

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Certiorari to Greenwood County

Honorable J. Mark Hayes, Circuit Court Judge
—————

JOVAN MITCHELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001004
—————

BRIEF OF PETITIONER
—————

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ISSUE PRESENTED

Whether trial counsel's deficient performance in failing to object to the charging of a lesser-included offense for which there was no evidence at trial prejudiced petitioner?

STATEMENT

On September 27, 2013, a Greenwood County grand jury indicted petitioner for grand larceny. App. 339. On October 1, 2013, petitioner was tried before the Honorable Donald B. Hocker and a jury. App. 1. Shannon S. Odom and Cam Morrow represented the State. App. 1. Carson Henderson represented petitioner. App. 1. The jury convicted petitioner of the lesser included offense of larceny in the amount of \$1,000.00 to \$5,000.00. App. 212. Judge Hocker sentenced petitioner to five years' imprisonment suspended upon the service of eighteen months and two years' probation. App. 238. Judge Hocker also ordered restitution in the amount of \$1,000.00. App. 238. Petitioner's conviction was affirmed on appeal. State v. Jovan Mitchell, Op. No. 2015-UP-543 (S.C. Ct. App. Nov. 25, 2015).

On December 12, 2016, petitioner filed a PCR application. App. 241. On February 26, 2018, the Honorable J. Mark Hayes held a hearing. App. 256. Ashley McMahan represented petitioner and Justin Hunter represented the State. App. 256. On April 25, 2018, Judge Hayes denied the application. App. 321. This Court granted certiorari and this brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Trial counsel's deficient performance in failing to object to the charging of a lesser-included offense for which there was no evidence at trial prejudiced petitioner.

Petitioner was charged with larceny under the version of the statute that existed at the time of the alleged theft in March 2010. See S.C. Code Ann. § 16-13-30 (2010) *amended by* 2010 Act No. 273, §16.E, effective June 2, 2010. That version of section 16-13-30 contained three tiers of larceny punishments. Id. Petit larceny was the theft of goods valued at less than one thousand dollars. Id. Theft of goods valued more than one thousand dollars was grand larceny. S.C. Code Ann. § 16-13-30(B) (2010). An offender could be punished up to five years' imprisonment if the goods were valued between one thousand dollars and five thousand dollars. S.C. Code Ann. § 16-13-30(B)(1) (2010). The punishment increased to a maximum of ten years' imprisonment if the goods were worth more than five thousand dollars. S.C. Code Ann. § 16-13-30(B)(2) (2010).

The PCR court correctly found trial counsel performed deficiently in failing to object to the giving of a lesser-included offense, but erred in finding no prejudice. App. 335-36. Appellant was originally charged with grand larceny in an amount exceeding \$10,000 for the theft of metal from an old mill site. App. 339. App. 36. The owner of the property testified that petitioner took a metal called "Niresist" which was "a real valuable metal." App. 49. The owner testified the value of the metal was over \$22,000. App. 50.

However, the owner did not give the police this value on the day of the incident. App. 63. On cross-examination, trial counsel confronted the owner with tickets from a scrap yard showing an amount under \$1,000. App. 69-73. The trial judge charged the jury on three

offenses of larceny: (1) over \$5,000; (2) between \$1,000 and \$5,000; and (3) less than \$1,000. App. 206. The jury convicted petitioner of the intermediate amount. App. 212.

After the verdict, trial counsel moved for a judgment of acquittal because the only amounts before the jury were the owner's testimony that the metal was worth more than \$5,000 and the tickets showing the metal was worth less than \$1000, but no evidence in between the two amounts. App. 215-219. The trial judge said there had been a discussion in chambers regarding the jury charge, but that petitioner failed to object on the record to charging "the three levels of larceny" or the verdict form and denied the motion. App. 216-17.

At the PCR hearing, trial counsel admitted he "dropped the ball and didn't object to it." App. 295-96. The PCR judge found trial counsel deficient for failing to object to the charge. App. 335-36. However, the PCR judge found no prejudice because the valuation of the metal was a question for the jury. App. 335-36. The court reasoned that because it was a question of fact whether the metal was worth between the amount claimed by the owner and the amount presented by the defense, the trial judge correctly instructed the jury on the lesser included offense of between \$1000 to \$5000.

The PCR court erred in its reasoning. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A lesser included offense instruction should be refused if there is no evidence to support it. Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

This was a criminal trial, not a civil trial. Therefore, the jury was not being asked to determine damages, but only whether there was evidence beyond a reasonable doubt to convict. The analogy that the jury was the factfinder and entitled to consider amounts in between the owner's value and the amount of the scrapyard tickets simply does not apply. Here, there was

only evidence that the metal was worth more than \$20,000 and there was only evidence that the metal was worth less than \$1000. No evidence existed to place the value in between these amounts.

Without clear authority allowing a jury to reach its own valuation independent of the evidence presented, the trial court should not have charged the intermediate offense. State v. Smith, 274 S.C. 622, 266 S.E.2d 422 (1980) supports this position. In Smith, the defendant's directed verdict on a grand larceny charge was denied by the trial judge. Smith at 623, 266 S.E.2d at 422. Grand larceny at the time required the theft of goods worth more than fifty dollars. Id. at 623, 266 S.E.2d at 423. The Court wrote, "The State must present credible evidence establishing each element of the crime charged." Id.

