STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2012-UP-576 (S.C. Ct. App. filed 10/24/2012)

07-GS-18-1755

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

PETITIONER

Appellate Case No. 2013-000617

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

INDEX 1

CERTIFICATE OF COUNSEL 2

QUESTION PRESENTED 3

STATEMENT OF THE CASE 4

ARGUMENT

The Court of Appeals erred in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot 5

CONCLUSION 11

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 22, 2013.

QUESTION PRESENTED

Did the Court of Appeals err in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot?

STATEMENT OF THE CASE

Petitioner was indicted for murder by the Dorchester County Grand Jury during its December 3, 2007 term (2007-GS-18-1755). R. 431-432. He was tried before the Honorable Diane Schafer Goodstein and a jury beginning on November 15, 2010. R. 1. He was represented by Sara Jayne Rogers. The state was represented by Russell D. Hilton and Harrison Bell, Jr. R. 1. He was convicted and sentenced to forty-five years' incarceration. R. 406, lines 4-7; R. 425, line 25 – R. 426, l. 2. Petitioner filed a timely notice of appeal, which was perfected by Elizabeth A. Franklin-Best of the Office of Appellate Defense. On October 24, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. App. 1-2; State v. Gethers, 2012-UP-576 (Ct. App. filed Oct. 24, 2012). On November 6, 2012, Petitioner filed a petition for rehearing. App. 3-7. By order filed February 22, 2013, the Court of Appeals denied the petition for rehearing. App. 8.

Petitioner now files this timely petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot.

Relevant facts

Petitioner was convicted of the murder of Earl Robinson which occurred on September 17, 2007. Earlier on that date, the decedent had borrowed $200 from his son, Marcus. The decedent was found seated in the driver's seat of a white Toyota Sequoia in the parking lot of apartment complex. R. 69, l. 3 - R. 72, l. 5. He had been shot once in the arm, with the bullet entering his chest and mortally wounding him. R. 221, ll. 5-23.

Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots, although no one identified Petitioner as the one arguing with the decedent. R. 52, l. 12 – R. 53, l. 12; R. 61, lines 4-8. The apartment complex was known as a very high crime area and gunshots were "fairly common." R. 63, ll. 5-7; R. 56, ll. 12-15 (testimony by a neighbor that "arguments happen a lot" in the neighborhood); R. 60, ll. 19-23 (testimony by a neighbor that arguments were "common around there" and he had "learned to tune it out"); R. 66, ll. 6-12 (testimony by a neighbor that hearing "pop-pop" was not unusual and "it always happened in the neighborhood"); R. 67, ll. 6-14 (testimony by a neighbor that violence was a common occurrence at the apartment complex); R. 77, ll. 9-15 (testimony by a police officer that the area was violent and he responded to multiple shootings there). An officer with the Dorchester County Sheriff's Office confirmed that there were many fights and drug-related calls that occurred in the area. R. 72, l. 24 – R.73, l. 6. As law enforcement conducted their investigation, they seized a number of cigarette

butts, a .40 caliber gunshot shell, and a Bluetooth telephone headset. R. 84, ll. 8-19. Law enforcement did not analyze the cigarette butts that were located in the immediate area of the car. R. 84, ll. 20-23. The .40 caliber bullet was determined not to be relevant to the crime scene. R. 88, l. 20 - R. 89, l. 3.

Law enforcement also extracted thirty-four latent fingerprints from the decedent's car. R. 89, ll. 14-19. Three people were identified based on the presence of the fingerprints found on the car, but they were never pursued in connection with this investigation. R. 119, ll. 16-22. Later in their investigation, law enforcement obtained a buccal swab from Petitioner and obtained his DNA profile. R. 101, ll. 4-9.

Petitioner's DNA was found on the Bluetooth telephone headset that was found in the middle of the road near the apartment complex. Significantly, the telephone headset was not found close to where the decedent's body was located:

> That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment F. It was not located anywhere around the vehicle. It was between Apartment F and Azalea Park, the apartment complex to the right. It was in that area on the road as you came in.

