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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON GREENE,

APPELLANT

APPELATE CASE NO. 2012-212903

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to allow Appellant to introduce surrebuttal testimony to rebut the State's reply witnesses who testified that at the time of Appellant's arrest the Hampton County Sheriff's Department impounded the car Appellant was driving and nobody removed fishing tackle from the car, as testified to by Appellant?

STATEMENT OF THE CASE

In December of 2009, the Hampton County Grand Jury indicted Greene for murder and assault and battery with intent to kill, indictments #2009-GS-25-515, 567. On September 4, 2012, Greene proceeded to jury trial before the Honorable R. Markley Dennis. Attorney Byron E. Gipson represented Greene at trial. Attorneys Randolph Murdaugh, III and Tameaka Leggette prosecuted the case on behalf of the State. The jury found Greene not guilty of assault and battery with intent to kill but guilty of murder. Judge Dennis sentenced Greene to forty (40) years in prison. A timely notice of intent to appeal was served on September 7, 2012. This appeal follows.

ARGUMENT

The trial judge erred in refusing to allow Appellant to introduce surrebuttal testimony to rebut the State's reply witnesses who testified that at the time of Appellant's arrest the Hampton County Sheriff's Department impounded the car. Appellant was driving and nobody removed fishing tackle from the car, as testified to by Appellant.

The jury found Greene guilty of the murder of Dominick Badger. At trial Greene testified that he shot both Dominick Badger and his brother Anthony [Tony] Badger in self defense. (R. p. 291, line 8 – p. 292, lines 1-22). The jury found Greene not guilty of the assault and battery with intent to kill involving Tony Badger. Greene testified that on October 2, 2009, he left work at 5:00 PM, stopped and bought two half pints of brandy, went to the home that he shared with his grandparents and loaded his fishing gear and a gun in case he encountered alligators or wild hogs while he was fishing. (R. pp. 296-299). On his way to his fishing spot, Greene stopped at Dominick Badger's house. (R. p. 299, line 23 – p. 300, lines 1-2). Greene had previously talked with Dominick about getting a chain for Greene's son's four wheeler. (R. p. 297, lines 2-22). Greene spoke with Dominick who told him that he did not have the chain for the four wheeler. (R. p. 300, lines 1-6).

Greene did not go fishing but instead stayed in the yard at Dominick's house, talking with Dominick and Tony Badger, Dexter Bozeman and Keith King. (R. p. 300, line 6 – p. 301 lines 1-12). Greene shared his brandy with the others. (R. p. 301, lines 13-19). Greene testified that as the evening went on Tony became more aggressive. (R. pp. 311-314). Dominick Badger and Dexter Bozeman tried to separate Greene and Tony Badger by putting Tony in their car. (R. p. 314, line 5 – p. 315, lines 1-3). Tony, however, jumped out of the car and ran toward Greene yelling that he was going to "burn

him.” (R. p. 315, line 8 – p. 316, lines 1-23). Greene testified that he pulled the gun from his waist and shot in Tony’s direction. (R. p. 316, line 24 – p. 317, lines 1-5).

Greene testified that after he shot at Tony, Dominick attacked him and Greene shot Dominick. (R. p. 318, line 4 – p. 319, lines 1-25). Greene was then able to get in his car and drive away. (R. p. 320, lines 1-5). Greene testified that he went home and changed his shirt and then drove to his cousin’s house. (R. p. 320, lines 11 – 25). Greene received phone calls from his family telling him the police were looking for him so he returned home. (R. p. 322, lines 3-7). Greene testified that on the way home he threw the gun away. (R. p. 322, lines 8-22).

Greene testified that when he got home the police were waiting on him and took him into custody. (R. p. 322, line 22 – p. 323, lines 1-22). Greene testified that when he returned home that night his fishing tackle was still in the car. (R. p. 343, lines 2-14). Greene later learned that his grandfather took the fishing tackle out of the car before the police impounded the car. (R. p. 343, lines 20-25).

