

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5038 - Appellate Case No. 2008-111046
Howard P. King, Circuit Court Judge

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STATE OF SOUTH CAROLINA,

Petitioner,

v.

JEREMY McMILLAN,

Respondent

S.C. Supreme Court

APPELLATE CASE No. 2012-213692

RESPONSE TO MOTION FOR BOND PENDING PETITION FOR WRIT OF
CERTIORARI
BY STATE OF SOUTH CAROLINA

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ATTORNEYS FOR PETITIONER

The State of South Carolina opposes the request for bond pending certiorari review which has been pending in this Court since March 2013. The Respondent Jeremy McMillan, made a motion for bond received December 22, 2014 pending the review of the petition for a writ of certiorari. In the motion, McMillan cites to State v. Whitner, 225 S.C. 244, 251-251, 81 S.E.2d 784, 787-88 (1954) and SCACR Rule 246(a). In addition to noting that the Court of Appeals had reversed the case which is on certiorari, *State v. McMillan*, 400 S.C. 298, 734 S.E.2d 171 (Ct. App. 2012), he claims he should be entitled to a presumption of innocence because the case is on certiorari, although the issue was unrelated to guilt or innocence. He notes that he is presently 29 years old and was 23 when the conviction was initially held. He claims that he was a lifelong resident of Lake City, South Carolina and claims he would not be a flight risk. He requests the Court to set a reasonable bond or a transfer to county jail pending resolution of the matter.

I.

Respondent submits that this Court should deny the motion for release on bond pending appeal and certiorari. Should this Court consider the request pursuant to Whitener v. State, 225 S.C. 244, 81 S.E.2d 784 (1954), the State asks this Court to exercise its discretion to deny the motion. The State submits that release on bond pending appeal on certiorari review should be exercised with caution and only in exceptional circumstances. In considering a request for release on bond pending appeal, the Supreme Court opines that the following factors should be reviewed: (1) the probability of success on appeal and the relief granted; (2) the seriousness of the crime committed; (3) the danger to the community if Appellant is released; and (4) the character and circumstances of Appellant.

Nichols v. Patterson, 202 S.C. 352, 25 S.E.2d 155 (1943). Respondent submits that this case does not present the requisite circumstances to warrant Appellant's release on bond pending appeal. For the reasons set forth below, Respondent requests that this Court deny the motion for release on bond pending appeal.

II.

The State contends, first, that the request should be denied because Appellant fails to show he will likely prevail on appeal although he was successful on the Batson issue in the Court of Appeals. Respondent incorporate by reference in its entirety the Petition for Writ of Certiorari before this Court.

Second, at time of the original sentencing, the trial judge used his discretion to sentence the Appellant to the highest sentence of life without parole when lesser sentences were available based upon his character and the crime which resulted in two deaths. In his sentencing, Judge King stated:

I was told by my colleagues that this is the hardest thing to do. I sympathize with you and your loss and I hope that this brings some closure. Very often the sentence does not satisfy, quite sometimes do not satisfy everybody, but it is something we have to do based upon the fact. The fact that he had two murders in this case. There very well could have been more. These deaths were the result of a shooting that day. I said we are very fortunate that there were not more deaths in this situation. You realize that this type of conduct can not be tolerated. Therefore it is my opinion that the appropriate sentence is life without parole.

Tr.p. 523, 1. 12-25.

There was substantial evidence presented concerning McMillan's involvement in the deaths. The trial involved the incident at Mr. C's Club after midnight on April 29, 2006, in Lynchburg. The club had a DJ working that night at the club and the bouncers

escorted people out of the club. R. 91-95, Tr. p. 122-126. Under the State's theory, the Appellant went to his car and got a long gun (rifle) and he starts shooting back at the club and Patrick Hood, a bouncer is shot and falls to the ground and then Lee is shot. R. 96-99, Tr. p. 127-130.

During the trial, co-defendant Toby Fulmore testifies for the state. R. 113-15, Tr. p. 144-146. Fulmore admits being a dealer in drugs around Lake City. R. 115-17, Tr. p. 146-148. Fulmore stated that he had been a friend of the Appellant for a long time. He stated that they had been to Mr. C's Club twice. R. 118, Tr. p. 149. He stated that there were groups of people from St. John's there and Lake City people who generally do not associated with each other. R. 119, Tr. p. 150.

Fulmore testified that about one month before the April 29 incident, he was at Mr. C's with the Appellant. R. 120, Tr. p. 151, l. 1-8. He stated - without objection - that Appellant got into a fight with Tyce Rhodes from St, John's. R. 120, Tr. p. 151, l. 9-12. He stated that Appellant never told him what the fight was about. He stated that when he was getting ready to leave, he saw people coming outside of the club in a rage, probably over a girl. He stated that Rhodes and Appellant got into the altercation in the parking lot. Fulmore testified that McMillan grabbed a gun from the truck and did not respond when asked what was going on. R. 121, Tr. p. 152, l. 15-24.