R. 123, ll. 4-9 (emphasis added).

Brandee Kiefer, Petitioner's girlfriend, recalled that around the time of this crime, she and Petitioner switched cars. R. 144, l. 18 – R. 147, l. 19. Veronica Kitt was another friend of Petitioner's. R. 155, l. 25 – R. 156, l. 2. She described the decedent as her friend as well. R. 156, ll. 3-13. She testified that on the date the decedent was killed, she was supposed to meet with him. He was expected to bring her money that evening because he intended to have sex with Kitt, who was fourteen-years old at the time. R. 156, l. 14 – R. 159, l. 9; R. 176, ll. 10-14. That evening, she was using her friend, Maggie Reid's, telephone. R. 157, ll. 1 - 2. At some point, after the decedent

was killed, Kitt and Petitioner drove to Virginia, and then eventually traveled to New York. R. 164, l. 4 – R. 165, l. 2.

During their investigation, law enforcement obtained the telephone that belonged to the decedent, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, Kitt's friend. R. 188, l. 18 – R. 189, l. 17. Ultimately, their investigation led them to identify Petitioner's telephone number. R. 192, ll. 2-25. Law enforcement obtained search warrants based on telephone calls between Kitt and Petitioner, but those searches did not uncover anything of evidentiary value. Law enforcement also had identified Petitioner's fingerprints located on the passenger side of the decedent's car. Other fingerprints were also located on the car, but they were not identified by law enforcement. R. 193, ll. 6-10; R. 196, ll. 15-17; R. 262, ll. 8-12. Law-enforcement never located the murder weapon even after exhaustively searching the area. R. 193, l. 5 – R. 197, l. 18. Ultimately, Kitt and Petitioner were located in New York City. R. 199, ll. 2 - 19.

Kitt gave a statement to law enforcement that suggested that she had Petitioner meet with the decedent in order to take his money. At trial, she did not testify to these facts, but her statement was found admissible as a prior inconsistent statement. R. 208, l. 2 - R. 209, l. 23; R. 204, ll. 6-16. In exchange for cooperation, Kitt's charge of murder remained in the jurisdiction of Family Court. R. 279, ll. 7-11.

Petitioner's DNA was located on the Bluetooth headset that was found in the middle of the road at the apartment complex. R. 328, l. 2 – R. 330, l. 25. Petitioner did not testify at trial. R. 343, ll. 4 - 7.

At the close of the prosecution's case, counsel made a motion for directed verdict, which was renewed at the end of the case. R. 346, ll. 10-18. The trial court judge denied the motions. R. 346, ll. 19 -- 21.

Discussion

The trial court judge erred when she denied Petitioner's motion for a directed verdict because the evidence adduced at trial did not rise above the level of providing a "mere suspicion" that Petitioner was guilty of murder. The Court of Appeals erred in affirming the trial judge's decision.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and … all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

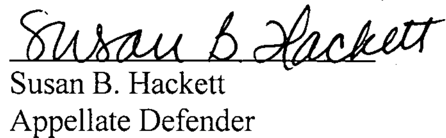
The trial court judge erred by not granting Petitioner's motion for a directed verdict because the evidence did constitute positive proof of facts and circumstances which reasonably tended to prove his guilt of murder. At most, the evidence proved that Petitioner had a relationship with a young woman who had a relationship with the decedent. Her statement tending to implicate Petitioner merely raised a suspicion that Petitioner was guilty, since it was made under circumstances militating against its trustworthiness because it was induced by a deal from the state. And, in any event, she did not testify against Petitioner during trial. All then, that was left to connect Petitioner to the murder, was Petitioner's Bluetooth telephone headseat, found in the apartment complex parking lot, and phone calls between Kitt and Petitioner.

Additionally, Petitioner's fingerprints on the *outside* of the car did not constitute evidence that Petitioner was guilty of committing murder.

CONCLUSION

For these reasons, the trial court judge erred, and Petitioner respectfully asks this Court to reverse his conviction and order a directed verdict of acquittal.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 15th day of May, 2013.

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THE STATE,

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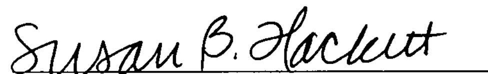
PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 15th day of May, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013