

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

R. Keith Kelly, Circuit Court Judge

RECEIVED

APR 06 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DAVID ADAM YOUNG,

APPELLANT

APPELLATE CASE NO. 2015-000483

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing the state to publish jail calls allegedly made by appellant to unknown persons where the calls were not properly authenticated because no one identified the voice on the phone calls as being appellant's voice, and they also were not otherwise properly authenticated under Rule 901, SCRE?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County Grand Jury for the offenses of murder, possession of a weapon during the commission of a violent crime and failure to stop for a blue light. R. p. *. Appellant's case was called to trial on February 9, 2015 before the Honorable R. Keith Kelly, and a jury. Randy Chambers represented appellant. Jeff Weston and Elizabeth Major were the assistant solicitors. Tr. 1.

On February 11, 2015 the jury found appellant guilty on all three counts. Tr. 464, ll. 16-25. The state had served its notice of intent to seek a life sentence if appellant was convicted of murder. Judge Kelly sentenced appellant to life imprisonment based on the statute following the murder conviction, and he imposed a one year concurrent term for failure to stop for a blue light. Tr. 471, ll. 3-12.

This appeal follows.

ARGUMENT

The court erred by allowing the state to publish jail calls allegedly made by appellant to unknown persons where the calls were not properly authenticated because no one identified the voice in the phone calls as being appellant's voice, and they also were not otherwise properly authenticated under Rule 901, SCRE.

Relevant Facts

The shooting in this case occurred at about 5:30 a.m. at Bobby T's tavern on Whitehorse Rd. in Greenville. Police officer Ryan Holmes found the decedent's dead body lying between two cars in the parking lot. Tr. 88, l. 21 – 95, l. 20.

Elisha Green was the decedent's girlfriend. Her boyfriend went by the nickname "Boogie." She did not know appellant and she admitted that Boogie was a drug dealer. Tr. 124, l. 25 – 125, l. 19.

Green knew Porchae Adams as "Chop." She remembered that Boogie sold cocaine to Chop on the night before he was killed hours later. Tr. 126, l. 4 – 128, l. 20. Boogie sold Chop cocaine that evening for \$1,350. The purchase price was \$1,400 but Chop was \$50 short. Tr. 128, l. 11 – 130, l. 21.

It was undisputed that Chop was very upset because the cocaine was either of very poor quality or it was fake. Green remembered that Chop "blew up his phone" telephoning Boogie repeatedly to complain about the drugs that evening. Tr. 137, l. 2 – 138, l. 14. Boogie later left Green alone at her house, and Green said she did not know where he was going.

Robert Bowens was the bouncer at Bobby T's that evening. Bobby T's was in a strip mall on Whitehorse Rd. Bowens' job was to "pat down" everyone before they went into the bar. Tr. 144, l. 14 – 147, l. 23.

Bowens knew Boogie from working security at different clubs in the area. He remembered Boogie came to the bar about four or five in the morning. Bowens did not know appellant. He did remember appellant coming into the club, and then leaving. He said appellant walked back into the club a second time, and walked past him. Tr. 149, l. 1 – 152, l. 25.

Bowens maintained that while Boogie was talking to "a few girls" he heard someone say to Boogie: "I told you motherfuckers about fucking with me." Bowens then heard several gunshots. He claimed: "I saw the defendant fire the other three shots. I think it was three shots." Bowens said that Boogie fell to the ground after being shot. Tr. 153, l. 5 – 155, l. 17.

Porchae Adams testified that after Boogie sold her bad drugs she called him about eight times that evening. She wanted the drugs replaced with real or better cocaine. Adams recalled she went with appellant -- who was often her "driver" -- to Bobby T's about 4:30 or 5:00 in the morning. She saw Boogie's car in the parking lot. Adams claimed appellant told her "he would handle it." Adams said she heard three or four gunshots, and she claimed that appellant came back outside and said: "I killed that, parenthesis, negro." Adams maintained appellant said this "matter of fact." Tr. 231, l. 1 – 237, l. 24.

Appellant would later testify that he was with Adams and another man "Jack Frost" at Bobby T's that morning. Appellant told the jury that he was standing

nearby when either Adams or Jack Frost shot Boogie. Appellant said he saw Boogie reach for something, and then Adams or Frost shot Boogie. Tr. 372, l. 7 – 374, l. 17.

Jail calls

Jared Johnson worked at the Greenville County Detention Center. He testified that inmates were given a PIN number and a six-digit PAC number so that they could make calls from the jail. Tr. 325, l. 20 – 329, l. 10. Johnson said he brought to court various recordings of calls he claimed were made by appellant from the jail from January 2013 to March 2013. Tr. 329, ll. 11-12.

When solicitor asked permission to publish the calls, Defense Counsel Chambers objected that the state had not laid a proper foundation for their admission. Defense counsel argued that to properly authenticate the calls, the state needed to have a witness who could testify that they were familiar with the voice on the tape, and that it was appellant's voice. Since the state had failed to properly authenticate the calls, they should not be published. The solicitor said while the jail call system was "not infallible" that Rule 901, SCRE did not require "absolute infallibility." The judge overruled the objection. Tr. 334, l. 7 – 336, l. 14.

The solicitor said he was not going to publish all of the jail calls to the jury, and the court reporter (as is the practice) did not transcribe the calls that were played for the jury. Nonetheless, the solicitor in her closing argument told the jury that in the prison calls appellant admitted to shooting the decedent. The solicitor reminded the jury that they "didn't play all of the jail calls for you. We just wanted to give you a flavor. They're in evidence, if you feel the need to go back and listen to what we have put in evidence." Tr. 439, l. 4 – 442, l. 3.

Discussion

In State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980), Plyler's ex-wife testified that she telephoned her sister, the decedent, after they had gone out together. The sister was alone at the time of their conversation. However, the ex-wife testified that her sister excused herself on the phone to answer the door. Because the receiver of the phone was placed on the couch approximately sixteen feet from the front door, the ex-wife maintained she overheard the resulting conversation and recognized the voice of her ex-husband, Plyler. Several gunshots were then heard.

The defense challenged the admissibility of the ex-wife's identification of the voice being on that telephone call as being Plyler's voice. The Supreme Court rejected that challenge writing: "[S]ince an early period, witnesses' testimony of identification of a person by having heard his voice has been regarded as legitimate and competent to establish identity in criminal and civil cases. 29 Am. Jur. 2d., Evidence, Section 381." State v. Plyler, 275 S.C. at 294, 270 S.E.2d at 127-128.

The state in this case did not have anyone as a witness who claimed to identify the voice on the telephone calls from the jail as being appellant's voice. As such, the jail calls were not properly authenticated, and they should not have been published to the jury.

While Plyler was a prior to the South Carolina Rules of Evidence case, it is still controlling precedent.¹ Rule 901(b)(5), SCRE also states that identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording can be authenticated "by opinion based *upon hearing the voice at any time*

recording can be authenticated “by opinion based *upon hearing the voice at any time* during circumstances connecting it with the alleged speaker. (emphasis added). Further, telephone conversations can also be authenticated under Rule 901(b)(6), SCRE. However, there must be evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if “in the case of a person, circumstances, including self-identification, show the person answering to be the one called...” The solicitor in this case did not produce the person or persons appellant allegedly called. The jail-taped calls in this case were not admissible under either State v. Plyler or Rule 901, SCRE.

There was absolutely no evidence that it was appellant’s voice on the jail tapes. In State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct. App. 1992) this Court considered the issue of the admission of the testimony of the Sheriff’s dispatcher that she recognized the voice on a call from an anonymous telephone caller as being Smith’s voice. Under the circumstances of that case, this Court held the dispatcher could identify Smith’s voice because she remembered it as being a highly unusual “very country and rugged scratchy-like voice.” The voice stuck out in the dispatcher’s mind because it was “so country [and] kind of had a ring to it.” State v. Smith, 307 S.C. 376, 386, 415 S.E.2d 409, 415 (Ct. App. 1992). Moreover, this Court also considered the fact that less than twenty-four hours after the anonymous call, Smith came to the Sheriff’s office and told the dispatcher he was there to talk to two of the detectives. The dispatcher immediately recognized Smith’s voice as being that of the anonymous caller.

None of these circumstances on the uniqueness or highly unusual nature of appellant's voice exist in this case. Johnson admitted that it would be possible for someone to mimic appellant's voice or the voice of another person in the detention center. A sufficient foundation was simply not laid for the admissions of the jail calls. Further, the jail calls were highly prejudicial since the person on the tapes made inculpatory statements. The jail calls, State's Exhibit 27, is on file for this court to review. The jail calls were played prior to Appellant's testimony and there was no instruction to the jury that they would first have to find the voice on the jail tapes as belonging to appellant before they could consider this evidence against him. See State v. Porter, 251 S.C. 393, 162 S.E.2d 843 (1968); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950).

The evidence of appellant's guilt in this case was not so overwhelming it can be said that the admission of the jail tapes were harmless beyond a reasonable doubt. Appellant took the stand in his own defense and testified that either Adams or another man, Jack Frost, shot the decedent. Adams clearly had a motive since she had been cheated out of \$1,350 earlier that night by the decedent. There was testimony Adams was in a rage and "blew up" the decedent's phone that evening with harassing phone calls about the fake cocaine. Adams obviously had a motive to lie and claim that appellant told her he shot the decedent.


Further, Bowens identification of appellant as being the shooter, standing alone, where he did not claim to see the first shot did not make the error harmless beyond a reasonable doubt. Finally, appellant admitted being right next to Adams or

Frost when one of them shot the decedent which could have affected Bowens' perception of who the shooter actually was in this case.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed, and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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R. Keith Kelly, Circuit Court Judge

THE STATE,

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V.

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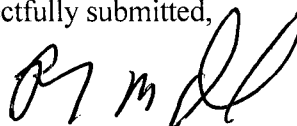
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Adam Young states:

1. He is Chief 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 R. Keith Kelly, which was held on February 9-11, 2015, 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 David Adam Young.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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R. Keith Kelly, Circuit Court Judge

THE STATE,

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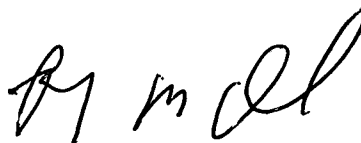
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Entire trial transcript;
- (3) State's exhibit 27 (CD of jail calls).

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

April 6th, 2016



Robert M. Dudek
Chief Appellate Defender

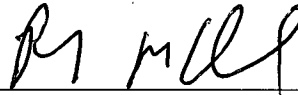
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Attorney for Appellant

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."

April 6th, 2016



Robert M. Dudek
Chief Appellate Defender

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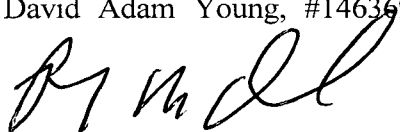
V.

DAVID ADAM YOUNG,

APPELLANT

CERTIFICATE OF SERVICE

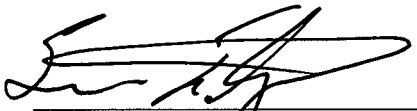
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on David Adam Young, #146369 at Lee Correctional Institution, this 6th day of April, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2016.



(L.S.)

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