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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Dorchester County
Hon. Maite Murphy, Circuit Court Judge
Appellate Case Tracking No. 2021-001492

The State, Respondent,

v.

Travis Latrell Lawrence, Petitioner.

Opinion No. 5863 (S.C. Ct. App. filed October 6, 2021)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

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STATEMENT OF THE CASE

Procedural History

On February 2, 2017, the Dorchester County Grand Jury indicted Petitioner for attempted murder, armed robbery, and possession of a firearm by persons unlawful. On May 21–23, 2018, Petitioner proceeded to a jury trial before the Honorable Maite Murphy. The jury acquitted Petitioner of armed robbery and unlawful possession of a weapon but found him guilty of attempted murder. The trial judge sentenced Petitioner to thirty years' incarceration.

Petitioner filed a timely Notice of Appeal. After briefing the Court of Appeals affirmed Petitioner's conviction and sentence. State v. Lawrence. Op. No. 5863 (S.C. Ct. App. filed Oct. 6, 2021) (Howard Adv. Sh. No. 35 at 20). Both parties filed a Petition for Rehearing, which was denied on November 18, 2021. Petitioner served and filed his Petition for Writ of Certiorari and this Return follows.

Factual Background

Clayton Baxter (Victim), at the time of the crime, lived with a roommate in a townhouse. He worked "off and on" and received Social Security payments every month. When he obtained the cash from these checks, he would hide it around his home. (R.11-15).

On July 2, 2016, Victim was contacted by Terell Bennett (Codefendant), who was not a blood relative of his but was treated as a member of his family. Codefendant claimed he needed to borrow money, so Victim agreed to the favor and invited him to his home. Codefendant arrived in a gold Cadillac DeVille and called Victim to let him know he had arrived. Further, Codefendant asked Victim whether he was alone in the house at that time. Victim informed Codefendant he was alone and offered to meet him at the door. As Codefendant entered the home, Victim noticed a pair of feet behind Codefendant, moving slowly. When Victim

questioned Codefendant about who was with him, Codefendant moved to the side and Victim saw Petitioner pointing a gun at him. Victim recognized Petitioner because he had met him "[m]aybe six or seven times" prior but had never had any major interactions with him and "no issues, no problems," no altercations. (R.15-R.19).

Victim noticed Petitioner holding a revolver while Petitioner demanded Victim "[g]ive [him] [his] money." Victim waited for Petitioner to become distracted and stop aiming the gun at him, which occurred when Petitioner tried to search his pockets. Victim used the opportunity to grab Petitioner's hand, pick him up, and slam him on top of a nearby table. At this point, a three-way struggle erupted among the men. As they struggled, the gun went off and fired a round into the upstairs room. Eventually, Petitioner went into the kitchen and retrieved a knife. He sliced Victim across the face, followed by several stabs to Victim's head and upper back. Victim, weakened by the attack, lost his hold on the gun. Codefendant gained control of the gun and told Victim not to move. Petitioner and Codefendant quickly escaped. Victim then grabbed a towel to try and slow down his bleeding while he called 9-1-1. (R.19-R.25).

Victim told officers Petitioner and Codefendant attacked him. A few days after the attack, he provided officers with a written statement describing the events of that night. Later, Victim identified Petitioner in a photo lineup as the person who stabbed him. (R.25-34).

Detective Brandon Byrd of the Dorchester County Sheriff's Office was one of the first officers on the scene. Detective Byrd photographed the crime scene, including the upstairs spare bedroom. There, Detective Byrd discovered "a bedside table with a hole coming out of the top" which appeared to match holes in the ceiling he saw from the first floor of the home. Using dowel rods, he determined the holes were created by a bullet fired from the floor below. Notably

no firearms, ammunition, or firearm paraphernalia were located in the house. Further, the weapon used to stab Victim was not located in the home. (R.73-90).

