

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Colleton County

Honorable William H. Seals, Circuit Court Judge
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MAURIO D. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001106
—————

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI
—————

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QUESTIONS PRESENTED

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2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof?

3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the trial judge's preliminary comment to the jury that a trial is a search for the truth to make sure that justice is done between the parties because this language diluted the State's burden of proof?

ARGUMENTS IN REPLY

- 1. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the trial judge’s instruction to the jury on accomplice liability/the hand of one is the hand of all when the State failed to show a pre-arranged common design or purpose between the co-defendant and Petitioner to attempt to kill the police officer who was chasing the vehicle driven by Petitioner.**

The evidence does not support a jury instruction on accomplice liability, the hand of one is the hand of all. The State’s evidence at trial showed that Petitioner was the driver of black car that a deputy tried to stop for failing to use a turn signal. (App. p. 63, line 10 – p. 64, lines 1-25). Petitioner failed to stop and a high-speed chase ensued. There were two sets of shots fired at the officer at different times. As to the first set of shots, during the chase the passenger, co-defendant Bronson Shelley, fired a gun at an officer who was pursuing them. (App. p. p. 92, line. 19 – p. 93, lines 1. 7; p. 96, line 22 – p. 97, lines 1-7). Respondent argues that, “Here there was abundant evidence Petitioner and Codefendant acted in concert to accomplish the illegal purpose of failing to stop for a blue light.” (Return to Petition for Writ of Certiorari p. 8). The State presented no evidence, however, that the passenger acted in concert with the driver to fail to stop for a blue light. Additionally, the State presented no evidence that the driver acted in concert with the passenger in shooting at the officers. Petitioner ‘s act of not stopping for the officer is not sufficient to establish that he acted in concert with the passenger to attempt to murder the officer. At this point the unequivocal evidence established that Petitioner, as driver, failed to stop for a blue light and the co-defendant, as the passenger, shot at the officer.

In State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020), the South Carolina Supreme Court wrote, “For an accomplice liability instruction to be warranted, the evidence must be ‘equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.’ Barber v.

State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011).” In Wilds v. State, 407 S.C. 432, 438–39, 756 S.E.2d 387, 390 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

Our supreme court has noted that “[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.” Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In Barber, as in the instant case, four men committed an armed robbery, and, during the robbery, one of the men shot two of the victims. Id. at 234–35, 712 S.E.2d at 437–38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the robbery. Id. at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. Id. at 438. Our supreme court noted “[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place.” Id. at 237, 712 S.E.2d at 439. Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because “the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter.” Id. at 236, 712 S.E.2d at 439. In making this finding, the supreme court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic experts testified fired all the shots during the robbery. Id. at 237, 712 S.E.2d at 439.

In Washington the Court found the trial judge erred in giving an accomplice liability charge when there was no evidence that Washington’s accomplice was the shooter. In Wilds the Court of Appeals held, “Accordingly, because no evidence in the instant case indicated anyone other than Wilds was the shooter, we find the PCR court correctly determined the trial court erred in charging the jury on accomplice liability.” 407 S.C. at 440, 756 S.E.2d at 391. The accomplice liability instruction in the present case is inapplicable to the first set of shots because the evidence unequivocally established that the passenger was the shooter and there was no evidence that Petitioner, as the driver, acted in concert with the passenger to attempt to murder the officer. Fleeing from the police is not circumstantial evidence that Petitioner joined the passenger or pre-arranged with the passenger to attempt to murder the officer.

The black car was eventually struck by the patrol car and as the car traveled backwards out of control before flipping over, a second set of shots was fired from the black car. (App. p. 97, line 8 – p. 98, lines 1-20). The officer was unable to identify who fired the second set of shots. After the black car wrecked both Petitioner and the co-defendant fled. Three guns were found at wreck scene. One gun, a .38 special, was found on the ground after the car was rolled upright. (App. p. 105, line 21 – p. 106, lines 1-18, p. 107, line 19 – p. 108, lines 1-4). Another gun, a Bursa Firestone .380, was found lying in plain view while the car was still upside down. (App. p. 109, lines 1-4; p. 133, lines). This gun was found with the slide back indicating all bullets had been fired from the weapon. (App. p. 109, lines 1-20; p. 133, lines 11-16). A third gun, a Colt .45, was found inside the glove box of the black car. (App. p. 111, line 11 – p. 112, lines 1-3). The jury found Petitioner guilty of the attempted murder of the officer but found Petitioner not guilty of the associated weapon charge.

