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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID BOYD,

APPELLANT

APPELLATE CASE NO. 2013-002119

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

The plea judge erred in denying appellant’s motion for a reduction of his sentence to reflect what his sentence would have been (9 to 13 years less) had he been prosecuted by the federal government because the record showed that the solicitor selectively prosecuted appellant as vindication for the trauma two female bank tellers suffered via the bank robberies and bomb threats, which in turn constituted due process and equal protection violations.

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

TABLE OF AUTHORITIES

Cases

State v. Geer, 391 S.C. 179, 705 S.E.2d 441 (2010)..... 7

United States v. Armstrong, 517 U.S. 456 (1996) 7

Constitutional Provisions

U. S. Const.Amend. V.....8

U. S. Const.Amend. XIV.....8

S.C. Const art. 1,§ 3.....8

STATEMENT OF ISSUE ON APPEAL

The plea judge erred in denying appellant's motion for a reduction of his sentence to reflect what his sentence would have been (9 to 13 years less) had he been prosecuted by the federal government because the record showed that the solicitor selectively prosecuted appellant as vindication for the trauma two female bank tellers suffered via the bank robberies and bomb threats, which in turn constituted due process and equal protection violations.

STATEMENT OF THE CASE

Appellant David Boyd pled guilty to breach of trust with fraudulent intent, forgery, entering a bank with intent to steal, two counts of bank robbery, and two counts of threatening to kill, injure, and intimidate by means of an explosive device during the August 2012 term of the Beaufort County General Sessions Court before Judge Carmen T. Mullen. Appellant was represented by Trasi Campbell and Assistant Solicitor Benjamin T. Shelton appeared on behalf of the state.

Appellant was sentenced to an aggregate term of thirty years imprisonment. A sentencing reconsideration hearing was held on September 9, 2013, at the Beaufort County Courthouse before Judge Mullen, who denied the motion for resentencing. Appellant appealed his case. This brief follows.

ARGUMENT

The plea judge erred in denying appellant's motion for a reduction of his sentence to reflect what his sentence would have been (9 to 13 years less) had he been prosecuted by the federal government because the record showed that the solicitor selectively prosecuted appellant as vindication for the trauma two female bank tellers suffered via the bank robberies and bomb threats, which in turn constituted due process and equal protection violations

Appellant was charged with robbing a Bank of America located in Bluffton and a Bank of America located at Hilton Head Island on May 1, 2013, and on May 2, 2013, respectively. Tr. 6, l. 19 – p. 10, l. 4.

The solicitor requested that appellant be sentenced to the maximum thirty-year sentence for the bank robberies. Tr.34, lines 17-18. However, had appellant been sentenced in federal court for the same crimes, his sentence would have fallen within a 17-to-21-year range¹ per the federal sentencing guidelines. The solicitor requested this maximum sentence because of appellant's prior (bank robbery) crimes,² which caused him to view appellant as a "ticking time bomb," and because of the trauma he caused two female bank tellers to suffer, one of whom was "nine months pregnant... and could have lost her baby," and the other who "fell to the ground crying" after the robbery and requested the maximum sentences because she still relieves the robbery daily. Tr. 6, lines 19-25; Tr. 8 lines 19-20; Tr. 11, lines 12 – 16; Tr. 23, lines 6-10; Tr. 27, l. 14 – p. 28, l. 18; Tr. 32, l. 25 – p. 33, l. 14; Tr. 33, lines 19-25.

¹ Tr. 27, l. 14 – p. 28, l. 4.

² Appellant committed two prior 1995 bank robberies in Florida. Tr. 10, l. 5 – p. 11, l. 4.

The solicitor added that the federal government did not take the case because of the government's focus on terrorism cases instead, but also because it was obvious that the "state was very interested in prosecuting [appellant]." Tr. 33, l. 24 – p. 34, l. 16. Clearly, appellant's case was literally grabbed by the solicitor from federal prosecutors in order to prosecute appellant, which was tantamount to an unlawful selective prosecution by the state that resulted in appellant's receipt of a thirty-year sentence when the maximum federal sentence he would have received would have been between 17 and 21 years.

In the case at bar, it was obvious that the solicitor was apparently profoundly moved by the fact that the two female tellers in question were traumatized as one of the tellers whom appellant robbed was nine months pregnant and could have lost her baby via the trauma of the robbery, and the other bank teller was so distraught that she "fell to the ground crying" after handing over the cash money as instructed and claimed she relives the robbery trauma daily. The pregnant female teller, who has since moved to Long Island, New York, wrote a letter (which the solicitor's presented to the plea judge) regarding the event, and the other teller was present at the plea proceeding in order to verify her trauma and request maximum sentencing for appellant. The solicitor offered the letter in question at the plea proceeding and at the sentencing reconsideration hearing. Tr. 11, lines 5-16; Tr. 23, lines 5-15; Tr 34, lines 8-9. The appellant not only wrote a note asking for money, but added in the note that he was in possession of a bomb. Tr. 6, l. 19 – p. 7, l. 6; Tr. 8, l. 4 – 14.

