STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODERICK JEROME SELLERS,

APPELLANT.

APPELLATE CASE NO. 2013-002020

ANDERS BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in denying Appellant's directed verdict motion on the charge of felony driving under the influence where the evidence only raised a mere suspicion that Appellant was the driver of the vehicle involved in the accident.

STATEMENT OF THE CASE

On March 1, 2012, Appellant Roderick Jerome Sellers was indicted by the Florence County Grand Jury for one count of felony driving under the influence ("DUI") resulting in great bodily injury in violation of S.C. CODE ANN. § 56-5-2945(A)(1). R. 254.

Appellant was tried before the Honorable Howard P. King and a jury on September 16-17, 2013. R. 1. Appellant was represented by William E. Grove, and the State was represented by Assistant Solicitor Todd S. Tucker. Id.

The jury found Appellant guilty as charged. R. 242, ll. 11-16. Judge King sentenced Appellant to four years imprisonment. R. 252, ll. 1-6.

Appellant timely filed and served his Notice of Appeal on September 19, 2013.

ARGUMENT

The Trial Court erred in denying Appellant's directed verdict motion on the charge of felony driving under the influence where the evidence only raised a mere suspicion that Appellant was the driver of the vehicle involved in the accident.

The State alleged that Appellant wrecked a vehicle while driving under the influence of alcohol, causing injuries to himself and passenger, Johnny Williams. R. 64, l. 18 – 66, l. 22. On the evening of September 27, 2011, Trooper R.E. Denham was dispatched to an automobile accident on Savannah Grove Road. R. 93, ll. 18-25; 95, l, 20 – 96, l. 1. When he arrived at the accident scene, Trooper Denham observed "an overturned vehicle well off the roadway that was obviously traveling at a high rate of speed and [he] saw two persons that were laying in close proximity to the . . . vehicle in question, as well as a lot of debris." R. 96, ll. 4-8. Both occupants had been ejected from the vehicle. Trooper Denham testified that Johnny Williams was lying a little bit farther away from the vehicle. R. 98, ll. 9-16. Trooper Denham therefore believed that Appellant was the driver of the vehicle because he was lying closer to the vehicle. R. 98, l. 17 – 99, l. 5. Trooper Denham approached Appellant and smelled the odor of alcohol. R. 99, ll. 14-20.

Appellant and Williams were both transported to the hospital. R. 101, ll. 18-22. After Appellant was transported to the hospital, Trooper Denham determined that probable cause existed to arrest Appellant. Trooper Denham read Appellant his Miranda[1] rights and advised Appellant of his implied consent rights relating to the testing of his blood for the presence of alcohol. R. 102, l. 8 – 103, l. 19.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Trooper Denham also smelled alcohol and marijuana on Williams, but Trooper Denham did not seek any blood tests on Williams because he believed Williams was not the driver. R. 117, l, 19. – 119, l. 5.

Trooper Tony Wayne DeWitt was a member of the Multidisciplinary Accident Investigation Team ("MAIT"), and he gave his opinion at trial that the vehicle at issue was traveling north on Savannah Grove Road, crossed over the center line, went off the left shoulder of the road, came back on the road, began rotating in a counter-clockwise direction, and then went off the left side of the road again, overturning and ejecting both occupants of the vehicle. R. 157, l. 17 – 158, l. 20; 162, l. 13 – 163, l. 2; 165, ll. 14-20. Trooper DeWitt believed that speed was a contributing factor of the accident. R. 163, ll. 3-11.

Trooper DeWitt also testified that in his opinion, if a vehicle flips over and the occupants are ejected, normally the person found closest to the vehicle is the driver. R. 166, l. 13 – 167, l. 1.

On cross-examination, Trooper DeWitt acknowledged that when a vehicle flips over with occupants being ejected and windows busted out, that there is a certain amount of chaos going on and that there is no real way to accurately depict what has happened in the accident, including accurately depicting where the driver and passenger of the vehicle would end up after being ejected from that type of accident. R. 168, ll. 10-16.

Trooper DeWitt further admitted on cross-examination that no one knows how far away from the vehicle Appellant and Williams were actually found because no one marked their final resting positions. R. 170, ll. 2-11. Trooper DeWitt also admitted that he had no idea how many times the vehicle actually flipped. R. 171, ll. 12-23.

Johnny Williams testified at trial and claimed that Appellant was the driver of the vehicle that wrecked. R. 77, l. 7 - 83, l. 15. Williams admitted that he himself was drinking alcohol and smoking marijuana that evening and was "drunk" and "high" at the time of the accident. R. 76, l. 21 – 77, l. 6; 92, ll. 10-11.

