

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUL 29 2013
SC Court of Appeals

Appeal from Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-212639

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WALTER DOUGLAS BARCLAY,

APPELLANT.

RETURN TO MOTION FOR BOND AND STAY OF SENTENCE

Appellant was convicted by a jury of felony driving under the influence, death resulting. On November 1, 2011, the trial judge, the Honorable Deadra L. Jefferson, sentenced Appellant to twelve years of imprisonment. Appellant timely served and filed a notice of appeal. His Initial Brief and Motion for Bond and Stay of Sentence were both served on July 17, 2013. By letter dated July 18, 2013, this Court requested a response to Appellant's motion for bond within ten days.¹

Appellant requests that this Court order his release on bond during the pendency of the appeal. In support of his request, Appellant asserts several factors in favor of bond, including a low level of danger to society, a low probability of forfeiture or escape, Appellant's good character and reputation, Appellant's lack of a prior felony record, and a

likelihood that Appellant will prevail on appeal. The State opposes Appellant's motion for bond and stay of sentence for the following reasons.

Initially, the State submits Appellant should not receive release on bond pending appeal because Appellant was sentenced to a term of imprisonment of more than ten years. See S.C. Code § 18-1-90 ("Bail may be allowed to the defendant in all cases in which the appeal is from the trial, conviction, or sentence for a criminal offense. However, bail is not allowed when the defendant has been sentenced to death, life imprisonment, or *imprisonment for more than ten years.*") (emphasis added). The legislative intent behind this statute is to prevent defendants who have been convicted of serious crimes that carry stiffer penalties from being released while an appeal is pending. Therefore, in light of Appellant's conviction for the very serious offense of felony driving under the influence, death resulting, and his sentence of twelve years, the State requests that this Court deny Appellant's request for bond. See Parker v. State Highway Department, 224 S.C. 263, 78 S.E.2d 382 (1953) ("Upon . . . conviction, there is no longer a presumption of innocence. There then arises a 'legal as well as laical presumption' that the conviction is just. Such a presumption is not destroyed or abrogated by appeal.") (citation omitted).

However, should this Court consider the request for bail pursuant to Whitener v. State, 225 S.C. 244, 81 S.E.2d 784 (1954), S.C. Code § 14-8-200, and Rule 246(a), SCACR, the State asks this Court to exercise its discretion and deny the motion. The issuance of bond after a conviction is a matter of discretion and not a right. Nichols v. Patterson, 202 S.C. 352, 355, 25 S.E.2d 155, 155-56 (1943). The court's power to release a defendant on

¹ The Initial Brief of Respondent is due to be served and filed on August 16, 2013.

bond pending appeal should be exercised with “due discretion” and “extreme caution.” Id. In considering a request for release on bond pending appeal, the following factors should be reviewed: (1) the probability of reversal; (2) the nature of the crime; (3) the possibility of escape; and (4) the character and circumstances of the accused. Id. at 355, 25 S.E.2d at 156.

The State submits that this case does not present exceptional circumstances warranting Appellant’s release on bond pending appeal. First, although undersigned counsel has not yet had the opportunity to thoroughly research the six issues raised in Appellant’s Initial Brief, the State submits that it is unlikely Appellant will prevail on appeal. Even if Appellant is able to show some error on the part of the trial judge, the State believes he will be unable to show the requisite prejudice. See State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) (“It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him.”).

Second, regarding the nature of the crime, the State submits that the offense of felony driving under the influence, death resulting, is a very serious crime. Indeed, Alvaro Antonio Garcia died as a result of Appellant’s commission of this offense. Mr. Garcia is survived by his wife and three children who had been relying on him for their support. Further, although the trial judge saw fit to sentence Appellant to twelve years, the offense carries up to twenty-five years in prison. Finally, Appellant’s blood alcohol level was extremely high – a .208 - several hours after the offense. (See Exhibit A - Trial Transcript, Volume IV, p. 718). This illustrates Appellant’s blatant disregard for the law and for the safety of the members of his community. Accordingly, the State submits that the

seriousness of the crime in this case weighs heavily against allowing Appellant to be released on bond during the pendency of his appeal.

Regarding the third and fourth factors - the possibility of escape and the character and circumstances of the accused - Appellant asserts that he has strong ties to South Carolina, and the Edisto Island community in particular, and that his good character and reputation weigh in favor of granting his release on bond. While the State cannot necessarily refute that Appellant *generally* has a good character and reputation in his community, his commission of the offense of felony driving under the influence reveals that there exists a darker side of Appellant. Of paramount concern to the State is the safety of the drivers and pedestrians in Appellant's community. If Appellant is released on bond during the pendency of this appeal, there is a definite risk that Appellant will drink and drive. Notably, Jose Davilla, the passenger in the car Appellant struck, informed the prosecutor that, even after the accident, he had seen Appellant at the store in the daytime buying beer and that Appellant was still drinking and driving. (See Exhibit B - Trial Transcript, Volume V, p. 1091). Mr. Davilla also told the prosecutor that this was not a "one time thing" and that Appellant was "an accident waiting to happen." (See Exhibit C - Trial Transcript, Volume V, p. 1090). Accordingly, the State submits that erring on the of caution, and denying Appellant's motion for appeal bond, would be the best course of action to ensure the safety of the residents of Edisto Island.²

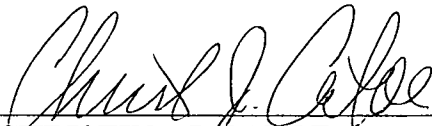
Based upon the foregoing, the State respectfully requests that this Court deny Appellant's request for bond pending appeal.