With regard to the second set of shots, it is unclear who fired these shots. The accomplice liability instruction, however, is also inapplicable to the second set of shots because there was no evidence that Petitioner acted in concert with the passenger to attempt to murder the officer. The three guns found at the wrecked car and the fact that both Petitioner and the co-defendant passenger fled the scene does not establish that Petitioner joined with the co-defendant to attempt to murder the officer.

“‘Under the ‘hand of one is the hand of all’ theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.’ Mattison, 388 S.C. at 479, 697 S.E.2d at 584. To support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him

when the robbery took place. See State v. Dickman, 341 S.C. 293, 295–96, 534 S.E.2d 268, 269 (2000).” Barber v. State, 393 S.C. 232, 236–37, 712 S.E.2d 436, 439 (2011). Even if Petitioner, as the driver with control of the car, and the passenger could have joined together and had some common design to flee from the police, as argued by Respondent, the shooting is not incidental to any assumed plan to evade law enforcement. If Petitioner shot the second set of shots, a theory the jury rejected by finding him not guilty of the weapon charge, he shot alone and was not acting in concert with the passenger. If the passenger shot the second set of shots, he acted alone. Under the facts of this case the judge erred in charging the jury with accomplice liability, hand of one is the hand of all.

State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), cited by Respondent, involved the improper admission of testimony and the improper admission of a photograph not an improper instruction on the hand of one is the hand of all, accomplice liability. In determining that the error was not harmless, the South Carolina Supreme Court differentiated between the “hand of one, the hand of all theory” and accomplice liability writing:

A jury could have found appellant guilty of victim's murder under several theories presented by the State. First, appellant would be guilty of murder if he actually shot victim. Second, under the “hand of one, the hand of all theory,” appellant would be guilty of murder if he aided Derrick. Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. To admit evidence under this theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981). Third, appellant would be guilty of murder if the jury found he was an accomplice. Under accomplice liability theory, “a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.” State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989); *see also* State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) (to be liable as an aider or abetter, the participant must be chargeable with knowledge of the principal's criminal conduct; mere presence at the scene is not sufficient to establish guilt as an aider or abetter).

Langley, 334 S.C. at 648–49, 515 S.E.2d at 100–01.

The Langley case involved a turf war between two groups of drug dealers, the Charleston boys and the New York boys. Two of the New York boys, Langley and Derrick left the drug house together, confronted the deceased, a friend of the Charleston boys, and either Langley or Derrick fatally shot him. In Langley there was a question about who actually shot and evidence that Langley and Derrick acted together. In contrast, in the present case there is no evidence, direct or circumstantial, that Petitioner acted with the passenger in attempting to murder the officer. Petitioner was fleeing from the police. The passenger was shooting at the police.

In State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct.App. 2002), the South Carolina Court of Appeals found that the trial judge properly charged the “hand of one is the hand of all” doctrine to the jury because there was evidence that Condrey and West were acting pursuant to a plan to steal shoes. In contrast, in the present case the State failed to present any evidence that Petitioner and the passenger were acting pursuant to a plan to attempt to murder the officer. In State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010), the South Carolina Court of Appeals found that the trial judge properly denied the motion for directed verdict because there was evidence that Adams Gibson, the defendant, and his brother acted in concert to assault the group from Winnsboro. The Court of Appeals wrote:

In this case, the State does not contend Adams fired the fatal shot. Rather, the State simply maintains there is sufficient circumstantial evidence that Adams agreed to, and did, act in concert with Jacques to assault the Winnsboro group; thus, sufficient evidence of Adams's guilt existed to submit the issue to the jury under the hand of one is the hand of all theory. In order to demonstrate that Adams and Jacques intended to join together in a common design to achieve an illegal purpose, the State maintains: (1) Adams called Jacques to the scene; (2) when Jacques arrived he went inside the bar and Adams pointed out the group of Winnsboro men, rather than leaving straight away; (3) Williams testified Adams approached Jacques's white sedan in the parking lot and retrieved a gun moments

before the shooting; and (4) although separately, the two men fled the scene after the shooting.

Gibson, 390 S.C. at 354–55, 701 S.E.2d at 770. In the present case the State failed to present evidence that Petitioner acted in concert with the passenger to attempt to murder the officer.

Trial counsel was ineffective for requesting and then not objecting to the jury instruction on accomplice liability, hand of one is the hand of all. Petitioner was prejudiced by the deficient performance. The jury appears to have struggled with the instruction, requesting a re-charge on accomplice liability. (App. p. 209, line 23 – p. 210, 211, 212, 213, lines 1-11). The jury found Petitioner not guilty of the weapon charge which reflects that the jury did not believe that Petitioner was the shooter. The jury appears to have found Petitioner guilty based solely on a theory of accomplice liability, a theory that did not apply under the facts of this case. There is no evidence that Petitioner joined with the co-defendant to attempt to murder the officer. There is a reasonable probability that, but for the accomplice liability charge, the outcome of the trial would have been different. The PCR judge erred in refusing to grant relief based on trial counsel's deficient performance.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof.

