STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County
Thomas A. Russo, Circuit Judge

The State,

Respondent,

Vs.

Shawn William Sharpe,

Appellant.

Appellate Case No: 2013-001915

Pro-Se Appellant Brief

By: Shawn William SHarpe, #340383
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STATEMENT OF ISSUES FOR PRO-SE BRIEF

Whether appellate counsel should have filed a merit brief as opposed to a Anders v. California, bried. Accompanied by his motion to withdraw as appellate counsel?

Whether the lower court failed to undertake the "prjudice" prong of allowing introduction of DNA and gun evidence at trial, in violation of appellant's rights under the Confrontation Clause? And whether such admissions deprive appellant of receiving a fair trial?

BACKGROUND OF CASE

This case derives from a September 21, 2011 incident, in which the appellant, along with co-defendants were all charged as "principles" in a robbery, burglary and murder type crime.

The warrant affidavit records that the affiant "on 9/21/2011", was provided with three witnesses statement, that appellant "had told them he shot the victm (Leon W. Justice) during the robbery". The appellant provided "an alibi" for none but a single witness attempted to refute with self-serving testimony.

Appellant was arrested on September 22, 2011, where he remained continuously detained at the Lexington County Jail. Although imprisoned since the above date. "No official charge by grand jury indictment was secured until 'May 6, 2013'".

Prior to trial, several pre-trial motions were filed on behalf of the appellant. Important here was (1) the motion to exclude and suppress the introduction of gun and DNA evidence related to the weapon; and (2) statements "allegedly" made by (subsequently deceased) unavailable witness (Ms. Ashley Vasquez), for which the appellant would be unable to cross-examine.

Third, there was also a pre-trial hearing on "May 8, 2013", a mere 48 hours after the official charge against the appellant had finally been lodged. Requesting the court to grant permission to collect DNA samples from appellant. When appellant's DNA profile was already a part of state records, via "South Carolina Department of Corrections".

Trial counsel, Ms. Zmroczek, move to (1) deny such request, and (2) to dismiss the unreasonably delayed indictments. Based on South Carolina Rules of Criminal Procedure, Rule 3 (c). See Record on Appeal Tr. tr. p. 723-737 Vol. II of II.

The State countered the above motion stating for one; the defendant did not file any motion for fast and speedy trial, coupled with, there is no consequence placed on the state for its failure to secure the indictment within 90 days.

The court noted that "Mr. Sharpe was not reportedly bleeding", according to the information before the court. And trial counsel correctly asserted "the timeliness" of such a request for DNA is shocking to say the least, when the state (1) has appellant's DNA file. Coupled with (2) why such an unreasonably delay in requesting DNA, whereas "an official charge by indictment" was not a rush situation. For these reasons, appellant will argue that appellate counsel should have filed a merit brief as opposed to a Anders.

SUMMARY OF ARGUMENT

1. Under Anders v. California, 386 U.S. 738 (1967), the Court held that when a attorney appointed to represent an indigent defendant on direct appeal finds a case wholly frivolous: "[h]e should so advise the court and request permission to withdraw. That request must however, be accompanied by a brief referring to anything in the re-

cord that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowing him to raise any "points" that he chooses; the court, not counsel, then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous". 386 U.S. at 744.

ARGUMENT SUPPORTING MERITS BRIEF

2. Appellant's initial "point" herein contends that (a) his trial attorney, Ms. Zmroczek, adequately "preserved" the unreasonable delay by the state in obtaining the indictment from the grand jury.

The trial court denied relief by way of quashing the indictment based on the state's assessment that; "there was no fast and speedy trial motion, coupled with there is also no consequence for the state's failure to have indicted the appellant within the 90 day period outlined in Rule 3(c). To which this appellant can show, "does not foreclose the issue because it is based on a erroneous contention by the state, and the subsequent error by the court in denying relief".

In State v. Edwards, 374 S.C. 543, 649 S.E.2d 112 (2007), the defendant had been in county jail for over 800 days between the time of arrest warrant and indictment. Edwards, nor this appellant argues under the speedy trial clock that the delay violated his right to a speedy trial. However, appellant moved to quash the indictment for unreasonable delay as a potential "due process" violation under the Fourteenth Amendment of the United States Constitution. The Edwards attorney "failed to assert a due process violation of the appellant's Fourteenth Amendment rights".

