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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LANCE ANTONIO BREWTON,

APPELLANT

APPELLATE CASE NO. 2018-001572

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5912

PETITION FOR REHEARING

On May 25, 2022, this Court affirmed Petitioner's convictions, holding that Petitioner was not entitled to jury instructions on involuntary manslaughter and accident. This Court also held that appellate counsel abandoned Petitioner's argument that the trial judge erred in prohibiting Petitioner from testifying about the reason he initially fled the scene of the incident and that trial counsel failed to preserve for appellate review the trial judge's decision to allow Petitioner to be impeached with a remote criminal conviction. State v. Brewton, Op. No. 5912 (S.C. Ct. App. filed May 25, 2022) (Howard Adv. Sh. No. 18 at 79). Pursuant to Rule 221(a),

SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

Jury Instructions

In holding that Petitioner was not entitled to jury instructions on involuntary manslaughter or accident, this Court determined that Petitioner's unlawful possession of a firearm was the proximate cause of Natalie's death. Brewton at 88. This Court compared Petitioner to the defendant in State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994):

> Like the defendant in Goodson, [Petitioner] admitted he was unlawfully handling a loaded firearm while intoxicated. [Petitioner] testified he had been on an illegal drug binge that prevented him from sleeping the three days preceding Niemitalo's death; [Petitioner] also admitted he used illegal drugs the morning of Niemitalo's death. Additionally, [Petitioner] testified the gun fell out of his pocket as he got out of the car, he held the gun in his hand while arguing with Niemitalo, and he still held the gun in his hand when he reached into the car to take its keys. Further, [Petitioner] held a gun that would fire once it had five-and-a-half pounds of pressure applied to its trigger, even if that pressure was unintentional. Finally, like the defendant in Goodson, [Petitioner's] illegally possessed gun fired the shot that killed Niemitalo. Therefore, [Petitioner's] unlawful possession proximately caused Niemitalo's death. Accordingly, we affirm the trial court's decision to refuse to instruct the jury on involuntary manslaughter and accident.

Brewton at 88-89 (footnotes omitted). The facts relied on by this Court in determining that Petitioner proximately caused the death of Natalie did not include Petitioner's status as a felon. To be clear, whether Petitioner was a felon or not, and therefore prohibited from possessing a firearm, Natalie would have still died based on all the other reasons stated by this Court which contributed to her death.

"Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries." McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009). "Proximate cause requires proof of (1) causation in fact and (2) legal cause." Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990).

"Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Id. "Legal cause is proved by establishing foreseeability." Id. "A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, *it produces the injury, and without it, the injury would not have occurred.*" Vinson v. Hartley, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996) (emphasis added).

"A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008). "The defendant's act need not be the sole cause of the death, provided it is a proximate cause *actually contributing to the death of the deceased.*" Id. (emphasis added). Natalie would still be dead even if Petitioner were not a convicted felon. This reality demonstrates that Petitioner's status as a felon – the reason his possession of the firearm was unlawful – did not actually contribute to Natalie's death. Instead, her death was caused by the several other factors which this Court pointed to in its opinion, none of which was Petitioner's status as a felon.

In State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994), the Supreme Court noted that in the context of an accident case where the defendant is in unlawful possession of a firearm, "the burden rests upon the State to prove beyond a reasonable doubt *that the unlawful act in which the accused was engaged* was at least the proximate cause of the homicide." Id. at 278, 440 S.E.2d 370 n.1 (emphasis added). This Court, and the state, relied on Petitioner's unlawful possession of a firearm as the unlawful act that he was engaged in at the time of the homicide. Petitioner's possession of the gun was unlawful only because of his prior criminal record and therefore *his status as a felon must have been the proximate cause* of Natalie's death in order for accident and involuntary manslaughter instructions to be precluded. It is not enough for this

Court to list other reasons that contributed to proximate cause that are not unlawful acts because the issue is whether the unlawful act – Petitioner's possession of a gun where he had a prior felony conviction – was the proximate cause. Petitioner respectfully requests this Court to rehear this matter and hold that Petitioner's unlawful possession of a firearm was not a contributing factor in Natalie's death.

