THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2021-000486
Lower Case Nos. 2018GS2401480, 2018GS2401481

The State, ... Respondent,

vs.

Tremaine O. Pride, ... Appellant

INITIAL BRIEF OF APPELLANT

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Statement of Issues on Appeal

Question I: Did the trial court err in failing to acknowledge that Tremaine O. Pride had been released on a bond order that cited the arrest warrant number for trafficking cocaine in violation of S.C. Code § 44-53-370(e)(2)(b)(3) when the State had indicted him for trafficking crack cocaine in violation of S. C. Code 44-53-376(C) and, therefore, the Court did not have the right to try him in his absence for a different charge?

Question II: Did the trial court err in failing to exclude the testimony of a witness that had violated the sequestration order issued by the judge when the state knew the witness would be called at trial to testify and permitted him to sit in the courtroom during the testimony of two other witnesses?

Question III: Did the trial court err in failing to give a reasonable doubt instruction that included the phrase "hesitate to act" as approved by prior decisions of this court?

Statement of the Case

Procedural History

Wesley McClinton of the Greenwood City Police Department arrested Tremaine O. Pride on April 18, 2018 on the charges of resisting arrest and trafficking what he believed to be crack cocaine. ROA at 75, ll 8-10. An arrest warrant was issued for trafficking cocaine. On August 17, 2018, the Greenwood County Grand Jury indicted Mr. Pride on the resisting arrest charge and directly indicted him on the charge of trafficking crack cocaine.

On September 4, 2018, a bond hearing was held on the charges. The bond hearing transcript references indictment № 2018-GS-24-01481, which is the trafficking in crack cocaine charge. Mr. Pride was released on a bond of $75,000 with electronic monitoring. The bond order references the arrest warrant number of 2018A2420100383, which is the trafficking in cocaine charge, and arrest warrant № 2018A240100386, which is the resisting arrest charge.

On December 10, 2018, the State called Mr. Pride's case for trial. He did not appear. He was then tried in his absence. On December 12, 2018, he was convicted of trafficking crack cocaine and resisting arrest. On April 29, 2021, after Mr. Pride was apprehended, the sentence was opened and read. He was sentenced to one year in prison for resisting arrest and 25 years for trafficking crack cocaine. The sentences are to run concurrently.

On April 29, 2021 a Notice of Intent to Appeal was filed and received by the Court of Appeals on May 3, 2021.

Factual History

On April 18, 2018, Officer Wesley McClinton, of the City of Greenwood Police Department, along with two other officers in other patrol cars, was patrolling the area of Gray

Street in the City of Greenwood based upon information that Tremaine O. Pride may be in the area. Rec. on App. at 70, ll 18-20. As they turned onto Gray Street, Officer McClinton saw Mr. Pride sitting on the front porch of 719 Gray Street. Rec. on App. at 70, l 22 to 71, l 1.

As the officers approached Mr. Pride, Officer McClinton informed him he was under arrest as the officers knew of an outstanding arrest warrant. After they told Mr. Pride he was under arrest, Mr. Pride took off running. Rec. on App. at 71, ll 14-21. Officer McClinton chased Mr. Pride from the apartment, to an area near the city shop and ultimately into a small creek running through the area. With the assistance of Agent Sammy Evans, Officer McClinton was able to control Mr. Pride. Before Agent Evans came to the assistance of Officer McClinton, Officer McClinton saw Mr. Pride pull an object from his sock and throw it away. ROA 72, ll 4-15.

After Agent Evans controlled Mr. Pride, Officer McClinton went in the direction of where the object was thrown and found a bag containing approximately 30 grams of crack cocaine. ROA at 75, ll 8-17.[1] The bag was never checked for fingerprints nor tested for DNA. ROA at 89, ll 10-23.

During the trial, the State called Officer Whitfield Brooks to testify. ROA at 102. His name was read out as a potential witness at the beginning of the trial. ROA at 6, l 5. Defense counsel objected to this witness testifying as he had been in the courtroom during the previous testimony of officers McClinton and Sammy Evans. The parties had agreed to sequester the witnesses. ROA at 97, ll 10-23. The trial judge declined to bar the witness from testifying

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[1] While the Officer McClinton testified he believed the substance to be crack cocaine, he signed an arrest warrant for trafficking cocaine. The reason for this discrepancy was never explained.

stating, "I think it would be in violation of the sequestration order if it's something different or something that has not been brought out." ROA at 98, ll 8-10. Officer Brooks supported the testimony of Officer McClinton as to the bag of crack cocaine being placed in the police vehicle being used by Officer Brooks.

