibit #1. According to the video, the police spoke to Petitioner from 2:11 a.m. until 2:30 a.m., just a short time after Petitioner spoke to Cantebury's supervisor by phone. R. 46, ll. 11-15; R. 47, ll. 6-9; R. 53, ll. 22-25; State's Exhibit #1.

21-23; R. 50, l. 24 – R. 51, l. 1. During this conversation, Petitioner provided the officers with full access to his phone. R. 182, ll. 3-23; State's Exhibit #1.

Jeff Cauble was assigned to investigate the disappearance of Elvis at 8:30 or 9:00 a.m. on December 20, 2013, - a mere six hours after the police met with Petitioner at his home and only seven-and-a-half hours after Furr called Petitioner. R. 121, ll. 2-23. Jonathan Martin, another detective working the case, obtained Elvis's phone records around 8:30 or 9:00 a.m. on December 20, 2013. R. 51, l. 24 – R. 52, l. 1; R. 63, ll. 1-11; R. 64, ll. 9-17; R. 64, l. 20. In fact, the police may have had Elvis's phone records prior to questioning Petitioner on December 20, 2013, at 2 a.m., which would explain Cantebury's reference to text messages and phone calls. R. 60, ll. 13-21; R. 124, ll. 8-12; State's Exhibit #1. As the police explained, it would be "routine" to obtain the cell phone records of a missing person. R. 58, ll. 15-17.

Elvis's phone records revealed that she received a phone call from a pay phone at 1:35 a.m. on December 18, 2013 R. 68, l. 23 – R. 72, l. 10.[3] In light of the call being made from a pay phone, the police did not know the identity of the caller. "In the beginning stages" of the investigation, Brian Wilson was tasked with getting video of the pay phone at a gas station. R. 293, ll. 9-15. The police had this video *prior* to Petitioner's interrogation during the afternoon on December 20, 2013. R. 293, l. 25 – R. 294, l. 2. Due to its quality, the video did not reveal the identity of the caller either. R. 297, ll. 20-22.

Prior to Petitioner meeting with police during the afternoon of December 20, 2013, at least one officer had watched the pay phone video footage. R. 98, ll. 15-20. The footage revealed a "male figure" fitting Petitioner's description. R. 98, ll. 19-20. The police were aware

[3] The payphone records established that at 1:33 a.m. on December 18, 2013, there was a call to Elvis's phone from that payphone that lasted for four minutes and fifty seconds. R. 115, ll. 10-21.

that Petitioner was "the one communicating with her so much around" the time of the pay phone call; therefore, "it made sense" to the police that "he would have been the one to make that phone call" from the pay phone. R. 101, ll. 7-12.

Wilson explained that the police would have obtained the video from the pay phone *even if* Petitioner *never* spoke to the police. R. 299, ll. 11-19. Wilson was clear that the police would not have known the caller's identity had Petitioner not told the police that he was the person using the pay phone to call Elvis. R. 300, ll. 3- 23. In fact, according to Wilson, Petitioner aided the investigation by supplying this information. R. 301, ll. 3-6.

Beginning at 2:29 a.m., Elvis repeatedly called the pay phone. R. 73, l. 1 – R. 75, l. 17. Then, at 3:16 a.m., Elvis called Petitioner's phone number. R. 75, l. 18 – R. 76, l. 2. Elvis called Petitioner's number again at 3:17 a.m., and the call lasted for just over four minutes. R. 76, ll. 12-18. Elvis continued to call Petitioner's number thereafter. R. 76, l. 20 – R. 77, l. 5; R. 80, ll. 1-14; R. 90, ll. 24-25.

On December 20, 2013, the police obtained Petitioner's phone records. R. 76, ll. 7-9; R. 86, ll. 16-22; R. 87, ll. 13-20; R. 95, ll. 3-5. Thereafter, Martin and Cauble interrogated Petitioner around 3 p.m. for "about 45 minutes." R. 89, ll. 4-9; R. 91, ll. 20-22; R. 124, ll. 3-5; State's Exhibit #8. Martin explained that the police were "[v]ery early in the investigation," having been working the case only "about five hours." R. 90, ll. 3-6. Martin noted that gathering accurate information is important in an investigation because "[a]ny leads that lead you to a different direction can be very time consuming." R. 89, l. 25 – R. 90, l. 2.

Initially, Petitioner "did not disclose the pay phone call," but within ten or fifteen seconds of the police "present[ing] him with the belief that he was the one that made the call," including having video from the area of the pay phone, Petitioner admitted he made the pay phone call. R.