During the erroneous instruction on accomplice liability, hand of one is the hand of all the trial judge gave the following example:

For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one – only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted together in concert to commit a burglary.

(App. p. 193, line 25 – p. 124, lines 1-8). In both the original PCR application and the amended application Petitioner alleged that trial counsel was ineffective for failing to object to the example given by the trial judge. (App. pp. 283-284; p. 295). The issue was addressed during the PCR hearing. (App. p. 328; p. 369; pp. 378-379). In the order of dismissal the PCR judge mistakenly referred to the example as being given by the prosecutor. (App. p. 418). The mistake was brought to the attention of the PCR judge in the Rule 59(e) motion. (App. p. 422). The PCR judge denied the motion to alter or amend despite the factual error. (App. pp. 425-426).

Respondent does not address the factual error in the order of dismissal. Respondent argues that the judge's example was not an improper comment on the facts and even if it is, Petitioner was not prejudiced by the error because it is undisputed that Petitioner was the driver of the car. (Return to Petition for Writ of Certiorari p. 9). The example constitutes an improper comment on the facts because Petitioner was the driver. While it is undisputed that Petitioner was the driver, his role in the attempted murder as the driver is disputed. Based on the example given by the judge, the jury could have found liability for the attempted murder based solely on Petitioner driving the car and failing to stop for police. The example further complicated the error in the erroneous instruction.

Respondent's reliance on State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978), is misplaced. In Norris the South Carolina Supreme Court wrote:

In his instructions on assault and battery of a high and aggravated nature, the judge noted several of the facts in the case such as the disparate weights and ages of the appellant and the victim. Appellant asserts this violated Article V, Section 17 of the South Carolina Constitution which prohibits a judge from charging juries on matters of fact. We disagree.

The constitutional provision was designed to preserve inviolate the jury's fact finding function. All questions of fact are to be decided exclusively by the jury, uninfluenced by any expressions of opinion by the judge. State v. White, 15 S.C.

381 (1881); State v. Pruitt, 187 S.C. 58, 196 S.E. 371 (1938); State v. Thorne, 237 S.C. 248, 116 S.E.2d 854 (1960).

However, where the facts stated in a charge are not in dispute, the instruction is not erroneous. Turner v. Lyles, 68 S.C. 392, 48 S.E. 301 (1904); Riser v. Southern Ry., 67 S.C. 419, 46 S.E. 47 (1903).

The weights and ages of the appellant and the victim were not questions of fact for the jury. Appellant admitted his age and weight on cross-examination. Accordingly, we affirm, concluding the trial judge's reference to undisputed facts did not violate Article V, Section 17 of the South Carolina Constitution.

270 S.C. at 552–53, 243 S.E.2d at 440. In contrast, in the present case Petitioner never admitted to being a getaway driver. Petitioner was fleeing from the police when the passenger in his car started shooting. Petitioner's role in the attempted murder as a driver was in dispute. There was no evidence of a pre-arranged plan to attempt to murder the officer. The improper example made the erroneous instruction on accomplice liability, hand of one is the hand of all even more prejudicial.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the trial judge's preliminary comment to the jury that a trial is a search for the truth to make sure that justice is done between the parties because this language diluted the State's burden of proof.

In her preliminary comments to the jury the trial judge said, "While all of these things may be true at times, this trial is not for entertainment. It is a fundamental part, maybe the fundamental part, of our democracy, a search for the truth in an effort to be sure that justice is done between the parties before the Court. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite of what you may have seen on television or in the movies or read in books." (App. p. 49, lines 15-23). Trial counsel did not object to the comments.

Trial counsel was ineffective for failing to object to the search for the truth language. Respondent argues that, “On the contrary, Petitioner was not prejudiced by the search for the truth language in this case because the language did not affect the outcome of the Petitioner’s trial.” (Return to Petition for Writ of Certiorari p. 11). The preliminary comments diluted the State’s burden of proof beyond a reasonable doubt, especially when viewed with the erroneous jury instruction on accomplice liability, hand of one is the hand of all.

Due Process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). The Due Process Clause of the Fourteenth Amendment “safeguard[s] against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978). The preliminary comments to the jury that a trial is a search for the truth combined with the erroneous jury instruction on accomplice liability, hand of one is the hand of all unconstitutionally diluted the State’s burden of proof beyond a reasonable doubt. A constitutionally deficient reasonable doubt instruction cannot be harmless error. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993).

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

s/ Kathrine H. Hudgins
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of June, 2021.