

STATE OF SOUTH CAROLINA

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IN THE COURT OF APPEALS

NOV 18 2015

Appeal from Hampton County

SC Court of Appeals
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Perry M. Buckner, Circuit Court Judge

NOV 18 2015

THE STATE,

SC Court of Appeals

RESPONDENT,

V.

JAMES GARDNER,

APPELLANT

APPELLATE CASE NO. 2015-000286

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding that Appellant's statement to police was made freely and voluntarily when there was evidence that Appellant consumed a bottle of Crown Royal and more prior to giving the statement?

STATEMENT OF THE CASE

In October of 2014, the Hampton County Grand Jury indicted Appellant Gardner for three counts of attempted murder, possession of a weapon during the commission of a violent crime and pointing and presenting a firearm, indictments #2013-GS-25-00073, 75, 79, 80¹ and 2014-GS-25-374. On February 2, 2015, Appellant proceeded to jury trial before the Honorable Perry M. Buckner. Cory Fleming represented Appellant at trial. Tameaka Legette prosecuted the case. At the close of the State's case the prosecutor elected not to proceed with the pointing and presenting charge, indictment #2014-GS-25-374. (R. p. 319, lines 11-25). The jury returned verdicts of guilty on the remaining charges. Judge Buckner sentenced Appellant to twenty five (25) years concurrent for each of the attempted murder charges and five years concurrent for the weapons charge. A timely notice of intent to appeal was served on February 5, 2015. This appeal follows.

¹ It is unclear why the indictment numbers for the attempted murder and weapons charges are numbered 2013 when the Grand Jury indicted Appellant in October of 2014.

ARGUMENT

The trial judge erred in finding that Appellant's statement to police was made freely and voluntarily when there was evidence that Appellant consumed a bottle of Crown Royal and more prior to giving the statement.

The jury found Appellant guilty of the attempted murder of Mary Etta Montouth, Appellant's girlfriend, her sister, Mariam Walden and Major Bobby Anderson of the Varnville Police Department. Appellant lived with Montouth and her sister in a house in Varnville. At trial Montouth testified that Appellant came into the house, accused her of being unfaithful and threatened to kill her. (R. p. 157, line 16 – p. 158, lines 1-2). According to Montouth, Appellant then went to his truck, got a rifle, came back into the house and shot at her but missed. (R. p. 158, lines 6-17). Montouth testified that she left the house and walked to Mae Francis Smith's house where she met her sister. (R. p. 159, lines 10-23). According to Montouth, Appellant followed her to Smith's house in his truck. (R. p. 159, lines 18-23). Montouth testified that she returned to her house but when Appellant followed her back to the house she ran to a church to get help. (R. p. 164, line 6 – p. 165, 166, lines 1-16).

Montouth's sister, Mariam Walden also testified at trial. Walden testified that she left Smith's house and returned home after Montouth left Smith's house. (R. p. 198, lines 1-23). According to Walden, Appellant came in the house with two rifles and threatened to kill her. Walden testified that she dropped to her knees, heard the gun click but the gun did not fire. (R. p. 199, lines 16-25). When she opened her eyes Appellant stated that he was going to kill himself and he ran out of the house. (R. p. 199, line 23 – p. 200, lines 1-2). Walden called 911 and then ran out of the house to look for her sister. (R. p. 200, lines 2-

11). According to Walden, as she ran out of the house, Appellant shot her. (R. p. 200, lines 12-17).

Major Bobby Anderson with the Varnville Police Department was one of the officers who arrived at the scene. According to Major Anderson, he and Appellant exchanged gunfire. (R. p. 284, line 1 – p. 285, lines 1-16). Lieutenant Luis Hernandez with the Hampton Police Department arrested Appellant and read him his Miranda rights. (R. p. 256, line 5 – p. 257, 258, lines 1-24). Appellant was transported to the Varnville Police Department where he provided a taped statement to Chief Tyrone Smith with the Varnville Police Department. (R. p. 260, lines 1-10). A recording of Appellant's statement was introduced in evidence as State's Exhibit #22 and played for the jury. (R. p. 306, line 17 – p. 307, p. 308, lines 1-22).