During the sentencing reconstruction hearing, counsel for appellant advised the plea judge that appellant's sentence violated the due process and equal protection clauses because the state "selected him out personally" to prosecute him, particularly since "the solicitor stated on the record that the state took a particular interest, i.e, they were very interested, in

appellant's case, and convinced the federal government to drop appellant's case. This patent zeal in taking on appellant's case for prosecution reeked of unlawful selective prosecution. Tr. 4, l. 24 – p. 5, l. 18 (Resentencing Consideration Motion Hearing Transcript). Counsel requested that appellant's sentence be reduced to reflect what a comparable sentence would have been had he been prosecuted in federal court (i.e. 17-21 years imprisonment), but for the state's selective prosecution of him in state court. App. 6, lines 4 – 16. As it stood, appellant's thirty-year sentence received in state court exceeded what he would have received in federal court by 9 to 13 years. Undoubtedly, the solicitor was overly concerned to the point of being consumed with the stress the female tellers, suffered as victims of the robbery. Apparently, the solicitor's intense regard for the emotional aftermath the tellers experienced from the bank robberies led to the unconstitutional selective prosecution of appellant in the case.

There are two elements required to establish selective prosecution. First, one must show that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Also, one must show that the government used a discriminatory basis upon which to select him for prosecution. State v. Geer, 391 S.C. 179, 705 S.E.2d 441 (2010) citing to United States v. Armstrong, 517 U.S. 456 (1996). Here, it is clear that due to the unique facts and circumstances of the case, i.e., bank and bomb charges and the traumatization of two female bank tellers (one of whom could have miscarried a pregnancy), appellant was singled out for prosecution by the solicitor when other robbers, who were fortunate enough to approach tellers who suffered no ill effects from any robberies were not, in order to achieve vindication for the traumatized tellers in question and ended up being targeted (unlawfully

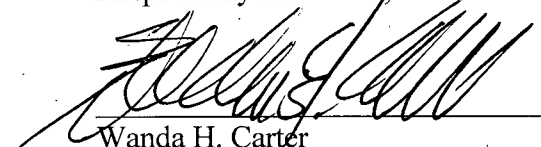
selected) for prosecution. Also, the discriminatory focus on appellant's gender, that being male, played a role in that he (this male of the opposite sex) frightened these females tellers whom the solicitor assumed to be "the weaker sex."

The selective prosecution of appellant that occurred in this case violated appellant's equal protection and due process rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, appellant requests that his sentences be vacated and his case remanded for a new sentencing hearing, or in the alternate that his case be remanded for a new guilty plea proceeding.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of July, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT;

V.

DAVID BOYD,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Boyd states:

1. She is Deputy Chief 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 Carmen T. Mullen, which was held on August 29, 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 David Boyd.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of July, 2014.

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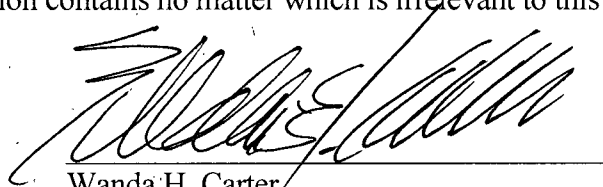
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Guilty Plea Transcript; and
- (3) Entire Sentencing Reconsideration Hearing Transcript, and
- (4) Sentencing Reconsideration Hearing Motion

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

July 21st, 2014



Wanda H. Carter
Deputy Chief Appellate Defender

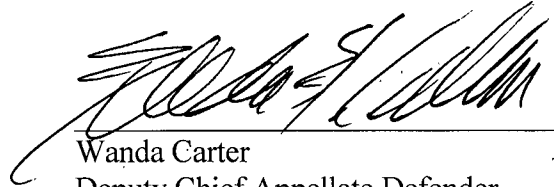
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(803) 734-1343

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 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 21, 2014



Wanda Carter
Deputy Chief Appellate Defender

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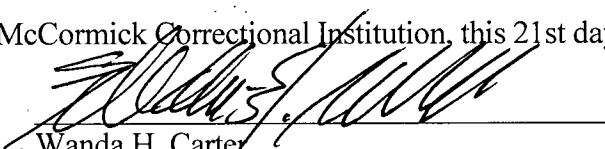
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DAVID BOYD,

APPELLANT


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 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 David Boyd, #356852 at McCormick Correctional Institution, this 21st day of July, 2014.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of July, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022 .