

Order Being Challenged on Appeal

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SC Court of Appeals

STATE OF SOUTH CAROLINA

) **IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT**

COUNTY OF CHARLESTON

) Indictment No(s): 2012-GS-10-6844, 6845, 6846

) Charge(s): Poss. Wpn. During Viol. Crime;
Armed Robbery; Murder

STATE OF SOUTH CAROLINA

)

vs.

)

MARVIN REGINALD BROWN,

)

)

Defendant

)

)

)

)

**ORDER
GRANTING DEFENDANT'S
MOTION TO EXCLUDE
HEARSAY TESTIMONY
OF VICTIM'S IDENTIFICATION**

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APPEALS

THIS MATTER CAME BEFORE THE COURT on March 25, 2013, and December 10, 2013, on the Defendant's Motion to Suppress Hearsay Testimony and Defendant's Motion to Exclude the Victim's Identification of the above-named defendant, Marvin Brown. Deputy Public Defender Cody Groeber appeared on behalf of Defendant Brown; Assistant Solicitor Chad Simpson appeared on behalf of the State.

STATEMENT OF FACTS

The victim, Davon Goodwin, was shot on April 26, 2011, around 2 a.m., on America Street in downtown Charleston, South Carolina. He was transported to the Medical University of South Carolina, where he underwent surgery that same day. He made it through surgery and regained consciousness sometime on April 27, 2011. The following day, the victim's breathing tube was removed, and he was able to converse with his family and doctors. As exhibited by Mr. Goodwin's medical records, the victim's condition was generally improving throughout his stay at MUSC. See Exhibit A to Defendant's Motion to Suppress Hearsay Testimony.

ARM

On April 29, 2011, Detective Fleming of the Charleston Police Department interviewed the victim. Detective Fleming read him a standard admonition form for photographic lineups. See Exhibit B to Defendant's Motion to Suppress Hearsay Testimony. The victim identified the Defendant in a six-pack photo lineup. There is a partial audio recording of this identification procedure. See Exhibit C to Defendant's Motion to Suppress Hearsay Testimony. On May 4, 2011, the victim died from complications of the gunshot wound.

LEGAL ANALYSIS

The Defendant maintains that the victim's statements are inadmissible under the Sixth Amendment's Confrontation Clause, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that the admission of testimonial statements by an unavailable witness whom the defense has not had a prior opportunity to cross-examine violates the defendant's Confrontation Clause rights under the Sixth Amendment. In South Carolina, not only is the right applicable to state prosecutions under the Fourteenth Amendment, it is specifically mandated by the State Constitution. *State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977) citing S.C. Const. Art. I, § 14.

In the alternative, Defendant argues that the victim's statements are hearsay and that no exception exists in this case that would allow testimony regarding the victim's identification of Defendant Brown from the six-pack photo array. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted.” Rule 801(c), S.C.R.E. Hearsay is generally inadmissible. Rule 802 S.C.R.E.

The State argues that the victim’s statements are admissible under Rule 804(b)(2), S.C.R.E., which provides an exception to the hearsay prohibition for statements made by a declarant while under the belief that his death is imminent. Specifically, Rule 804(b)(2) states that “[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death” is not excluded by the hearsay rule.

This "dying declaration" rule has long been recognized in South Carolina. *See State v. Riley*, 98 S.C. 386, 82 S.E. 621 (1914). It is a codification of the common law rule that “dying declarations are competent evidence, for or against the accused, upon preliminary proof of certain conditions.” *State v. Bethea*, 241 S.C. 16, 21, 126 S.E.2d 846, 848 (1962). “It is incumbent on the party offering to introduce in evidence a dying declaration to show that it fulfills the requirements of the law.” *State v. Brown*, 108 S.C. 490, 497-98, 95 S.E. 61, 63 (1918). The three conditions that must be proved are as follows: (1) imminent death at the time the declaration is made; (2) the declarant must be so fully aware of this as to be without any hope of life; and (3) the circumstances of the death must be the subject of the declaration. *State v. Bethea*, 241 S.C. at 21, 126 S.E.2d at 848-849.