At that point, counsel McKnight made an objection to relevance which was overruled. R. 122, Tr. p. 153, l. 7-12.

Fulmore restated that Appellant was in the truck turning his hat around backwards looking in the mirror and then grabbed his gun. R. 122, Tr. p. 153, l. 15-21. At that point, Fulmore stated that he could solve this because he knew people in the area. The police then

were seen after Rhodes went between the cars and got the security guards and everyone then left. R. 123, Tr. p. 154.

Fulmore stated that he left with Appellant who dropped him off and “he came back.” R. 123, Tr. p. 154, l. 7-23. Fulmore stated that “Jeremy McMillan came back and shot Tyce Rhodes house up.” R. 123, Tr. p. 154, l. 21-22. the defense objected on “hearsay, relevance, the whole thing.” R. 123, Tr. p. 154, l. 24- 25. The court rejected the hearsay objection because it was a statement by the defendant to Fulmore and it was admissible under SCRE Rule 804(b). R. 124-27, Tr. p. 155-158.

At that point, Fulmore returned to testify about the earlier incident. He stated that after the argument was over between McMillan and Rhodes he got into the truck and McMillan took him home. He stated that he saw McMillan the next day and McMillan told him: “ he shot Tyce’s home up.” R. 134, Tr. p. 165, l. 12-16.

The testimony continued that Fulmore still associated with McMillan. Concerning April 28, he stated he left his house around 11 PM after he called McMillan to pick him up. He stated that they went to a store and bought beer, drank a little and then decided to go to Mr. C’s. R. 138, Tr. p. 169. After they agreed to go, they went by McMillan’s house where McMillan got a rifle (which Fulmore thought was a shotgun) out of the house and put it in the back of the truck. R. 139-40, Tr. p. 170-171. McMillan also had two guns on him. R. 139-40, Tr. p. 170-171. He stated that he was during the ride, McMillan stated he “wasn’t playing when I shot the n___’s house up. I’m gonna get the n ----, I’m gonna get the n___” R. 141, Tr. p. 172, l. 2-8. However, he never said to McMillan why he wanted to get him.”

Id.¹

Fulmore stated that the got to Mr. C's around 1:30 AM. He went into the club with "Buggalou" who they had picked up and were drinking. He saw his brother there. He noticed an altercation break out and the security guards starting grabbing people and he saw his brother push Adrian and Fulmore's brother then got stabbed. R. 143, Tr. p. 174. After they were pushed out by security, Fulmore stated his brother and Adrien started fighting each other again and his brother got stabbed again. R. 145, Tr. p. 176. He stated that he needed to be taken to the hospital. Fulmore and his uncle were taking his brother out and Fulmore saw McMillan that through him his car keys. R. 146-47, Tr. p. 177-178. Fulmore stated that he though McMillan was going to follow them when his uncle and Fulmore had gotten in his uncle's car to go to the hospital, but Fulmore saw McMillan reach into the back of the truck and get the long gun out and went toward the club and shot one time. R. 147, Tr. p. 178, l. 18-25. Fulmore stated that he saw two more shots. R. 148, Tr. p. 179. He stated he saw the first shot go into the ground. And described where he saw the second shot. R. 149-50, Tr. p. 180-181. He stated that he saw McMillan the next morning to get his keys back around 11 AM. McMillan told him that "I handled that, OG call,² I handled that." R. 151-52, Tr. p. 182-183. McMillan stated that he told him to get rid of the guns. He stated that he took the guns and put them into his girlfriends car and out them later in his Corolla at his grandmother's house. R. 152-53, Tr. p. 183-184. The next day, though McMillan initially claimed he wanted drugs, he came to get the guns back. R.

¹ Officer Dellinger testified that Fulmore gave a statement during the interview on June 13, 2006. In the statement, he described that McMillan talked to him about the earlier incident when he shot up the house. R. 376-77, Tr.p. 423, l. 17- p. 424, l. 7.

² "OG" was described as standing for "original gangster." R. 380, Tr. p. 427.

154-55, Tr. p. 185-186. He got his two pistols from the trunk of the call and left the long gun. R. 155, Tr. p. 186. After he was arrested, Fulmore stated that he told them where the gun was, but when the police got there, he was gone from the unlocked trunk. R. 156-57, Tr. p. 187-188.

Keith Rose testified that he saw McMillan and Toby Fulmore at Mr. C's on April 29. He stated that he saw Toby and McMillan go to the truck and McMillan came out with an assault rifle and Fulmore had a handgun. R. 185, Tr.p. 223. He stated he saw McMillan fire the rifle once and then two more times firing at the door of Mr. C's. R. 185-86, Tr. p. 223-224. He described the rifle as an "AK." R. 186, Tr. p. 224. He stated that he did not see Toby Fulmore shoot anything. R. 186-87, Tr. p. 224-225. He stated he saw the bouncer get hit with the second shot. Tr.p. 225. He stated that he saw two people get hit. R. 187, 195, Tr. p. 225, 233 .

Demetrius Hamm testified he was the Disc Jockey at Mr. C's on April 29. He described Fulmore and McMillan getting slammed by the security guards. He stated that he heard McMillan arguing that he was going to shoot the place up. R. 215, Tr. p. 253. He stated he later saw McMillan pull out an assault rifle from the car and Fulmore get a gun. He stated that he saw the Appellant start shooting the assault rifle. R. 216-17, Tr. p. 254-255. He then saw Patrick Hood get hit. R. 217-18, Tr. p. 255-256. However, he did not see Fulmore ever shoot.

Nathaniel McEwin testified similarly that he saw Hood and Tremaine Lee get shot, as well as others. R. 341-42, Tr. p. 384-385. He stated he saw the Appellant with the long gun. R. 346-47, Tr. p. 389-390.

The pathologist testified that Hood died of a single gunshot wound to the head. R.

R. 230, 233, Tr. p. 268, 271. Tremaine Lee had a fatal wound to his chest. R. 237-38, Tr. p. 275-276. Testimony was that the bullets retrieved would have been from a gun that fired 762 bullets like an assault rifle and that they came from the same weapon. R. 327-28, Tr. p. 327-328.

There is substantial evidence pointing to the Appellant's involvement in the April 29 shootings. As noted above, a plethora of eyewitnesses identified Appellant as the perpetrator who held the long rifle which was deemed to be the murder weapon as compared to Toby Fulmore (or anyone else). State v. Liverman, 386 S.C. 223, 244, 687 S.E.2d 70, 81 (S.C.App.,2009) See State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct.App.2008) (holding error is harmless where it could not reasonably have affected the trial's outcome; no definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case; in considering whether error is harmless, a case's particular facts must be considered along with various factors including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case).

III.

Appellant had not sought release previously pending the appeal. Appellant's release on bond pending appeal would circumvent these requirements that the trial judge obviously thought were necessary to protect the community and victims in this case. Appellant may pose a danger to the same victim and community where the crime was

committed.

IV.

The State submits the surrounding circumstances of this case call for denial of Appellant's release from custody on bond pending appeal. Appellant's offense establishes a total disregard for the rules of government and the welfare and safety of others.

The factors this Court considers in determining whether to grant bond pending appeal weigh against Appellant. Appellant will not likely succeed upon appeal, the nature of the crime is violent, Appellant poses a danger to the community, and Appellant's character has proven to be harmful.

CONCLUSION

Based upon all the foregoing, the State prays that this Court deny Appellants request for release on bond pending appeal.

WHEREFORE, Respondent moves this Court to deny Appellant's request for release on appeal bond pending certiorari review of the State's petition for writ of certiorari.

Respectfully submitted,

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S.C. Bar No. 3758

By:


DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT

January 5, 2015

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Lee County
Howard P. King, Circuit Court Judge**

STATE OF SOUTH CAROLINA,

Petitioner,

v.

JEREMY McMILLAN,

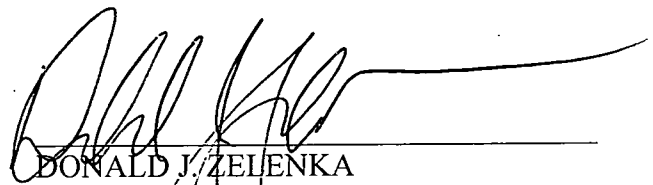
Respondent

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the **RESPONSE TO MOTION FOR BOND PENDING PETITION FOR WRIT OF CERTIORARI** in the foregoing action by depositing two copies in the United States mail, postage prepaid to the following:

Nicole Nicolette Mace, Esquire
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577

This 5th day of January 2015.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General



ALAN WILSON
ATTORNEY GENERAL

January 5, 2015

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S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. Jeremy McMillan
Appellate Case No. 2012-213692

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Response to Motion for Bond Pending Petition for Writ of Certiorari by State of South Carolina, in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/mv
Enclosures

cc: Nicole Nicolette Mace, Esquire
Ernest A. Finney, III, Solicitor
Trisha Allen, Victims Assistance