STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TRAVIS LATRELL LAWRENCE,

APPELLANT

APPELLATE CASE NO. 2018-000989

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

Opinion No. 5863

PETITION FOR REHEARING

On October 6, 2021, this Court affirmed Appellant's conviction for attempted murder. State v. Lawrence, Op. No. 5863 (S.C. Ct. App. filed Oct. 6, 2021). This Court affirmed the trial court's finding that Terrell Bennett, who was charged along with Appellant, but was not on trial, could exercise his Fifth Amendment right against self-incrimination even where the proposed testimony would not expose him to criminal sanction. Pursuant to Rule 221(a), SCACR,

Appellant respectfully seeks rehearing of this ruling based on the significant facts and legal doctrines overlooked or misapprehended by this Court in arriving at this conclusion.[1]

The solicitor met with Bennett twice prior to Appellant's trial. R. 148, ll. 1-10; R. 152, l. 25 – R. 153, l. 12. The meetings were not memorialized. R. 147, ll. 19-21. While the first meeting was considered unproductive by the state's investigator, the second meeting bore greater fruit. R. 148, ll. 6-21; R. 149, l. 4 – R. 150, l. 20. When defense counsel learned about these meetings from Bennett's counsel, defense counsel contacted the solicitor. R. 153, l. 23 – R. 154, l. 16; R. 156, ll. 6-8. The solicitor informed defense counsel that he had not taken any notes during the meetings. R. 154, ll. 18-21.

Later, after learning from Bennett's counsel that Eric Melendez, the solicitor's investigator, was present for the meetings, defense counsel contacted the investigator. R. 146, ll. 20-24; R. 155, ll. 3-8. What occurred during this contact was disputed as demonstrated by defense counsel's questioning of the investigator during an *in camera* hearing. Most importantly, the investigator denied telling defense counsel that Bennett stated that the alleged victim, Clayton Baxter, rushed or lunged at Appellant. R. 151, ll. 5-17. The investigator also did not recall telling defense counsel that Bennett's statement indicated Appellant acted in self-defense. R. 151, l. 22 – R. 152, l. 16.

Appellant wanted to call Bennett as a witness. R. 127, ll. 7-9. However, Bennett indicated he wanted to invoke his Fifth Amendment right to silence. R. 128, ll. 4-8; R. 135, ll. 17-19. Therefore, Judge Murphy held an *ex parte*, *in camera* hearing to determine whether Bennett could invoke his right to silence; in essence, the judge inquired whether the proposed

[1] Appellant does not seek rehearing regarding the second issue concerning the erroneous admission into evidence that Terrell Bennett was stopped by the police three months before the alleged incident for which Appellant stood trial.

testimony would be incriminating of Bennett. R. 127, ll. 18-25; R. 129, ll. 1-6; R. 135, ll. 23-24; R. 136, ll. 9-12.

Outside the presence of counsel, Judge Murphy personally questioned Bennett. Bennett explained that he spoke with the solicitor shortly before Appellant's case was called to trial. R. 136, l. 23 – R. 139, l. 17. The judge asked Bennett to tell her what he told the solicitor during that meeting. R. 139, ll. 18-21. Bennett explained that he told the solicitor "the truth of what happened." R. 139, ll. 22-25. Bennett and Appellant went to Baxter's home to buy marijuana. R. 140, ll. 1-2. When the pair arrived, Baxter attacked them. R. 139, l. 25 – R. 140, l. 1. Bennett believed Appellant and Baxter had a "history" because as soon as Bennett and Appellant went into Baxter's house, Baxter "attacked [Appellant] first." R. 140, ll. 2-9. As soon as Baxter saw Appellant, "his whole demeanor just flip[ped] out of nowhere like he was frustrated." R. 140, ll. 17-20.

Bennett's counsel admitted Bennett's testimony would "provide or bolster" a self-defense case for Appellant. R. 143, ll. 6-8. Further, she admitted that she would "probably call" Bennett to testify in his defense at his trial if the state ever called his charges to trial. R. 145, ll. 2-8. However, she argued Bennett would be asked to give information "that could potentially be used against him" if he were to testify on behalf of Appellant. R. 143, ll. 8-10.