1. Imminent Death at the Time the Declaration is Made

The Court concludes that while there is no doubt that the victim in this case was in serious condition at the time of his identification of Defendant Brown, his medical records demonstrate that he was improving and was not in imminent danger of death at the time the

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statements were made. The victim was admitted into the hospital on April 26, 2011, and underwent surgery the same day. *See* Exhibit A, page 56 of 519. He was intubated on April 26th and extubated on the 28th. Ex. A at 186. Furthermore, on the day that the challenged statements were made, the Defendant, the victim was “adequate on the floor, transferred out of STICU, was making strides with physical therapy, and ambulating in the hall.” Ex. A at 56. He received a physical therapy consult on April 29th, and began physical therapy on April 30th. Ex. A at 404-406 and 465. On that day, he tolerated 5-15 minutes of uninterrupted exercise. Ex. A at 429. Moreover, the victim’s May 4th death was listed as sudden and unexpected. Ex. A at 48.

2. Declarant must be Fully Aware of Imminent Death to be without any Hope of Life

The Court further finds that neither the medical records nor the other evidence in the case demonstrates that the victim was aware of his imminent death when identifying the photograph of the defendant from the six-pack lineup. In fact, the evidence suggests the contrary; on April 29th, the victim's medical condition was improving. Furthermore, evidence presented at the pre-trial hearing suggested that the victim was planning on seeking revenge against his assailant. This is inconsistent with both an awareness of imminent death as well as one who has given up all hope of survival. Ex. A at 464.

3. The Circumstances of the Death Must be the Subject of the Statement

The Court concludes, and all parties agree, that the circumstances of the shooting - which resulted in the victim’s subsequent death - were the subject of the hearsay statement. However, this alone does not satisfy the requirements of either Rule 804(b)(2) or the common law rule.

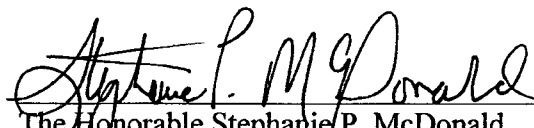
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CONCLUSION

Following oral arguments and a detailed review of the facts, exhibits, and case law, this Court hereby finds that the victim's statements are barred under S.C. Rules of Evidence 801 and 802. As the statements are hearsay and no hearsay exception applies, the statements are inadmissible.¹

THEREFORE, IT IS HEREBY ORDERED that the statements of the victim shall not be admitted in the trial against the Defendant as they are inadmissible hearsay. Defendant's Motion to Suppress Hearsay Testimony is hereby GRANTED.

AND IT IS SO ORDERED.


The Honorable Stephanie P. McDonald
Chief Administrative Judge, Ninth Judicial Circuit

August 18, 2014
Charleston, South Carolina

¹ The Court also conducted a *Neil v. Biggers* hearing regarding the six-pack identification procedure at the hospital. Under the totality of the circumstances, the Court determined that the identification process was not unduly suggestive, was reliable, and that no substantial likelihood of misidentification existed. *See State v. Spears*, 393 S.C. 466, 480, 713 S.E.2d 324, 331 (S.C. App. 2011) *citing Biggers*, 409 U.S. 188, 198-99 (1972).

**Previous Court of Appeals Filings & Correspondence
Appellate Case No. 2013-002738**

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Stephanie P. McDonald, Circuit Court Judge

Case No. 2012-GS-10-06844, 06845, 06846

The State,

Appellant,

v.

Marvin Brown,

Respondent.

FILED
2013 DEC 30 AM 9:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____


PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Marvin Brown by depositing a copy of it in the United States Mail, postage prepaid, on December 20th, 2013, addressed to his attorney of record, Cody J. Groeber, Ninth Circuit Public Defender, 219 N. Highway 52, Suite E, Moncks Corner, South Carolina, 29461.

