

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Marion County

MAY 26 2015

D. Craig Brown, Circuit Court Judge

SC Court of Appeals

The State,

Respondent,

v.

Tyrell Woods,

Appellant,

Appellate Case No. 2014-001130

PRO-SE APPEAL BRIEF

By: Tyrell Woods, pro-se
Broadriver Corr. Inst.
4460 Broadriver Rd.
Columbia, S.C. 29210

STATEMENTS OF ISSUES ON APPEAL.

1. Whether appellate counsel provided ineffective assistance, by compiling a Anders brief, in light of the "preserved" issues involving appellant's statutory and constitutional rights under Due Process, to an official authenticated true billed indictment, and statutory "service" thereof?

2. Whether appellate counsel provided ineffective assistance on appeal by filing an Anders brief, as opposed to a merits brief, positing a logical claim or claims of double jeopardy violations. In regards to the "consecutive cumulative penalties" imposed, under the theory of a "common scheme or plan"?

3. Whether the substantive offenses would sustain in the event the court finds cause to reverse the conviction for conspiracy, and its accompanying sentence?

FACTS OF THE CASE.

On or about May 9, 2013, a Marion County Grand Jury indicted appellant for murder, armed robbery, first degree burglary, attempted murder, possession of a firearm during the commission of a violent crime, and "alleged to have also indicted the appellant for conspiracy".

On or about May 19, 2014, based on appellant's not guilty plea,

the case was called to trial before the Honorable D. Craig Brown, and a jury. Ed Clements and Dudley Saleeby represented the state. Ralph Wilson, Sr. represented appellant's codefendant, Marco Sanders. And Scott P. Floyd and William Vick Meetz, represented appellant.

The trial began on May 19, 2014 and ended on May 22, 2014, wherein the jury found appellant guilty of all charges named above. Judge Brown sentenced appellant to life imprisonment for the murder, life imprisonment for first degree burglary, thirty years for armed robbery, thirty years imprisonment for attempted murder, five years imprisonment on the weapon charge, and five years imprisonment for conspiracy. R. 767 line 1-15; 768 line 1-9. The court set all sentences to run consecutively. This appeal in pro-se capacity follows. In a "brief notation" to this Court of Appeals, appellant quotes the words of his codefendant immediately after Judge Brown imposed sentences.

"We got to die two times and then
come back and do 70 years?" R 768
lines 14-15.

SUMMARY OF ARGUMENTS ON APPEAL

Appellant begins by assuming appellate counsel reviewed the record in this case. However, "never once consulted with appellant concerning the issues or non-issues which would be raised on appeal". Seemingly, with such a serious sentence imposed by the court, the least counsel could have done was "follow the letter of law". In accordance with Anders v. California, 386 U.S. 738 (1967), ~~in standing~~ as leading authority here. Counsel reviewing the record prior to

submitting a appeal on behalf of the appellant, is but a single mandate from the Court. Instead, the Court held; "after a study of the record and "consultation" with appellant, if appellant counsel concludes that there was no merit to the appeal subsequent to a conscientious examination, he should so advise the court and request permission to withdraw. That request however, must be accompanied by a brief referring to anything in the record that might arguably support the appeal".

And again, the initial error is where appellate counsel "failed to follow the above controlling authority, by first consulting with the appellant prior to submitting the brief". Next, to summarize what could have resulted from consultation with appellant, prior to filing the Anders brief, is the potential for the grounds asserted herein by appellant, for review by this Honorable Court of Appeals.

Beginning with Griffin v. Illinois, 351 U.S. 12 (1956), the Court held that "equal protection was not afforded an indigent appellant where the nature of the review depends on the amount of money he has" at 19, and continuing through Douglas v. California, 372 U.S. 353 (1963); where this Court has consistently held invalid the procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent already burdened by a preliminary determination that his case is without merit, is forced to shift for himself".

Consequently appellant argues; "counsel's role as advocate requires that he support his client's appeal to the best of his ability". But in the circumstances explained above, appellant is forced

to shift for himself, while bringing the following issues to the attention of the Honorable Court of Appeals.

1).. Appellant argues first that trial counsel in fact "did preserve by a contemporaneous objection, that appellant could be tried, convicted and sentenced for conspiracy. Whereas, Due Process (Substantive and Procedural) were violated in the course of mandatory indictment procedures".

It is irrefutable by the State's own admission, "that proper service of the indictment in this case for specifically conspiracy, never occurred". See Tr.tr. R. 154 lines 14-25; and pg. 155 lines 1-4. Whereas the objection was made and noted by the lower court.