92, ll. 1-5; R. 101, l. 22 – R. 102, l. 2; R. 135, ll. 4-14; R. 144, l. 21 – R. 145, l. 1; State's Exhibit #8. Petitioner denied seeing Elvis the week before. R. 92, ll. 6-8.[4]

Two months after the interrogation of Petitioner, the police charged him with obstruction of justice. R. 148, ll. 2-4. On March 20, 2014, an Horry County grand jury indicted Petitioner for obstruction of justice (2014-GS-26-1121). R. 1100-1101. The state, represented by Nancy Livesay and Joshua Holford, called the case for trial before the Honorable R. Markley Dennis, Jr., and a jury on August 28-30, 2017. R. 1. James Galmore and Kirk Truslow represented Petitioner. R. 1.

During the trial, Martin was forced to admit he would not have known that Petitioner made the phone call to Elvis without Petitioner's admission. R. 110, l. 5 – R. 111, ll. 23. In essence, the information Petitioner provided actually assisted law enforcement in their investigation. R. 111, ll. 21-23.

Initially, Martin implied that the police would not have "follow[ed] up on everything that had to do with [Petitioner's] statement" had the police not learned that some of what he said "was less than true." R. 92, ll. 9-21; R. 94, ll. 6-11. However, when asked what follow-up Martin did as a result of Petitioner not disclosing the pay phone call immediately, Martin explained the police "would be thorough in the complete investigation." R. 94, ll. 2-5. The obvious implication being the police would be less than thorough had Petitioner immediately disclosed the pay phone call.

According to Martin, if Petitioner had told the first officers with whom he spoke about his calling Elvis from a pay phone, the police "*probably* would have gone out to that pay phone

[4] Martin testified that Petitioner denied "seeing her prior to November." R. 92, ll. 6-8. This statement could not be true as the recording of the interrogation revealed and as the police knew because Elvis and Petitioner were dating from July until October or November.

the night of the incident, maybe talked to witnesses when we know he was out there, talk to maybe the person that worked the pay phone." R. 95, l. 16 – R. 96, l. 1 (emphasis added). Martin alleged that if Petitioner had told the patrolman that he used a pay phone to call Elvis, that "probably would have furthered" law enforcement "a couple of hours" and the police would not "have to do the phone records from the pay phone." R. 96, ll. 1-3; R. 98, ll. 4-9.

When pressed for how Petitioner's denial of making the call from the pay phone impeded or obstructed the investigation, Martin seemed bewildered: "If he was honest about making the pay phone call then there would have been …." R. 103, ll. 9-11. Upon further prodding, he stated, "There would have been more belief that the statements he [was] providing us were truthful, everything was truthful, as opposed to - - a single lie can make the entire statement be questioned." R. 103, ll. 12-16.

Cauble claimed that Petitioner misled the police about his whereabouts on December 17-18, 2013. R. 133, ll. 11-13; State's Exhibit #8. According to Cauble, the police found out Petitioner "was actually near her residenc[e] at one point, and that he was also at Long Beard's which is where [Elvis] was actually as well, later on that evening." R. 133, ll. 14-18.[5] For some unstated reason, this was "material" to the police investigation, and the police did not discover it until *after* speaking to Petitioner. R. 134, ll. 3-7. However, Cauble was forced to admit that Petitioner told the police he did not know where Elvis lived, but believed she lived somewhere in North Myrtle Beach. R. 158, ll. 21-23. The police knew Elvis lived nowhere near North Myrtle Beach. R. 159, ll. 3-13. Thus, Petitioner's statements about not being near her residence were not false or misleading. Further, Petitioner's presence near Long Beard's was important to police because they knew Elvis had been at Long Beard's, but the police never asked Petitioner

[5] Long Beard's was a bar and restaurant. R. 160, l. 18 – R. 161, l. 10.

if he were near Long Beard's and Petitioner never denied being near Long Beard's. R. 160, l. 18 – R. 161, l. 10; R. 164, ll. 8-10; R. 162, l. 24 – R. 163, l. 1.

Although Cauble "guess[ed]" it took until mid-February for the police to "figure out what part of [Petitioner]'s statement was true and which part was not," Cauble could point to only one alleged lie from Petitioner – when he denied using the pay phone to call Elvis, which Petitioner corrected within ten seconds. R. 140, l. 24 – R. 141, l. 2; R. 167, ll. 2-6. According to Cauble, Petitioner *misled* the police regarding the length of his relationship with Elvis when he said the two were involved from the beginning of September until late October or early November. R. 171, ll. 7-12. According to Cauble, Petitioner "misled" the police by leaving "parts of the story out." R. 163, ll. 2-6. Cauble claimed that Petitioner was misleading about "how long he had been having contact with" Elvis. R. 143, ll. 1-3.

