

No. 123926

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

People of the State of Illinois,
Plaintiff-Appellant,

v.

Shadwick R. King,
Defendant-Appellee.

Appeal from the Appellate Court of
Illinois, Second Judicial District
No. 2-15-1112

There heard on Appeal from the Circuit
Court of the 16th Judicial Circuit, Kane
County, Illinois
No. 14 CF 1229

Hon. James C. Hallock, Presiding

REPLY BRIEF IN SUPPORT OF
DEFENDANT-APPELLEE'S REQUEST FOR CROSS-RELIEF

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The appellate court correctly reversed King's conviction for all the reasons explained in the response brief. The reversal was also appropriate because King was improperly denied a substitution of judge (which rendered the judgment against him null and void). Additionally, the appellate court should have not have remanded the case for further proceedings. The State failed to prove King guilty beyond a reasonable doubt and a new trial would violate King's double jeopardy rights.

I. The Circuit Court Improperly Denied King's Motion for Substitution of Judge.

King's motion for substitution of judge was timely filed seven days after the case was assigned to Judge Hallock and before Judge Hallock ruled on any substantive issues. (C5; C38.) The improper denial of that motion represents another basis for reversal of King's conviction.

The State suggests its motion to obtain cell phone records was substantive because it "went to the State's ability to acquire evidence to use in prosecuting defendant." (Reply Br. at 16.) If that were the appropriate standard, it would make all discovery rulings substantive, regardless of whether they go to the merits of the case. *Cf. In re Marriage of Birt*, 157 Ill. App. 3d 363, 368–69 (2d Dist. 1987). This Court has never interpreted the statute in such an expansive manner.

In *In re A.N.*, 324 Ill. App. 3d 510, 513 (4th Dist. 2001), the appellate court held that a ruling on a petition for temporary detention under the Juvenile Court

Act was not substantive, even though it required the court to consider whether there was probable cause to believe a crime was committed and that the defendant committed the crime. *Id.* Similarly, in *In re Austin D.*, 358 Ill. App. 3d 794, 800 (4th Dist. 2005), the appellate court determined that a ruling at a shelter-care hearing was not substantive for purposes of a motion for substitution, because it did not “directly relate to the merits of the case.” *Id.* at 801. The court defined “merits of the case” to include “(1) whether the minor is abused, neglected, or dependent; and (2) if so, whether it is consistent with the health, safety, and best interests of the minor and the public that he be made a ward of the court.” *Id.* The preliminary shelter-care determination that there was probable cause to believe the minor was abused, neglected, or dependent was not considered a ruling on the merits of whether the minor *was* actually abused, neglected, or dependent. *Id.*

Here, the State’s motion seeking historical cell site records only asked the court to determine whether there were “‘reasonable grounds’ to believe that the records sought [were] ‘relevant and material’ to an ongoing criminal investigation” (Reply Br. at 15 (quoting 18 U.S.C. § 2703(d))), not whether there were reasonable grounds to believe King was involved in a crime and certainly not whether King was guilty of any crime. The court did not determine that the location of King’s cell phone would support the State’s theory of where King’s phone was located that night. The court’s ruling on the motion does not equate to

a finding that King was present at the scene of Mrs. King's death, nor does it address any other issue directly related to the merits of the case. The motion contained nothing that would indicate the court's ruling addressed King's guilt or innocence.

"[T]he provisions of the [substitution] statute are to be construed liberally to promote rather than defeat substitution[.]" *People v. McDuffee*, 187 Ill. 2d 481, 488 (1999). The substantive ruling limitation is merely meant to prohibit litigants from "testing the water" or "judge shopping." See *People v. Jones*, 197 Ill. 2d 346, 356 (2001) (citing *People v. Taylor*, 101 Ill. 2d 508, 518 (1984)). Because the State's motion did not require the court to assess the credibility of any evidence or to address the merits of the case, it did not offer either party the opportunity to "test the waters," and there is no reason to consider it a limitation on King's right to a substitution.