Dorchester County Sheriff's Deputy Jordan Williamson confirmed Codefendant did, in fact, drive a gold Cadillac. Specifically, Deputy Williamson testified he initiated a "simple traffic stop" with Codefendant in April 2016, at which point he was driving a gold Cadillac DeVille with the license plate number LLN163. After an objection, the trial judge, noting the reason for the stop would not be provided to the jury and that the testimony would corroborate Victim's testimony, found the testimony's probative value outweighed its prejudicial effect and overruled the objection.[1] (R.119-122; 124-125).

Trial counsel attempted to call Codefendant as a witness at trial, but Codefendant asserted his Fifth Amendment right against self-incrimination. The trial judge questioned Codefendant in the presence of his counsel, but outside the presence of the parties. After instructing Codefendant on this Fifth Amendment rights, Codefendant volunteered the following information: (1) early into the police investigation into the case, he volunteered to meet with the Solicitor's Office and discuss the case; (2) no agreement or promises regarding Codefendant's prosecution were made by the State; (3) Petitioner and Codefendant went to Victim's house the night of the attack looking to purchase marijuana, but Victim "flip[ed] out" when he saw Petitioner and attacked him first. The trial judge noted Codefendant's testimony was that he "basically [acted in] self-defense" but that he admitted he was there to buy marijuana and that Codefendant's testimony put him at the scene of the crime. Codefendant admitted he had no

[1] The Court of Appeals, after assigning the most damaging possible motivation for admitting this testimony and finding corroboration of Victim's testimony insufficient, found the testimony improperly admitted but harmless error. Petitioner has not raised this issue in his Petition.

idea the location of the weapons used and neither he nor Petitioner received any serious injuries from the fight. (R.126-142).

Codefendant's counsel supported Codefendant's assertion of his Fifth Amendment privilege, noting his testimony could bolster Petitioner's defense but that it also placed Codefendant "in a position where he's giving information that could potentially be used against him." (R. 142-143).

The parties then returned to the courtroom, where the trial judge questioned Investigator Melendez, who had sat in on Codefendant's meeting with the Solicitor's Office, as to whether Codefendant's comments were incriminating in nature. Investigator Melendez noted Codefendant was not forthcoming and originally only really admitted he was at the house the night of the attack. The initial meeting "ended abruptly" and without Codefendant providing any information relating to self-defense. At a second meeting, Codefendant claimed the purpose of his trip to Victim's home was to borrow money. However "some sort of an incident occurred" and a struggle erupted over the gun, during which he was able to grab hold of the gun with the "barrel . . . somewhat in his grip," and while holding the gun it went off and burned his hand; Codefendant showed investigators the burn during the meeting. Further, Codefendant told investigators Petitioner eventually obtained a knife and began stabbing Victim. The second meeting ended because Codefendant could not provide any additional information, such as what happened to the weapons used in the attack and skipped other "pertinent parts of what happened." Investigator Melendez did not believe the statements he heard from Codefendant supported a finding of self-defense. (R. 145-152).

After questioning Investigator Melendez, trial counsel noted: "Judge, at this point, you know, I really don't know what [Codefendant's] going to say." (R.153). She concluded by

indicating: "But I really don't know whether or not I would even call him at this point." (R.155-156).

After considering Codefendant's statements and Melendez's testimony, the trial judge found Codefendant's testimony created a "hazard of incrimination" for him. Specifically, he noted: "His silence is certainly justified in this matter and it appears to be that if he were allowed to testify, that he would incriminate himself and any questions, even those specific single questions may not be overtly incriminating — but would be incriminating through any further confessional proof." (R.159).

STANDARD OF REVIEW

While South Carolina has not specifically articulated the standard of review for the grant of the invocation of the Fifth Amendment right, generally this Court has provided: "In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. Other Courts utilize an abuse of discretion standard when considering a ruling on the Fifth Amendment privilege against self-incrimination: "When a district court rules favorably on a witness's invocation of his Fifth Amendment right, we review its ruling for abuse of discretion. Under this standard, we will reverse the district court's ruling 'only when it is perfectly clear . . . that the answers [sought from the witness] cannot possibly incriminate.'" United States v. Forty-Febres, 982 F.3d 802, 807–08 (1st Cir. 2020).

ARGUMENT

I. The Court of Appeals properly affirmed the trial court's decision to allow Petitioner's codefendant to assert his Fifth Amendment privilege against self-incrimination.

