ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ANTHONY HACKSHAW,

APPELLANT

APPELLATE CASE # 2010-177006

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

Opinion No. 2013-UP-147

PETITION FOR REHEARING

On April 10, 2013, this Court affirmed Appellant's convictions of murder, assault with intent to kill, and use of a firearm during the commission of a violent crime and sentences in an unpublished opinion. State v. Hackshaw, Op. No. 2013-UP-147 (filed April 10, 20130). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter.

One of the issues raised by Appellant was that the trial judge erred in permitting the prosecution to introduce a prior statement of a witness where the witness refused to testify regarding anything to do with Appellant's case. Appellant alleged this violated his Sixth Amendment right to confront the witnesses against him. Concerning this issue, this Court cited State v. Stokes, 381 S.C. 390, 401-402, 673 S.E.2d 434, 439 (2009) for the proposition that the "the Confrontation Clause

'guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish.'" This Court's opinion misapprehends the United States Supreme Court's jurisprudence governing the Confrontation Clause and the facts presented at Appellant's trial. Essentially, this Court held Appellant had an opportunity to cross-examine the witness, but the facts presented demonstrate the witness unequivocally refused to answer questions related to Appellant's criminal case, which denied Appellant the opportunity to cross-examine him.

At trial, the prosecution called Torrian Gleaton to the stand. R. 757, l. 21. He was a critical witness for the state because, according to a statement he gave to police, Appellant made highly incriminating statements to him about the shooting. When he first took the stand, the state elicited from him that he had pled guilty recently in federal court to possession of a firearm by a felon, and that he had an outstanding warrant in Sumter County for unlawful possession of a weapon. He also had a conviction for possession of ecstasy. R. 758, l. 17 - R. 760, l. 9.

After he answered these preliminary questions about his record, the prosecution then asked him whether he knew Ellison Hudson. At that point, he testified that he did not want to cooperate. R. 760, ll. 11-14. At least seven times, he stated that he did not want to cooperate. R. 760, ll. 15-18; R. 761, ll. 22-24; R. 762, ll. 3-4; ll. 9-11. The trial court judge then addressed Gleaton and informed him that he could be held in contempt. He asked if he wanted to consult with his lawyer, and he replied that he did. R. 762, ll. 16-18; R. 763, ll. 5-16.

Gleaton's counsel arrived at the courthouse and spoke to him. Counsel informed the court:

> MR. KIRKLAND: He maintains that the reason that he is not cooperating—unfortunately, he's not able to plead under—to say that it's a fifth amendment privilege against incriminating himself. He's only able to say that he fears for his safety and the safety of his family.

R. 814, l. 23- R. 815, l. 2. Counsel again reiterated that Gleaton was not going to cooperate at all. R. 836, ll. 11-22; R. 838, ll. 5-12; R. 848, l. 23- R. 849, l. 9. The state argued it should be allowed to admit the statement, and that it was entitled to do so under State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009). R. 841, l. 6- R. 842, l. 14. Trial counsel objected. R. 842, l. 16- R. 845, l. 7.

Based upon Gleaton's failure to answer questions, the trial judge held Gleaton in contempt. Specifically, the trial court explained that Gleaton had not asserted a specific right that would allow him the privilege of not responding to questions. Nevertheless, Gleaton had "elected not to do so for whatever reason." As a result, the judge held him in contempt. R. 848, ll. 12-22. The trial judge explained that as a citizen, Gleaton had a responsibility to testify and answer questions asked. He sentenced Gleaton to six months' imprisonment, which was to run consecutively to Gleaton's federal sentence. R. 849, l. 12 – R. 850, l. 4.

Appellant objected to the state's being allowed to introduce the statement. R. 853, l. 19-25. The trial court judge ruled that the statement was admissible. R. 854, l. 1- 24. The court ruled that Stokes was controlling, and permitted the state to introduce Gleaton's statement. R. 885, ll. 14-24. The state called Investigator Walter Mahoney, of the CPD's Major Crimes Unit to read Gleaton's statement to the jury. R. 960, l. 9 – R. 968, l. 25. According to Mahoney's reading of Gleaton's interview, Gleaton told the police that Appellant was going to "retaliate from the robbery." R. 969, ll. 10-25.

Later, defense counsel attempted to call Torrian Gleaton to the stand. He testified that he was still unwilling to answer any of her questions. R. 1291, l. 17- R. 1292, l. 12.

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; U.S. Const. amend. XIV. This right to confront and cross-examine witnesses "is essential to a fair trial

in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The Confrontation Clause guarantees the opportunity for cross-examination. United States v. Owens, 484 U.S. 554 (1988). The opportunity for cross-examination has been deemed the "main and essential purpose of confrontation." Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985); see Crawford v. Washington, 541 U.S. 36 (2004).

> Cross-examination allows the accused the opportunity:
>
> [N]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Douglas v. Alabama, 380 U.S. 415 (1965) (quoting Mattox v. United States, 156 U.S. 237, 242 (1895)). As Stokes makes clear, it is the opportunity to cross-examine that is constitutionally protected. Id. at 402, 673 S.E.2d at 440.

The trial court judge erred by admitting Gleaton's statement because doing so violated Appellant's right to confront the witnesses against him. Gleaton was not available for cross-examination because of his repeated refusals to cooperate with either the prosecution or defense. He flatly refused to answer questions related to Appellant's case. Appellant did not have the opportunity to cross-examine Gleaton as to the statements he made to law enforcement because he refused to cooperate. He refused to answer any questions about this incident, and was therefore not available for cross-examination. This case, then, is distinguishable from Stokes because, in that case, the appellant had an opportunity to cross-examine the witness, but chose not to. Here, Gleaton repeatedly refused to cooperate, and the admission of his statement denied Appellant his right to confront the witnesses against him. The witness unequivocally informed the state, defense, and the trial court that he did not intend to cooperate at all. He rendered himself unavailable. In this case,

the witness declined to cooperate, and his unsworn statement was admitted, substantively, to prove the matter asserted—that Appellant was involved in this murder. The prosecutor used the statement in its closing argument as evidence of Appellant's guilt. R. 1544, ll. 15-20. R. 1557, l. 23- R. 1558, l. 9. R. 1560, l. 19- R. 1561, l. 11.

Given the dearth of evidence tending to show that Appellant was guilty of this crime, including Hudson's initially informing law enforcement that someone else did it, the prejudice of allowing this statement into evidence was overwhelming. Additionally, Appellant was prejudiced because the jury would have necessarily have drawn an adverse inference by having Officer Mahoney testify to Gleaton's statements after he refused to cooperate before the jury. See United States v. Griffin, 66 F.3d 68, 71 (5th Cir. 1995); United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959). Prejudice is evidenced by the notes they sent to the judge during their deliberations. On two separate occasions, the jury requested Gleaton's testimony. See Court Exhibit #4 ("We need Gleaton's written testimony."); Court Exhibit #6 ("Gleatons hold testimony/ Did he admit that he signed a written statement (sic)"). Given the importance of this testimony to the jury during their deliberations, Appellant was prejudiced by its improper admission.

Appellant respectfully requests this Court rehear the matter because this Court's decision that Appellant had an opportunity to cross-examine Gleaton is contrary to the facts presented and governing case law.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 25th day of April, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Anthony Hackshaw, Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 25th day of April, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day of April, 2013.

Shawn A. Graham (L.S.)

Notary Public for South Carolina
My Commission Expires: April 27, 2022