

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 15 2015

SC Court of Appeals

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWART RANDALL ARD,

APPELLANT

APPELLATE CASE NO. 2014-001463

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether appellant's due process rights and right to a jury trial under the federal and state constitutions were violated when the solicitor threatened appellant with increased charges and a mandatory life without parole sentence if he did not accept a plea offer?

STATEMENT OF THE CASE

Appellant was originally charged with four counts of assault and battery by mob, second degree. R. 468. On April 9, 2014, a Richland County grand jury indicted appellant for attempted murder, three counts of second-degree assault and battery, and carrying a concealed weapon. R. 468. On June 23, 2014, appellant was tried before the Honorable James R. Barber, III. R. 1. Luck Campbell, Dolly Justice Garfield, and Ramie Shalabi represented the State. R. 1. Aimee J. Zmroczek and M. Wade Downtin represented appellant. R. 1. The jury convicted appellant as charged, except found him guilty of the lesser included offense of third-degree assault and battery for one of the counts. R. 442, 1. 10 – 443, 1. 7. Judge Barber sentenced appellant to mandatory life in prison without parole pursuant to South Carolina's recidivist statute for attempted murder, a consecutive term of three years' imprisonment for second-degree assault and battery, and concurrent terms of three years' imprisonment for the other second-degree assault and battery, ninety days' imprisonment for carrying a concealed weapon, and thirty days' imprisonment for third-degree assault and battery. R. 456, 1. 4 – 457, 1. 2. This appeal follows.

ARGUMENT

Appellant's due process rights and right to a jury trial under the federal and state constitutions were violated when the solicitor threatened appellant with increased charges and a mandatory life without parole sentence if he did not accept a plea offer.

This case arises from a bar fight in the Five Points area of Columbia. Appellant and three friends were at the bar Group Therapy when one of appellant's friends punched a wall. R. 90, l. 12 – 91, l. 8. A bouncer asked them to leave. R. 91, ll. 2 – 15. Words were exchanged and the bouncers "escorted them out of the bar." R. 91, ll. 2 – 15. Two bouncers assisted the original bouncer. R. 91, ll. 12- 15.

One of the bouncers pushed one of appellant's friends. R. 134, l. 17 – 135, l. 17. On cross-examination, this bouncer admitted that appellant tried to convince his friends to leave peacefully and was not pushing or shoving. R. 134, l. 3 – 135, l. 17. Appellant and his friends left. R. 120, ll. 12 – 20.

Jesse Patterson ("Patterson") was the bouncer working the door to the bar. R. 213, ll. 2 – 9. He claimed that appellant threatened him as they left. R. 217, ll. 3 – 7. Later that evening, Patterson was outside the door talking to the bar's owner when he heard screaming behind him, turned, and saw appellant's co-defendant running at him and throwing punches. R. 219, l. 15 – 220, l. 18.

During the course of this altercation, appellant stabbed Patterson and the bar's owner with a knife. R. 220, ll. 7 – 18. R. 260, l. 2 – 261, l. 10. Cameras both inside and outside the bar captured some of the fight. R. 224, l. 6 – 235, l. 18. The State charged appellant with attempted murder for the stabbing of Patterson and three counts of assault related to the bar's owner and two other bouncers who gave chase immediately following the fight, but

received no injuries. R. 458. In her opening statement, appellant's attorney admitted appellant was guilty of second-degree assault and battery with respect to Patterson, but denied he was guilty of attempted murder. R. 70, l. 25 – 71, l. 19. Appellant's attorney also admitted guilt as to second-degree assault and battery as to the bar's owner and third-degree assault and battery as to the other two bouncers. R. 70, l. 25 – 71, l. 19. In closing, appellant argued he lacked malice or intent to kill Patterson.¹ R. 402, l. 1 – 406, l. 12.

Prior to trial, appellant moved to quash the indictments and exclude life without parole ("LWOP") under South Carolina's recidivist statute as a possible sentence. R. 10, l. 10 – 14, l. 19. R. 473. The trial judge denied the motion to quash the indictments and stated he would hear argument on LWOP if appellant was convicted. R. 10, l. 10 – 14, l. 25. The motion was based on the fact that appellant's charge was upgraded from second-degree assault and battery by mob to attempted murder in an effort to force appellant to plead guilty because of the threat of LWOP. R. 473. R. 10, l. 10 – 14, l. 19. During the pretrial argument, the solicitor claimed that she increased the charges after reviewing the case, but admitted that she offered appellant a chance "to take advantage of the plea as charged" before she sought new indictments. R. 12, l. 14 – 13, l.

During the argument on LWOP after the guilty verdict, the State basically admitted that its decision to seek LWOP was because appellant exercised his right to a jury trial. The solicitor stated, "Judge, the State did exercise its discretion in seeking life without parole

¹ Should this Court elect to disregard its error preservation rules in favor of judicial economy, it should address the erroneous jury charge given by the trial court. When explaining attempted murder, the trial judge told the jury, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." R. 415, l. 25 – 416, l. 3. This charge is error. State v. King, No. 5513, ___ S.C. ___, ___ S.E.2d ___ (Ct. App. April 22, 2015).

against Mr. Ard. This was a made—a **decision made if we went to trial. Mr. Ard was given several options to plead.**” R. 450, ll. 1 – 5 (emphasis added).

The right of a criminal defendant to a jury trial is perhaps the most fundamental principle of our nation’s criminal justice system. U.S. Const. amend. VI. “The right of trial by jury shall be preserved inviolate.” S.C. Const. art. I., § 14. While a solicitor has discretion in making a charging decision, the decision may not be made vindictively. See Bordenkircher v. Hayes, 434 U.S. 357, 367-68 (“Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect.”) Blackmun, J., dissenting.

Appellant is constrained to acknowledge the holding of the majority in Bordenkircher that a prosecutor may threaten increased charges to induce a guilty plea. Id. at 364-65. However, Bordenkircher was a 5-4 decision and even the majority acknowledged that the Constitution places limits on prosecutorial discretion. Id. Bordenkircher was also decided in 1977 and recent United States Supreme Court precedent shows greater emphasis on examining the plea bargaining process. See Lafler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Frye, 132 S.Ct. 1399 (2012). The Court is also more hostile to mandatory LWOP. Miller v. Alabama, 132 S.Ct. 2455 (2012). Considering these more recent precedents and the increasing arbitrary use of the threat of LWOP in plea negotiations, it is likely that Bordenkircher would be decided differently today.

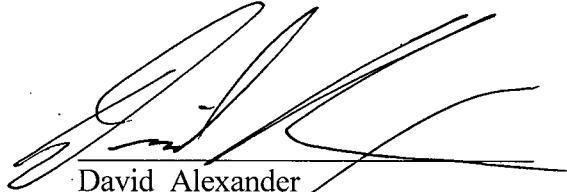
Furthermore, this Court should also recognize that the South Carolina Constitution places a greater emphasis on the right to a jury trial than the federal constitution. Our Constitution states that the “right to a jury trial shall be preserved inviolate.” S.C. Const. art. I., § 14. This language, which is additional to what is contained in the Sixth Amendment,

shows that South Carolina is more protective of the right to a jury trial than the federal courts. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) (holding that additional language in South Carolina Constitution meant that it provided greater protections of South Carolinians' rights against illegal searches and seizures than the Fourth Amendment). Therefore, under the South Carolina Constitution, a solicitor may not use LWOP to penalize a criminal defendant's exercise of his right to a jury trial. Appellant's sentence should be reversed.

CONCLUSION

For the foregoing reasons, appellant's sentence should be reversed and this case remanded for resentencing without the possibility of an LWOP sentence.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2015.

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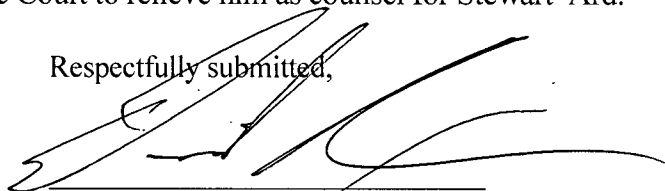
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Stewart Ard 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 James R. Barber, III, which was held on June 25, 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 Stewart Ard.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2015.

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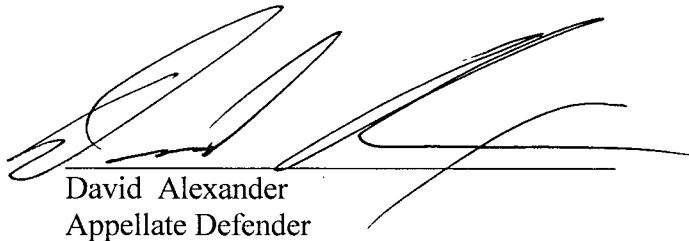
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) Arrest Warrants;
- (4) Motion to Exclude Penalty of Life Imprisonment Without Possibility of Parole.

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

May 15th, 2015


David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

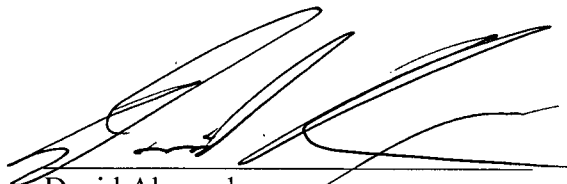
The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 15th, 2015

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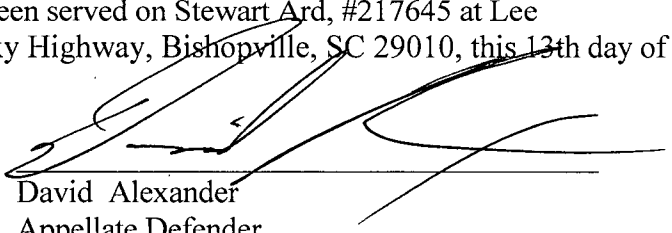
V.

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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 Stewart Ard, #217645 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 13th day of May, 2015.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of May, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.