Trial counsel had also objected to the failure of the trial judge to charge the "hesitate to act" portion of the reasonable doubt charge. ROA at 142, ll 19-23.

Standard of Review

As to Issues I and III, the standard of review is de novo as they both involve a question of law. "We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018)

As to Issue II, the admission of the testimony of Officer Whitfield Brooks, the standard of review is abuse of discretion. "The admission or exclusion of evidence is also subject to an abuse of discretion standard of review." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2016)

Argument

Question I

Question I: Did the trial court err in failing to acknowledge that Tremaine O. Pride had been released on a bond order that cited the arrest warrant number for trafficking cocaine in violation of S.C. Code § 44-53-370(e)(2)(b)(3) when the State had indicted him for trafficking crack cocaine in violation of S. C. Code 44-53-376(C) and, therefore, the Court did not have the right to try him in his absence for a different charge?

The basic issue here is whether a defendant who is released on bond as to one charge can be tried in his absence for a separate charge from that listed in the bond? The obvious answer is no, even if the defendant were aware of the fact that he possessed a substance different from which he was released on bond. When the bond cites possession of a substance which the defendant knows the State cannot prove, then he knows that the State in the trial for the possession of the substance upon which he was released on bond, cannot prove the case and, therefore, he has no chance of being convicted. His failure to comply with the conditions of his

bond could not as a matter of law result in his conviction for the crime upon which he was released on bond. Under the conditions of the bond, the only charge for which he could be tried was trafficking cocaine. He was not tried for that charge. The State used the code section for trafficking cocaine in the warrant. The State used the arrest warrant number and not the indictment number in the bond order. While the State argued below that the body of the warrant says "crack cocaine," the State knew enough to direct indict Mr. Pride rather than make reference to an arrest warrant that contains a different crime. The trial judge dismissed the contradiction as being "nothing more than a scribbler's error." ROA at 38, ll 3-4. The problem with this conclusion is that the trial judge never took any testimony to determine how the error occurred. Nor does the finding change the fact that the bond given to Mr. Pride made reference to the warrant that included the "scribbler's error."

The issue in this case is not what knowledge Tremaine O. Pride had as to what the nature of the substance was or even upon which charge he was indicted. The issue is upon what charge was Mr. Pride issued a bond which would require him to appear in court and answer to the crime set forth in the bond. As this Court has held, "The bond form only provided Goode with notice of the charge for breaking into a motor vehicle and that he would be tried in his absence if he failed to appear for his trial on that particular charge." *State v. Goode*, 299 S.C. 479, 482, 385 S.E.2d 844, 846 (1989). Here the bond form provides notice that Mr. Pride was being released on the charges contained in a specifically identified arrest warrant which has been served on Mr. Pride. Mr. Pride knew the charge was trafficking cocaine. The State knew the charge was trafficking cocaine. These two facts do not change the wording of the bond order.

The State may argue this is putting form over substance. A bond order is not difficult or

complicated to prepare. To say that a bond order releasing a defendant on a bond for one charge is a basis to try him in his absence with any other charge for which he has been arrested is to ignore the purpose of the bond order - to tell the defendant upon which charge he is being released and which charge he would be tried on if he did not show up for trial. The bond order, aside from special conditions such as no contact with a victim, serves no other purpose. If the State or the lower court made a mistake in preparing the bond order, that should not be a basis for ignoring the specific conditions of the bond.

Question II

Question II: Did the trial court err in failing to exclude the testimony of a witness that had violated the sequestration order issued by the judge when the state knew the witness would be called at trial to testify and permitted him to sit in the courtroom during the testimony of two other witnesses?

As the Connecticut Supreme Court has said, "The right to have witnesses sequestered is an important right that facilitates the truth-seeking and fact-finding functions of a trial." *State v. Robinson*, 230 Conn. 591, 598, 646 A.2d 118, 122 (1994). Against this standard, this issue must be judged. The facts establish that Officer Whitfield Brooks violated the sequestration order. When Officer Brooks was called to testify, defense counsel made a timely objection to the officer testifying. ROA 97, ll 10-23.

