RECEIVED
Mar 14 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS S. MCFADDEN,

APPELLANT

APPELLATE CASE NO. 2023-000566

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

The trial court erred in admitting DNA results obtained from appellant pursuant to an invalid search warrant in violation of the Fourth Amendment. 4

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL 8

TABLE OF AUTHORITIES

Cases

Chapman v. California, 386 U.S. 18 (1967) 3

Schmerber v. California, 384 U.S. 757 (1966) 5

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216, (2006) 6

State v. Jenkins, 398 S.C.215, 727 S.E.2d 761 (Ct. App. 2012) 6

State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2015). 6

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting DNA results obtained from appellant pursuant to an invalid search warrant in violation of the Fourth Amendment?

STATEMENT OF THE CASE

Appellant Thomas McFadden, Jr. was indicted in Charleston County for murder and a weapons charge and on March 27, 2023, was tried before the Honorable Edward Miller and a jury. R. 1. Stephanie Linder, Phil Abshire, and Scarlett Wilson represented the State. R. 2. Jason King and Lindsay Luther represented appellant. R. 2. The jury convicted appellant. R. 613-14. Judge Miller sentenced appellant to life imprisonment. R. 621. This appeal follows.

STANDARD OF REVIEW

Errors must be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

ARGUMENT

The trial court erred in admitting DNA results obtained from appellant pursuant to an invalid search warrant in violation of the Fourth Amendment.

The police found a gun in appellant's brother's car when appellant was arrested for the shooting of Damien Stokes. R. 277-80. R. 516. Stokes was shot in the parking lot of the factory where he worked. R. 208-09. The factory manager saw the shooting from about 200 yards away. R. 208-11. He saw Stokes running and another man chasing him and shooting him. R. 208. Stokes fell to the ground and the shooter got into a Honda CRV and drove away. R. 208. The CRV returned and the driver shot Stokes again. R. 208. The shooter then fled in the CRV. R. 208.

The factory manager said the gun "looked like a Tec-9" semi-automatic weapon. R. 209. The manager was not close enough to identify the shooter, but said he was a Black male wearing a dark hoodie. R. 211. The surveillance videos obtained by the police were not sufficient to identify the shooter. R. 316-17. (State's Ex. 177 – video of shooting).

The police developed a theory that the shooting of Stokes was in retaliation for the murder of Justin Stewart based on a t-shirt recovered at the scene of the shooting. R. 318-19. The t-shirt was a "memorial t-shirt for someone who has passed away" and bore Stewart's image. R. 318-19. Through Facebook research, the police identified Jamal Smalls, Ishmael Weston, and appellant as people connected to Stewart. R. 319-20. No usable DNA evidence was obtained from the t-shirt. R. 519.

Smalls and Weston worked worked at a factory adjoining the factory where Stokes was shot. R. 427. Smalls initially denied any involvement or knowledge of the crime. R. 442. After Smalls was arrested in Georgia for the murder, the police questioned him again. R. 443-44. The

police applied pressure tactics in the interview. Smalls then gave a proffer to the State and made bond. R. 443-53. In his proffer he claimed appellant killed Stokes. R. 443-53. Smalls told the jury that Weston and appellant talked on the phone and Weston told appellant that Stokes was walking outside. R. 431-32.

Smalls and Weston drove away and did not see the shooting. R. 432-33. Smalls said he later saw appellant after the shooting and they followed appellant in a Honda CRV. R. 433-34. Appellant gave Weston some money. R. 436. At a barbeque, Smalls claimed appellant admitted shooting Stokes and showed off the gun, a mini Draco. R. 438-39.

When the police arrested appellant, an Infiniti SUV was parked at the house where appellant was found. R. 516. The Infiniti belonged to appellant's brother. R. 516. The police towed the Infiniti and performed an inventory search before the tow. R. 278-79. They found a mini Draco in the backseat during the inventory search. R. 279-81. The State's firearm expert claimed that shell casings from the scene were fired by the mini Draco found in appellant's brother's car. R. 472-75.