Prior to trial the judge held a hearing to determine if Appellant's statement was voluntarily made. (R. pp. 8-40). Lieutenant Hernandez and Chief Smith testified at the hearing. Lieutenant Hernandez admitted that he heard Appellant tell Chief Smith that he drank an entire bottle of Crown Vic² and more. (R. p. 18, lines 14-19). Lieutenant Hernandez admitted that they found a bottle in the area where the shooting took place but denied smelling alcohol on Appellant. (R. p. 18, lines 20-25). Chief Smith testified, "We found a bottle of Crown Vic. They found it on the scene. He stated he had a few drinks, and I told him that we found a bottle, and I [he/Appellant] said, yeah, I drunk that and more." (R. p. 27, lines 15-17). Chief Smith testified that Appellant had no odor of alcohol and did not appear drunk. (R. p. 27, line 20 – p. 28, lines 1-16).

² Counsel for Appellant assumed he meant Crown Royal. (R. p. 18, lines 14-16).

The judge found that the statement was voluntarily given. (R. p. 39, line 7 – p. 40, lines 1-10). At trial the statement was admitted in evidence subject to the judge’s ruling on voluntariness. (R. p. 307, lines 13-16). At the close of the State’s case Appellant renewed the objection to admission of the statement. (R. p. 318, lines 14-20). The judge did not change his ruling in regard to the admission of the statement. (R. p. 318, line 21 – p. 319, lines 1-7). The judge erred in admitting Appellant’s statement as the statement was not voluntarily made.

In State v. Franklin, 299 S.C. 133, 137-38, 382 S.E.2d 911, 913 (1989) the South Carolina Supreme Court wrote:

The test of admissibility of a statement is voluntariness. If a defendant was advised of his *Miranda* rights, but nevertheless chose to make a statement, the “burden is on the State to prove by a *preponderance of the evidence* that his rights were voluntarily waived.” State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988) (emphasis in original); State v. Neeley, 271 S.C. 33, 244 S.E.2d 522 (1978). The State bears this burden of proof even where a defendant has signed a waiver of rights form. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31, cert. denied, 449 U.S. 1037, 101 S.Ct. 616, 66 L.Ed.2d 500 (1980).

The Court in Franklin also wrote:

The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). The trial judge's resolution of the issue will not be disturbed absent an error of law. State v. Atchison, 268 S.C. 588, 235 S.E.2d 294, cert. denied, 434 U.S. 894, 98 S.Ct. 273, 54 L.Ed.2d 181 (1977).

299 S.C. at 138, 382 S.E.2d at 914.

In State v. Miller, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007) the South Carolina Court of Appeals wrote:

On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion. State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695

(1996). When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate 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. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

The trial judge abused his discretion in finding that Appellant made his statement voluntarily. Appellant was intoxicated at the time he made the statement to Chief Smith. In State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) the Court wrote:


The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying. Proof of intoxication, short of rendering the accused unconscious of what he is saying, 'goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence.' 29 Am.Jur. (2d), Evidence, Section 577. Annotation: 69 A.L.R. (2 d) 361; 23 C.J.S. Criminal Law s 828, p. 229.

Based on the totality of the circumstances, Appellant did not realize what he was saying when he made the statement to Chief Smith. The statement should have been suppressed because it was not made voluntarily.

CONCLUSION

Based on the above argument, Appellant's convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2015.

STATE OF SOUTH CAROLINA

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Appeal from Hampton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

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APPELLATE CASE NO. 2015-000286

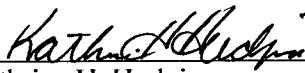
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Gardner states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Perry M. Buckner, which was held on February 2-4, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for James Gardner.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2015.

STATE OF SOUTH CAROLINA

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Appeal from Hampton County

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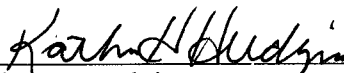
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript;
- (3) State's Exhibit #22 - DVD of Defendant's redacted statement - to be transported.

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

November 18th, 2015


Kathrine H. Hudgins
Appellate Defender

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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

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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."

November 18th, 2015

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Kath. H. Hudgins
Kathrine H. Hudgins
Appellate Defender

SC Court of Appeals

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Perry M. Buckner, Circuit Court Judge

THE STATE,

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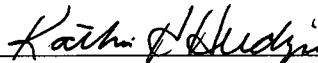
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JAMES GARDNER,

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CERTIFICATE OF SERVICE

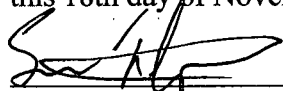
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on James Gardner, #177263 at McCormick, Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of November, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.