The Edwards appeal court relied in part on State v. Culbreath, 282 S.C. 38, 316 S.E.2d 681 (1984), which ruled; "that the rule requiring solicitors to act on a warrant within ninety (90) days of his receipt was not jurisdictional and instead was administrative". And futher stated; "the rule '<u>initself</u>' is silent on the question, coupled with, "the failure of the solicitor to act upon a warrant within ninety (90) days, as required by the Rule (then Rule 95, now Rule 3 (c)), does not '<u>itself</u>' invalid the warrant or prevent subsequent prosecution. That "however, failure to comply with the Rule would subject the solicitor to contempt proceedings."

Appellant point out that it should be noteworthy the underscores above. Where the Court vividly carved out on two separate occasions in interpreting Rule 3(c), that one could not prevail by claiming the solicitor violated the Rule itself. A mistake committed by Edwards attorney. Had Edwards claimed that "by violating the Rule, it deprived him of Düe Process of law", for which does not turn on a distinction between a jurisdictional or administrative rule. The State would not have recovered from the relief which would have been mandatorily extended.

LEGAL ANALYSIS

Rule 3(c) states the following;

> Within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall be filed with the Clerk of Court, assigned a criminal case number, and presented to the Grand Jury; (2) formally dismissing the warrant, noting on the face of the warrant the action taken; or (3) making other affirmative disposition in writing and filing such action with the Clerk of Court.

After acknowledging the above. Appellant points out that "the purpose of the indictment" under the presentment Clause of the Fifth Amendment is twofold; (1) it entitles the defendant to be in jeopardy only for the charges by a group of his fellow citizens, acting independent of either the prosecutor or the judge; and (2) it entitles the defendant to be appraised of the charges against him so that he knows what he must be prepared to meet at trial." See United States v. Fogel, 910 F.3d 23 (4th Cir. 1990); see also State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992)

Thus, it is easily understood that "a lone arrest warrant" has no constitutional place "holding or depriving one of his liberty", for more than ninety (90) days. Because the Constitution requires the process of indictment acting "independent of either, the prosecutor or the judge", as a formal charge by the state.

Moreover, the fact of by title given to Rule (95) during the Culbreath era, "administrative as opposed to jurisdictional", Carries with it "no Constitutional significance", once an entitled due process claim comes into play.

See since Ex Parte Bain, where it plainly conveys under the Constitution that "no person may be held to answer to a capital or infamous crime unless upon a presentment of a grand jury indictment". U.S.C.A. V.; S.C. Const. Art. I., §11.

Thus, regardless of previous South Carolina Court's relying on the fact that Rule 3(c) is administrative rather than jurisdictional. That is not dispositive under a clear "Due Process Claim" of entitlement to the indictment within 90 days. Where otherwise, "no locatable authority existed afterwards, to have held appellant in the Lexington County jail". In otherwords and in addition, appellant retained "a substantial and legitimate expectation that he would be deprived of his liberty only to the extent determined by law". And that liberty interest is one that the Fourteenth Amendment preserves "against arbitrary deprivation by the State". See c.f. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S. Ct. 2100 (1979); Vitek v. Jones , 445 U.S. 480, 100 S. Ct. 1254, citing Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963.

Wherefore, since appellant here does not rely on the Rule in-itself. Culbreath nor Edwards forecloses his point for which appellate counsel should have raised in a merits brief. Since the issue was "specifically preserved" during the May 8, 2013 pre-trial hearing. Especially where the trial court denied the issue thinking, as the prosecutor presumed, a motion for speedy trial had to have initiated in order for review to be considered. When such is legally incorrect.

Thus, in criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 42 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). They are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997). The Court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 1.

On appeal, the court is limited to determining whether the t trial judge abused its discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006). An abuse of discretion occurs when the ruling is based on an error of law (as in the instant case at bar) or a factual conclusion that is without evidentiary support. (likewise as in the instant case at bar). See Fields v. Regional Med. Ctr. Orangburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Renney v. Dobbs House, 275 S.C. 562, 274 S.E.2d 290 (1981)

Error of law exist; (1) when the circuit judge, in issuing [the order], was controlled by some error of law or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support. See McSween v. Windham, 77 S.C. 223, 226 S.E.2d 847 (1907).

