STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Horry County

Steven H. Johns, Circuit Court Judge

THE STATE

RESPONDENT

V.

SHELTON LATHAL BUTLER,
JR.,

APPELLANT

MEMORANDUM IN SUPPORT OF APPEAL

SHELTON LATHAL BUTLER,
JR.,
Appellant
Lieber Corr. Inst.
P.O. Box 205
Ridgeville S.C. 29472

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STATEMENT OF ISSUES

Was trial counsel ineffective in failing to move the court for a direct verdict and or object to the constructive amendment of the indictment prior to trial?

Was trial counsel ineffective in failing to object to the jury instructions?

Was trial counsel ineffective in failing to object to the sentencing while failing to adequately investigate and present mitigation?

STATEMENT OF THE CASE

In September of 2012, the Horry County Grand Jury indicted Appellant for Murder, indictment # 2012-GS-0401C. The gun was never recovered. On June 2, 2014 Appellant proceeded to Jury trial before the Honorable Steven H. John. Attorney J. Eric Fox represented Appellant. The Jury returned a verdict of guilty and Judge John Sentence Appellant to 30 years imprisonment. A timely Notice of intent to appeal was served on June 11, 2014 This appeal follows.

ARGUMENT

Trial Counsel was ineffective in failing to move the court for a direct Verdict and or object to the constructive amendment of the indictment prior to trial.

Prior to trial appellant rejected the plea bargain of the state and elected to proceed to trial (R.P. 57, lines 15-17) because appellant was prepared to meet the initial charge of the indictment but was prejudicially surprised when the trial court permitted the constructive amendment of the indictment (R.P. 57, lines 20-25 - P. 58, lines 1-10) and by trial Counsel's failure to move the court for a direct verdict and or object to the constructive amendment of the indictment pursuant to Fed. R. Crim. P. 12 (b) 3 (B) (R.P. 59, lines 23-25). See U.S. V. Redd, 161 F.3d 793 (4th Cir. 1998)

IN U.S. V Redd, Redd did not move to dismiss the indictment at the time the evidence was presented at trial, he failed to preserve his claim for appellate review.

IN Appellant's case trial Counsel did not move to dismiss the indictment at the time the evidence was presented at trial, thus failing to properly preserve this claim for appellate review pursuant to Fed. R. Crim. P. 12 (b) 3 (B) Nevertheless, under Rule 52 (b) of the Fed. R. Crim P., the Court may notice, in its discretion, "[P]lain errors of defects affecting substantial rights," even though no objection was made."

Appellant asserts that the Fifth Amendment to the united states constitution provides for a right to indictment by grand jury. This right is violated when the proof offered at trial permits a jury to convict a defendant for a different offense than that for which he was indicted. (Note: Appellant has noted that when a defendant is convicted of charges not included in the indictment, an amendment

has occurred which is per se reversible error). Appellant has also noted that a variance in the indictment violates a defendant's right only if it prejudices him and this prejudice occurs only when the variance either surprises him at trial and hinders the preparation of his defense, or... exposes him to the danger of a second prosecution for the same offense.

> Appellant asserts that his conviction should be reversed because the indictment had been constructively amended by broading the possible bases for conviction and trial counsel was ineffective in failing to object and or move the court for a direct verdict pursuant to Fed. R. Crim. P. 12 (b) 3 (B), and trial counsel's dereliction bolstered the abusive discretionary authority. How? Because trial counsel failed to object when the trial court failed to apprise the jury of the indictment which the Appellant was prepared to meet (R. P. 60, lines 2-25 - P. 64, lines 24).

Appellant asserts that trial counsel's failure to object and or move the court for a direct verdict prior to trial strengthen the states case in detaining appellant under United states V. Miller, 471 U.S. 130, 134-35, 105 S. Ct. 1811 L.Ed 2d 99 (1985); Fletcher, 74 F. 3d at 53; (As long as the indictment provides the defendant with adequate notice of charge (s) against him and is sufficient to allow the defendant to plead, it as a bar to subsequent prosecution[2] a variance in proof at trial will not prejudice the defendant. See Appeal / Post-conviction § 335 Ineffective Assistance (2)," See Ross V. Kemp, 260 Ga. 312, S.E. 2d 244 (1990) "Where the evidence of ineffectiveness was so pervasive that a particularized inquiry into the prejudice was deemed unguided speculation" Id., 260 Ga at 315, 393 S.E. 2d 244; Now see (R. P. 48, lines 5-6) where trial counsel states what this case is all about.

ARGUMENT

Trial Counsel was ineffective in failing to object to jury instruction.

