

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
James R. Barber, III, Circuit Court Judge

RECEIVED

JUL 22 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEWART RANDALL ARD,

APPELLANT.

APPELLATE CASE NO. 2014-001463

ANDERS PRO SE RESPONSE

STEWART RANDALL ARD, APPELLANT
Lee Correctional Institution
990 Wisacky Hwy
Bishopville, S.C. 29010

DAVID ALEXANDER
ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether Appellants due process rights and constitutional right to a jury trial under the United States and South Carolina Constitutions were violated when the Solicitor threatened Appellant with a life without parole sentence if Appellant refused to cooperate and accept the guilty plea offer made by the Solicitor.
2. Whether the trial court committed error in denying the motion for mistrial by the defense.
3. Whether the trial judge erred in denying the defense motion for a directed verdict on all of the assault and battery charges.
4. Whether the trial judge gave an erroneous jury charge regarding the upgraded indictment for attempted murder.

STATEMENT OF THE CASE

Appellant was originally charged with four counts of assault and battery by mob, second degree. On April 9, 2014, Appellant was indicted by a Richland County Grand Jury for attempted murder, three counts of assault and battery in the second degree, and carrying a concealed weapon. Appellant stood trial as charged on June 23, 2014 before Judge James R. Barber, III. Luck Campbell, Dolly Garfield, and Ramie Shalabi represented the State. Attorneys Aimee Zmroczek and Wade Downtin represented Appellant. The jury returned a guilty verdict on all charges except one, and found Appellant guilty of the lesser included offense of assault and battery third degree on one of the counts. Appellant was sentenced to mandatory life without the possibility of parole for attempted murder under the recidivist statute, with three years consecutive for assault and battery second degree, concurrent three year terms for the remaining assault and battery charges, ninety days for carrying a concealed weapon, and thirty days for assault and battery third degree. Appellate Defender David Alexander filed an ANDERS BRIEF OF APPELLANT, and this Court granted Appellant until July, 2015 to file an ANDERS PRO SE RESPONSE. The PRO SE RESPONSE follows.

APPELLANTS ARGUMENT IN RESPONSE

Appellants due process rights and constitutional right to a jury trial under the United States and South Carolina Constitutuions were violated when the Solicitor threatened Appellant with a life without parole sentence if Appellant refused to accept the guilty plea offer made by Solicitor.

Appellant states the claim that his due process rights and constitutional right to a jury trial were violated at the moment Solicitor first threatened Appellant with the life without parole sentence IF APPELLANT REFUSED TO ACCEPT HER OFFER. The Solicitor unjustly and unethically conjoined the plea offer with the threat of enhanced charges that would result in a life without parole sentence if Appellant refused. Appellant properly assessed the situation, gave due consideration to the legal ramifications of the attempted murder charge, and concluded that the 'either - or' guilty plea bargain was not a bargain at all, by reason that there was never any intent by Appellant to commit murder. Therefore, Appellant relied on his defense counsel and the integrity of the judicial creed of justice for all to extract the truth of Appellants assault and batteries, one of which inflicted serious bodily harm. However, the Solicitor also harbored a reliance, one that Appellant would succumb to the either or guilty plea offer, so that the Solicitors turnstyle of convictions would continue to spin. This manner of supplanting

convictions for justice, using the threat of severe penal enhancement in order to secure the guilty plea is contemptible, as well as constitutionally unsound. Both United States and South Carolina Constitutions confer guarantees and protections to ensure that Defendants may have their day in court **without** being pressured, threatened, coerced, or exposed to duress in any form, yet appellant was threatened outright by the Solicitor, and the Solicitors admission of this threat is documented by the record at trial transcript, p. 450, lines 1 - 5, where the Solicitor stated, "Judge, the State did exercise Its discretion in seeking life without parole against Mr. Ard. This was a made --- a decision made **IF WE WENT TO TRIAL. MR. ARD WAS GIVEN SEVERAL OPTIONS TO PLEAD**". This admission is transparent in showing the element of threat, and fully supports Appellants claim of a due process violation. The Solicitor literally used the cloak of authority to bring retaliation against Appellant for what the Solicitor perceived as Appellant 'disrupting' her continuous stream of courtroom convictions. In Bordenkircher v. Hayes, 434 U.S. 357, the Court handed down a ruling specifically relevant to the criminally accused Defendants that directed a Solicitor may not make a charging decision vindictively, as has occurred in this case. A Justice in Bordenkircher, in a dissenting opinion, stated that the Due Process Clause "ought to protect against prosecutorial vindictiveness". Appellant seeks this Court will find the principle applicable to the