The State called two witnesses in reply, Officer Chauncey Solomon and Detective Perry Singleton both of the Hampton County Sheriff’s Department. Officer Solomon testified that when Greene returned in the car the sheriff’s department took custody of the car and nobody took anything out of the car. (R. p. 347, line 17 – p. 348, lines 1-14). Officer Solomon testified that when he inventoried the car no fishing tackle was found. (R. p. 348, lines 15 – p. 349, lines 1-10). Detective Perry also testified that upon inventory no fishing tackle was found in the car.

After the State’s two reply witnesses testified counsel for Greene asked the judge, “Your Honor, I don’t know what the court’s position is on this, but we have witnesses who

would contradict what these officers just said.” (R. p. 355, lines 5-7). The judge replied, “You could have called anyone you wanted, sir.” (R. p. 355, lines 8-9). The judge also stated, “You don’t get a – it’s not a surrebuttal---” (R. p. 355, lines 11-12). The judge then stated, “It may be in federal court, but not here.” (R. p. 355, line 16). The judge erred.

In State v. Watson, 353 S.C. 620, 623-624, 579 S.E.2d 148, 150 (Ct. App. 2003) the South Carolina Court of Appeals wrote:

South Carolina courts have approved the use of surrebuttal testimony in the discretion of the trial court. In Goethe v. Browning, 146 S.C. 7, 18, 143 S.E. 362, 366 (1928) our supreme court stated: “Admission of evidence in surrebuttal is very much in the discretion of the trial judge.” In State v. Summer, 55 S.C. 32, 40, 32 S.E. 771, 774 (1899) the court observed: “[I]f the plaintiff [or the prosecution in a criminal case] in reply puts new matter in evidence, or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal.” Further, in Camlin v. Bi-Lo, Inc., 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct.App. 1993), we stated: “A defendant has a right to respond to new evidence given in reply.”

(footnotes omitted)

The trial judge abused his discretion in refusing to allow surrebuttal testimony. The judge’s comments reflect that he believed that surrebuttal testimony was not permitted in state court. The failure to exercise discretion is itself an abuse of discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)(“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)(“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”).

The testimony sought to be introduced was proper surrebuttal testimony. Greene was prejudiced by the judge’s failure to allow the surrebuttal testimony. In closing argument the State emphasized the reply testimony of Officer Solomon and accused

Greene of lying about the fishing tackle. (R. p. 386, line 19- p. 387, 388, lines 1-15).

The State argued that Greene went to Dominick's house that night with mischief on his mind. (R. p. 389, line 7; p. 390, lines 3-4). Testimony contradicting Officer's Solomon's testimony that nobody took anything out of the car was important to rebut the State's accusation that Greene was lying about going fishing that evening and to rebut the State's argument that he went to Dominick's house with mischief on his mind.

CONCLUSION

Based on the above argument, Greene's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRANDON GREENE,

APPELLANT

APPELATE CASE NO. 2012-212903

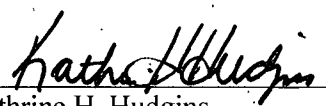
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Greene states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge R. Markley Dennis, Jr., which was held on September 5, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Brandon Greene.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2013.

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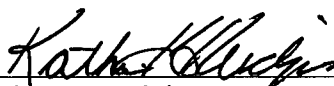
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Trial Transcript;
- (3) Defendant's Exhibit #5 – Dexter Bozeman statement;
- (4) Defendant's Exhibit #7 – Bernard Badger statement;
- (5) Defendant's Exhibit #1 for ID Anthony Badger statement.

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

August 14th, 2013



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 14, 2013



Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
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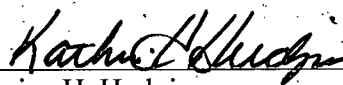
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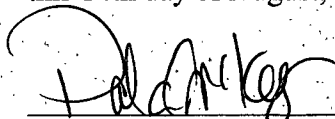
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Brandon Greene, # 289919 at Lieber Correctional Institution, PO Box 205 Ridgeville, SC 29472 this 14th day of August, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2013.



Notary Public for South Carolina
My Commission Expires: July 24, 2022.