See Fauling V. State, 565 S.E. 2d 769 (2002)

IN this case COUNSEL was found ineffective for failing to object because the court's instruction was wrong because there was no evidence in the record distinguishing defendant's conduct such to convict one and not the other.

IN Appellant's case the distinguishing evidence is plain and obvious. The indictment reports that appellant did kill the victim with a gun. (R.P. 65, lines 22-23) NOW See (R.P. 133 lines 14-18, P. 482, lines 5-6).

ARGUMENT

Trial COUNSEL was ineffective in failing to object to the sentencing, while failing to adequately investigate and present Mitigation.

During trial respondent prejudicially stated appellant called the victim, went to his home, set up a drug deal, and senselessly murdered the victim. Despite trial counsel's failure to object and request curative instructions regarding respondent's inflammatory baseless speculative remarks (R.P. 65 lines 5-10) he did assert there will be no testimony stating appellant made any phone calls, or had any type of weapon (R.P. 69 lines 9-11). Counsel also asserted appellant was merely present during the occurence of the crime (R.P. 69 lines 15-19) and that being there, even knowing something's gonna happen is not enough (R.P. 481, lines 23-24) and that the only evidence respondant has is all speculation (R.P. 482, lines 5-6). See Council v. State 670 S.E. 2d 356 (S.C. 2008)

IN Council v. State, COUNSEL found ineffective in capital sentencing for failing to adequately investigate and present Mitigation.

IN Appellant's case COUNSEL should be found ineffective in capital sentencing for failing to adequately investigate and present Mitigation.

In Council v. State, Defense counsel asserted during trial and sentencing that the defendant was merely present at the time of the crime which was committed by another man.

In Appellant's case trial counsel asserted during trial that the defendant was merely present at the time of the crime which was committed by another man (R. P. 69, lines 9-19, P. 483, lines 14-18)

In Council v. State the only mitigation evidence presented was extremly limited testimony by defendant's mother.

In Appellant's case the only mitigation evidence presented was extremely limited testimony by defendant's mother and defendant (R.P. 527, lines 11-21 P. 525, lines 15-33).

Appellant asserts that he's entitled to equal protection of the laws which provides and protects Appellant's right to the effective assistance of counsel which trial counsel violated when he failed to adequately investigate and present mitigation during the sentencing phase of Appellant's trial see Williams v. State, 410 S.E. 2d 563 (S.C. 1991)

In Williams v. State, the defendant plead guilty to assault and battery with intent to kill and received extra punishment for displaying "what appeared to be a knife" during the attack. Id. at 563

In Appellant's case the Appellant rejected the plea and received extra punishment for being merely present, when the indictment alleged that Appellant did murder the victim with a gun.

In Williams v State, the instrument was actually a barbecue fork, and the trial court was ruled to be without jurisdiction to accept the plea because the statue clearly states that the "weapon" involved had to be a knife Not "what appeared to be a knife". Id. at 564.

In Appellant's case the trial court should also be ruled to be without jurisdiction to entertain the case and the statue should unequivocally state that the weapon involved has to be a gun Not mere presence.

Appellant asserts that "a challenge to the sentencing must be raised at trial or the issue will not be preserved for appellate review" State v Johnson, 333 S.C. 459, 462, 510 S.E. 2d 423 (1999). Nevertheless, an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances.

CONCLUSION

Based on the above arguments Appellant's conviction should be reversed.

S/Shelton L. Butler Jr.
Shelton Butler Jr.
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P.O. Box 205
Ridgeville S.C. 29472
Appellant

IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

Respondent

V

SHELTON L. BUTLER JR.

Appellant

Appellate Case No. 2014-001274

CERTIFICATE OF SERVICE

I, Shelton L. Butler Jr., (hereinafter referred to as Appellant) hereby certify that on the 6th day of Nov. of 2014 I, caused a true and correct copy of the "Memorandum in Support of Appeal" in the above caption matter to be served via united state mail, postage prepaid through Lieber Corr. Inst. Mail room, addressed as follows;

Robert M. Dudek, chief Appellate Defender
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201-3332

S/Shelton L. Butler Jr.
Shelton L. Butler Jr.
Appellant

Nov. 5, 2014

Shelton L. Butler Jr. #339834
Lieber Corr. Inst.
P.O. Box 205
Ridgeville S.C. 29472

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
P.O. Box, 11629
Columbia S.C. 29211

Dear Ms Abbott

Please find enclosed for your filing in your Court a true copy of Appellant's "Memorandum In Support of Appeal" and a certificate of Service.

Would you please be kind and courteous by notifying Appellant via letter when the filing is complete. Thank you and goat day.

Sincerly
Shelton L. Butler Jr.

Shelton L. Butler Jr #359839
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