Petitioner told the police that Elvis rode by his house four or five times. R. 144, ll. 2-4; R. 149, ll. 5-9; State's Exhibit #8. Cauble claimed that the tower information obtained from Elvis's phone records indicated Petitioner was misleading the police regarding Elvis riding by his house. R. 144, ll. 5-9. According to Cauble, there was no way for Petitioner to "fix" this inconsistency and it was up to the police to figure that out. R. 149, ll. 5-9. Later, Cauble confessed that he did not know *when* Petitioner said Elvis was on his road five times and he did not even recall if Petitioner had told him about it. R. 155, ll. 13-18. In fact, the transcript showed Petitioner never indicated *when* he saw Elvis on his road. R. 156, ll. 22-25; R. 171, l. 21 – R. 172, l. 1.

Cauble claimed that if he had "all of this information" that he "eventually had," he would have done things differently when he "got up from that interview room on December 20th." R. 149, ll. 15-19. Without offering any specifics, Cauble claimed the police "would have been able

to start on this investigation earlier than what [they] did." R. 149, ll. 20-23. To this point, Cauble further claimed that if Petitioner had told Furr what Petitioner told Cauble and Martin, then Furr would have called out the investigations unit. R. 149, 24 – R. 150, l. 2. Cauble asserted the police "definitely would have been able to get to the evidence quicker" and "would have been able to get to an interview with him quicker." R. 150, ll. 5-6. However, Cauble could not point to one thing that the police would have found at that point. R. 150, ll. 6-7. In Cauble's opinion, Petitioner's conversation with police "hindered the investigation." R. 150, ll. 14-20.

Petitioner told the police that he and his wife were "in a good place" and as a result, he wanted to call Elvis to tell her to stop contacting him. R. 172, ll. 19-21. Cauble admitted that even if Cauble believed what Petitioner said regarding his discussion with Elvis on the pay phone, *the investigation would not stop*. R. 176, l. 22 – R. 177, l. 5. When asked whether there was anything in the investigation that was done because Petitioner said he told Elvis to stop leaving notes, Cauble responded, "Everything thereafter was because of his lie." R. 177, ll. 6-9. Yet, when asked if the police "take away the lie," if there would be "no investigation," Cauble admitted the police were still investigating Petitioner and others. R. 177, ll. 10-14.

Regarding what the police did differently based upon Petitioner's interview, Cauble contended that the police "had to get extensive phone records" – for Petitioner, Petitioner's wife, and Petitioner's kids. R. 177, ll. 15-24. The police "had to Cellebrite" Petitioner's phone because the police "needed to know more information there." R. 177, l. 25 – R. 178, l. 1. Additionally, Cauble claimed the police got video from "a couple of places," which resulted in "MAIT" being called out. R. 178, ll. 1-4.[6] There were "several things that took place after the

[6] According to Cauble, numerous individuals, including Horry County Police Department investigators, SLED, the Myrtle Beach Police Department, and the Sherriff's Department,

fact." R. 178, ll. 4-5. Yet, Cauble was forced to admit that if Petitioner had never met with the police – if Petitioner had never said one word to the police – then the police still would have gotten Petitioner's phone records, Petitioner's wife's phone records, and Elvis's phone records. R. 178, l. 6 – R. 179, l. 1.

Cauble insisted that if Petitioner "would have come out with this information" during his first phone call with the police, then "things could have been different in [the police] investigation." R. 179, ll. 15-19. Cauble amended this statement to be clear that he could only contend that the investigation "could have been different," and could not say it "would" have been different. R. 180, ll. 7-12. It was "hard" for Cauble to say "exactly" what the police "would have found" if the police "got to it early enough." R. 180, ll. 20-21; R. 187, ll. 3-8.

Furr claimed that if he had known about "a pay phone call or that he had talked to her twice after midnight," he would have "probably" "gone out there" himself and "with additional information, it would have led [him] to contact Investigations." R. 23, ll. 3-22. At trial, Scales claimed that if Petitioner had told them that he called Elvis from a pay phone earlier that night, then the police "would have tried to locate the pay phone and any surveillance video around" it. R. 51, ll. 10-15. However, testimony from another officer revealed the police were well aware of the pay phone calling Elvis's phone and immediately obtained surveillance video from the area around the pay phone.

The phone records showed decreasing contact between Elvis and Petitioner from July through December, just as Petitioner indicated. While there were over 500 contacts between the two in August, September, and October, there were only 64 contacts in November. R. 197, ll.

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worked on finding evidence regarding what part of what Petitioner told the police was true and what part was not. R. 148, ll. 5-11.

10-15; R. 198, ll. 1-10; R. 198, ll. 15-19; R. 199, l. 1-5; R. 199, ll. 11-14; R. 205, ll. 6-9. The last contact between the two numbers was on December 18, 2013. R. 205, ll. 6-9.