December 30th, 2013



Assistant Solicitor Chad Simpson
Ninth Judicial Circuit
O.T. Wallace Building
101 Meeting Street
Charleston, South Carolina 29401
(843) 958-1922
Attorney for Appellant

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By 
DEPUTY CLERK

NOTICE OF APPEAL FROM A RULING IMPOSED BY THE COURT OF
GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Stephanie P. McDonald, Circuit Court Judge

Case No. 2012-GS-10-06844, 06845, & 06846

FILED
2013 DEC 30 AM 9:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The State,

Appellant,

v.

Marvin Brown,

Respondent.

NOTICE OF APPEAL

The State appeals a ruling by the Honorable Stephanie P. McDonald in this case pursuant to S.C. Code §14-3-330 (1977 & Supp. 2009) and State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) (concluding a pretrial order granting the suppression of evidence that significantly impaired the prosecution of the State's case could be directly appealed by the State). The ruling was imposed on the record by the Honorable Stephanie P. McDonald on December 10, 2013, written order to follow.

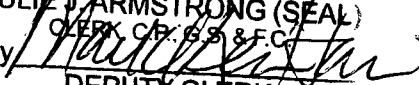
December 20th, 2013

[Notice served via U.S. Mail on this date]



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Ninth Judicial Circuit
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Attorney for Appellant

Other Counsel of Record:
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Ninth Circuit Public Defender
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JULIE J. ARMSTRONG (SEAL)
CLERK OF B.S. & F.C.
By 
DEPUTY CLERK

Moncks Corner, South Carolina, 29461
(843) 899-2777
Attorney for Respondent

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2013 DEC 30 AM 9:40

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

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By *Mark Pennington*
DEPUTY CLERK



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 03, 2014

Mr. Benjamin C. Simpson
The O.T. Wallace Office Bldg.
101 Meeting St.
Charleston SC 29401

Mr. Cody J. Groeber
219 N. Highway 52
Suite E
Moncks Corner SC 29461

Re: The State v. Marvin Brown
Appellate Case No. 2013-002738

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the notice of appeal indicates this appeal may have been prematurely filed. Please update the Court on the status of the written order being prepared by Judge McDonald within ten days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's receipt of an update.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny A. Kitchings".

CLERK

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AUG 28 2014

SC Court of Appeals

cc: Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
The Honorable Stephanie P. McDonald

LETTER TO THE APPELLATE COURT CLERK

January 13th, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State v. Marvin Brown, Appellate Case No. 2013-002738

Dear Ms. Kitchings:

I'm writing in response to a letter I received from your office (attached) informing me that this appeal may have been prematurely filed due to the fact that a written order has not yet been filed in this case by the trial judge. Pursuant to my conversation today with Jacqueline, I am writing to let you know that I have confirmed with Judge McDonald that a written order is to be issued in this case and that it will be entered within 30 days. I will provide a copy of the ruling to your office as soon as it is entered and I have received it. I am sorry for the confusion, but as there was a clear ruling on the record, I believed my time was running to preserve the right to appeal. I thank your staff for their kind help today.

Sincerely,

Assistant Solicitor Chad Simpson
Ninth Judicial Circuit
O.T. Wallace Building
101 Meeting Street
Charleston, South Carolina 29401
(843) 958-1922
Attorney for Appellant

cc: Mr. Cody J. Groeber
Ninth Circuit Public Defender
219 N. Highway 52, Suite E
Moncks Corner, South Carolina 29461
(843) 899-2777, Attorney for Respondent.

The South Carolina Court of Appeals

The State, Appellant,

v.

Marvin Brown, Respondent.

Appellate Case No. 2013-002738

The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2012GS1006844, 2012GS1006845,
2012GS1006846

ORDER

On January 13, 2014, counsel for the state represented to the Court that the trial judge has not issued a written ruling regarding the issues on appeal. Accordingly, this matter is dismissed without prejudice, and remanded for a written order from the circuit court. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY


CLERK

Columbia, South Carolina
cc: Cody J. Groeber, Esquire
Benjamin C. Simpson, Esquire
Salley W. Elliott, Esquire
Robert Michael Dudek, Esquire
The Honorable Julie J. Armstrong
The Honorable Stephanie P. McDonald

FILED

1/24/14 JRO