The Court of Appeals correctly found the trial court did not abuse its discretion in allowing Codefendant to assert his Fifth Amendment privilege against self-incrimination. In this case, Codefendant reasonably believed his answers to questions could be used in a criminal prosecution or could lead to other evidence that might be so used. It is not so "perfectly clear" that Codefendant was mistaken to allow the trial court to overrule his assertion of the privilege and, as a result, the trial court did not err in allowing him to assert his Fifth Amendment privilege and the Court of Appeals did not err in affirming that decision.

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). "The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty." Kastigar v. United States, 406 U.S. 441, 444 (1972). The United States Supreme Court continued: "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the **witness reasonably believes** could be used in a criminal prosecution or could lead to other evidence that might be so used." Id. at 444-445 (emphasis added). "[N]o rule, on the subject of evidence, is

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

better established than that a witness shall not be bound to criminate himself." State v. Edwards, 11 S.C.L. 13, 14 (S.C. Const. App. 1819).

The United States Supreme Court has instructed: "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951). It noted: "This Court has been zealous to safeguard the values which underlie the privilege." Kastigar, 406 U.S. at 445. Similarly, the Fourth Circuit Court of Appeals has explained: "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).

In explaining the privilege, this Court has opined: "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).

Merely asserting the privilege is not sufficient.

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken."

Hoffman, 341 U.S. at 486 (citing Temple v. Commonwealth, 75 Va. 892, 899 (1880). The United States Supreme Court previously cited Temple with approval for the conclusion:

> [T]he great weight of authority in the United States was in favor of the rule that, when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer, unless it was **perfectly clear**, from a careful consideration of all the circumstances in the case, that the witness was mistaken, and that the answer could not possibly have such a tendency . . . .

Counselman v. Hitchcock, 142 U.S. 547, 580 (1892) (emphasis added). Where a witness makes an invocation of the privilege, it must be "*perfectly clear*, from careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate." Hoffman, 341 U.S. at 488 (emphasis in original). But the United States Supreme Court has cautioned: "[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.

In Grosshuesch, this Court applied the Fourth Circuit's[3] test for invocation of the privilege against self-incrimination: (1) determining whether the information is incriminating in nature; and (2) evaluating whether there is a sufficient possibility of criminal prosecution to trigger the privilege. Id. at 23, 659 S.E.2d at 117. This Court acknowledged "at least two categories of potentially incriminating questions": those whose incriminating nature "is evident on the question's face in light of the question asked and the surrounding circumstances," and "questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof." Id. at 23, 659 S.E.2d at 117–18. It is the trial court's duty to question parties invoking the right for enough information as to discern whether the questions posed by the requesting party require answers by the responding party which would violate its privilege against self-incrimination. Id. at 25–28, 659 S.E.2d at 119–20.

Applying these standards to Grossheusch, the Court found that requiring the defendants to respond to discovery responses pertaining to the amount of and use of assets, when the management of those same assets was the subject of a criminal prosecution, was a violation of

[3] See United States v. Sharp, 920 F.2d 1167, 1170–71 (4th Cir. 1990).

their Fifth Amendment privilege against self-incrimination. It specifically noted that even though the defendants asserted that they acted appropriately:

> [T]he question when judging the application of the privilege against self-incrimination does not revolve around what defenses a party has asserted . . . but 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. Thus, the court found "it appeared probable that the [defendants] could have a reasonable fear that their answers to questions focused on this information would ultimately be used against them in the pending criminal proceeding." Id. at 25, 659 S.E.2d at 119.

Petitioner seems to assert that a confession of guilt is the only possible reason to assert the Fifth Amendment privilege. He contends because Codefendant claimed he acted in self-defense and did not commit a crime that he should not be entitled to the privilege. In essence, he asks this Court to find that as long as a jury could believe his story and it could end in his not being guilty of the crime, it is not reasonable for him to believe any part of his testimony could be used against him in a trial.