During the early morning hours of December 18, 2013, between 2:32 and 3:05 a.m., Elvis's phone used a tower that was "in the vicinity of Long Beard's restaurant." R. 334, ll. 3-12. The phone then started using the tower nearest Elvis's home for two calls at 3:16 a.m. and 3:17 a.m. R. 334, ll. 15-16. The final four calls connected to a tower in the area of Peachtree Landing. R. 334, ll. 16-20.

On December 17, 2013, Petitioner's phone used a tower near his home for almost the entire day. R. 337, l. 23 – R. 338, l. 10. For calls made at 9:38, 9:40 and 9:53, the phone used a tower "in the vicinity of the Tilted Kilt restaurant or the phone booth, in that general area." R. 338, ll. 20-25. At 10:52 p.m., the phone began to change antenna on the tower showing movement to the River Oaks area, where Elvis lived. R. 339, ll. 12-23. Between 11:03 and 11:06, Petitioner's phone was in the vicinity of Long Beard's restaurant. R. 340, ll. 4-11. Around 1:30 a.m., the phone was in the vicinity of the phone booth. R. 342, ll. 15-21.

Finally, Donald DeMarino claimed that after Elvis went missing, he had a private conversation with Petitioner during which Petitioner showed him "a flip phone, gray flip phone." R. 374, ll. 4-14; R. 374, ll. 20-23. When the prosecutor asked DeMarino if Petitioner showed him "something on that phone that showed [DeMarino] that he knew more about Heather Elvis after she went missing," DeMarino answered, "I want to say yes." R. 375, ll. 6-9. Notably, DeMarino had *no idea* when this alleged conversation took place. R. 375, ll. 18-25.[7]

[7] Despite his alleged awareness of this information, DeMarino, who had been arrested "[t]en, maybe 15 times," did "[n]othing." R. 376, ll. 10-20. At some point while DeMarino was sitting in jail, he told the police about his alleged encounter with Petitioner. R. 378, ll. 17-23. DeMarino had a charge pending against him until June of 2017, just two months before Petitioner's trial. R. 377, ll. 1-16.

In closing, the solicitor argued that obstruction of justice is "hindering the police," "misleading" the police, or "doing anything to obstruct justice being served." R. 379, ll. 7-10. First, the solicitor described Petitioner's answers to Furr's questions as "deceptive" and misleading to the police when all the solicitor could point to were things Petitioner never said, such as calling Elvis first. R. 380, ll. 9-25. The solicitor alleged Petitioner told a "story to the police to hinder the investigation, obstruct, not tell vital information; not only not tell it, but mislead." R. 400, ll. 12-15.

Petitioner offering his phone to the police officers was a "turning" point for the solicitor. R. 401, ll. 3-5. That was "[s]uch a deliberate act to hinder and mislead them." R. 401, ll. 6-7. According to the solicitor, Petitioner allowing the police to examine his cell phone was "an intentional, deliberate act to hinder this investigation and mislead the police." R. 401, ll. 9-10. In the solicitor's opinion, Petitioner knew his cell phone records would not "show the pay phone" call to Elvis, and therefore, Petitioner was willing to permit law enforcement to inspect his cell phone. R. 403, ll. 20-25. By showing the police his phone that would not show his contact with Elvis by pay phone, Petitioner, according to the solicitor, was lying, deceiving, and deliberating hindering the investigation. R. 404, l. 24 – R. 405, l. 3.

Next, the prosecutor argued that Petitioner's deleting of a voicemail from Elvis, but keeping records of phone calls from and to Elvis was "[d]eliberately, intentionally misleading the police." R. 402, ll. 1-4. Of course, the prosecutor omitted that Petitioner actually told the police about the voicemail which he had deleted prior to the police asking him about Elvis.

The solicitor even argued that Petitioner voluntarily going to the police department on the afternoon of December 20, 2013, was because he wanted "to hinder and obstruct the police

and mislead them." R. 406, ll. 22-24. "He came to give a false story and lead them in the wrong direction." R. 406, ll. 24-25.

Petitioner's denial, according to the solicitor, to Cauble and Martin of calling Elvis from a payphone resolved any doubt that Petitioner was trying to mislead, obstruct, or hinder the police investigation. R. 407, l. 15 – R. 408, l. 2. Per the solicitor, "[t]hat statement alone shows his intent to mislead and obstruct that investigation." R. 408, ll. 9-10. Of course, within ten seconds, Petitioner admitted he had called Elvis from a payphone. R. 408, ll. 11-12. Then, Petitioner also admitted that he had seen Elvis, who had left notes on his vehicle. R. 408, ll. 19-24.

