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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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 REPLY BRIEF OF APPELLANT

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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 bond order of September 18, 2018 signed by Judge Hocker is confusing at best. The "Case number/charges" reflects the arrest warrant number for trafficking cocaine but has after it "Trafficking Crack 3rd." (Bond Order). Thus, a conflict exists between the two statements. A bond order, as with a jury charge, "is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). As with statutes, ambiguous orders when drawn by the State should be interpreted in favor of the defendant. "Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." *State v. Blackmon*, 304 S.C. 270, 273–74, 403 S.E.2d 660, 662 (1991)

In arguing that Mr. Pride had notice that he would be tried in his absence, the State does not discuss the question of "tried upon what charge?" The State treats the notice in the bond papers as a notice by the State to try him for any charge they desire. Because the warrant numbers are used, the charges referenced in the bond papers are resisting arrest and trafficking cocaine. (Bail proceedings.) Mr. Pride had the right to rely upon the fact that he could only be tried in his absence for one or both of those charges and no others.

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?

The State argues as to this issue that Mr. Pride was not prejudiced by the violation of the sequestration order. This argument ignores the purpose of the sequestration order. As Officer Whitfield Brooks heard the testimony of the other two officers, the record can never reflect what the testimony of Officers would have been had he not heard the other testimony. The purpose of sequestration is to prevent witnesses from hearing each others testimony. While the testimony as given may not have been prejudicial, one will never know if the exact same testimony would have been given if the sequestration order had been followed. Prejudice from a violation of the sequestration rule simply cannot be judged by looking backwards.

The State has failed to discuss that the trial judge abused his discretion when permitting Officer Brooks to testify. As noted in the opening brief, "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). Simply saying, as the State does, that whether to permit the testimony of a witness who has violated the sequestration order is in the sound discretion of the trial judge, does not counter Mr. Pride's argument that the trial judge abused his discretion. As noted in the opening brief, the trial judge erred as a matter of law in permitting Officer Brooks to testify and erred in making a factual determination that was without any factual basis. The trial judge erred as a matter of law in permitting Officer Brooks to testify.

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?

The real question on this issue is whether the trial judge or defense counsel gets to choose

which of two reasonable doubt charges should be given. Common sense tells any lawyer that when his closing argument tracks the judge's charge to the jury, the credibility of the argument is enhanced. Thus, while the State is correct in saying defense counsel was not limited or prohibited from making an effective argument, this begs the question. While trial counsel did argue the hesitate to act argument to the jury, such argument would have been more powerful had the trial judge also told the jury the same thing.

The State is correct when it says a trial judge is not required to give a definition of reasonable doubt. *State v. Johnson,* 315 S.C. 134, 508 S.E.2d 857 (1998). This is not what happened in this case. The trial judge elected to give one of two correct charges to the jury. The real question here, is whether the trial judge or the defense counsel get to elect which of two proper charges as to reasonable doubt is to be given to the jury. No logical reason can be given for favoring the choice of the trial judge over the choice of the defense counsel. The defense counsel knows the case and knows which definition he believes will assist him in representing his client. Here defense counsel asked for the charge that he believed would assist him best in representing his client. The trial judge should not be given the right to veto that decision.

This Court almost 100 years ago stated, "It certainly will not be questioned for a moment that under the guaranties of state and federal Constitutions every man on trial in a criminal prosecution, however humble or guilty he may be, is entitled to a fair and impartial trial." *State v. Bigham*, 133 S.C. 491, 131 S.E. 603, 607 (1926).[1] When a defense lawyer requests a correct statement of the law as to the definition of reasonable doubt, the right to a fair trial is violated

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[1] This is a rather bizarre case where a witness died on the stand after direct examination and before cross-examination.

when the trial judge declines to give the requested definition. A trial judge should not be permitted to use their discretion to deprive a defendant of a correct statement of the law.

The South Carolina Supreme Court has given the defense lawyer the choice as to which circumstantial evidence charge to use. The court stated, "Thus, we modify *Grippon* and *Cherry* to allow the additional language provided above if requested by a defendant." *State v. Logan*, 405 S.C. 83, 100, 747 S.E.2d 444, 453 (2013). The court in *Logan* recognized that the defense lawyer best knows which charge would give his client a fair trial. "When requested, the Logan charge must be given in cases based in whole or part on circumstantial evidence." *State v. Herndon*, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020). This Court has also said, "We find the trial court erred in failing to grant Dent's request to charge the jury with the *Logan* instruction on circumstantial evidence." *State v. Dent*, 434 S.C. 357, 362–63, 863 S.E.2d 478, 481 (Ct. App. 2021), reh'g denied (Oct. 18, 2021). The same principle should be applied in this case. When a request is made by defense counsel for a definition of reasonable doubt that has been previously approved by our appellate courts, that request should be honored.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, this court should reverse the conviction of Tremaine O'Keefe Pride and remand for a new trial.

May 23, 2021

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CERTIFICATE OF SERVICE

I hereby Certify that I, Sandy Traynham, am the Secretary for C. Rauch Wise, attorney for the Appellant in the above entitled case. That on May 23, 2022, I did send via e-mail a copy of the Initial Reply Brief in the above case addressed to Jonathan Scott Matthews at smatthews2@scag.gov.

May 23, 2022

Sandy Traynham
Secretary

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Re: The State v. Tremaine O. Pride, Case No. 2021-000486

Dear Ms. Kitchings:

I am attaching herewith for filing the Initial Reply Brief together with a Certificate of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt

cc Jonathan Scott Matthews