Judge Murphy acknowledged that Bennett's testimony showed his actions and Appellant's actions were in self-defense. R. 141, ll. 15-20. Nevertheless, she ruled that Bennett's statement that he was going to Baxter's home to buy marijuana would implicate him in a crime. R. 141, ll. 1-5. She also ruled that Bennett was "putting [himself] at the scene of this alleged crime," implying that such was incriminating of Bennett. R. 141, ll. 11-14. Thus, Judge Murphy found Bennett's answers to the questions *she* posed "would be indicative that would

establish a hazard of incrimination for him." R. 159, ll. 2-5. She further determined "his silence [was] certainly justified in this matter" because "if he were allowed to testify, that he would incriminate himself." R. 159, ll. 5-8. She concluded that even if "those specific single questions may not be overtly incriminating" they "would be incriminating through any further confessional proof." R. 159, ll. 8-11. Thus, she permitted Bennett to assert his Fifth Amendment right to silence *in toto* and prohibited Appellant from calling him as a witness. R. 159, ll. 11-13.

This Court affirmed Judge Murphy's determination. With no details, this Court concluded "[t]he hazard of incrimination was openly apparent." State v. Lawrence, Op. No. 5863 (S.C. Ct. App. filed Oct. 6, 2021). Further, this Court held "Bennett was not facing just a risk of prosecution; he was already being prosecuted as [Appellant]'s indicted co-defendant." Id. Boldly, this Court declared, "Almost anything Bennett could utter about the incident would likely be used against him at his upcoming trial." Id. Although this Court recognized that "Bennett's proposed testimony was at odds with what the State was contending was the truth," which implicitly acknowledged that Bennett's testimony would have supported Appellant's claim of self-defense, this Court appeared to reason that this fact supported a finding that Bennett's testimony was self-incriminating. This is simply not the test.

No person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[2] "The essence of this basic constitutional principle is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Estelle v. Smith, 451 U.S. 454, 462 (1981); see also Kastigar v. United States, 406 U.S. 441, 444 (1972) (explaining the privilege "reflects a complex of our fundamental values and

[2] The South Carolina Constitution also provides for protection against compelled self-incrimination. S.C. Const. art. I, § 12.

aspirations, and marks an important advance in the development of our liberty"). The privilege is "accorded liberal construction in favor of the right it was intended to secure," and may be claimed when a witness "has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). "The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to answers furnishing a link in the chain of evidence needed to prosecute an individual." Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (citing Hoffman, 341 U.S. at 486); see also Maness v. Mayers, 419 U.S. 449, 461 (1975); United States v. Pardo, 636 F.2d 535, 544 (D.C. Cir. 1980) (explaining that "a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea arrangement").

"The privilege against self-incrimination, one of our most cherished fundamental rights, is jealously guarded by the courts." North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987). Examining the validity of the assertion of the privilege, the Sixth Circuit held a valid assertion "exists where a witness has reasonable cause to apprehend a real danger of incrimination." In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983). "While the privilege is to be accorded liberal application, the court *may* order a witness to answer if it *clearly* appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge." Id. (emphasis added).

For a court to "overrule the claim of privilege, it must be [p]erfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded [c]annot possibly have such tendency." Commonwealth v. Carrera, 227 A.2d 627, 629 (Pa. 1967). "[I]f the witness, upon interposing his

claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Hoffman, 341 U.S. at 486.

According to the South Carolina Supreme Court, "[i]n determining whether the information is incriminating," there are "at least two categories of potentially incriminating questions." Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117. "First, there are questions whose incriminating nature is evident on the questions' face in light of the question asked and the surrounding circumstances." Id. at 23, 659 S.E.2d at 117-118. "Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof." Id. at 23, 659 S.E.2d at 118. A court must answer "whether there is a reasonable possibility that requiring a party to answer a certain question would provide information that could be used against the party in a criminal proceeding or would lead to the discovery of such information." Id. at 24, 659 S.E.2d at 118. "[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness's claimed fear of future prosecution." Id. at 26, 659 S.E.2d at 119.

This Court affirmed Judge Murphy's finding that Bennett could invoke his right against self-incrimination and refuse to testify because his proposed testimony (1) placed him at the scene of a crime and (2) was an admission that he was going to buy marijuana. While this Court's opinion provided no information regarding the proposed testimony or explained what portions of the proposed testimony would be incriminating, it must be assumed this Court agreed with the trial judge that these two areas posed the risk of self-incrimination for Bennett. Petitioner respectfully requests this Court rehear this matter because Bennett's proposed

testimony was not self-incriminating as demonstrated when his actual proposed testimony is examined.