The solicitor claimed that when Petitioner spoke to the police, he left out that "he rode by her house that very night." R. 416, ll. 20-22. The solicitor indicated the jury knew Petitioner knew where Elvis lived because Petitioner "didn't say a dang word about going down" to the area where Elvis lived "that night." R. 416, ll. 16-19. This was enough to prove that Petitioner "knew she lived there," in the solicitor's estimation. R. 416, ll. 16-19. Additionally, Petitioner did not tell police that "he had been down by Long Beard's." R. 416, ll. 23-25. This was somehow significant because Elvis made that same route after Petitioner called her from a payphone. R. 417, ll. 1-3.

All of this indicated, according to the solicitor, that Petitioner "was misleading the police in a very deliberate way that night with his story of where he had been." R. 417, ll. 21-23.

Recognizing the weakness in her case – the lack of evidence that Petitioner's statements to the police did not actually hinder the investigation – the solicitor argued that Martin's testimony that "as soon as he told the lie," the police had "to start all over now" was enough to support an obstruction of justice conviction. R. 422, ll. 18-20. The police "had to start the

interview back over" when Petitioner admitted to not telling the police the truth, just ten seconds prior. R. 422, l. 25 – R. 423, l. 1. According to the solicitor, instead of re-starting the interview, the police "should have been out on good information looking for this woman that was missing." R. 423, ll. 104. This was "20 more, 30 more minutes lost" per the solicitor. R. 423, ll. 4-5.

Ultimately, the jury found Petitioner guilty as charged. R. 460, l. 24 – R. 461, l. 5. Judge Dennis sentenced Petitioner to ten years in prison. R. 475, l. 1; R. 1102. On September 1, 2017, Petitioner served his notice of appeal. Undersigned counsel filed a brief on Petitioner's behalf. Without the benefit of oral argument, the Court of Appeals affirmed Petitioner's conviction. State v. Moorer, Op. No. 2020-UP-198 (S.C. Ct. App. filed July 1, 2020). Following denial of his petition for writ of certiorari, Petitioner now seeks certiorari review in this Court.

ARGUMENT

The Court of Appeals erred by affirming the trial judge's denial of Petitioner's directed verdict motion based upon its conclusion that Petitioner's lies and omissions to police constituted obstruction of justice where the undisputed evidence showed no change in the police investigation as a result and no impact on any judicial proceedings.

Relevant facts

At the conclusion of the state's case, Petitioner moved for a directed verdict. R. 384, ll. 5-10.[8] Defense counsel and the judge agreed that the law concerning obstruction of justice "is kind of murky." R. 384, ll. 9-11. Specifically, defense counsel noted that "misrepresent" was undefined, leaving the offense vague. R. 392, ll. 3-7; R. 393, ll. 8-9. Additionally, defense counsel observed that when trying to determine what conduct by Petitioner was alleged to be obstructive, the evidence was "kind of murky also." R. 384, ll. 21-24.

[8] Based upon the state's evidence, defense counsel noted that the proper charge was the statutory offense of "false information to a police officer." R. 384, ll. 16-20.

First, defense counsel noted that the first officer who spoke to Petitioner indicated that he would have contacted "investigations" regarding the case. R. 385, ll. 1-4. However, the evidence revealed that the case was assigned to an investigator within seven hours of the first officer speaking to Petitioner. R. 385, ll. 4-6.

Second, defense counsel noted that the officer who met with Petitioner at his home took *no action* after the meeting. "He didn't have to go prove a lie. He didn't have to prove that [Petitioner] in some way impeded the investigation." R. 385, ll. 15-20. When the officers arrived at Petitioner's home, he allowed the officers to examine his cell phone, which revealed prior contact with Elvis and a telephone conversation with her the day before. R. 385, l. 21 – R. 386, l. 9.

Finally, defense counsel noted that "each of the cases involving obstruction of justice under South Carolina involve[d] a court official." R. 393, ll. 13-16. Neither the judge nor defense counsel could find a common law obstruction of justice case involving the conduct of a private citizen as obstructive. R. 393, ll. 17-24. More specifically, the case law concerning obstruction of justice concerned "the administration of justice" and court officers "hampering the administration of justice." R. 394, ll. 19-22.

The judge explained that the state's evidence was "a misstatement," that Petitioner "corrected." R. 387, ll. 14-16.[9] The judge indicated there was "no question" that Petitioner's misstatement to police about not calling Elvis from a payphone was corrected within ten seconds. R. 390, ll. 5-7. Remarking on implications that the content of the payphone call may have, the judge also expressed concern over the lack of definition for the term of impede for common law obstruction. R. 388, l. 1 – R. 389, l. 4. Ultimately, the judge concluded it was "a

[9] The judge indicated the state should have charged Petitioner with misprision of a felony, not obstruction of justice. R. 387, ll. 16-18.

jury issue of what is 'impede.'" R. 389, ll. 19-20. Additionally, the judge concluded the issue of "intent" was a matter for the jury. R. 391, ll. 24-25.