present claim. SEE ALSO, Lafler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Frye, 132 S.Ct. 1399 (2012); Miller v. Alabama, 132 S.Ct. 2455 (2012). In accord with the recent cases listed above, the South Carolina Constitution, under Article 1, ¶14, protects the criminal Defendant by the published declaration that the right of trial by jury shall be preserved inviolate. This is a resounding echo of the guarantee bestowed by the U.S.C.A. Sixth Amendment. SEE, State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), where it was held by this States highest Court that the language drafted in Article 1, ¶14 of the South Carolina Constitution provides greater protection of the right of South Carolinians than the U.S.C.A. Fourth Amendment, and THEREFORE, a Solicitor may not use a life without parole sentence to penalize [threaten] this Appellants exercise of his right to a jury trial, as was done by Appellant. While the procedural obligations of the Solicitors Office encompass every facet of prosecution in representation of the State, the Solicitor may not abuse discretionary authority by exceeding the limits placed upon that Office by the United States and South Carolina Constitutions. The record of the proceeding exposes that the Solicitor in this case crossed the threshold of unethical conduct, and asks this Court to agree that the Solicitor abused her discretion when she threatened Appellant with the life without parole on at least two occasions.

The trial court committed error in denying the motion for mistrial by the defense.

In the testimony of State Witness Scott Flemming, trial transcript, p. 268, lines 4 - 7, defense counsel called the court to a matter of law regarding witnesses testimony alluding to Appellants previous bad character, resulting in a motion by defense for a mistrial. The trial judge excused the jury, took up the matter, and heard from the defense and the State. Defense moved for a mistrial based on the extremely prejudicial statement made before the jury by State Witness Flemming about Appellant saying he had been to prison. When questioned by the judge about instructions to the subpoenaed State Witnesses concerning their testimonies, it was revealed that the Solicitor had instructed all witnesses except State Witness Flemming. Solicitor offered the judge the paltry excuse of, "I thought I had spoken personally to Mr. Flemming", to which the judge returned, "Well, you did or you didn't", trial transcript, p. 269, l. 19. At the end of this investigation the judge erroneously denied the motion, failing to give sufficient weight to the tactical subterfuge employed by the Solicitor. The judge, by his response, obviously saw through the feigned apology of "I thought I had". After being called on her "forgetfulness", the Solicitor then used the maneuver that she had verbally informed defense counsel that the witnesses were going to testify that Appellant was yelling he'd been to jail. Yet, at the end

of the colloquy the Solicitor agreed that she would instruct the witnesses "not to say that". The deeper, unspoken prejudice in this claim lies in the fact that Appellant was first heard to say he'd been to jail, and he didn't want to go back, trial transcript, p. 256, lines 18 - 20, which was revised, under examination of the Solicitor, to " . . . he had been to prison and he didn't want to go back, trial transcript, p. 270, lines 4, 5. Appellant states the claim that any juror of reasonable experience and understanding will make a very clear distinction in their thoughts about the difference between jail and prison. Without doubt many jurors have had experience with jail in some form, but it would be a safe estimation to state that virtually no jurists have experienced the devastation of prison life, and conceptualize PRISON as a presentiment of evil, dark, and foreboding, and would also perceive anyone who has been there as having those dark elements. Appellant does not state, and neither believes, that the crux of his conviction hinged on the contrast of the words jail and prison, however, it can be stated accurately that the perception of the difference between the two words can be dramatic in the mind of a reasonable juror, and therein lies the basis for a claim of extreme prejudice. The Solicitor craftily assuaged the necessity for another hearing via a mistrial with the support of an erroneous denial of the motion for mistrial. The grant of a mistrial at that point in the proceeding would have been legally correct, and the Solicitors

feeble attempt to justify a hidden motive to prejudice Appellant by inflaming the passion of the jury is reprehensible, unethical conduct. Appellant states the claim that a cause exists which shows the trial court to be in error for denying the defense motion for a mistrial. The conduct of the Solicitor supports Appellants first claim of vindictive prosecution, displaying openly that Solicitor was faking an 'oversight' in a trial of utmost importance, one which carried the second most serious penal consequence to Appellant - life without the possibility of parole - as compared with the most serious, the death sentence. Reality testifies loudly that the "I thought" scene played by the Solicitor was an inpromptu effort to evade the harsh and embarrassing light of exposure, but the judge saw through the elementary school charade and called her on it. Unfortunately for Appellant the judge gave the Solicitor a window to crawl out, and allowed her to exit without a scratch. This Court should decide the merit and value of this claim in a light favorable to the Appellant. The court was properly moved for a mistrial and Appellant now seeks this Court will find that the lower court was in error for denying the motion.

The trial judge erred in denying the defense motion for a directed verdict on all of the assault and battery charges.

Defense counsel properly moved the trial court for a directed verdict on all the assault and battery charges, trial transcript, p. 363, l. 10, and explained for the court how the elements of each charge were applicable to the motion. The judge, in a somewhat rambling monologue, failed to answer each charge and element specifically. The judge also neglected to specifically deny the motion, only implying with the statement, " . . . but I think there's some evidence, and that's all there has to be". Appellant states the claim that he deserves more than "I think", assumptions, and suppositions based on whatever the solicitor decides, and justice demands that each and every aspect of a most important trial be attended to. The courtroom decorum between the judge and Solicitor, to the end of the hearing, was awash with undertones of southern justice from an earlier era, when civil rights were only hoped for. This is the twenty first century, yet it appears that the judicial system in South Carolina has chosen to remain in the past, as evidenced by the present case at bar, where an assault and battery of a high and aggravated nature has been inflated to the unrealistic proportion of attempted murder, with the imposition of a forever sentence in the presence of a non-homicide conviction. Prima facie the sentence does not equate to the offense; it is both illogical and unreasonable. An eye for an eye is Scriptural,

but even though Divinely Inspired, that Biblical principle is lacking in balance in this case. To impose a life without parole sentence for a bodily harm offense is ludicrous, at best. Justice decries equity, fairness, and impartiality. The U.S.C.A. Fifth Amendment guarantees that every accused person will receive a fair and impartial trial. Notwithstanding the procedural anomalies of Appellants proceeding, the evidence presented does not support the sentence served. Appellant states that this Court of review possesses the legislative authority to correct this grievous injustice and craft a remedy whereby the State may satisfy the penalty for assault and battery with a sentence commensurate with the offense committed, and Appellant may have the opportunity for restoration of his constitutional right to liberty before he reaches the ultimate end in this world. For this corrective intervention does Appellant ever pray.

The trial judge gave an erroneous jury charge regarding the upgraded indictment for attempted murder.

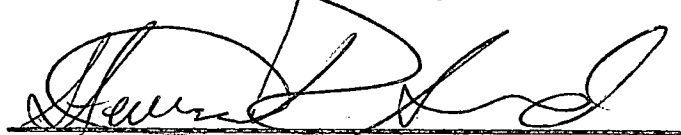
In the trial transcript, p. 415, l. 25 thru p. 416, l. 3, the trial judge gave the following charge to the jury: "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." Appellant states that the judge erroneously charged the jury with this instruction, and such error was visited by this Court previously this year in the case of State v. King, NO. 5513, __S.C.__, __S.E.2d__ (Ct. App. April 22, 2015). Before giving this erroneous instruction to the jury the judge had already addressed the jury with the admonition, "You must accept as correct the law which I charge and apply it to the evidence as you find it and then reach your verdict." In State v. King, this Court held that the jury instruction given here is erroneous, and cannot stand the test of legal review. Therefore, Appellant asks this Court to find that the jury instruction was erroneous, and that the error was not harmless, but prejudicial to Appellant by and through the conviction that resulted in Appellant being sentenced to life without parole. The jury deliberations that produced the guilty verdict were infected with the erroneous charge, and as such Appellants protections, guarantees, and right to a fair and impartial trial under the U.S.C.A. Fifth Amendment was violated. Appellant asks this Court to agree, and reverse the conviction and sentence,

which was obtained through this violation.

C O N C L U S I O N

For the foregoing reasons given in Appellants Pro Se Response, the supporting case law, and United States and South Carolina Constitutional mandates cited, Appellant concludes that because of the cumulative errors committed in this case his conviction and sentence should be reversed, and his case remanded to the lower court for resentencing in a proceeding that does not include the option of a life without parole sentence.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Stewart Randall Ard', is written over a horizontal line.

Stewart Randall Ard, Appellant

This 20th day of July, 2015
Bishopville, S.C. 29010

SC Court of Appeals

July 20th, 2015

Stewart Randall Ard, 217645
Lee Correctional Institution
990 Wisacky Hwy
Bishopville, SC 29010

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SC Court of Appeals

SOUTH CAROLINA COURT OF APPEALS
JENNY ABBOT KITCHINGS, CLERK
POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

Re: Case No. 2014-001463; Filing Of ANDERS
Pro Se Response

Dear Clerk,

Enclosed please find for filing in your Court my ANDERS PRO SE RESPONSE, in accord with the ORDER filed in your Court, dated June 19, 2015, which granted your Appellant until July 30, 2015 to file this Response. Attached with the Pro Se Response is a CERTIFICATE OF SERVICE, showing proper and timely service of this Response upon the attorney for the State.

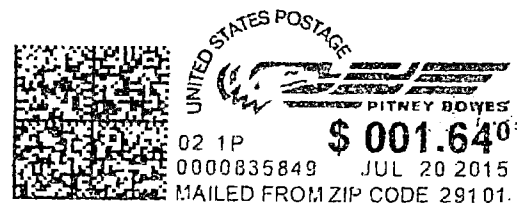
Will you please notify me by mail when the filing of this Pro Se Brief is complete? Thank you for your assistance in this appeal matter.

S/



Stewart Randall Ard

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JUL 22 2015

SC Court of Appeals

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LEE CHAMBER ROOM