Initially, after a brief discussion, the trial judge stated, "I think it would be in violation of the sequestration order if it's something different or something that has not been brought out." ROA at 98, ll 8-10. This is the exact opposite as to the reason for sequestration of witnesses. The purpose is to prevent two witnesses who are testifying about the same incident or

observation from hearing the testimony of the other witness. As the North Carolina Court of Appeals has said, "The purpose of a sequestration order is to prevent the witnesses from hearing the testimony of other witnesses and colluding with each other." *State v. Williamson*, 74 N.C. App. 114, 117, 327 S.E.2d 319, 321 (1985); *See, also State v. Lowe*, 61 Conn. App. 291, 297, 763 A.2d 680, 684 (2001)("The primary purpose of a sequestration order is to ensure that the defendant receives a fair trial by preventing witnesses from shaping their testimony to corroborate falsely the testimony of others.") and *People v. Melendez*, 80 P.3d 883, 885 (Colo. App. 2003), aff'd, 102 P.3d 315 (Colo. 2004) ("The purposes of a sequestration order are to prevent a witness from conforming his or her testimony to that of other witnesses and to discourage fabrication and collusion")

If witnesses are testifying about different subjects, they could hardly collude or tailor their testimony to agree. When the witnesses are testifying about the same subject, the chances of a witness tailoring their testimony to agree with the testimony they heard is greatly increased. The need for the sequestration of the SLED chemist is generally not related to the illegal seizure of the drugs or the chain of custody prior to the drugs arriving at SLED. Here the testimony of the two officers related to the seizure and chain of custody of the seized items. Under such circumstance, prejudice can be and should be presumed. This is true because once a witness has heard the testimony of the other witness on the same subject, defense counsel will never be able to prove what the witness would have testified to had the witness not heard the other witness testify.

After Officer Brooks testified in camera, the trial judge then stated, "I'm going to find that, based upon what he's testified to, the sequestration order has not been violated." ROA at

102, ll 20-22. This is obviously an incorrect factual finding. This is important in determining if the trial judge abused his discretion in permitting Officer Brooks to testify.

Our Supreme Court has held, "The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge." *State v. Saltz*, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001). This Court has said, "An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." *Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004). Here both are present. First the trial court erred in concluding that because Officer Brooks was testifying about the same subject, no violation of the rule occurred. This was an error of law. Second, when the trial court ruled, the sequestration rule was not violated, this was an error of fact. The facts in this record clearly show Officer Brooks was present in the courtroom during a substantial portion of the testimony of Officer McClinton. If he were in the courtroom during the testimony of Officer McClinton, then he was also in the courtroom during the testimony of Officer Sammy Evans, whose testimony followed Officer McClinton. The rule was violated as to two witnesses. The State knew who their witnesses were before the trial started.

In *State v. Washington*, 424 S.C. 374, 409, 818 S.E.2d 459, 477 (Ct. App. 2018), aff'd in part, vacated in part, rev'd in part, 431 S.C. 394, 848 S.E.2d 779 (2020), this Court affirmed a ruling where a defense witness was excluded for a violation of the sequestration rule. In so ruling this court said, "[T]he trial court found defense counsel, as an officer of the court, was responsible for enforcing the order involving its witnesses." *Id.* at 409, 818 S.E.2d at 477. The exact same rule should apply to the State. The attorney for the State, as an officer of the court, had an obligation to control their witness so that the sequestration rule was not violated. They

failed in their obligation. And the trial court abused its discretion in permitting Officer Brooks to testify.

In reversing this case on this issue, this Court should issue an order barring Officer Whitfield Brooks from testifying at the re-trial. If such an order is not issue, the the sequestration order would still be violated. The State should not benefit from its wrong.

Question III

Question III: Did the trial court err in failing to give a reasonable doubt instruction that included the phrase "hesitate to act" as approved by prior decisions of this court?

Trial counsel objected to the failure of the trial judge to include in his charge the statement that a reasonable doubt is a doubt that would cause a person to "hesitate to act." ROA at 142, ll 19-21. The request by trial counsel was in keeping with the law and prior decisions of our supreme court. "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act." *State v. Manning*, 305 S.C. 413, 417, 409 S.E.2d 372, 375 (1991). Thus, at the time of this trial, this had been the suggested definition of reasonable doubt in our state for 27 years. In *State v. Jenkins*, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014) this Court quoted a reasonable doubt instruction that included the hesitate to act clause. This Court then said, "We find this reasonable doubt instruction to be a correct statement of the law." *Id.* at 573, 759 S.E.2d at 766. A defendant is entitled to have the jury instructed on a correct statement of the law. This is especially true when trial counsel requests a charge that has previously been approved by this Court in defining reasonable doubt. A defendant should not be convicted based upon an almost correct statement of the law. This is what occurred in this case.

This Court has further held that when a jury is charged that a reasonable doubt is a doubt

for which a reason can be given, this error is cured by a "hesitate to act" charge.[2] As this Court said, "Viewing the reasonable doubt charge as a whole, we find no reversible error given the court's use of the suggested language in *Manning* that a reasonable doubt is 'the kind of doubt that would cause a reasonable person to hesitate to act.'" *State v. Clute*, 324 S.C. 584, 595, 480 S.E.2d 85, 90 (Ct. App. 1996), overruled on other grounds by *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). This case is not like *State v. Johnson*, 315 S.C. 485, 445 S.E.2d 637 (1994) where our Supreme Court upheld a decision by the trial judge not to give a definition of reasonable doubt. Here the trial judge gave a definition of reasonable doubt. Trial counsel objected contending he did not give a complete definition of reasonable doubt. The trial judge erred in not charging the applicable law as requested by trial counsel. Granted our Supreme Court has approved more than one definition of reasonable doubt. The fact there is more than one definition does not mean trial counsel is not entitled to the definition that best suits his defense to the case. This Court has reversed cases where the "hesitate to act" charge was not given after the trial judge stated they would give the charge and then changed his mind after closing arguments. *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). In that case, in reliance upon the representation of the trial judge, defense counsel made this argument, "Well, when you go through this testimony and this evidence in this case, you're gonna hesitate and you're gonna hesitate and you're gonna talk and it's gonna get slow and you're gonna hesitate and you're finally gonna have to stop. And when you stop, you're gonna have to say that, you know, he's innocent. The State hasn't carried their burden." *Id.* at 576, 541 S.E.2d at 820-21. Because the trial judge

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[2] Defining reasonable doubt as a doubt for which a reason can be given has not been reported in our state since 2003. *Todd v. State*, 355 S.C. 396, 585 S.E.2d 305 (2003)

elected not to charge a proper statement of the law, trial counsel in this case was not able to make such an argument. The difference between the two cases is not that the law has changed but that the judge decided before hand to tell trial counsel he was not going to charge a correct statement of the law. If Jones was entitled to have his lawyer make this argument, Mr. Pride was also entitled to have his trial lawyer make such an argument.

In *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) our Supreme Court permitted a specific charge on circumstantial evidence be given only when defense counsel specifically requested the charge. The court said, "Thus, we modify *Grippon* and *Cherry* to allow the additional language provided above if requested by a defendant." *Id.* 100, 747 S.E.2d at 453. This Court should adopt the same rule in this case. When defense counsel specifically requests the "hesitate to act" language be given as part of the definition of reasonable doubt, it should be given. Some defense lawyers may not like the "hesitate to act" language based upon either their personal preferences or the facts of the particular case. Others may always prefer the charge be given. The decision as to which definition of reasonable doubt is given should be the choice of the lawyer defending the accused and not the particular preference of the trial judge. It is the defense counsel who knows how he can best use the legal definition of reasonable doubt. Each defendant should be entitled to the same valid argument if their attorney so elects. An argument should not be precluded simply because the trial judge prefers another definition of reasonable doubt. The trial judge is not on trial.

Because the attorney for Mr. Pride was prohibited from making effective arguments, this case should be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, the conviction of Tremaine O. Pride should be reversed and remanded for a new trial. At the re-trial, Officer Whitfield Brooks should be barred from testifying.

March 11, 2022

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DESIGNATION OF MATTER

The Attorney for the Appellant proposes the following to be included in the Record on Appeal:

1. Bond hearing of September 4, 2018;
2. Transcript of trial except pages 5-36;
3. Sentencing transcript April 29, 2021;
4. Indictment № s 2018-GS-24-01480 and 2018-GS-24-01481;
5. Arrest warrant numbers of 2018A2420100383 and 2018A240100386.

I certify that this designation contains no matter which is irrelevant to this appeal.

March 11, 2022

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