Concerning whether Petitioner's conduct as a private citizen could be considered obstruction of justice where the matter allegedly obstructed as a police investigation, Judge Dennis explained he could not "find anything in South Carolina law that deals with any type of investigation." R. 394, ll. 8-10. Despite finding cases dealing with individuals misleading law enforcement, none of those cases involved the criminal offense of obstruction of justice. R. 394, ll. 10-15.

Judge Dennis revealed that he was "feeling" that he should direct a verdict. R. 389, l. 25 – R. 390, l. 1. However, ultimately, Judge Dennis denied the motion for directed verdict. R. 395, ll. 14-17.

Reasons for granting certiorari

By affirming the trial judge's denial of Petitioner's motion for a directed verdict, the Court of Appeals equated lying to police with obstruction of justice where the state failed to present any evidence that Petitioner's statements had any effect on the police investigation or any impact on any judicial proceedings. State v. Moorer, Op. No. 2020-UP-198 (S.C. Ct. App. filed July 1, 2020). Petitioner's case presents the novel issue of whether a private individual may be charged with obstruction of justice where the alleged obstructive act does not occur in the context of a judicial proceeding. Rule 242(b)(1), SCACR. Additionally, Petitioner's case presents the novel issue of whether a private individual's lies and omissions to law enforcement in the context of a police investigation constitute obstruction of justice where the state failed to present any evidence that the private individual's conduct influenced the police investigation or any judicial proceedings. Rule 242(b)(1), SCACR.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963). See also State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012) (using the traditional circumstantial evidence jury charge to explain how a trial judge should evaluate circumstantial evidence at the directed verdict stage); State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009) (same).

The indictment alleged Petitioner "did in Horry County on or about December 20, 2013, intentionally do an act which prevented, obstructed, impeded, or hindered the administration of justice, in violation of the Common Law offense of Obstruction of Justice." R. 1100-1101. According to South Carolina law, "[u]nder common-law obstruction of justice, 'it is an offense to do *any* act which prevents, obstructs, impedes, or hinders the administration of justice.'" State v. Lyles-Gray, 328 S.C. 458, 464, 492 S.E.2d 802, 805 (1997) (quoting State v. Cogdell, 273 S.C. 563, 567, 257 S.E.2d 748, 750 (1979)). According to this Court, "[s]uccess in the effort to obstruct justice is not necessary to constitute the offense; it is sufficient if some act is done in furtherance of the endeavor." State v. Love, 275 S.C. 55, 62, 271 S.E.2d 110, 113 (1980).

"All the offences which fall under the general head of 'obstructing justice' are considered to be of a very grave and high character, for the obvious reason that they strike at the very foundation of authority and government, and tend by the strong arm to defeat the administration of justice and to overthrow all peace and order." State v. Bowen, 17 S.C. 58, 60 (1882); see also State v. Yarborough, 363 S.C. 260, 262, 609 S.E.2d 592, 593 (Ct. App. 2005) (prosecution for obstruction of justice where a lawyer offered an alleged victim $500 to drop charges against his client); State v. Caskey, 273 S.C. 325, 328, 256 S.E.2d 737, 738 (1979) (considering an obstruction of justice charge where a lawyer and a magistrate conspired to dismiss charges in exchange for money). While the law is not entirely clear on what constitutes the obstruction of justice, some guidance regarding the character of conduct that would support such a charge is available:

> Attempts to suborn a witness to commit perjury or to prevent his giving evidence, are offences against public justice; and there can be no well founded reason why the fabrication of evidence not involving perjury, or the destruction and suppression of that which is good, should not equally be so; they are alike calculated to pervert the public justice of this country, and to do individual injustice.

State v. DeWitt, 2 S.C.L. (1 Hill) 282, 287 (1834).

This Court upheld Cogdell's convictions for twenty-one counts of obstructing justice where Cogdell, while Mayor of the Town of Landrum, failed to report traffic convictions to the highway department as required by law. Cogdell, 273 S.C. at 565, 257 S.E.2d at 749. This Court concluded that the failure of Cogdell to report the convictions prevented the imposition of the penalties mandated by statutory law of individuals convicted of certain traffic offenses. Id. at 566-567, 257 S.E.2d at 750. Thus, this intentional failure by Cogdell to report traffic violations, as the statute required, constituted the common law offense of obstruction of justice. Id. at 567, 257 S.E.2d at 750. Similarly, this Court found the evidence sufficient to deny a directed verdict for Police Officer Lyles-Gray for obstruction of justice, where there was evidence, including Lyles-Gray's conduct at the crime scene and her mishandling of evidence, that Lyles-Gray was on notice that her daughter was a suspect in a crime. Lyles-Gray, 328 S.C. at 466, 492 S.E.2d at 806-807.

In State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980), this Court confronted an obstruction of justice case involving a magistrate. This Court concluded there was sufficient evidence to submit the case to the jury. Id. at 62, 271 S.E.2d at 113. The evidence showed the magistrate "told a driver's license examiner that, if he could get a driver's license for [the individual], it would be beneficial to the examiner." Id. Thereafter, the magistrate gave the individual an invalid temporary driver's license. Id. The evidence also showed the magistrate asked an investigator working at the public defender's office if he knew anyone who could stop an indictment, and the magistrate admitted he had paid money to a public employee to help prevent the prosecution of the individual. Id.

This Court confronted the interpretation of a city ordinance making it "unlawful for any person to assault, resist, hinder, oppose, molest, or interfere with any employee of the police department of the city, in discharge of official duties." City of Charleston v. Mitchell, 239 S.C.

376, 393, 123 S.E.2d 512, 520 (1961), rev'd on other grounds, 378 U.S. 551 (1964). When interpreting the ordinance, this Court cited a North Carolina case regarding the definition of "interfere." Id. (citing State v. Estes, 185 N.C. 752, 117 S.E. 581 (N.C. 1923)). The North Carolina court construed the word "interfere" to mean "to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty." Id. at 394-395, 123 S.E.2d at 521. The North Carolina court interpreted "obstruct" to mean "direct or indirect opposition or resistance to the lawful discharge of [an officer's] official duty." Id. at 395, 123 S.E.2d at 521. Using those definitions as guidance, this Court concluded the protesters did not interfere with the police officer in the discharge of his official duty because their conduct was "merely inaction." Id.

Considering a resisting arrest conviction, this Court explained that "[r]esisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it." City of Columbia v. Bouie, 239 S.C. 570, 574, 124 S.E.2d 332, 333 (1962), rev'd on other grounds, 378 U.S. 347 (1964). According to the testimony of the arresting officer, "the only 'resistance' on Bouie's part was his failure to obey immediately the officer's order, with the result that the latter 'had to pick him up out of the seat.'" Id. Examining the facts before it, this Court concluded that the defendant's "momentary delay in responding to the officer's command [did not] amount[] to 'resistance' within the intent of the law." Id.

Recently, the Court of Appeals addressed common law obstruction of justice. State v. Singleton, 430 S.C. 546, 846 S.E.2d 361 (Ct. App. 2020). When questioned about a shooting, Singleton falsely identified Antonio Barrett as the shooter. Id. at 548, 846 S.E.2d at 362. Based on solely on Singleton's statement, the police arrested Barrett. Id. at 549, 846 S.E.2d at 362. Only after two others involved in the shooting exonerated Barrett and implicated another person

did the state drop the charges against Barrett. Id. Thereafter, the state charged Singleton with obstruction of justice. Id. Although the Court of Appeals concluded Singleton's argument on appeal 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" was unpreserved for appellate review, the Court "note[d] 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." Id. at 551 n.3, 846 S.E.2d at 363 n.3. Thereafter, the Court held that "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." Id. at 553, 846 S.E.2d at 365 (emphasis added). After noting that Barrett was subjected to eight months of legal proceedings for a crime he did not commit, the Court held "Singleton's lies obstructed the administration of justice by temporarily preventing [the shooter]'s arrest, hindering the police investigation [of the shooting], and causing Barrett to be indicted and jailed for an attempted murder with which he had no involvement." Id. at 554, 846 S.E.2d at 365.

Here, the state failed to present any direct or substantial circumstantial evidence that Petitioner did any act that had the intent to prevent, obstruct, impede, or hinder the administration of justice. The state's entire case was built upon the obstruction of the administration of justice being defined as a citizen lying during a police investigation. Petitioner is unaware of any case in South Carolina equating the two. Typically, the administration of justice involves a matter concerning the courts. As described supra, it may involve bribing witnesses, bribing court officials related to criminal charges, falsifying police reports, and

knowingly falsely accusing someone against whom judicial proceedings are instituted. The state failed to prove that any of Petitioner's actions interfered with any matter before any court of law.

There is no dispute that Petitioner lied to Martin and Cauble when he denied calling Elvis from a pay phone. However, Petitioner immediately – within ten seconds – admitted to the call. The state failed to present any evidence that Petitioner's lie obstructed the administration of justice in any way. All of the evidence indicated the police investigation before and after Petitioner's interrogation was the type of investigation the police would have engaged in whether Petitioner spoke to law enforcement or not. At best, the state could rely upon the officer's testimony that had Petitioner not been caught in a lie to the police, then the police would have conducted a less than thorough investigation. In other words, by catching Petitioner in a lie, the police were forced to conduct a more thorough investigation. By any measure, having the police conduct a very thorough investigation surrounding the disappearance of a young woman would not be the equivalent of hindering or impeding the investigation. In fact, Petitioner's lie improved the investigation by forcing the police to investigate more thoroughly.

