

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

RECEIVED

JUN 03 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LEE GARVIN,

APPELLANT

APPELLATE CASE NO. 2014-002205

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
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

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to grant a directed verdict to the charge of shoplifting when the State failed to present any substantial evidence beyond a reasonable doubt that appellant was the shoplifter?

STATEMENT OF THE CASE

Appellant was convicted of shoplifting, third or subsequent offense, after a jury trial held in his absence before the Honorable Brooks Goldsmith on March 17-18, 2014, in Beaufort County. On October 1, 2014, appellant was brought before the Honorable Carmen T. Mullen and the sealed sentence of nine (9) years was opened and read to him. Annie Bax, Esq. and James Bell, Esq. represented him. Mary Lempeisis, Esq. and Mary Concannon, Esq. were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in failing to grant a directed verdict to the charge of shoplifting when the State failed to present any substantial evidence beyond a reasonable doubt that appellant was the shoplifter.

Appellant was tried for shoplifting a nail gun from a Lowe's Home Improvement store in Beaufort. Daniel Jones, a loss prevention manager at Lowe's, testified that on April 19, 2012, he saw a person looking at multiple nail guns. That person picked up a DeWalt nail gun and then made his way out of the tool department. With the aid of security cameras Jones followed him. (Tr. p. 37, l. 18- p. 41, l. 24) He saw the person lift up his sweatshirt and put the nail gun in the front of his pants and then cover it up with his sweatshirts. (Tr. p. 42, l. 13-18) The person left the store and ran across the parking lot. (Tr. p. 43, l. 11-18)

William Roucoulet testified that he was driving by near Lowe's and saw a man run across the road and then pull a nail gun out from under his shirt. He thought that was odd because he had just seen him run from Lowe's. He decided to call dispatch. (Tr. p. 54, l. 11- p. 55, l. 1)

Master Sergeant Day testified that from the description he received of the area and the suspect he put handcuffs on appellant to detain him. (Tr. p. 64, l. 6- p. 65, l. 20) Day learned that another officer had stopped at Lowe's to look at some of the video footage. The other officer identified appellant and appellant was placed under arrest for shoplifting and taken to the detention center. (Tr. p. 67, l. 17- p. 69, l. 10) Day also took custody of the nail gun that was recovered. (Tr. p. 69, l. 20-21)

Investigator Erdel testified that he went to Lowe's and made contact with the loss prevention manager and looked at the video to see if he could identify the person detained by Officer Day. After watching the video surveillance, he went to where Officer Day was and recognized the person detained as the shoplifter in Lowe's. (Tr. p. 106, l. 23- p. 109, l. 2)

Based on the lack of evidence in this case the trial court erred in failing to grant a directed verdict to the charge of shoplifting. Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence from which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117

S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, “where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused’s guilt.” State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a “rationally supportable state of near certitude.” Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

CONCLUSION

A directed verdict should be granted to the shoplifting charge.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 2015.

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V.

LEE GARVIN,

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APPELLATE CASE NO. 2014-002205

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lee A. Garvin 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 Carmen T. Mullen, which was held on October 1, 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 Lee A. Garvin.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 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) Indictment;
- (2) March 17, 2014 transcript-49 pages
March 17, 2014 transcript voir dire and jury selection-26
pages
March 18, 2014 transcript-168 pages
October 1, 2014, sentencing transcript -10 pages

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

June 3rd, 2015.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

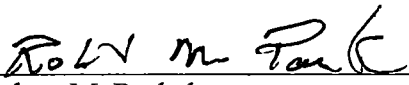
South Carolina Commission on Indigent Defense
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Columbia, SC 29211-1589
(803) 734-1343

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."

June 3, 2015



Robert M. Pachak
Appellate Defender

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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 Lee A. Garvin, #228336 at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936 this 3rd day of June, 2015.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 3rd day of June, 2015.

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