Petitioner's Testimony

This Court held that appellate counsel abandoned Petitioner's exception to the trial judge's limitations on his testimony because appellate counsel did not argue on appeal that Petitioner's testimony was not hearsay or was not unfairly prejudicial. This Court may have misapprehended the trial judge's ruling because the judge gave different reasons for excluding different parts of Petitioner's testimony.

The state's initial hearsay objection during Petitioner's proffered testimony came when Petitioner was testifying about statements made by Natalie. R. 263, l. 10 – 16. After Petitioner finished his proffered testimony, the state argued in part:

> [Y]ou've got numerous hearsays involved in this [sic] – her mother, the victim, everything. . . . There's hearsay all through it. There is no exceptions to those hearsays [sic], especially the victim in this case and her mother. Neither one of them testified from that standpoint. That's the majority of it – her father, calling the victim's father and talking to him. . . . I ask to keep that evidence out from the voices, *as well as any kind of hearsay in talking to any other witnesses from that standpoint.*

R. 272, l. 13 – 273, l. 3 (emphasis added). Defense counsel *agreed* that some of Petitioner's testimony was hearsay, e.g., Petitioner's testimony regarding statements made by Natalie and her mother, and that *he would not be offering that testimony before the jury.* R. 273, ll. 5 – 25. To the extent the trial judge ruled that Petitioner would not be permitted to testify to hearsay, trial counsel agreed that the hearsay testimony from the proffer would not be presented

to the jury. However, trial counsel argued that the limitations placed on Petitioner's right to testify amounted to an outright prohibition on Petitioner's testimony because Petitioner needed to explain to the jury why he initially fled the scene. R. 278, ll. 8 – 14.

As an initial matter, the trial judge's hearsay ruling appeared to be referring to statements made by Natalie and her mother which defense counsel agreed were inadmissible and would not be presented to the jury. In that respect, the hearsay arguments and ruling were not disputed at trial. What was disputed was whether Petitioner had a right to testify to matters that were critical in refuting the state's theory that Petitioner fled the scene of the shooting because he acted with malice. Regarding this disputed issue, the trial judge limited Petitioner's testimony because he believed the jury would misinterpret the evidence as suggesting that Petitioner was raising an insanity defense. App. 275, l. 2 – 277, l. 9.

This Court may have overlooked the true basis for Petitioner's argument at trial which was that the judge was preventing Petitioner from testifying to matters that were critical to his defense in violation of the Constitution. R. 278, ll. 8 – 14. The Supreme Court held in State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), that "[t]he right of an accused to testify in his defense is fundamental to the trial process *and transcends a mere evidentiary ruling*. An accused's right to testify is either respected or denied; its deprivation cannot be harmless." Rivera at 249, 741 S.E.2d at 707 (emphasis added) (internal quotations omitted). In other words, regardless of the trial judge's evidentiary rulings, Petitioner contended that the trial judge violated his constitutional right to testify, which transcended his evidentiary rulings.

In light of this Court's possible misapprehending the trial judge's rulings in conjunction with the arguments raised by the parties, Petitioner respectfully requests this Court grant

rehearing and rule on the merits of Petitioner's claim that his constitutional right to testify was violated by the trial judge.

Petitioner's remote criminal conviction

Finally, this Court determined that Petitioner failed to preserve his objection to the use of his remote conviction against him because, after Petitioner's objection was unsuccessful, defense counsel asked the judge if he was going to allow the state to refer to the prior conviction by name or in the alternative as a "crime of dishonesty" in an apparent attempt to mitigate the unfair prejudice Petitioner would suffer. This Court erroneously held that Petitioner "acquiesced to referring to [the remote conviction] as a crime of dishonesty." Brewton at 90-91.

This Court may have overlooked the fact that the trial judge had already erroneously ruled that Petitioner's remote conviction was admissible over Petitioner's unequivocal objection to it. This Court implied that defense counsel's subsequent efforts to mitigate the judge's erroneous ruling by referring to the conviction as a "crime of dishonesty" instead of "strong arm robbery," and introducing the evidence on direct examination in anticipation of the state's cross-examination on the conviction, constituted a waiver of the objection. Respectfully, this Court's holding is incorrect.