To the extent, the administration of justice could be equated with a police investigation, the state failed to present evidence that Petitioner did any act that had the intent to prevent, obstruct, impede, or hinder the police investigation.

Furr, who spoke to Petitioner around 1 a.m. on December 20, 2013, indicated that if he had known about a pay phone call from Petitioner to Elvis or that Petitioner talked to Elvis twice after midnight, Furr would have interviewed Petitioner personally and would have contacted investigations. These suppositions fail to support the state's charge. An investigator was placed on the case within hours of Furr talking to Petitioner, and there is no indication that Petitioner's statement to Furr would have been any different than the statement he provided to the two

officers who interviewed him that morning. Additionally, there was no evidence that Petitioner's omission of the pay phone call and other calls was intended to prevent, obstruct, impede, or hinder the administration of justice. In fact, there was no evidence regarding how Petitioner's omissions could have done so. Also, it must be noted that Furr was well aware that Petitioner and Elvis spoke by phone "last night," calling into question Furr's insistence that his conduct would have been different had he known about the pay phone and after midnight calls.

Scales, who interviewed Petitioner around 2 a.m. on December 20, 2013, indicated that had he known about the pay phone call, then the police would have tried to locate the pay phone and video around it. Petitioner's omission of the pay phone did not prevent, obstruct, impede, or hinder locating the pay phone or obtaining the video around the phone. From Elvis's phone records, the police were aware of the pay phone call and had directed an investigator to get the video around it. The video was obtained prior to the police meeting with Petitioner during the afternoon of December 20, 2013. Thus, there was no evidence that Petitioner's omission of the pay phone call to Scales and Cantebury was intended to prevent, obstruct, impede, or hinder the administration of justice regarding locating the pay phone and obtaining the video from the area around the phone.

Martin could only speak as to what "probably" would have occurred differently when describing how Petitioner's omission of the pay phone call affected the investigation. Martin claimed that if Petitioner had told the first officers with whom he spoke about the pay phone call, the police probably would have gone to the pay phone on the night of the incident and talked to witnesses. What Martin missed was that the first officer talked to Petitioner just hours before Martin talked to Petitioner, which was approximately two or three days after Elvis went missing and two or three days after the pay phone call. Had Petitioner told the first officer about the pay

phone call, there would have been no way the police could have gone to the pay phone "on the night of the incident" because the conversation was days after the pay phone call.

Martin vaguely claimed that the investigation would have been furthered by a couple of hours had Petitioner initially revealed the pay phone call. Martin could not identify how the investigation would have been furthered with the information, however.

Cauble's insistence that Petitioner lied about his whereabouts was belied by the record. Petitioner answered law enforcement's questions about his whereabouts to the best of his ability. He admitted to being near restaurants because he was working. He admitted he was unclear regarding everywhere he had been that night and early morning, which was reasonable and understandable, but he did provide accurate information about his whereabouts, including telling the police about going to gas stations and stores.

Cauble's claim that Petitioner intentionally misled law enforcement about the length of his relationship with Elvis was unproven and not connected to any obstruction of the investigation, or more importantly, the administration of justice. Similarly, Cauble's claim that Petitioner misled the police by claiming Elvis drove by his house when the phone records showed her phone did not use the tower by his house was an erroneous conclusion. The phone records only showed when the phone was in use with a voice call. The phone records could not show Elvis never drove by Petitioner's house. Cauble's conclusion was based upon a false premise.

Most telling of the state's case was that Cauble, the lead investigator, admitted that the police would have investigated the disappearance, in much the same way as they did, had Petitioner never even spoken to police. Further, Cauble admitted that Petitioner's omissions would not have resulted in a different investigation. He thought things "could have been

different," but he was not able to say what those things wer e or how Petitioner's omissions altered the investigation.

Quite simply, the state failed to present any direct evidence or substantial circumstantial evidence that Petitioner did any act that had the intent to prevent, obstruct, impede, or hinder the administration of justice. As defense counsel succinctly put it, the police "never did anything that they weren't going to do. Anything." R. 434, ll. 4-5.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court direct a verdict of acquittal in his favor.

Respectfully Submitted,

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of October, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
Oct 28 2020
SC Court of Appeals

Certiorari to the Court of Appeals
Appeal from Horry County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2020-UP-198 (S.C. Ct. App. filed July 1, 2020)
2014-GS-26-01121

THE STATE,

RESPONDENT,

V.

SIDNEY STCLAIR MOORER,

PETITIONER

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 Writ of Certiorari in this case has been served on Deborah R. J. Shupe, Esquire at the primary e-mail address listed in the Attorney Information System (AIS), which is dshupe@scag.gov; and Sidney Stclair Moorer, #373721, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 28th day of October, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER