ORIGINAL

RECEIVED
AUG 14 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Gary Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AVIS CREDELL PRIOLEAU,

APPELLANT

APPELLATE CASE NO. 2014-002411

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

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 8

PETITION TO BE RELIEVED AS COUNSEL 9

TABLE OF AUTHORITIES

Cases

Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994) 6

Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979) 6

State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991) 7

State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976) 6

State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980) 7

State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) 6

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955) 6

State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974) 6

State v. Totherow, 263 S.C. 275, 210 S.E.2d 228 (1974) 6

State v. Turner, 117 S.C. 470, 109 S.E. 119 (1921) 6

United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971) 6

United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984) 6

Williams v. State, 306 S.C. 89, 410 S.E.2d 563 (1991) 7

Other Authorities

S.C. Code §24-13-470 7

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to grant a directed verdict to the charges of throwing bodily fluids on a police officer because appellant did not throw anything, instead, he spit on the officers?

STATEMENT OF THE CASE

Appellant was convicted of two counts of throwing bodily fluids on a police officer after a jury trial held before the Honorable D. Garrison Hill on October 28-29, 2014, in Charleston County. Appellant was sentenced to 7 years suspended on service of 3 years with 18 months probation thereafter. Charles Cochran, Esq. and Annie Andrews, Esq. were the defense attorneys. Thomas Waring, Esq. and Burns Wetmore, Esq. were the assistant solicitors.

This appeal follows.

ARGUMENT

The trail court erred in failing to grant a directed verdict to the charges of throwing bodily fluids on a police officer because appellant did not throw anything, instead, he spit on the officers.

Officer Woods with the North Charleston Police Department testified that on April 19, 2013, he was dispatched around 5:55 a.m. to an apartment in reference to a burglary. When he arrived, he saw a window that had been broken out and then he saw appellant fall from an awning onto the ground. He was on his back. He was ordered to roll over so he could be handcuffed. He was combative and not cooperating. Appellant had injuries to his mouth and when he was cuffed blood got on the officer's hands. (Tr. p. 42, l. 2- p. 43, l. 24) EMS was called due to the injuries (Tr. p. 45, ll. 19- 22) While they were trying to secure appellant's hands to the stretcher, appellant removed his mask, turned toward some officers and spit in their direction. (Tr. p. 47, ll. 1- 19) Both Officer Slager and Sergeant Prosser had spit on them. (Tr. p. 48, ll. 2- 6) Officer Slager confirmed that appellant spat on him and Sergeant Prosser. (Tr. p. 62, l. 19- p. 63, l. 9) Sergeant Prosser also confirmed this. (Tr. p. 73, ll. 11- 16)

At the conclusion of the State's case the trial court failed to grant a directed verdict to the charges of throwing bodily fluids on a police officer. (Tr. p. 81, l. 21- Tr. p. 83, l. 21) That ruling was in error. 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 form 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).

S.C. Code §24-13-470 sets forth the law on throwing bodily fluids as follows:

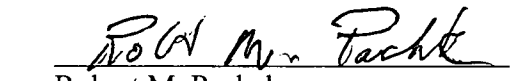
An inmate, a detainee, a person taken into custody, or a person under arrest, who attempts to throw or throws bodily fluids including, but no limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention facility, or any other person authorized to be present in a state correctional facility or local detention center facility in an official capacity is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years. A sentence under this provision must be served consecutively to any other sentence the inmate is serving. This section shall not prohibit the prosecution of an inmate for a more serious offense if the inmate is determined to be HIV-positive or has another disease that may be transmitted through bodily fluids.

In conjunction with the above statue, case law mandates that when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. Williams v. State, 306 S.C. 89, 410 S.E.2d 563 (1991); State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). Throwing is not spitting and spitting is not throwing. Because the statute does not cover the act of spitting a directed verdict should be granted in appellant's behavior. Spitting is not an element of the offense of throwing bodily fluids.

CONCLUSION

A directed verdict should be granted to the offense of throwing bodily fluids.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Gary Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AVIS CREDELL PRIOLEAU,

APPELLANT

APPELLATE CASE NO. 2014-002411

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Avis Credell Prioleau 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 Gary Hill, which was held on October 28-29, 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 Avis Credell Prioleau.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Gary Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AVIS CREDELL PRIOLEAU,

APPELLANT

APPELLATE CASE NO. 2014-002411

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;
(2) Trial Transcript

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

August 14th, 2015

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

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."

August 14, 2015

Robert M. Pachak

Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 14 2015
SC Court of Appeals

Appeal from Charleston County
Gary Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AVIS CREDELL PRIOLEAU,

APPELLANT

APPELLATE CASE NO. 2014-002411

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 Avis Credell Prioleau, #361891 at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 14th day of August, 2015.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2015.

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