

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lee County
Ralph Ferrell Cothran, Jr., Circuit Court Judge
Case No. : 2019-000969

The State,

Respondent,

v.

Kevin E. Herriott,

Appellant.

FINAL BRIEF OF APPELLANT

Kevin E. Herriott
T97826

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STATEMENT OF THE CASE

The Appellant Kevin E. Herriott was housed within the South Carolina Department of Corrections (SCDC) at Lee Correctional Institution. The Appellant was summoned to appear before Lee County Municipal Magistrate Court to answer to two arrest warrants. The Magistrate Court binded the case over to General Sessions Court.

The Appellant withdrawn Counsel E. Thompson Kinney from the case. During the competency hearing Appellant was forced counsel newly appointed Timothy L. Griffith.

The Appellant decided to an jury trial. The Appellant was convicted of attempted armed-robbery and a(n) inmate possession of a weapons charge. The Appellant appealed the unconstitutional conviction. This brief follows.

STATEMENT OF FACTS

On May 10, 2018, the Appellant Kevin E. Herriott learned that his life was in imminent danger and acted by creating a disturbance to be removed out of the unit he was housed.

The Appellant intentions were to put space between those who participated in the deadly riot, the prison officers, and him while being housed in the initial starting point within the dormitory where the April 15, 2018, deadly riot took place.

The Appellant was being sought by gang affiliated inmates due to corresponding with Lee Correctional Guards and the Administration. The Appellant did not assault Officer Lieutenant Lucky nor did the Appellant tried to take the mace canister from Lieutenant Lucky persons.

ARGUMENT

The Appellant directs the Court's attention to the fact that the Magistrate Court had summoned the Appellant to answer to two (2) invalidated arrest warrants. In order for the Court to properly gain personal jurisdiction over the Appellant, who was at that time represented by former counsel of record, Counsel E. Thompson Kinney, the arrest warrants were to be sufficient and validated for service. The Appellant's attorney, however, waived the service of process of the arrest warrants without the Appellant's consent and the trial court never cure that error.

Howbeit, the arrest warrants was not served in the manner required by law. Therefore, personal jurisdiction was not gained since proper service is a prerequisite to the Court's exercising personal jurisdiction over the defendant. See 1 S.C. Litigation Forms And Analysis § 10:13 SC ADC 12-608.8.

The Appellant demonstrates to the Court that the Circuit Court was without jurisdiction to proceed over the case to start with. The Appellant, who was the defendant, would have been entitled to a procedure that was not available, had not the decision of counsel

of record affected the outcome of this particular proceeding in Magistrate Court.

The Appellant avers that the record reflects Counsel Kinney was withdrawn from the case because his performance fell below an objective standard of reasonableness. Counsel Kinney had made a decision without ever making an appointment to meet with the Appellant before the Magistrate Court's proceeding that determine to bind the case over to general sessions nor did counsel consulted with the Appellant during the proceeding at the time when counsel waived Appellant's right to challenge the arrest warrants to which constitutes a question of law. Did Counsel Kinney overreach by surrogate?

The Appellant have raised a(n) constitutional ground whether the lower court that determined and deliver the criminal judgment lacked subject-matter jurisdiction. Accord the Fifth (5)th and Fourteenth (14)th Amendment of the U.S. Constitution. See *State vs. Gentry*, 363 S.C. 93, 610 S.E. 2d 773.

On or before August 06, 2018, the Appellant was served notice of a(n) single document, presentment of indictment, in which

the Appellant had a(n) hearing on to determine whether Lee County Judicial Circuit had gained subject-matter jurisdiction to hear the case followed by a jury trial that rendered a verdict of guilty.

On August 6, 2018, the said indictment specifically states, "At a Court of General Sessions, convened on August 30, 2018, the Grand Jurors of Lee County present upon their oath: one count of assault and battery of an high aggravated nature, one count of attempted arm-robbery, and one count of an inmate carrying a conceal weapon."