A forensic toxicologist with the South Carolina Law Enforcement Division ("SLED") testified that Appellant had a blood alcohol content of 0.158%. R. 184, ll. 10-19; 188, ll. 6-11.

Appellant moved for a directed verdict at the conclusion of the State's case, arguing that the State had not satisfied its burden of proof as to who was driving the vehicle. R. 194, l. 19 – 195, l. 12. The Trial Court denied Appellant's directed verdict motion. R. 198, ll. 8-11.

The Trial Court erred in denying Appellant's motion for a directed verdict where the evidence was insufficient to establish that Appellant was the driver of the wrecked vehicle. A defendant is entitled to a directed verdict at trial when the State fails to present evidence on a material element of the offense charged. State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). The grant of a directed verdict motion for acquittal by a defendant is proper if there is a failure of competent evidence tending to prove the charge. State v. Jackson, 395 S.C. 250, 254, 717 S.E.2d 609, 611 (Ct. App. 2011); see also In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the trial court should submit the case to the jury. Otherwise, "a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Buckmon, 347 S.C. 316, 321-22, 555 S.E.2d 402, 404-05 (2001); see also State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); State v. James, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004).

Section 56-5-2945(A) of the South Carolina Code of Laws establishes the elements of felony driving under the influence:

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence . . . .

§ 56-5-2945(A).

State v. Grampus is the leading case in South Carolina setting forth the elements of felony driving under the influence. 288 S.C. 395, 343 S.E.2d 26 (1986) *abrogated on other grounds by* State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). A felony driving under the influence charge requires proof of three elements: (1) the actor drives a vehicle while under the influence of alcohol or drugs; (2) the actor does an act forbidden by law or neglects a duty imposed by law; and (3) the act or neglect proximately causes great bodily harm or death to another person. Id. at 397, 343 S.E.2d at 27; accord State v Dantonio, 376 S.C. 594, 658 S.E.2d 337 (Ct. App. 2008).

Therefore, to prove that Appellant committed the offense of felony DUI, the State had to prove beyond a reasonable doubt that Appellant was operating the vehicle. Appellant's mere presence at the scene and Trooper Denham's belief that Appellant was the driver are insufficient to sustain a conviction for felony DUI under the facts of this case.

Both occupants of the vehicle were ejected and therefore neither occupant was found in the driver's seat when law enforcement arrived. While Trooper Denham testified that Appellant was found closer to the vehicle than Williams, no markings or measurements were made or taken to show where both Appellant and Williams were found in relation to the final resting position of the vehicle. It is now unknown exactly where Appellant and Williams ended up following the accident. The State did not present any evidence as to how far Appellant was located from the vehicle versus how far Williams was located. The State did not present any evidence as to how many feet from the vehicle both Appellant and Williams were located. The State did not even enter into evidence any photographs of the accident scene. The jury therefore could not make any inferences as to who was the driver based on where Appellant and Williams were located since this information was unknown.

Trooper DeWitt also testified that he had no idea how many times the vehicle actually flipped, and he further acknowledged that there was no way to accurately depict how the accident happened and how the occupants may have been thrown about and ejected.

Even though Williams testified that Appellant was the driver of the vehicle, Williams' testimony should be discredited as he certainly had an incentive to testify that Appellant was the driver. Otherwise, Williams, who admitted that he was drunk and high at the time of the accident, would have faced the felony DUI charge.

Accordingly, where the evidence only raises a mere suspicion that Appellant was the driver of the wrecked vehicle, the State failed to meet its burden of proof that Appellant was guilty of felony DUI.

CONCLUSION

For the reasons set forth herein, Appellant Roderick Jerome Sellers respectfully requests this Court to reverse his conviction for felony DUI under S.C. CODE ANN. § 56-5-2945(A)(1) and issue an Order of Acquittal.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of July, 2014.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roderick J. Sellers 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 Howard P. King, which was held on September 16-17, 2013, 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 Roderick J. Sellers.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of July, 2014.

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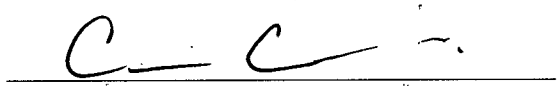
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictment;
(2) Entire transcript of trial held September 16-17, 2013;
(3) State's Exhibits 1-9; and
(4) Sentencing sheet.

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

July 11th, 2014



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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 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."

July 11, 2014.

Carmen V. Ganjehsani
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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 Salley W. Elliott, 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 Roderick J. Sellers, #357102 at Ridgeland Correctional Institution, this 11th day of July, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of July, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.