

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 18 2014

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2012-212222

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

CHARVUS TARREL NESBITT,

APPELLANT.

MOTION TO DISMISS APPEAL AS MOOT

The above-named Respondent hereby moves to dismiss the present appeal as moot. In support of this motion, Respondent would show as follows:

Charvus Tarrell Nesbitt (Appellant) is currently incarcerated in the Perry Correctional Institution, of the South Carolina Department of Corrections, as the result of his Spartanburg County murder conviction and life sentence. The Spartanburg County Grand Jury rendered three indictments on March 25, 2011, charging Appellant with one count of murder and one count of possession of a weapon during the commission of a violent crime (11-GS-42-1414); attempted murder (11-GS-42-1415); and armed robbery (11-GS-42-0349). **R. pp. 1-4.**

Initially, Fletcher N. Smith, Esquire, represented Appellant on these charges and counsel successfully plea bargained for a negotiated sentence of forty years imprisonment on all of the charges against Appellant. Appellant appeared before the Honorable Roger L. Couch to plead

guilty under *North Carolina v. Alford*, 400 U.S. 25 (1970), to these charges on February 23, 2012. The Deputy Solicitor called these four charges and announced the negotiated sentence. **R. p. 14, lines 3-11.** Mr. Smith also confirmed the negotiated sentence on Appellant's behalf and explained that it was an *Alford* plea. Judge Couch then had a colloquy with Appellant and Mr. Smith consistent with *Boykin v. Alabama*, 395 U.S. 238 (1969) and he accepted Appellant's plea as to all charges, except for the count of possession of a weapon during the commission of a violent crime in 11-GS-42-1414. **R. p. 14, line 12- p. 38, line 3.**

Judge Couch announced that he was accepting the negotiated sentence and he sentenced Appellant to forty years imprisonment for murder, with concurrent sentences of thirty years for attempted murder and twenty years for attempted armed robbery. **R. p. 38, lines 14 - 21.**¹ After Appellant had left the courtroom, the Deputy Solicitor brought to Judge Couch's attention that he had not addressed the weapons charge. Judge Couch asked Mr. Smith if counsel wanted Appellant brought back in to receive a five year concurrent sentence. Counsel replied, "Yes, sir. Thank you." Judge Couch then imposed a concurrent five year sentence. **R. p. 38, line 24- p. 39, line 18.**

However, Appellant was apparently not brought back into the courtroom for further proceedings. Instead, he filed a February 23, 2012 motion for reconsideration or new trial on the weapons charge. **R. pp. 7-8.** He made an amended motion on March 7, 2012. **R. pp. 9-10.** Judge Couch heard this motion on April 26, 2012. Kenneth P. Shabel, Esquire, represented Appellant at the hearing. Deputy Solicitor Balsa again represented the State.

Counsel argued that the trial court had to vacate the plea to the weapons charge because the sentence was imposed even though the trial court never addressed this count with Appellant

¹ Appellant was given credit for time served, as well. **R. p. 38, lines 4-13.**

and had not determined that Appellant had made a knowing and voluntary waiver of his constitutional rights. Because the weapons count was part of a negotiated sentence to all four charges, he argued that the trial court had to vacate the remaining pleas, as well. **R. p. 43, line 3 - p. 51, line 16.** At the conclusion of this hearing, Judge Couch took the matter under advisement. **R. p. 51, lines 19-20.**

On May 24, 2012, Judge Couch filed an Order vacating the conviction and sentence on the weapons charge but “affirming” the other convictions and sentences. **R. pp. 5-6.**

Appellant timely served and filed a notice of appeal, the parties have filed their respective briefs and the case is set for oral argument on November 19, 2014. As reflected by the attached copy of the indictment from the Spartanburg County Clerk of Court’s Office, Deputy Solicitor Derek Balsa *nolle prossed* the charge of possession of a weapon during the commission of a violent crime in indictment 11-GS-42-1414. The undersigned was unaware of that action until today, November 18, 2014.

The South Carolina Department of Corrections mistakenly has in its records Appellant serving a five (5) year sentence on the weapons charge. As the attached correspondence reflects, Corrections was not provided with a copy of the May 24, 2012 Order. The undersigned has now contacted Corrections and is seeking to correct this mistake. Once corrected, Appellant will not have this conviction.

Appellant’s Statement of Issues on Appeal is that:

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ONLY SETTING ASIDE ONE OF APPELLANT’S FOUR GUILTY PLEAS WHEN THE NEGOTIATED PLEA WAS NOT FULLY AND PROPERLY PLACED ON THE RECORD?

An issue becomes moot when a decision, if rendered, will have no practical legal effect upon the existing controversy. *See Linda Mc Co. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499,

506 (2010); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). It is undisputed that Appellant received a forty year sentence on the charge of murder and concurrent sentences of thirty years for attempted murder and twenty years for attempted armed robbery. R. p. 28, lines 14-21; pp. 1 & 3-4. Also, the plea to the weapons charge has been vacated and now dismissed. Therefore, Respondent's position is that Appellant's appeal is now moot. The undersigned has spoken to Appellant's counsel, Mr. Shabel, about the *nolle prosequere* and Mr. Shabel does not feel that the *nolle prosequere* moots Appellant's appeal.

Wherefore, Respondent respectfully moves to dismiss the appeal as moot.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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(803) 734-6305

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3rd Floor, 180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575

By: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

November 18, 2014

WITNESSES

SPARTANBURG COUNTY
Spartanburg County
REPORT MADE

Compute.

CARD PULLED

INDEXED

CHECKED WARRANTS

CHECKED SIGNATURE

ASSESSMENT AND
FINE CARD MADE

Compute.

ARREST WARRANT NUMBER

M751483 (Count One)

M751457 (Count Two)

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date:

MAR 25 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO

11-GS-42-1414

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE
vs.

Charvus Tarrel Nesbitt

Indictment for

COUNT ONE-MURDER, COUNT TWO-
POSSESSION OF WEAPON DURING
VIOLENT CRIME

SC Code 16-03-0010, 0020, 16-23-490
CDR Code 116, 549
Class FEL-EXM

2013
MAR 27 10:50 AM

MAR 29 AM 9:23

M. HOPE BLACKLEY

2013 MAR 27 AM 10:50
M. HOPE BLACKLEY

NP Count 2 pursuant to
Court Order dated Mar 24 2013
by Judge Couch

3/27/13 Det B. Baker

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on , the
Grand Jurors of Spartanburg County present upon their oath:


COUNT ONE-MURDER

The Defendant Charvus Tarrel Nesbitt did in Spartanburg County on or about December 7, 2010, feloniously, willfully, and with malice aforethought, kill one Daniel Tremayne Landrum, by shooting him with a gun and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

COUNT TWO- POSSESSION OF WEAPON DURING VIOLENT CRIME

That the defendant, Charvus Tarrel Nesbit, did in Spartanburg County on or about December 7, 2010, visibly display a firearm during the commission or attempted commission of a violent crime, to-wit: Murder, in violation of Code §16-23-490, *CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Deputy Solicitor

CERTIFIED COPIES OF THE FOLLOWING SENTENCE WERE ACCEPTED BY:

J Gray OF THE SPARTANBURG COUNTY JAIL.
DATED 3-27-13 ON Charmo Nesbitt
WARRANT, TICKET, INDICTMENT NUMBER AND/OR PROBATION 11-1414A

Nol pros

Ed Salter

From: Daniel Crooks III (C055212) <Crooks.Daniel@doc.sc.gov>
Sent: Tuesday, November 18, 2014 11:07 AM
To: Ed Salter
Subject: RE: Charvus Nesbitt - SCDC #00349711 - (Indictment #2011-GS-42-1414)

I have forwarded the order to Stobbe.

From: Ed Salter [<mailto:ESalter@scag.gov>]
Sent: Tuesday, November 18, 2014 10:42 AM
To: Daniel Crooks III (C055212); Donna D'Alessio
Cc: DJHopkins@sccourts.org
Subject: RE: Charvus Nesbitt - SCDC #00349711 - (Indictment #2011-GS-42-1414)

Dan,
FYI, I have already spoken to Mike Stobbe about the case. Apparently, SCDC only received the original sentencing sheet and not the May 24, 2012 Order of Judge Couch or the subsequent nolle prosequere of the weapons charge.
Sincerely,
Ed Salter

From: Daniel Crooks III (C055212) [<mailto:Crooks.Daniel@doc.sc.gov>]
Sent: Tuesday, November 18, 2014 10:37 AM
To: Donna D'Alessio
Cc: DJHopkins@sccourts.org; Ed Salter; Daniel Crooks III (C055212)
Subject: RE: Charvus Nesbitt - SCDC #00349711 - (Indictment #2011-GS-42-1414)

Good morning Ms. D'Alessio,

Thank you for your email. I will reach out to my records folks and have them take a look. I'll get back to you once that's completed.

Dan

From: Donna D'Alessio [<mailto:DDAlessio@scag.gov>]
Sent: Tuesday, November 18, 2014 10:28 AM
To: Daniel Crooks III (C055212)
Cc: DJHopkins@sccourts.org; Ed Salter
Subject: Charvus Nesbitt - SCDC #00349711 - (Indictment #2011-GS-42-1414)

Dear Mr. Crooks:

Currently the SCDC records reflect that Mr. Nesbitt (SCDC #00349711) is serving a 5 year concurrent sentence on a weapons possession charge that resulted from a February 13, 2012 guilty plea to the charges of murder, attempted murder, attempted armed robbery and possession of a weapon and a negotiated 40 year sentence. However, by way of the attached Order filed on May 24, 2012 by the Honorable Roger L. Couch, that conviction sentence was vacated. Also, on March 27, 2013 the State entered a nolle prosequere of this charge, so that it no longer exists.

I would appreciate your assistance in trying to correct Mr. Nesbitt's sentence.

Upon your receipt of this email, please contact Mr. William Edgar Salter, III directly at (803) 734-3734 (main line 803-734-6305).

Thank you.

Donna D'Alessio, Legal Assistant for William Edgar Salter, III
Capital Litigation
Office of the Attorney General
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THE STATE OF SOUTH CAROLINA,

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CHARVUS TARREL NESBITT,

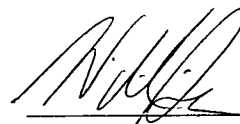
APPELLANT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Motion to Dismiss Appeal as Moot on Appellant via email and by depositing same in the United States mail, postage prepaid, and addressed as follows:

Mr. Kenneth P. Shabel, Esquire
Campbell & Shabel, LLC
175 Magnolia Street, Suite #201
Spartanburg, SC 29306.

This 18th day of November, 2014.



WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT