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Jan 20 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE

RESPONDENT,

V.

VICTORIA LORRAINE SANCHEZ

APPELLANT

APPELLATE CASE NO. 2018-002163

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 5875

RETURN TO RESPONDENT'S PETITION FOR REHEARING

On December 8, 2021, this Court reversed Appellant's convictions for trafficking heroin and unlawful conduct toward a child and remanded her case to Greenville County because the trial judge failed to give Appellant's requested jury instruction on circumstantial evidence which was mandated in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) and again in State v. Herndon, 430 S.C. 367, 845 S.E.2d 499 (2020). State v. Sanchez, Op. No. 5875 (S.C. Ct. App. filed Dec. 8, 2021) (Howard Adv. Sh. No. 43 at 77). This Court correctly concluded that the judge's error was not harmless because "there was no direct evidence of [Appellant's]

knowledge of the hidden compartment or drugs,” and therefore, the state’s evidence against Appellant was “largely circumstantial.” Id. at 83.

The state filed a petition for rehearing with this Court on January 4, 2022. Appellant’s return to the state’s petition for rehearing follows.

In its petition for rehearing, the state agreed with this Court’s conclusion that the trial judge erred by refusing to give the requested Logan charge. Petition for Rehearing at 1. However, the state argued that this error was harmless because the trial judge accurately instructed the jury as to the burden of proof, reasonable doubt, the presumption of innocence, mere presence, and that the verdict must be unanimous. Petition for Rehearing at 6. Contrary to the state’s position, accurately charging the jury on other matters of law does not obviate the requirement that the judge also give an accurate charge on circumstantial evidence. See Herndon, 430 S.C. 367, 371-73, 845 S.E.2d 499, 502-03 (2020).

The specific portion of the Logan charge that this Court noted was absent from the trial judge’s instructions in this case was the portion that states that “to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.” Logan, 405 S.C. at 99, 747 S.E.2d at 452. This Court noted that this omission was particularly significant in light of the state’s heavy reliance on circumstantial evidence in its attempt to prove the element of knowledge.

This Court also correctly applied the Supreme Court’s decision in State v. Herndon, 430 S.C. 367, 845 S.E.2d 499 (2020). As this Court noted, in Herndon, the Supreme Court stated that “[w]hen requested, the Logan charge must be given in cases based in whole or part on circumstantial evidence.” Id. at 371, 845 S.E.2d at 501. While a trial judge’s failure to give a

requested Logan charge is still subject to a harmless error analysis, this Court correctly found that the error in Appellant's case was not harmless.

As this Court noted, Appellant's case was like Herndon in that the state relied very heavily on circumstantial evidence. Just like in Herndon, there were "competing inferences" that could be drawn from the circumstantial evidence presented in Appellant's case. The competing inferences that Appellant either did or did not know about the drugs in the car "illustrate well the need for the Logan charge." Herndon, 430 S.C. at 373, 845 S.E.2d at 503.

Having failed to persuade this Court that the trial judge's error was harmless in Appellant's case, the state has now adopted an entirely new argument in its petition for rehearing. The state has now taken the position that this Court's analysis was flawed because "in the context of a drug case like [Appellant's] as opposed to a murder case like Herndon's, a jury instruction suggesting all the circumstances – or even just the circumstances – must be consistent with each other in order for them to be sufficient to convict could be highly misleading and confusing." Petition for Rehearing at 10. The state further argued that "an instruction to the jury suggesting the circumstances must be consistent with each other is not entirely accurate [in a drug case] and, therefore, should not have been presented to the jury due to the potential for confusion." Petition for Rehearing at 11. Finally, the state insinuated that the Logan charge itself "could have only potentially confused the jury" in a drug case.¹ Petition for Rehearing at 12.

The state's petition for rehearing strongly insinuated that a Logan charge should not be given in drug cases because, in the context of a drug case, the language is misleading and

¹ The state's new argument appears to cut directly against the core holding in Herndon and Logan that the new circumstantial evidence charge must be given in circumstantial evidence cases by advocating for an exception to this rule in drug cases that neither this Court nor the Supreme Court has endorsed.

confusing. Because the state has taken this position for the very first time in its petition for rehearing, this Court should decline to entertain this argument. See State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (holding the state’s argument to the Supreme Court was unpreserved for review where the state offered its argument for the first time in its petition for rehearing in the Court of Appeals); Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000) (holding that an issue involving standing for a negligence action was not preserved because it was raised for the first time in the petition for rehearing and was not addressed by either the trial court or the Court of Appeals); see also Rule 242 (d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court”). Simply put, this Court cannot have “overlooked” or “misapprehended” an argument that the state never made until its petition for rehearing.

Appellant submits that this Court thoroughly considered the state’s harmless error argument and correctly found it unpersuasive. Appellant respectfully asks this Court to deny the state’s petition for rehearing. In the event this Court grants the state’s petition for rehearing, Appellant respectfully requests this Court to rule on Appellant’s two remaining issues raised in the briefs and at oral argument.

Respectfully Submitted,



ADAM SINCLAIR RUFFIN
Appellate Defender

This 20th day of January, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned attorney hereby certifies that a copy of the Return to Respondent's Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and upon Victoria Lorraine Sanchez, #378445, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 20th day of January, 2022.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT