

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BERNARD DAGGART FRAZIER,

APPELLANT

APPELLATE CASE NO. 2014-001178

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

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

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SC Court of Appeals

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing State's Exhibit #9, a 9-1-1 CD, into evidence and being played to the jury when it was done without the 9-1-1 caller being in court to be cross-examined in violation of Article 1, Section 14 of the South Carolina Constitution?

STATEMENT OF THE CASE

Appellant was convicted of burglary in the first degree after a jury trial held before the Honorable Donald B. Hocker on May 19 – 21, 2014, in Aiken County. A fifteen (15) year sentence was imposed. Michael Routzong, Esquire, was trial counsel. Kevin Malony, Esquire, and Samuel Grimes, Esquire, were the solicitors.

This appeal follows.

ARGUMENT

The trial court erred in allowing State's Exhibit #9, a 9-1-1 CD, into evidence and being played to the jury when it was done without the 9-1-1 caller being in court to be cross-examined in violation of Article 1, Section 14 of the South Carolina Constitution.

At pre-trial, one of the assistant solicitors announced that there was a CD of a 9-1-1 call that there may be a question about. The call was from the victim's son of the burglary in this case. The son was dyslexic and the assistant solicitor was not going to put the son on the stand, but he did not want to play the 9-1-1 CD to the jury without him being cross-examined. He acknowledged that the son did not know how to describe where his own location where he lived was and he could not give the name of the defendant even though he was supposed to be known to the family. This consumed about five to six minutes of the call. The assistant solicitor said his position was that this was an excited utterance to the hearsay rule, it was non-testimonial in nature, and it was not a Crawford confrontation clause issue. (R. p. 44, line 12 – p. 45, line 12).

Defense counsel argued that an excited utterance exception did not apply in this case to allow the 9-1-1 CD into evidence without the 9-1-1 caller being subject to cross-examination because it did not meet the criteria of the three elements set forth in State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002). He also argued that allowing the 9-1-1 CD into evidence without cross-examining the caller would violate Article I, Section 14 of the South Carolina Constitution which specifically guarantees confrontation. (R. p. 47, lines 1 – 25).

That section states:

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. (1970 (56) 2684; 1971 (57) 315.)

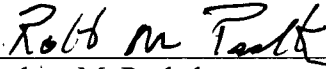
Contrary to the above constitutional provision, the trial court found that the 9-1-1 call fell into the excited utterance exception and would be allowed into evidence. He also relied on State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013) which held that the Sixth Amendment to the United States Constitution does not grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses. (R. p. 53, lines 5 – 23).

The ruling by the trial judge was in error. A hearsay exception and State v. Brockmeyer should not trump a provision of the South Carolina Constitution. Allowing the 9-1-1 call into evidence without allowing cross-examination of the caller was prejudicial. It became even more so when the jury was again allowed to listen to the 9-1-1 CD in the jury room during deliberations because that unduly emphasized that evidence. State v. Gullede, 277 S.C. 368, 287 S.E.2d 488 (1982).

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of November, 2014.

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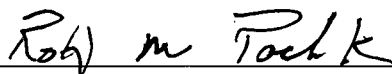
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bernard Daggart Frazier states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Donald B. Hocker, which was held on May 21, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Bernard Daggart Frazier.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of November, 2014.

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

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript (May 19 – 21, 2014)

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

November 14th, 2014

Robert M. Pachak

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
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PO Box 11589
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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."

November 14, 2014



Robert M. Pachak
Appellate Defender

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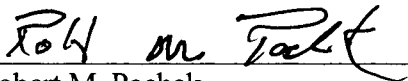
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BERNARD DAGGART FRAZIER,

APPELLANT

CERTIFICATE OF SERVICE

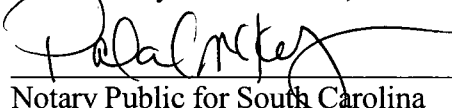
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Bernard Daggart Frazier, #237617 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of November, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022