On June 04, 2019, the Appellant received after trial one indictment document by the Clerk of Lee County Court. That true bill indictment reads: "At the Court of General Sessions, convened on September 01, 2018, the Grand Jurors of Lee County present upon their oath: one count of assault and battery of an high aggravated nature, one count of attempted armed-robbery, and one count of an inmate carrying a conceal weapon."

The Appellant put before this Court that the Circuit Judicial Court Schedule reflects there was no Court during the month of

August, 2018. The Appellant proffered to the trial court that there was no affidavit attached to the indictment in which reflects the credibility of the witness who testified to the content inside the indictment. Trial Transcript pg. 16 Ln 22-25 thru pg. 17 Ln 1.

The Appellant profered to this Court that the Lee County Judicial Circuit Index document show that there was no entry the indictments was docketed.

The Appellant demonstrates to the Court that when the Appellant challenged the indictments on their face as faulty and bad the State attempted to cover up the dates because one indictment document presented that the grand jurors convened on August 30, 2018, and the other presented that the grand jurors convened on September 01, 2018.

The Appellant further demonstrates to this Court that if September 1, 2018, is in fact, an true bill indictment document the dates in which the arrest warrants was dated and signed by the Magistrate Judge were issued to be served on the Appellant to the date the grand jurors convened is well

over ninety (90) days.

The Appellant contends that the dates the grand jurors allegedly convened show two (2) different dates and that both dates are outside the dates afixed by South Carolina Code Annotation Statute § 14-5-640. The Appellant further contends that the present indictment the State intends to profer indicates a sham illegal process.

Nevertheless, the Appellant has challenged the propriety of the accusation, the manner in which it has been presented, and the source from which it proceeds. See Trial Transcript pg. 16 Ln 18-21.

The Appellant avers that during the colloquy between the trial judge and the Appellant, the trial judge actually told the truth stating, "there are no minutes from the grand jury." See Trial Transcript Pg. 17 Ln 16-17. But the trial judge in the same breath stated, "They don't take minutes in a grand jury meeting." See Trial Transcript Pg. 17 Ln 25 thru Pg. 18 Ln 1.

The trial judge did not refuse the Appellant of the grand jury minutes, but did lied about the grand jury minutes being taken when the grand jurors convened. Because it is on record that in the case

of *The State v. Kevin Herrriott*, there are no record of the grand jury convening. Trial Transcript pg. 18 Ln 2-4.

The Respondent argues that the Appellant has not challenged the regularity of the indictment or the validity of the indictment on its face without substantiating the State's claim. The Appellant avers that the charging indictments were fundamentally defective and the variance of the indictments were differential of the presentation of the evidence proffer by the State's prosecution. See Motion To Quash Indictments.

The State's prosecution failed to prove beyond a reasonable doubt the elements within the charging indictments. Moreover, the Appellant did not waived the indictment process nor was the Appellant put on notice of an extension of time to be indicted.

The Appellant submits to the Court that Counsel Timothy L. Griffith, had abandoned the Appellants defense of actual innocence, self-perservance, and duress. Trial Counsel Griffith failed to prepare and present a(n) colorable claim of duress by failing to show the existence of the effects of the daily riot at Lee Corrections to which the Appellant was housed, then pursued by gang affiliated

inmates due to what the Appellant observed on April 15, 2018.

The Appellant's decision on May 10, 2018, was to create a disturbance rather than committing any crime whatsoever. The Appellant had learned that on May 10, 2018, that his life was in imminent danger due to the Appellant's cell-mate Gary Nunez had warned several Blood Affiliated Inmates that was housed at Lee Corrections that the Appellant is going to turn State's evidence against those who participated in the Riot of 2018, to which the Appellant did turned evidence against those who participated in the deadly riot on the week of the 18th of March, 2021, at an grand jury appearance.

The fact remains questionable, did the Appellant's testimonial was weighed by an just balance given the cumulative evidence reflected?

The Appellant did not disarm Lee Correctional guard Lieutenant E. Lucky nor did the Appellant assaulted the officer. The Appellant did reach for Lieutenant E. Lucky's mace canister in a(n) effort to get maced by Lieutenant Lucky, but rather than Lieutenant Lucky pulling the mace trigger Sgt. Coaxum pulled the mace trigger. The Appellant immediately withdrew his has from reaching for the mace canister after being maced.

The Appellant contends that there is no evidence that corroborates the State's contention of assaulting Lieutenant Lucky and the Appellant did not grab hold of Lieutenant Lucky's mace canister nor did the Appellant make an attempt to take it from Lieutenant Lucky.

The Appellant raised before the Court that Counsel Timothy L. Griffith failed to partake in the compulsory process the Sixth Amendment, U.S. Constitution safeguards. Counsel complete failure to investigate a(n) potentially corroborating witness Terrell Crawley. The deficient performance by Counsel Griffith where counsel made no effort to locate or interview witnesses who could have supported a potentially effective defense that was unsuccessfully advanced at trial.

The Appellant moves forward to a(n) manifest constitutional error that is plain and indisputable that has affected the Appellant's substantial rights. The Appellant avers that the State's prosecution failed to disclose favorable exculpatory and potentially impeachment material evidence. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 15. The materiality of evidence the Appellant sought was the knife that the prosecution failed to proffer in chief at trial before an impartial jury.

The Respondent argues that the Appellant failed to demonstrate any information which has not been turned over which was required to be turned over under Rule 5 or Brady. As a result, there was no reason to suppress any evidence. Respondent's Final Brief Pg. 8.

The Appellant avers that even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise reasonable doubt about the defendant's guilt. See *United States v. Agurs*, 427 U.S. 97, 112 S.Ct. 2392, 49 L.Ed. 2d 342 (1976), "where the prosecution failed to volunteer exculpatory evidence that was never requested, or requested in a general way."

The suppression of material exculpatory evidence violates the right to due process, "irrespective of the good faith or bad faith of the prosecution." See *Brady, supra*, 373 U.S. at 87, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). Accord *Fourteenth (14)th Amendment U.S. Const.*

The Appellant's standing is there was no chain of custody to produce the knife authenticity. The knife was not submitted as evidence and the knife was not produced during the discovery phase.

The Appellant has sought a directed verdict on all charges. The Appellant has sought a directed verdict on the possession of a knife by an inmate charge because according to the S.C. Code Ann. Statute

§ 24-13-0440 (Supp. 2019) the statutory language states, "the knife must be six (6) inches or more" to be a(n) felony charge in which the State failed to established at Chief of Trial. See Trial Transcript pg. 70 Ln 1-4.

In Accordance to the ULA Penal Code § 1.12 (1) "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof the innocence of the defendant is assumed."

The Appellant avers that the State failed to meet the burden of proof beyond a reasonable doubt and failed to prove the elements of the charge itself. *State vs McHoney*, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001), "A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged."

The Appellant directs the Court's Attention to the fact that in South Carolina, a person in custody has two primary means of attacking the validity of his conviction. The first avenue is through a direct appeal and, pursuant to state law, he is required to state all his grounds in that appeal.

The second avenue of relief is by filing an application for post-conviction relief (PCR). However, this avenue is a(n) discretionary appeal. The Appellant does not have this option available because he is a(n) out-of-state transferred inmate and is not in South Carolina Jurisdiction where the claims arises.

Nonetheless, the Respondent do not want the Appellant to have a(n) full review within the Appellate Courts. The Appellant is not required to file repetitive petitions in which to ask the State for collateral relief, based on the same evidence and issues already decided by direct review.

The Appellant's objections and motions that was submitted to General Sessions Court preserves his right to this Court for a(n) full review. The Respondent only has responded and replied to two(2) arguments out of six(6) the Appellant raised. The Appellant refutes the Respondent's contentions that this Court should not address Appellant's remaining issues.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be reversed.

Done This 20th Day of October, 2022.

Respectfully Submitted,

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