Presence at the scene of a crime

Bennett admitted to being present when Appellant acted in self-defense against Baxter's unprovoked attack. As Bennett explained, he *and* Appellant acted in self-defense. The only crime committed, according to Bennett's proposed testimony, was Baxter's assault of Appellant and Bennett. Being the victim of a crime is not incriminating of the victim. Furthermore, merely being present at the scene of a crime is not incriminating, even under an accomplice liability theory. State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987). "'Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.'" State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). The trial judge – and this Court – erred in finding Bennett's mere presence at the scene of a crime, especially if the only crime was the one for which Bennett was the victim, was somehow incriminating of Bennett.

Attempting to purchase marijuana

Likewise, the conclusion that Bennett's testimony that he went to Baxter's residence to purchase marijuana exposed him to criminal liability was legal error. Bennett did not admit to buying or possessing marijuana; thus, the only consideration left is whether his testimony incriminating him in attempting to purchase marijuana in violation of section 44-53-370 of the South Carolina Code. Under South Carolina law, it is unlawful for a person to attempt to purchase a controlled substance. S.C. Code Ann. § 44-53-370(a)(1).

"Generally, the mens rea of an attempt crime is one of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime." State v.

Reid, 383 S.C. 285, 292, 679 S.E.2d 194, 198 (Ct. App. 2009) (citing State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "'In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.'" Id. (quoting State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)). Additionally, "the defendant's specific intent" must be "accompanied by some overt act, beyond mere preparation, in furtherance of the intent." Id.

In Reid, this Court discussed how "[c]ourts have struggled to determine the point at which conduct moves beyond the preparatory stage to the perpetration stage." Id. at 293, 679 S.E.2d at 198. Further, "[c]ases in South Carolina do not clearly establish any absolute guiding test for our trial courts to employ in resolution of this issue." Id. After discussing other tests used by other courts, this Court looked to *dicta* from the South Carolina Supreme Court in State v. Quick, 199 S.C. 256, 259-260, 19 S.E.2d 101, 102-103 (1942). Id. at 296, 679 S.E.2d at 199. This Court relied upon the Supreme Court's notation that "'preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made.'" Id. (quoting Quick, 199 S.C. at 260, 19 S.E.2d at 103). Further, the Supreme Court, as explained by this Court, "went on to articulate 'the act' is to be liberally construed, and in numerous cases it is said to be sufficient that the act go far enough toward accomplishment of the crime to amount to the commencement of its consummation." Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102). Finally, this Court noted that according to the Supreme Court, "'the act need not be the last proximate step leading to the consummation of the offense.'" Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102).

According to this Court, "no definite rule as to what constitutes an overt act for attempt purposes can safely be laid down and each case is dependent upon its particular facts and the inferences which the jury may reasonably draw therefrom." Id. at 298, 679 S.E.2d at 200. The only self-incriminating evidence gained from Bennett's testimony was that he went to Baxter's house to buy marijuana. There was no evidence from his testimony that he acted in any way in furtherance of that act. At most, his testimony indicated that his purpose in going to Baxter's house was to purchase marijuana, but that is far cry from an overt act. Perhaps going to Baxter's home could be preparation as it may be "arranging the means or measures necessary" to purchase the marijuana, but it was not a direct movement toward the commission of a crime. In light of Baxter's testimony that he did not sell drugs and the officer's testimony that less than one ounce of marijuana was found in Baxter's residence, there seems to have been no pre-arrangement made by Bennett in hopes of buying marijuana from Baxter – there was none to buy and he did not sell it.

This Court erred in affirming the trial judge's finding that Bennett's proposed testimony would expose him to criminal liability, and therefore, allowing him to invoke his right not to incriminate himself. Being merely present at the scene of a crime is not a crime, and there was no evidence of an overt act for an attempt to purchase marijuana. Quite simply, the judge erred, and Appellant was denied the opportunity to present testimony from an eyewitness that Appellant acted in self-defense. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing to address the specific facts presented in this case, particularly in light of this Court's opinion's omission of any discussion of Bennett's proposed testimony, and the application of the controlling case law to those facts.

Respectfully Submitted,

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

This 21st day of October, 2021.

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Maite Murphy, Circuit Court Judge

THE STATE,

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APPELLATE CASE NO. 2018-000989

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) which is bschumacher@scag.gov; and Travis Latrell Lawrence, #342217, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of October, 2021.

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

ATTORNEY FOR APPELLANT