² However, if this Court should decide to grant Appellant's motion, the State would request that stringent

Respectfully submitted,

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Attorney General

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Assistant Attorney General



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ATTORNEYS FOR RESPONDENT

July 29, 2013

conditions be placed on Appellant, including electronic monitoring as Appellant suggests, to ensure that Appellant will not drink and drive.

Exhibit A

1 blood alcohol test that you ran for Mr. Barclay's
2 case?

3 MR. MASON: Objection, Your Honor.

4 THE COURT: Basis?

5 MR. MASON: Foundation.

6 THE COURT: Overruled.

7 THE WITNESS: The results that we found was
8 0.208 concentration.

9 BY MS. KINZELER:

10 Q Tell the jury what that means, a .208, what
11 does that mean?

12 A That is a weight per volume percentage, so as
13 you know, a .08 is what is more commonly known as
14 the legal limit throughout the country. A .208 is
15 close to, or a little more than twice that legal
16 limit.

17 Q Based on your training and education and how
18 alcohol affects individuals, what does a .208 mean?

19 A At a .208 you would usually start seeing the
20 loss of your peripheral vision, you start getting
21 more of a tunnel vision. You will start having
22 slower reaction times. You don't brake as fast,
23 you don't speed up as fast, you start losing that
24 ability to concentrate, you start having some
25 dizziness, some drowsiness, you can be confused.

1 as evidence in the case but for additional reasons that
2 weren't appropriate in front of a jury as far as
3 evidence goes as to whether or not he committed the
4 offenses that were charged, and the witnesses I spoke
5 with, particularly Nurse Heath, by example, remembers
6 him from that night particularly, in addition to the
7 obvious reasons, because of his lack of remorse. Most
8 of these witnesses used that word when they described
9 what they recall about this event, just the sheer
10 unremorsefulness of what happened. In addition, Jose
11 did tell us, Jose Davilla, the other victim, in short,
12 Your Honor, it wasn't a one time thing, it had happened
13 before, Jose believes it has happened before, not
14 necessarily the death and injuries, but the drinking
15 and driving. This wasn't a one time thing. It wasn't
16 a one time 19 year old making a mistake kind of case,
17 it was an accident waiting to happen and I just, I know
18 that the Court is going to hear from several people
19 about what a good person he is and I'm sure to those
20 people that is true and I'm sure he is a good person
21 but there is another side to Mr. Barclay I don't know
22 if they know and without repeating the exact words I
23 would ask Your Honor take into consideration the
24 statements that didn't come out in front of the jury
25 the firemen heard that night. Those statements came,

Exhibit C

1 and his filter may have been lowered by being
2 intoxicated, but he feels the way he does about a
3 particular group, what he says, it wasn't just because
4 he was drunk, and since then when Jose has seen him at
5 the store in the daytime buying beer or whatever Jose
6 had told us that he looks at him and says, "You killed
7 my friend and you still drink and drive," and he looks
8 at him in return as though he doesn't care, it is
9 almost as though it shouldn't matter because they were
10 Hispanic or whether or not they were here illegally,
11 and I would just like for the Court to have a very
12 honest view of both sides of what we're presenting here
13 today. It wasn't a one time mistake, it goes lot
14 deeper than that and that is the other side of the
15 defendant that we became aware of in preparing for
16 trial.

17 That being said, Your Honor, I think that, I do
18 realize his age, that there was one not guilty and one
19 guilty, I do think anything less than ten years would
20 not be justice. I would shoot for closer to fifteen
21 but I think ten to fifteen years would be most
22 appropriate. It does carry up to 25 years. I do think
23 that the way it happened and what happened and the way
24 this man died and the way Jose almost died, I think all
25 these things definitely support at least a ten if not

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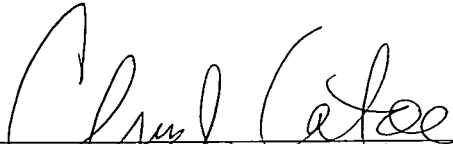
v.

WALTER DOUGLAS BARCLAY,

APPELLANT.


AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the State's **Return to Motion for Bond and Stay of Sentence** in the above-referenced case has been served upon **John B. Shupper**, Post Office Box 90623, Columbia, South Carolina 29290, this 29th day of July, 2013.


CHRISTINA J. CATOE
Assistant Attorney General

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(803) 734-3737

SWORN to before me this 29th day of July, 2013.


Notary Public for South Carolina.
My Commission Expires: 5/11/2014

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SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

July 29, 2013

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Walter Douglas Barclay
Appellate Case No. 2012-212639

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the State's **Return to Motion for Bond and Stay of Sentence** and **Affidavit of Service** in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Caroe
Assistant Attorney General
SC Bar No. 73562

cc: John B. Shupper, Esquire
Post Office Box 90623
Columbia, SC 29290

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