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Jun 20 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from York County Court of General Sessions
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2023-001483

The State.....Respondent

v.

John Kenneth Totherow.....Appellant

**MOTION FOR ORDER DELAYING TRANSFER
OF APPELLANT TO SCDC**

The Appellant, John Kenneth Totherow, by and through his undersigned attorney, hereby moves this Honorable Court for an Order staying or delaying his transfer from DJJ to adult confinement or SCDC until his eighteenth birthday, or in the alternative, to the completion of his appeal.

Appellant is currently sixteen years old and will turn seventeen years old in September of this year. He has been housed at DJJ since his arrest in May 2022. His placement at DJJ until his

eighteenth birthday was cleared with staff at DJJ and SCDC prior to his plea and was put on the record during his plea and sentencing hearing held in York County Court of General Sessions.¹

Undersigned Counsel was informed by Anna Melvin, County Director for York Community Office of DJJ, yesterday that the DJJ legal department notified her that DJJ cannot continue to keep Appellant in DJJ facilities further without a court order.

Appellant makes this earnest request for the purposes of safeguarding his well-being; he is a young man that would be particularly vulnerable outside of DJJ in an adult incarceration setting given the virtual social seclusion he was raised in, as well as his fragile emotional and developmental issues. DJJ provides the type of the environment needed for Appellant's unique needs.

In light of the foregoing, Appellant respectfully urges this Court to issue an order staying or delaying his transfer out of DJJ facilities until his eighteenth birthday or in the alternative, until the conclusion of this appeal.

Respectfully submitted,

By: *s/ Lauren Carole Hobbis*

South Carolina Bar No. 103190

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COUNSEL FOR APPELLANT

¹ Attached for this Court's consideration are excerpts from Appellant's plea hearing that are pertinent to this issue. See page 25. Counsel will seek copies of any letters/email communications with DJJ/SCDC legal counsel from prior counsel should the Court find the records would aid in review of this issue.

1 STATE OF SOUTH CAROLINA

2 -----x

3 State,

4 Plaintiff,

5 Case No.

6 -against- 2023-GS-46-05165

7 John Kenneth Totherow, 2023-GS-45-05165A

8

9 Defendant.

10 -----x

11 September 12, 2032

12 York, S.C.

13

14 B E F O R E:

15 HONORABLE EUGEN C. GRIFFIN

16

17 A P P E A R A N C E S:

18 ERIN JOYNER & WHITNEY PAYNE

19 Attorneys for the State

20

21 NATHAN SHELDON,

22 Attorney for the Defendant

23

24 Aileen Butler

25 Official Court Reporter

1 MS. JOYNER: We have before the Court in matter of
2 State of South Carolina versus John Totherow. Myself
3 and senior Solicitor Whitney Payne prosecuted this
4 case.

5 Mr. Totherow is before the Court with retained
6 counsel Nathan Sheldon. He has come before the Court
7 to plead guilty today, waive presentment and plead
8 guilty under Indictment 2023-GS-46-5165. Originally
9 charged with murder. Reduced to voluntary
10 manslaughter and as charged to 2023-GS-46-5165A,
11 possession of weapon during the commission of a
12 violent crime.

13 We have complied with the victim's rights act in
14 this case. The victim, Mr. Kenneth Totherow is
15 present in the courtroom and does wish to address the
16 Court at the appropriate time. Just to briefly lay
17 out the procedural history of this case, Your Honor.
18 John Totherow was originally charged as a juvenile for
19 the events of murder and possession of a weapon. He
20 was charged and detained on May 3rd of 2022. The
21 State filed a timely motion to waive this case to
22 general sessions. This waiver hearing was scheduled
23 to begin yesterday, Monday, September 11th before
24 Judge Debra Matthews. Last week the State and the
25 defense reached a plea agreement by which the

1 advantage several weeks prior of having those reports
2 just so she wasn't blindsided with it.

3 THE COURT: Did I read that she had it scheduled
4 for this week and it was scheduled for several days?

5 MR. SHELDON: This week for five days. It would
6 have started yesterday and it would have gone all the
7 way through Friday and so we were able to resolve this
8 I believe last Thursday when that portion of the trial
9 took place.

10 Judge, the reports, they're both very similar.
11 They both find low risk to the community and he has
12 really essentially no disciplinary history prior to
13 entering DJJ. But I think more significantly if you
14 were to talk to the forensic psychologist which we did
15 obviously talk to both them after preparing the
16 reports, there was no significant history while at
17 DJJ. He was there a long time and it's very difficult
18 for youths to stay out of trouble once they get in to
19 the juvenile detention center just because that just
20 the nature of where they are. There's a lot of
21 trouble there. So his ability to stay out of that
22 trouble I think speak volumes as to sort of where he
23 is today and what he's been able to accomplish.

24 This was an extremely egregious case as the State
25 said. It's a sad case. We've had numerous interviews

1 from Mr. Totherow which I'm sure the Court is going to
2 hear from last. Its just -- unfortunately in weighing
3 all this, it's murder. That's what it is. So the
4 benefit of being able to plead to manslaughter is a
5 benefit that we're saving hopefully years of this
6 young man's life.

7 We appreciate certainly the State for reducing
8 that charge. We'd be trying this waiver if that
9 wasn't part of the negotiation. That was clear that
10 they were going to have to come off the murder which
11 they agreed to do and gave us something to seriously
12 talk about and I think that's ultimately how we got to
13 where we are today. But with all that said we'd ask
14 -- and just just for the record, some of the other
15 things that we have done that I want to put on the
16 record. Both the State and myself have talked to
17 Christina Bigelow who is general counsel at South
18 Carolina Department of Corrections. The way it was
19 structured and the way that we have explained to Mr.
20 John Totherow since the beginning is essentially this
21 is a 24 year sentence. So he gets 339 months. Two
22 charges running concurrent with each other at 85% of
23 that is exactly 25 years and that's exactly what
24 S.C.D.C. confirmed. It's how they will compute it.
25 He doesn't expect to do any more than that but doesn't

1 expect to do any less of that. He understands this is
2 an 85% offense. It's not a day-for-day offense. That
3 the gun charge will run concurrent and be done before
4 the exhaustion of the 339 months. He understands he's
5 getting credit. We've explained we have had thorough
6 conversations with the Department of Juvenile Justice
7 where he is going to go be housed. It's my
8 understanding at essentially the Broad River facility
9 until such time that he turns 17-years-old. At that
10 time he will go to a different unit which is pursuant
11 to Federal Law. There's a statute that says
12 17-year-olds can not be housed with 18 and above. So
13 from 17 to 18 he will be in separate part essentially.
14 Detention center separates, segregated from both of
15 the juveniles and the adults and then at 18 will go to
16 SCDC and serve the remainder of his sentence. So he
17 understands how that's going to work.

18 We passed up an order. I don't know if the Court
19 has the authority to do this or not, but based on his
20 lack of disciplinary history, sort of his behavior
21 while there, they do have a unit at the Broad River
22 Juvenile Facility that is sort of an honor's dorm.
23 And we're asking the Court to sign that order that
24 allows him to go to honor's dorm. It's not clear
25 whether DJJ or ACDC will honor that order. We'd just

1 ask just like the Court orders addiction treatment
2 unit, orders shock incarceration or anything else,
3 that the Court order that today and if they honor it
4 they do and if they don't, they don't. And I'm
5 certain that their internal policies and their statute
6 control take stuff, but we've prepared that order and
7 pass it up. The solicitors office, I don't think they
8 have any objection to that.

9 MS. PAYNE: Your Honor, I do have some information
10 on that. A representative from the Department of
11 Juvenile Justice is present in the courtroom, Miss
12 Anna Melvin. She did check with her folks in
13 Columbia. The honor's dorm is a privilege that you
14 have to earn while you are at the Department of
15 Juvenile Justice. Since he will be housed there he's
16 eligible to earn that but he would not be eligible to
17 go into it to begin with.

18 THE COURT: But he's there now?

19 MS. PAYNE: Correct.

20 THE COURT: Okay, so he's already gotten himself
21 in the door.

22 MS. PAYNE: He is at the detention center. He
23 will be at Broad River and that is where the honor's
24 dorm is located.

25 THE COURT: Okay. The order says he currently

1 meets criteria. So, it will be up to him. Fair
2 enough. All right.

3 Now, the capability -- opportunity to him to met
4 the honor's dorm requirements, that wasn't a factor
5 for which he decided to enter this plea or not.

6 MR. SHELDON: No, sir.

7 THE COURT: So that is not a consideration?
8 That's a hope.

9 MR. SHELDON: Yes, sir.

10 THE COURT: Now, anything else from you all?

11 MR. SHELDON: No, sir.

12 THE COURT: All right.

13 MR. SHELDON: Judge, I would point out one other
14 thing. Miss Joyner indicated that I was retained on
15 this case. Mr. Totherow approached me to take this
16 case, Mr. Kenny Totherow, and it has been an extensive
17 amount of money that was going to be needed to
18 litigate this pursuant to Atkin v Byers and everything
19 else that we're dealing with. In exchange for
20 indigent defense they agreed to give me the funding
21 for that. I did take the case pro bono. So while I
22 wasn't appointed necessarily I don't think retained is
23 a fair word either.

24 THE COURT: You're kind of a hybrid.

25 MS. JOYNER: Are you ready to hear from the

C E R T I F I C A T E

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I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 12th day of September, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 19, 2023

Aileen Butler

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Motion for an Order Delaying the Transfer of Appellant to SCDC was served upon Counsel for Respondent, Senior Assistant Deputy Attorney General Mark R. Farthing, via email to his AIS email address: mfarthing@scag.gov.

This 20th day of June, 2024

s/ Lauren Carole Hobbis
South Carolina Bar #103190