However, whether a party maintains his or her innocence of a crime is irrelevant to such a determination. In Grossheusch, the Court specifically noted that the privilege against self-incrimination is not concerned with "what defenses a party has asserted . . . but whether there is a **reasonable probability** that requiring a party to answer a certain question would provide information that **could be used** against the party in a criminal proceeding or [] lead to the discovery of such information." Id. at 24, 659 S.E.2d at 118 (emphasis added). Requiring Codefendant to testify, even if he maintains his innocence of the crimes and explains any actions were in self-defense, would likely provide the State with information which could be used at his

trial. Notably, Codefendant admits to being at the scene of the incident and his testimony in this case would be uncontestable proof establishing his presence during the crime. Additionally, he readily admitted handling the gun and being involved in a struggle with Victim. Finally, his testimony could lead to other evidence developing his actions and the actions of Petitioner after the stabbing of Victim—including any knowledge regarding the location of the weapons—which could certainly be incriminating. While he asserts a claim of self-defense, a jury is not required to believe his version of events, and so even though his version may result in a not guilty verdict based on self-defense, the State has a contrary theory of the case and would use Codefendant's testimony to help establish at least part of what it is required to prove. As the United States Supreme Court indicated with approval:

> In *Reg. v. Boyes* (1861) 1 Best & S. 311, 329, 330, 121 Eng. Reprint, 730, Cockburn Ch. J., said . . . To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: . . . **A question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering.**

Mason v. United States, 244 U.S. 362, 365 (1917) (emphasis added).

The testimony by Codefendant in this case has even more dire reasonable consequences—he admits to the crime of attempting to purchase marijuana. Pursuant to section 44-53-370(a)(1) of the South Carolina Code, it is unlawful to . . . aid, abet, attempt, or conspire to . . . purchase, . . . a controlled substance or a controlled substance analogue. S.C. Code Ann. § 44-53-370(a)(1) (Supp. 2021). Even if it is his first offense, Codefendant would be admitting to a

felony punishable by up to five years in prison. See S.C. Code Ann. § 44-53-370(b)(2)(Supp. 2021). "To prove attempt, the State must prove that the defendant had the specific intent to commit the underlying offense, along with some overt act, beyond mere preparation, in furtherance of the intent." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (citing State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)). This Court explained what was necessary to constitute an overt act:

> No definite rule as to what constitutes an overt act can safely be laid down in cases of this kind. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom, subject to general principles applied as nearly as can be, with a view to working substantial justice.
>
> **It is well settled that 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. While the efficiency of a particular act depends on the facts of the particular case, the act must always amount to more than mere preparation, and move directly toward the commission of the crime. In any event, it would seem, the act need not be the last proximate step leading to the consummation of the offense.

State v. Quick, 199 S.C. 256, 19 S.E.2d 101, 102 (1942) (emphasis added and citation omitted).

There is no question based on Codefendant's testimony that he and Petitioner had the specific intent to purchase marijuana from the Victim. The only possible question is whether he committed an overt act towards the completion of the intent. The overt act in this case was travelling to the location and meeting with the person from which Codefendant and Petitioner planned to purchase marijuana. As this Court found in Reid, travelling to a location for the specific purpose of fulfilling the specific intent to commit a crime can be the necessary overt act beyond mere preparation. See Reid, 393 S.C. at 330–31, 713 S.E.2d at 277 (holding "an agreement to meet a fictitious minor at a designated place and time, **coupled with traveling to**

that location, may constitute evidence of an overt act, beyond mere preparation, in furtherance of the crime.") (emphasis added). Were Codefendant to testify in the manner presented to the trial court, his testimony could certainly be used against him in a future trial for attempting to purchase marijuana.

In the instant case, the trial court did not abuse its discretion in finding Codefendant's assertion of his Fifth Amendment privilege to be reasonably warranted to prevent him from incriminating himself or providing evidence which could be used at a future prosecution. As the United States Supreme Court explained:

> Ordinarily, [the trial court] is in much better position to appreciate the essential facts than an appellate court can hold, and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

Mason, 244 U.S. at 366. This Court should deny the Petition for Writ of Certiorari because the Court of Appeals properly gave due deference to the discretion exercised by the trial court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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