What subsequently occurred between pages 155 and 165, lines 1-25. Is where the court resolved "only the issue of the indictment being true billed or not". Yet omitting "the service requirement objection" on a direct indictment, for which did not occur. Thus, both defense attorneys preserved the issue "of whether the state could lawfully proceed on the conspiracy charge". Tr.tr. R. 166 lines 21-25; R. 167 lines 1-13. Coupled with the state's position "their case depended on the conspiracy charge". (R. 166, lines 144).

LEGAL ANALYSIS AND ARGUMENT.

Amendment Five, of the United States Constitution states in relevant part that; "No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury". Article 1, Section §11 of S.C. Const. confers the identical language.

The purpose of presentment clause of the Fifth Amendment is twofold; it entitles the defendant to be in jeopardy only for offenses charged by a group of his fellow citizens acting independent of either prosecutor or judge; and it entitles defendant to be appraised of charges against him so that he knows what he must be prepared to meet at trial. See United States v. Fogel, 901 F.2d 23 (4th Cir. 1990) and United States v. Field, 875 F2d 130 (7th Cir. 1989).

This State's recognition of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (S.C. 2005), also noted by our Supreme Court in Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (S.C. 2005), held "that challenges to the legality and sufficiency of "the process" of a Grand Jury, also must be made before the jury renders a verdict in order to preserve the error for appellate review". See S.C. Code §14-7-1140 (Supp. 2003).

Consequently, without a proper and timely service of a true billed indictment. Remains to be the functional equivalent "to no indictment at all". Whereas the defendant is unprepared to meet the charges initiated by the State, based on such negligence. Appellant recites the following exchange from the record. Tr.tr. p. 165, lines 7-25;

The Court: All right, anything further at this time, Mr. Wilson?

Mr. Wilson: Yes Sir, Your Honor, we still haven't addresses the issue regarding the conspiracy charge which is in the indictment and and it would by my understanding since the defendants were not indicted--I'm sorry. I apologize. Since the defendants were not arrested by arrest warrant, that would mean that the initial charge would have been--it was a direct indictment.

If there's a direct indicment, the process is the same as is for

a warrant, which means that it has to be served, bond has to be posted, and we have to go through the procedures that are required, and that's done to give the defendant's notice, as well as follow the statute which requires that it be done that way".

So appellant's position is one of "due process concerns". And holding the above concerns in mind. The incident resulting in the convictions occurred on July 4, 2012. As of the date of trial (i.e. May 19, 2014), the attorneys were arguing "the State failed to properly serve the indictment upon defendants". That "the conspiracy was a new charge", in which the defendants "were never arrested on". See Tr.tr.p. 166, lines 3-10. This statement went unchallenged by the State. Thus, there can be no question at this time "that the defendants were 'prejudice', by such failure to serve the indictment.

In Elliott v. Martinez, 675 F3d 1241 (10 Cir. 2012), this court held that the core of due process is the "right to notice" and a opportunity to be heard. Thus, the State's obligatory duty was to have defendants arraigned "by arrest", and timely notifying them of the State's intent by proper service of a true billed indictment. Alleging it was relying on a "conspiracy theory" to prove its case. As opposed to the "excuse it posited for its failure"; arguing "because conspiracy is the least of the charges, it did not prejudice the defendants, when in fact all sentences were ran consecutively". See Tr.tr.p. 166, lines 21-25. Nothing could be farther from the truth. And for these reasons, the Anders brief is inappropriate in this case.

2. Next, appellant argues whether counsel on appeal should have filed an Anders brief in light of logical concerns involving double jeopardy under the Blockburger test. If, as the State claimed, "the

case against defendants depended on "conspiracy" as a stand-alone substantive count, while alleging all other substantive counts within the conspiracy count as overt acts.

Count Six-conspiracy reads as follows;

That Marco Sanders and Tyrell Woods, did in Marion County on or about July 4, 2012, did unlawfully, willfully, knowingly, wickedly and feloniously unite, cobine, conspire, agree between and among themselves and have a tacit understanding with each other and with divers other persons whose names are unknown to the Grand Jurors for the purpose of committing the crime of Burglary and/or Armed Robbery and/or Murder, in violation of section 16-17-410, S.C. Code of Laws, 1976, as amended.

