

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 12 2015

SC Court of App.

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRESS ANTONIO LITTLEJOHN,

APPELLANT

APPELLATE CASE NO. 2014-002247

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

TABLE OF AUTHORITIES

Cases

Ham v. South Carolina, 409 U.S. 524, 526 (1973)..... 7

Mu’Min v. Virginia, 500 U.S. 415, 425 (1991)..... 8

State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997)..... 8

State v. Hill, 361 S.C. 297, 308, 604 S.E.2d 696 (2004)..... 8

State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008)..... 7

Other Authorities

U.S. Const. amend. VI 7

U.S. Const. amend. XIV 7

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to ask appellant's questions of the jury during voir dire?

STATEMENT OF THE CASE

On November 14, 2013, a York County grand jury indicted appellant for trafficking crack cocaine. R. 267. On October 14, 2014, appellant was tried before the Honorable John C. Hayes, III, and a jury. R. 7. Leslie Robinson represented the State. R. 7. Geoffry Dunn represented appellant. R. 7. The jury convicted appellant. R. 257, l. 17 – 261, l. 4. Judge Hayes sentenced appellant to fifteen years' imprisonment. R. 265, ll. 8 – 9. This appeal follows.

ARGUMENT

The trial court erred in refusing to ask appellant's questions of the jury during voir dire.

Tezo Ervin ("Ervin") worked for the police as an informant. R. 122, ll. 21 – 23. The police described Ervin as "working off criminal charges." R. 89, ll. 12 – 15. At the time of trial, Ervin had pending charges for: (1) trafficking crack cocaine; (2) possession of a weapon during a violent crime; (3) trafficking crack cocaine within a half mile of a park or school; (4) distribution of crack cocaine, third offense; (5) distribution of crack cocaine within proximity of a park or school. R. 123, ll. 1 – 20. Ervin's criminal history included convictions for: (1) possession with intent to distribute marijuana; (2) possession with intent to distribute crack cocaine third offense; (3) possession with intent to distribute crack cocaine within proximity of a park or school; (4) habitual traffic offender; (5) driving under suspension, third offense. R. 124, ll. 3 – 19. When asked whether he would "do a lot of things to try to keep [himself] out of prison," Ervin replied, "I'm not gonna say a lot but I would do some things." R. 159, ll. 18 – 20.

Ervin admitted that he was hoping to get "some kind of benefit when everything is said and done." R. 123, l. 25 – 124, l. 2. No doubt with this possible benefit in mind, Ervin approach law enforcement about setting up a purchase of crack cocaine from appellant. R. 126, ll. 3 – 17. Ervin claimed that he called appellant on his cell phone to arrange the deal. R. 126, ll. 18 – 25. The police did not record this phone call or document any record of the call from Ervin's cellular telephone. R. 182, l. 25 – 183, l. 11.

The police gave Ervin \$2,400.00 to make the purchase. R. 92, l. 12 – 93, l. 13. R. 130, ll. 17 – 19. The police gave Ervin recording equipment. R. 130, ll. 23 – 25. One device was a camera in his watch. R. 134, ll. 21 – 24. Another device was a camera in a key fob. R. 154, ll. 18 – 20. These video recordings along with audio were admitted at trial. R. 153, ll. 13 – 18. R. 135, ll. 7 – 18. Ervin claimed that he purchased crack cocaine from appellant. R. 132, l. 2 – 133, l. 15. While the jury viewed the video from the hidden cameras, Ervin testified and claimed that they corroborated his version of the drug transaction. R. 135, l. 24 – 141, l. 10. On cross-examination, Ervin admitted that nowhere in the video did it show Ervin give money to appellant. R. 161, ll. 18 – 21. He also admitted the video did not show appellant put the drugs in Ervin's hands. R. 161, l. 22 – 162, l. 1. The police admitted that they could not keep surveillance on Ervin throughout the alleged drug transaction. R. 193, l. 23 – 194, l. 6.

Appellant submitted proposed voir dire to the trial judge. R. 269. The trial judge refused to ask nine of appellant's proposed questions. R. 52, l. 22 – 53, l. 5. Specifically, Judge Hayes refused to ask appellant's questions: 7, 9, 10, 11, 12, 13, 14, 15, and 16. R. 53, ll. 1 – 5. Appellant's requested voir dire was made a court's exhibit. R. 53, ll. 6 – 20. The questions that the trial judge refused to ask were the following:

7. Have you served on a criminal jury before? What was the charge and the verdict? Was there anything about your previous jury experience that would cause you to feel some allegiance in favor of or against either the prosecution or the defense?

9. Are you inclined to think that a person is guilty of a crime simply because he was arrested?

10. Who has never been stopped by a police officer?

11. If you have been stopped by a police officer, did being stopped make you nervous?

12. Would you be inclined to believe a Police Officer's testimony over that of a private citizen merely because he is a Police Officer?