Again, appellant reiterate that "the court" was led to believe that (1) a defendant had to assert his speedy trial right to obtain relief for unreasonable delay by the state in securing a grand jury indictment. And (2), that there "was no consequence" for the State's failure to present the case to a grand jury in a timely manner. When in fact, the South Carolina Supreme Court limited it Culbreath decision to instances when the delay attack was premised on "the Rule" "initself". For which appellant's continuing attack under Due Process grounds, of "a preserved issue", entitles him to appellate review, as well as relief in accordance with a violation of Due Process. Thus, his appeal should have been a merit as opposed to a Anders brief.

Appellant's Second Point for consideration.

3. Apellant contends here that a merit brief should have ensued based on the trial court's denial of his motion at pre-trial, to suppress the introduction of gun DNA evidence, and any related evidence statements made by (or allegedly) Ashley Vasquez.

Appellant supports his position first by announcing to this Honorable Court that at all time during, prior to, and after the investigation of the 9/21/2011 incident. That **"he is actually, facually innocent"**. That but for the State's misconduct and malicious prosecution, "no reasonable jurors would have found him guilty beyond a reasonable doubt".

When a prudent minded individual reviews this case. Or like here, a panel of judges. Various inadequacies stand out which directly questions the validity of the conviction. Usually, in cases where a "burglary, murder and robbery has occurred". And the police has arrested "all suspects involved". It normally doesn't take almost two (2) years to indict the suspect "if in fact the testimony at trial happened as alleged". Especially, where in South Carolina, under the Rule of criminal procedure pertaining to timeliness of the indictment. It sets the stage at ninety (90) days. See S.C. Rule Crim. Proc., 3(c).

As pointed out earlier, State v. Baccus, 367 S.C. 42 (2006), this Court sits in criminal cases to review errors of law only. And is bound by the trial court's factual findings unless they are found to be clearly erroneous. State v. Quatlebaum, 338 S.C. 441, 527 S. E. 2d 105 (2000).

At Tr.tr.p. 59 lines 17-25, the State unfairly and prejudicially requested the gun inter alia, to be admitted in this case "based on an alleged statement the deceased had given to police". For which allegedly said "appellant had confessed to the shooting the man in this case, as well as left the gun". When in fact, such statement by Ashley Vasquez did not happen. And the State took an unfair advantage in introducing this to the court to influence the court's ruling on DNA and gun evidence.

On page 60, the State aligns "the former girlfriend of Ashley Vasquez", (Ms. Ashley Jeffcoat), that was at the time of the incident, at particular relational odds with the appellant. Based on the deceased "leaving Jeffcoat for him". And had "a special interest" in naming appellant as the origin of where the weapon had come. See Tr. tr. p. 292 lines 1-6.

Ashley Jeffcoat's testimony would further show that the appllant and the deceased had recently began dating. Tr.tr. p. 293, lines 1-3. Whereas the deceased (Ashley Vasquez and Ashely Jeffcoat) the State's witness had been dating for over two(2) years. See Tr. tr. p. 292, lines 1-13.

Not once did anyone consider the "reason for Jeffcoat's testimony". During the time the court was determining whether to admit the DNA and gun evidence against the appellant. Instead, the court allowed Jeffcoat's testimony to be the loose-end to tie the apellant to the gun that allegedly killed the victim, in violation to appellant's Fifth, Sixth and Fourteenth Amendment rights to a fair trial.

The Confrontation Clause of the Sixth Amendment provides; "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him". See U.S. v. Dukagjini, 326 F3d 45, 59 (2d Cir. 2002)(Confrontation Clause violated by admission of witness testimony that relied on hearsay as basis of non-expert testimony because testimony offered to establish truth of matter asserted). The above case is indistinguishable where the State specifically relied on Jeffcoat's testimony to corroborate (truth of a matter) where the gun had come from. Consistent with a co-defendants statements to police.

Yet, the appellant was unable to "cross-examine Ashley Vasquez, to determine if in fact the gun had come from her resident". And if so, how did it get there, when the incident and all involved in the incident regularly hung around one another, including Ashley Jeffcoat.

In otherwords, "the State had almost two (2) years to put this puzzle together prior to finding probable cause to indict the appellant". In that amount of time, the opportunity clearly existed to manufacture a case against the defendant. When actually "Charlie and his brother Danny", obviously committed the crime.

For these reasons, the lower court erred in admitting the DNA and gun evidence against appellant. And such ruling should have come by way of a merit brief for appellate review.

For the foregone reasons and "points", the Court is asked to reverse appellant's conviction and sentence, and reverse counsel's finding that a Anders brief was in order. And find for the appellant in this case, by granting a new trial.

Respectfully Submitted,

/s/ Shawn Sharpe

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