Appellant contends that "multiplicious indictments" are generally improper because they may prejudice the defendant or result in multiple sentences for a single offense in violation of the Double Jeopardy Clause. Multiplicity does not exist if each count of the indictment calls for factual proof not required by the other counts. See e.g. U.S. v. Lilly, 983 F.2d 300, 306 (2nd Cir. 1992)

However, in the instant case at bar, each count 1-5 charges that Marco Sanders and Tyrell Woods "did do", the criminal acts so charged. The conspiracy count number 'six', also charges essentially the same thing, i.e., "that Marco Sanders and Tyrell Woods together, "did do" the criminal acts charged". Moreover, the State at Tr.tr. p. 166-67, elaborates on this position insufficiently.

In other words, had the conspiracy charge omitted the substantive counts already accounted for, or counts in which one or the other defendants were not mentioned within a substantive count. It would not have raised a double jeopardy inquiry. However, count 'six' simply put, just renames the "murder and burglary charges" already accounted for in the substantive counts, as well as Armed Robbery.

And appellant argues that is a prong of malicious prosecution, as well as violations of double jeopardy. In United States v. Kerley, 544 F.3d 172, 178-79 (2d Cir. 2008) (multiplicious indictment violated Double Jeopardy Clause by punishing single offense multiple times); United States v. Tann, 577 F.3d 533, 543 (3d Cir. 2009) (multiplicious indictment "seriously affected the fairness and integrity of trial"); United States v. Miller, 576 F.3d 528 (5th Cir. 2009) (per curiam) (multiplicious indictment prejudiced the defendant by significantly adding to sentence).

In fact, the only time multipliciousness does not violate double jeopardy, is when the sentences imposed are ran "concurrent as opposed to consecutively". See United States v. Colton, 231 F.3d 890, 910 (4th Cir. 2000) (multiplicious indictment did not prejudice defendant because defendant received concurrent, not multiple sentences for one offense).

In addition, when outlining double jeopardy prohibitions. First Degree Burglary carries a life term imprisonment (in which was imposed in this case) if serious injury including death occurs

during the course of the illegal act. Thus, Burglary significantly took into account the potential for violence, the resulting injury and death, if such occurred. Thereby "taking into account murder". Wherefore, appellant cannot be sentenced to "two" life sentences for the same decedent, in the course of a single "scheme and plan". For these reasons, appellate counsel should have briefed this argument on appeal as opposed to filing an Anders Brief.

In addition, "charging possession of a weapon", when First Degree Burglary accounts for "possession of a deadly weapon", where the defendant stands to receive multiple sentences for the same act, is also a violation of double jeopardy, for which should have been raised on appeal.

3). Finally, appellant argues "whether the substantive offenses would be able to survive in the event the court finds cause to reverse the conviction for conspiracy", as well as the accompanying sentences.

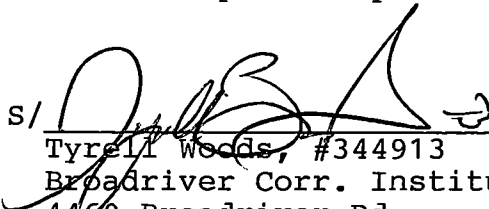
In otherwords, the State contended on record that "it's case depended on the agreement between the two defendants, in accordance with the statute's description of conspiracy. See §16-17-410. However, as previously pointed out within this brief, the State violated appellant's right to due process within the process of indicting the conspiracy charge. For which should have been restricted by the court, as its challenge was "preserved" by the defendants for appellate review. That issue was nevertheless omitted by appellate counsel, and is further cause to grant the required re-

lief here.

Under Anders, the appellant is cloaked with the duty to present any additional grounds for appeal that he feels counsel should have briefed. The issues herein were not hidden issues to which the appeal attorney should not have identified. Based on the position herein, appellant is at least entitled to a new sentencing hearing and at most, a new trial, based on the jury having decided the case on the State's impermissible "conspiracy theory". When such charge "did not find its way through proper procedure, in accordance with due process of law".

For these reasons, appellant respectfully request this court to vacate, reverse and remand this case to the lower court for a new trial and resentencing, in the event a new trial results in a conviction. And any further relief this Honorable Court deems just and proper.

Respectfully Submitted,

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cc: 5/22/2015

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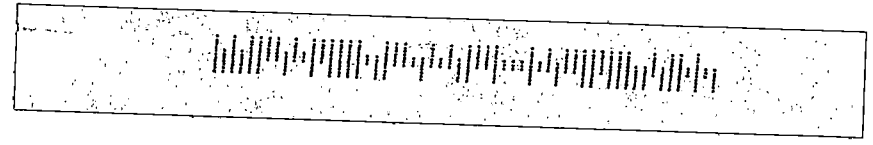
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