In State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995), the state argued on appeal that the defendant had waived his objection to the admissibility of a prior criminal conviction for purposes of impeachment. Specifically, the defendant in Mueller called her husband as the first defense witness after the state rested its case. The husband had a prior conviction for possession with the intent to distribute marijuana that the state sought to impeach him with. The trial judge ruled that the conviction was admissible over the defendant's objection. Therefore, "[a]nticipating the State's cross-examination, the defense revealed Mr.

Mueller's conviction during direct examination." Mueller, 319 S.C. at 267-68, 460 S.E.2d at 410.

The state in Mueller argued that the issue of the admissibility of the prior conviction was not preserved for appellate review because the defendant elicited the challenged evidence through direct examination. Conversely, the defense argued that the judge's ruling that the conviction was admissible was a final ruling on the matter and that the defense introduced the evidence on direct examination to minimize its impact on the jury. This Court agreed that "an attorney 'should not be given the Hobson's choice of either mitigating the damage to his witness by introducing impeachment evidence on direct examination, or preserving for review on appeal the error of a ruling already made.'" Mueller, 319 S.C. at 268, 460 S.E.2d at 410.

This Court held in Mueller that because the judge made its ruling on the admissibility of the prior conviction immediately before the witness took the stand, the ruling was a final ruling and that the defense was not required to renew her objection in order to preserve the issue for appeal. Id. at 268-69, 460 S.E.2d at 410-11. This Court further held that the defense did not waive the objection by eliciting the prior conviction on direct examination and that "[t]o force a defendant to choose between challenging an incorrect final ruling on appeal or minimizing the impact damaging evidence would be fundamentally unfair." Id.

Here, the judge made a final – and erroneous – ruling that Petitioner's prior conviction from 1999 was admissible immediately before Petitioner took the witness stand. Critically, *after* the judge made this final ruling, defense counsel asked for clarification as to what the crimes would be referred to as: "Is the Court going to allow the state to impeach on the actual name of the crime or are we going to just refer to it as a crime involving dishonesty?" R. 285, ll. 12 – 15. The judge then asked what the state's position was and stated: "I don't think I could necessarily

require it, but I would strongly suggest that it simply be referred to as crimes of dishonesty as opposed to actual crimes so that it's not too confusing or prejudicial to the jury and they understand the purpose of the admission of the convictions." R. 285, ll. 16 – 25.

This Court is incorrect that this constituted a waiver of Petitioner's objection to the clearly inadmissible remote prior conviction from 1999. Once the judge made his final ruling that the conviction was coming in, defense counsel had a right, and the responsibility, to mitigate the prejudicial impact of that evidence. Issue preservation is not a "gotcha game," and instead of being hyper-technical, this Court should approach issue preservation with a practical eye and find that the trial judge's ruling was final and that Petitioner did not waive his objection by attempting to mitigate the unfair prejudice he would suffer as a result of the judge's erroneous ruling. See State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (Ct. App. 2019).

Based upon the specific points overlooked and/or misapprehended by this Court in its opinion discussed above, Petitioner requests this Court to rehear the matter.

Respectfully Submitted,

ADAM SINCLAIR RUFFIN
Appellate Defender

This 9th day of June, 2022.

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STATE OF SOUTH CAROLINA

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APPELLATE CASE NO. 2018-001572

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 Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Lance Antonio Brewton, #272849, at McCormick Correctional Institution, 386 Redemption Way, Pelzer, SC, 29899, this 9th day of June, 2022.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

From: Leverett, Scott
To: SC - BROWN MELODY
Cc: Angela Brown; Ruffin, Adam
Subject: Lance Brewton - Petition for Rehearing - Appellate Case No. 2018-001572
Date: Thursday, June 9, 2022 2:50:00 PM
Attachments: Lance Brewton - Petition for Rehearing - Appellate Case No. 2018-001572.pdf
AG coverletter.pdf

Dear Ms. Brown,

Attached please find a copy of the petition for rehearing in the above referenced case that is being filed today, June 9, 2022, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Adam Ruffin
Appellate Case No. 2018-001572