The defendant in Smith allegedly stole a "Helbros gold watch." Id. at 624, 266 S.E.2d at 423. The watch, which had a broken band, was entered into evidence. Id. The evidence also showed the watch was given to the victim by his grandfather and the victim wore it on dress occasions. Id. But the Court noted that no testimony existed in the record that the watch was worth more than fifty dollars. Id. The Court wrote, "Even reviewing the evidence in the light most favorable to the State **the value of the watch was left entirely to conjecture and speculation by the jury** and the lower court should have granted the motion for a directed verdict as to the charge of grand larceny." Id. (emphasis added).

The lesson from Smith is that a jury cannot base its determination of value on its own speculation regarding an item's value. The gold watch was in evidence. The Smith jury got to handle and examine the watch for themselves during deliberations. The Court in Smith could have chosen a rule that allowed the jury to come to its own determination that the watch was

worth more than fifty dollars based on its own examination of the watch and their collective experiences, but declined to allow a jury such freedom without supporting testimony.

The difference between Smith and this case is that testimony placed the metal's value only in the upper tier and lower tier of the larceny statute. It seems logical to allow the jury to conclude the owner overstated the metal's value and the defense understated the value and therefore place the value in the middle. Juries do this all the time in civil cases when they evaluate damages. Juries also sometimes award a plaintiff more in damages than a plaintiff explicitly asks them to award and this is allowed. But Smith shows this commonplace practice in civil cases does not carry over to criminal cases.

In a case that is not precedent for this Court, a federal court dealt with this issue by concluding the opposite—that a jury can substitute its own judgment for the testimony about an object's value under the larceny statute. See Roller v. McKellar, 711 F. Supp. 272, 275-76 (D.S.C. 1989). At issue in Roller was whether the value of “an operational tractor trailer truck” was more than two hundred dollars. Id. The parties in Roller agreed that no testimony placed the value of the truck over two hundred dollars. Id. But the conclusion that the district court drew from Smith, which it cited, was that no doubt existed that the truck was worth more than two hundred dollars. Id. at 277-78. Citing a federal district court opinion from Virginia, the Roller judge said the jury could use its own experience to find a value for the truck. Id.

Roller fails to take into account the standard of review that the Court applied in Smith. The Court in Smith viewed the evidence in the light most favorable to the State, which could have given the benefit of the doubt to the jury's assessment of the watch's value. But the Smith Court declined to do so. The Roller judge's failure to account for this reasoning, plus his reliance on out-of-state precedent, makes the Roller decision unpersuasive.

In State v. Humphrey, 276 S.C. 42, 43-44, 274 S.E.2d 918, 918-19 (1981), the trial judge forgot to charge the jury on an element of the offense of grand larceny—that the value of the item taken was more than fifty dollars. The Court found any error harmless. Id. The Court reasoned that the only testimony about value was the owner’s who testified the goods were worth more than five hundred dollars. Id. Humphrey shows adherence to Smith’s preference for testimony about value. Had the jury been allowed to fix the value of the goods itself, then the error likely could not have been harmless in Humphrey.

The Supreme Court emphasized in 2013 that the testimony of an owner about the value of an item is sufficient to survive directed verdict. State v. Brown, 402 S.C. 119, 129-34, 740 S.E.2d 493, 497-501 (2013). Brown involved the value of two cars that were crushed for scrap metal and not available to enter into evidence. Id. The owners of the cars each testified that the cars were worth more than one thousand dollars. Id. The defendant moved for a directed verdict primarily based on the lack of any documentation by the owners. Id. Relying on inverse condemnation cases, the Court held that owners are competent to testify about the value of their items. Id.

Brown does not alter the reasoning here. The owner of the scrap metal testified, but only gave the value as over the amount for grand larceny. He did not testify to an intermediate amount. No testimony provided evidence to support the intermediate charge. Had the State wanted to bolster its case for the intermediate larceny charge, it could have called an expert witness to assess the value of the metal in that range. The State chose not to do so.

Therefore, with no evidence, the trial court clearly erred in giving the charge. Had trial counsel preserved his directed verdict motion, petitioner’s conviction would have been reversed on appeal. See McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (holding failure to

preserve issue for appeal constituted deficient performance). Furthermore, appellant cannot now be retried for the greater valuation of grand larceny. See State v. Cooley, 342 S.C. 63, 69, 536 S.E.2d 666, 669-70 (2000). In Cooley, the defendant was tried for murder and convicted of voluntary manslaughter. Id. The Court held that no evidence supported the voluntary manslaughter conviction. Id. The defendant had been acquitted of murder, had “run the gauntlet” of the greater offense, and double jeopardy prevented his retrial for murder. Id.

Under the rule from Cooley, because petitioner has been acquitted of the greater offense, double jeopardy prevents his retrial on that grand larceny charge. It also prevents his retrial on the intermediate offense as he has “run the gauntlet” on it and no evidence was presented. Petitioner has shown prejudice and his conviction must be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse petitioner's conviction.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2021.

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CERTIFICATE OF SERVICE
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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 Brief of Petitioner in the above-referenced case has been served upon Michael J. Neubauer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); on Jovan Alexander Mitchell, at 719 Truett Street, Greenwood, SC 29646, this 29th day of March, 2021.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER