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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Heath P. Taylor, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DELMAR RACORY SANDERS,

APPELLANT

APPELLATE CASE NO. 2022-001243

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to suppress appellant's statement to the police because the police knew appellant was represented by an attorney?

STATEMENT OF THE CASE

Appellant was indicted in Beaufort County for murder related to the death of Deonne McClendon, the attempted murder of Rhonda Randall, and a weapons charge. R. 6. On August 22, 2022, appellant was tried before the Honorable Heath P. Taylor and a jury. R. 1. Mary Jones and Samantha Molina represented the State. R. 2. Seth Paulk represented appellant. R. 2. The jury acquitted appellant of murder and attempted murder. R. 742. The jury convicted appellant of the lesser-included offense of voluntary manslaughter and the weapons charge. R. 742. Judge Taylor sentenced appellant to thirty years' imprisonment for manslaughter and a consecutive five-year term on the weapons charge. R. 770. This appeal follows.

STANDARD OF REVIEW

The trial court's factual findings regarding the voluntariness of a statement are reviewed for any evidentiary support, but the ultimate legal question of whether a statement is voluntary is reviewed de novo. State v. Miller, ___ S.C. ___, ___ S.E.2d ___, 2023 WL 5946016 (Sept. 13, 2023).

ARGUMENT

The trial court erred in refusing to suppress appellant's statement to the police because the police knew appellant was represented by an attorney.

This self-defense case hinged on appellant's credibility. Appellant was indicted for the murder of his cousin, Deonne McClendon ("McClendon") and the attempted murder of Rhonda Randall ("Randall"). Randall, a prostitute and crack addict, was the State's main witness at trial. R. 161. R. 173-74. She testified that appellant was high on cocaine and paranoid and shot his cousin and her for no reason after they questioned whether he should be driving. R. 163-65. She claimed that she only carried a small "satchel purse" that was not big enough to hold a gun, but the defense entered a picture of her purse from the hospital showing it was substantially larger. (Def. Ex. 7). The jury acquitted appellant of attempted murder for the shooting of Randall and only convicted him of voluntary manslaughter for McClendon's death. R. 742.

Appellant testified that he picked up his cousin that night and McClendon asked if he could put his gun under the hood of his car in case they got stopped by police. R. 394-95. They picked up Randall in Beaufort and then went to the Oasis Motel. R. 401-02. Appellant thought there would be two girls, but Randall was the only girl and appellant was not interested in hanging out at the motel with them. R. 401-03. Appellant waited in his truck in the parking lot while Randall and McClendon went into the motel room. R. 405-09. Randall came back to appellant's car and tried to convince him to come into the room, but he refused. R. 409-10.

Appellant admitted to using cocaine and that he saw McClendon using cocaine. R. 412-13. The toxicology report on McClendon's blood showed alcohol, THC, cocaine, and naloxone. R. 512-13. McClendon and Randall came out of the hotel and got into the car. R. 413-16.

McClendon unlocked the back door for Randall. R. 413-16. Appellant was afraid they planned to rob him because he told them he had been paid and was heading to an ATM. R. 419-20.

While he was driving, he heard Randall drop something heavy in the backseat. R. 422. Appellant saw McClendon reach into the backseat and Randall move as if to hand him something. R. 426-28. Appellant was scared and realized he was in danger. R. 429.

McClendon and Randall kept telling him they wanted to drive, and appellant eventually pulled over to the side of the road. R. 429-31. When appellant turned the interior dome light on, he saw a gun on McClendon's lap with the barrel facing him. R. 431. The gun was small enough to fit in a purse. R. 432-33.

McClendon got out of the car, leaving the gun on the seat, and so did appellant. R. 433-34. Randall remained in the backseat but leaned forward so that she was within arm's reach of the gun. R. 434-35. McClendon insisted on driving and appellant refused. R. 436. McClendon went back to the car and started talking to Randall. R. 436-37. McClendon placed his hand on the gun and appellant then snatched the gun from McClendon's grasp. R. 436-37.

McClendon was "outraged" and started coming towards appellant, yelling. R. 437. Appellant fired twice. R. 439. He yelled at Randall to get out of his car. R. 439. She did not comply and started rummaging through her purse. R. 440. Appellant fired a "warning shot" at her. R. 440-41. Randall got out of the car (she was shot in the arm), and appellant escaped by driving away. R. 440-43. Appellant turned himself in to the police in Georgia the next day. R. 445.

After his arrest, appellant gave a recorded interview to the police. (Court's Ex. 3). The State sought admission of the interview because appellant initially told the police a different story than his trial testimony. At the pre-trial Jackson v. Denno, 378 U.S. 368 (1964), hearing,

the investigator said he could not recall whether he talked to Christy Estrada at the Public Defender's office prior to interviewing appellant. R. 80-81. Defense counsel showed the investigator a handwritten note that the officer admitted writing. R. 80-83. The note said, "Seth Paulk, Public Defender, looking for Delmar Sanders." R. 83-84.

The officer remembered talking to Estrada, but when asked whether he knew defense counsel represented appellant, the officer claimed she never told him "why you were looking for him." R. 83. The officer added that appellant never mentioned that he was represented during the interview. R. 83. Estrada testified at the Denno hearing that she told the officer that Paulk was representing appellant. R. 86. Appellant testified that he did not understand the waiver of rights he was given. R. 88-89. Had he known he was represented, he would have invoked his right to counsel. R. 89. Appellant candidly admitted that he did not ask for an attorney during the interview. R. 93.

Appellant argued that his statement should be suppressed because his Sixth Amendment right to counsel had attached and the police were not allowed to interview him. R. 95-96. The trial judge said, "I am concerned that they had reached out, and they conducted the interview anyway." R. 100. Judge Taylor added, "I don't like the fact that there may have been a message that he had a lawyer, and he was still interrogated." R. 102. But the court did not suppress the statement, finding that appellant waived his right to have a lawyer present during the interview. R. 102-04.

The trial judge erred in allowing the State to admit the interview into evidence. "The State has the burden to show by the preponderance of the evidence that a defendant has voluntarily waived his right to counsel." State v. Binney, 362 S.C. 353, 359, 608 S.E.2d 418, 421 (2005). A citizen cannot "be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. 436, 474 (1966). An accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

The trial judge relied on Montejo v. Louisiana, 556 U.S. 778 (2009) to allow the statement. The court's reliance on Montejo was misplaced. In Montejo, the defendant was appointed counsel at an arraignment and then was interrogated later that day. Montejo, 556 U.S. at 781-82. The detectives convinced the defendant to write a letter of apology. Id. The Montejo Court found that when counsel is appointed, no presumption exists that a subsequent waiver of counsel is invalid. Id. at 789. The Court emphasized that Montejo did "nothing at all" to exercise his right to appointed counsel. Id. See also State v. Reid, 408 S.C. 461, 758 S.E.2d 904 (2014); State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998).

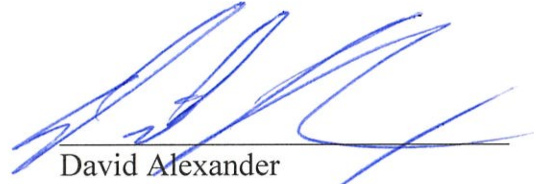
Montejo was at the arraignment when he was appointed counsel and knew about his potential representation. In contrast, appellant did not know that he was represented, and his attorney was looking for him. The trial judge was correct to be displeased that the police kept this information from appellant and interviewed him anyway. Had appellant known he had counsel; he would not have given the statement.

Admitting the statement was error and the effect was highly prejudicial. As shown by the acquittal for attempted murder and murder, the jury did not believe Randall's account of the shooting. Had the State not been able to impeach appellant with the inconsistencies between his

trial testimony and his initial statement, his credibility would have remained intact, and appellant would have been acquitted of manslaughter. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of September, 2023.

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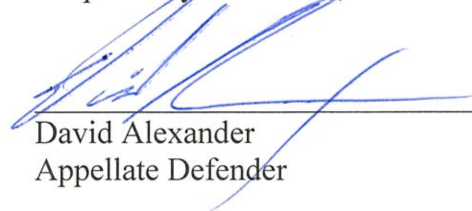
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Delmar Racory Sanders states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Heath P. Taylor, which was held on August 22-25, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Delmar Racory Sanders.

Respectfully Submitted,



David Alexander
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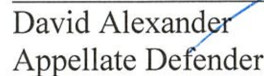
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s):
(2) Defendant's Ex. 7 (Photo of purse) (to be transported)
(3) Trial Transcript August 22-25, 2022
(4) Immunity Transcript April 21, 2022
(5) Court's Ex. 2 (Waiver of Rights)
(6) Court's Ex. 3 (Defendant's Interview) (to be transported)
(7) Court's Ex. 4 (Note Printout)

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



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This 29th day of September, 2023.

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 29th day of September, 2023.