Moreover, King's objection to the State's motion did not otherwise render the trial court's ruling "substantive." King objected on the basis that the federal statute governing the release of cell tower records is facially unconstitutional. (R12-21.) To prove a law *facially* unconstitutional, one must demonstrate that "'no set of circumstances exists under which the Act would be valid.'" *In re C.E.*, 161 Ill. 2d 200, 211 (1994) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

King's objection did *not* ask the court to consider whether, under the facts and circumstances of his particular case, the law was unconstitutional. Instead, his motion only asked whether the law was unconstitutional *per se*, which makes the specific facts related to him irrelevant. See *People v. Thompson*, 2015 IL 118151, ¶ 36 (“An as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party. In contrast, a facial challenge requires a showing that the statute is unconstitutional under any set of facts, *i.e.*, the specific facts related to the challenging party are irrelevant.”) (citing *People v. Garvin*, 219 Ill. 2d 104, 117 (2006)). As a result, the court's ruling on the facial constitutionality of the federal statute in no way related to the merits of the State's case against King or forecast the court's position on the merits.

Under the substitution statute, the court had no discretion to deny King's timely substitution motion. *McDuffee*, 187 Ill. 2d at 487 (“Section 114-5(a) provides a defendant with the ‘absolute right’ to a substitution of judge upon the timely filing of a proper written motion for substitution.”) (quoting *People v. Walker*, 119 Ill. 2d 465, 470 (1988)). The State does not dispute that the erroneous denial of a motion for substitution renders any further actions by the court “null and void.” *McDuffee*, 187 Ill. 2d at 492; *People v. Tate*, 2016 IL App (1st) 140598, ¶ 20. As a result, the denial of King's motion for substitution supports reversal too.

II. A New Trial Would Violate King's Double Jeopardy Rights.

The State failed to prove that Mrs. King was murdered, let alone that King was responsible. *See People v. Jerome*, 206 Ill. App. 3d 428, 436 (2d Dist. 1990) (“When a defendant is charged with first-degree murder, the State is required to prove death, causation and intent (or knowledge).”). Because the State did not, and cannot, meet its burden of proving King guilty beyond a reasonable doubt, a retrial would violate King's double jeopardy rights. U.S. Const., amend. V; Ill. Const. 1970, art. 1, § 10; *Burks v. United States*, 437 U.S. 1, 11 (1978); *People v. Williams*, 188 Ill. 2d 293, 307 (1999) (“[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”) (citation omitted). This Court should reverse the conviction outright.

The Second District noted the dearth of evidence of guilt—“Dr. Blum[, King's forensic pathologist expert,] questioned Dr. Kalelkar's[, the State's forensic pathologist expert,] methodology and conclusions. There was no eyewitness, no confession, and no forensic evidence connecting defendant to the crime.” *People v. King*, 2018 IL App (2d) 151112, ¶ 89.

The State suggests Dr. Kalelkar's testimony alone was sufficient to prove that Mrs. King was murdered. (Reply Br. at 18.) It is not. Dr. Kalelkar testified that manual strangulation was the cause of death, but her autopsy report listed only asphyxia. (R911; R970–71; R2782–83.) A finding of asphyxia alone is not proof that a crime occurred.

As Dr. Blum explained, asphyxia can result from a number of causes, criminal and not. (R2623–26.) Dr. Kalelkar's report said nothing about choking, strangling, or compression. (R911.) The report did not even identify Mrs. King's death as a homicide. (R2622–23.) This raised a "red flag" for Dr. Blum, who explained that typically he would defer to the doctor who did the autopsy, but the notable absence of critical information in Dr. Kalelkar's contemporaneous report made it, and her later testimony, unreliable. (*Id.*)

Notably, Dr. Kalelkar never revised her report, instead changing her conclusion when she testified at trial, after speaking with the prosecutors. (R910; R936–37 ("Q: Did you have a discussion before your testimony in this case with anybody about your testimony? A: Yes. I discussed my testimony with the attorneys who are here. Q: Well, there is -- A: I discussed them with Greg Sams as well as with Mark [two of the State's prosecutors]. Q: Did they use the word the body was placed or dumped or anything like that with you? A: They may have.").)

The State stresses that Dr. Kalelkar's testimony was corroborated by Safarik's inadmissible testimony. This argument only confirms the contradictory nature of the State's positions. On one hand, the State argues that the admission of Safarik's testimony was harmless¹—that is, that it had no effect on the jury's verdict because it was duplicative of Dr. Kalelkar's testimony. (Reply Br. at 3–4.) On the other hand, the State contends that Safarik's testimony proved King guilty beyond a reasonable doubt. (Reply Br. at 18.) The State cannot have it both ways.

To start, Dr. Kalelkar's testimony alone is not enough to establish that Mrs. King was murdered. And that holds true even if combined with the rest of the record evidence the State points to aside from Safarik's (Reply Br. at 20–21), because none of that evidence comes close to establishing murder. This is particularly so in light of Dr. Blum's testimony. As a result, if the State is really arguing that Safarik's testimony was harmless, it only confirms that there is not enough evidence to convict and any retrial would violate King's double jeopardy rights.

If the State is actually relying on its contradictory argument that it is Safarik's testimony that proved King's guilt, it is still wrong. Safarik's testimony

¹ Substantively, the State forfeited the argument that the introduction of Safarik's cause-of-death testimony was harmless because it failed to raise it in the opening brief. Ill. S. Ct. R. 341(h)(7) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

did not prove King guilty. Safarik performed no independent investigation regarding the cause of death; he simply reviewed Dr. Kalelkar's report and reached a different conclusion (R1344-45), the conclusion the prosecutors hoped Dr. Kalelkar would reach herself.

Dr. Blum testified that he could only identify one of the six indicators of asphyxia. (R2627-31, R2671-75.) He concluded Mrs. King's cause of death was a sudden cardiac event triggered by stress, lack of sleep, and alcohol intoxication. (R2631.) This conclusion is consistent with testimony from other witnesses that Mrs. King was just told she needed to decide between her husband and the man with whom she was having an affair, a stress-inducing conversation; that she had recently consumed large quantities of alcohol; and that she would have had very little sleep. (R843, R1168, R2631, R2701, R2704-06.) In short, and in light of all the record evidence, no reasonable juror could find King guilty, even including Safarik's testimony.

The State suggests the Court should ignore the statements of the first responders who found Mrs. King on the tracks. (Reply Br. at 19.) There is no reason to do so. The responders were the first to see Mrs. King at the site, and their perceptions were untainted by any suggested theory of what occurred. The first impression of the train engineer was that Mrs. King was breathing, and a paramedic reported that she was warm to the touch. (SR475-77, SR497, R2394,

R2583–86.) This evidence suggests that Mrs. King was alive when she reached the tracks, and this is not invalid just because no one testified to seeing her reach the tracks.

The Kings' prior marital interactions and the lack of direct evidence against King further show that there is no reason for a retrial. The State claims that King's own statements and actions reveal some criminal agency or motive. (Reply Br. at 21–22.) But evidence of a marital dispute alone does not prove intent to commit murder, especially in this case.

The record shows that King knew of Mrs. King's affair for some time and that the two previously discussed the issue. (R1757–58.) There is no evidence these discussions were violent. In fact, the Kings were out together the evening before and by all accounts appeared to get along. (R1121, R1138, R1159.) The record further shows that the Kings discussed the affair after they returned home that night (R1168), which supports Dr. Blum's conclusion that Mrs. King suffered a stress-induced sudden cardiac event.

There was no physical evidence linking King to Mrs. King's death, no eyewitness testified that he was seen near the railroad tracks on the morning in question, and there was no DNA from King or anyone else found on Mrs. King's body. (R1711–13.) Experts disagreed on the cause of death, and the accounts from various first responders differed. This evidence, or lack thereof, even when viewed

in the light most favorable to the State, is “so improbable or unsatisfactory that there remains a reasonable doubt of [King’s] guilt.” *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004). The State failed to carry its burden of proving beyond a reasonable doubt that Mrs. King was murdered and that it was King who was responsible. See *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 46. This Court should reverse King’s conviction outright.

CONCLUSION

The many errors in this case are well documented. The trial was rife with inadmissible and prejudicial evidence, and the court improperly failed to provide King with a substitution of judge. The appellate court was correct to reverse King’s conviction. Because the State failed to prove King guilty beyond a reasonable doubt, this Court should affirm the judgment of the appellate court in part and reverse the conviction outright.

September 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 10 pages.

Dated: September 13, 2019

/s/ Matthew R. Carter

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on September 13, 2019, the foregoing Reply Brief in Support of Defendant-Appellee's Request for Cross-Relief was filed with the Clerk of the Illinois Supreme Court using the court's electronic filing system, and copies were served by email to the following addresses and by mail to Joseph McMahon, State's Attorney, Kane County. Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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