13. Do you understand that if there is any uncertainty as to whether reasonable doubt exists, that uncertainty must be given to the Defendant and he must be acquitted?

14. If the evidence on the whole raises a reasonable doubt in your mind, would you hesitate to vote not guilty?

15. If you come to the conclusion that the prosecution has not proven the guilt of the Defendant beyond a reasonable doubt and a majority of the jurors believed that the Defendant is guilty, would you change your verdict because you are in the minority?

16. Do you agree and understand that an acquittal serves the interest of justice as well as a conviction?

R.269.

The Sixth and Fourteenth Amendments to the United States Constitution entitle a defendant to a fair and impartial jury of his peers. State v. Stanko, 376 S.C. 571, 576, 658 S.E.2d 94, 96-97 (2008). U.S. Const. amends. VI, XIV. Defendants are entitled to voir dire to insure the essential demands of fairness. Ham v. South Carolina, 409 U.S. 524, 526 (1973). In Ham, the United States Supreme Court reversed because the trial judge refused to ask questions concerning possible racial prejudice. Id.

In this case, appellant's voir dire was designed to discover whether the jurors would not be able to make an individual judgment about the evidence, would just go along with the majority, or had a bias in favor of police officers. Defendants are entitled to know whether jurors can comply with their oath and comply with a trial judge's

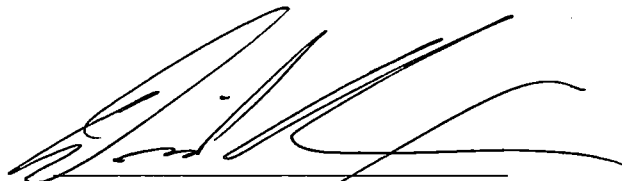
instructions. State v. Bennett, 328 S.C. 251, 257-58, 493 S.E.2d 845, 848 (1997) compare State v. Hill, 361 S.C. 297, 308-310, 604 S.E.2d 696, 702 (2004). Appellant's questions regarding reasonable doubt were designed to discover whether any jurors would disregard the State's heavy burden of proof.

Without the answers to these questions, appellant cannot be sure that he received a fair trial from an unbiased jury who could follow the instructions of the court. Appellant could not determine whether the members of the jury could come to an individualized decision that would not be subject to undue influence from other jurors. Finally, appellant could not be sure that his jury would hold the State to its burden of proof. The failure to ask these questions rendered appellant's trial "fundamentally unfair." Mu'Min v. Virginia, 500 U.S. 415, 425-26 (1991). Therefore, appellant's case should be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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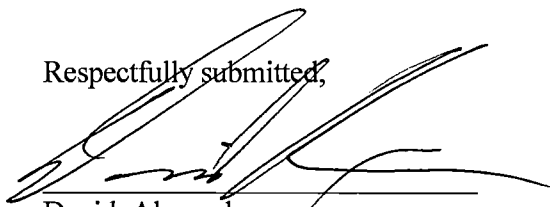
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyress Antonio Littlejohn 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 John C. Hayes, III, which was held on October 14-15, 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 Tyress Antonio Littlejohn.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2015.

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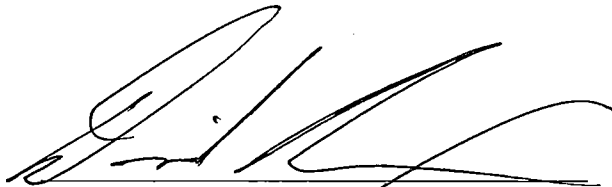
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) Hearing of July 15, 2014, transcript;
- (4) Defendant's requested voir dire (Court's Ex. 3).

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

June 12th, 2015



David Alexander
Appellate Defender

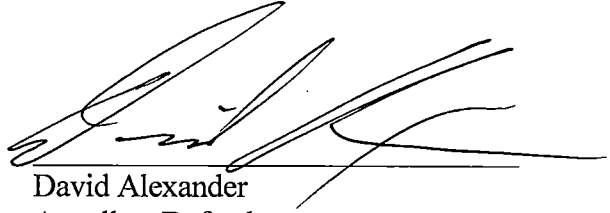
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(803) 734-1343

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 12th, 2015

A handwritten signature in black ink, appearing to read "David Alexander", written over a horizontal line.

David Alexander
Appellate Defender

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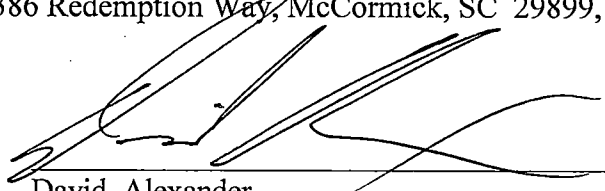
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TYRESS ANTONIO LITTLEJOHN,

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 Tyress Antonio Littlejohn, #263016 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of June, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of June, 2015.

Maria Mendel (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.