Prior to trial, appellant moved to suppress DNA collected from appellant pursuant to a search warrant. R. 73-78. The police officer who testified at the pretrial hearing admitted that at the time the warrant was issued, the police did not have any DNA profiles. R. 70-71. Appellant argued the warrant was invalid because the police had not developed any profile against which appellant's DNA swab could be compared. R. 73-78. Judge Miller denied the motion to suppress, stating he would give "substantial deference" to the magistrate who issued the warrant.

The trial court erred in finding the collection of appellant's DNA did not violate the Fourth Amendment. Schmerber v. California, 384 U.S. 757 (1966). In order to collect DNA evidence, the State must show that the following factors are present: (1) probable cause to

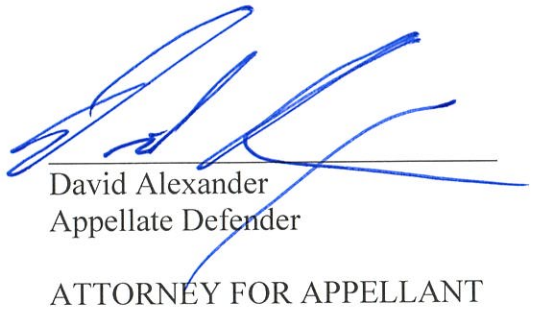
believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure it is safe and reliable. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216, (2006). The second element is at issue in this case.

At the time of the collection of the buccal swabs from appellant, the State did not know whether it would have any evidence from to compare to appellant's DNA. "[T]o show that a suspect's DNA is relevant under the second element of Baccus, the State must show there is other DNA evidence in the case to which it can be compared, or in some other manner clearly indicate the relevance of the DNA sought." State v. Jenkins, 398 S.C. 215, 224, 727 S.E.2d 761, 766 (Ct. App. 2012) rev'd on harmless error ground State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2015).

Just as in Jenkins, the police did not know if they could develop any DNA evidence when they performed the intrusive search. Therefore, the bodily intrusion is an illegal search and the trial court improperly admitted this evidence. This error cannot be harmless because the State used the touch DNA obtained from swabs of the mini Draco to connect appellant to the gun. The State's DNA expert said the swab from the gun contained a mixture and appellant could not be excluded as a contributor. R. 535. The expert then said the probability that the DNA was 3.3 billion times more likely to be from appellant than from a random, unrelated individual. Without the DNA, appellant's connection to the gun would be tenuous and the jury would not have convicted him. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2024.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS S. MCFADDEN,

APPELLANT

APPELLATE CASE NO. 2023-000566

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas S. Mcfadden 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 Edward W. Miller, which was held on March 27-30, 2023, 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 Thomas S. Mcfadden.

Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2024.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS S. MCFADDEN,

APPELLANT

APPELLATE CASE NO. 2023-000566

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) and sentence sheet(s);
(2) Trial Transcript;
(3) Court's Exhibit #1 (Search Warrant); and
(4) State's Exhibit #177 (Video) – **to be transported**

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

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 14th day of March, 2024.

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."

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 14th day of March, 2024.

RECEIVED
Mar 14 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

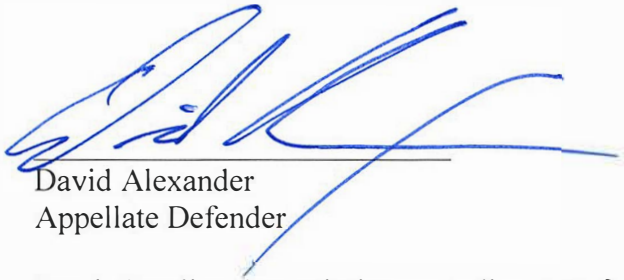
THOMAS S. MCFADDEN,

APPELLANT

APPELLATE CASE NO. 2023-000566

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Thomas S. Mcfadden, #390654, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 14th day of March, 2024.



David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT