

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
Honorable R. Scott Sprouse, Circuit Court
Judge

THE STATE,

RESPONDENT

v.

BILLY RAY SMITH,

APPELLANT

APPELLATE CASE NO 2015-002543

APPELLANT'S PROSE IN RESPONSE TO ANDER'S

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JAN 04 2017

SC Court of Appeals

Billy Ray Smith 274409
MCCI
386 Redemption Way
McCormick, SC 29899

PROSE

DAVID ALEXANDER
Appellate Defender for
Appellant

TABLE OF AUTHORITIES

Cases

Harrod v State 65 Md App. 128, 499 A2d 959 (1985)

United States

Anders v. California, 386 U.S. 738 (1967)

Douglas v. California 372 U.S. 353 (1963)

Lucy v. Exitts, 469 U.S. 396 (1985)

Jones v Barnes, 463 U.S. 745

Statutes

S.C. Code of Law § 16-3-29 (1976)

TABLE OF CONTENTS

TABLE OF CONTENTS	
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	4
STATEMENT OF THE CASE	5
STATEMENT OF FACT	6
ARGUMENT One	7
ARGUMENT TWO	9

STATEMENT OF ISSUE ON APPEAL

Argument One:

Appellant objects to Young's petition to be relieved as counsel of record, and that the granting of Young's petition would deny Appellant his right to effective assistance of appellate counsel on his first appeal of right.

Argument Two:

Whether the Court erred when it overruled appellant's motion for a directed verdict, since there was not substantial circumstantial evidence to sustain the finding that he was guilty of possession of a weapon "in the commission" of Attempted Murder, that he "display" and "present" a handgun, and likewise there was not evidence from which a rational trier of fact could find beyond a reasonable doubt that appellant was guilty, in violation of the federal due process standard?

STATEMENT OF THE CASE

On September 29, 2015, appellant was indicted for attempted murder, unlawful sale or delivery of pistol to and possession by certain persons, possession of a firearm during the commission of a violent crime, and obstruction of justice. R. 380-86. On November 16, 2015, appellant was tried before the Honorable R. Scott Sprouse and jury. Kristin W. Reeves and Chelcy Moore represented the State. Herverly B. Young represented appellant. The jury convicted appellant on all counts. Judge Sprouse sentenced appellant to twenty years' imprisonment for attempted murder and concurrent five years terms on the other charges. This appeal follows.

STATEMENT OF FACT

At trial, appellant's defense was "accident." Everyone involved in this case agreed that appellant was highly intoxicated and on control drugs (prescription) on the night his wife was shot. One of the first police officers on the scene described appellant as "intoxicated" and speaking "with very slurred speech." Another officer who interviewed appellant said he was intoxicated and "had a strong odor of alcohol about his person." The police found three prescription bottles in appellant's pocket, two of which were Oxycodon and Oxycontin.

Appellant's wife, Sandra Smith ("Wife") said she drank often and had been drinking on the day of the shooting. Wife testified that she and appellant was arguing about something but could remember the subject of the argument. We said she seen no gun, however, wife suffered a gunshot wound to the head.

Appellant gave several statement to the police. In the final statement appellant gave to police his confession; handling the gun,

STATEMENT 0

ARGUMENT ONE

Appellant objects to Young's petition to be relieved as counsel of record, and that the granting of Young's petition would deny Appellant his right to the effective assistance of appellate counsel on his first appeal of right.

FACTS

Hervery B. Young, Esquire was appointed to represent Appellant on direct appeal. On November 28, 2016, Young filed a no merit appeal pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct 1396 (1967) claiming the appeal is without legal merit sufficient to warrant a new trial while subsequently motioning this Court to be relieved of counsel.

Appellant objects to Young's petition to be relieved as appellate counsel on the grounds that there is meritorious and substantive issue available and unbriefed that was properly preserved for appellate review during trial.

Appellant asserts he has a right to the effective assistance of appellate counsel on his first appeal as a matter of right, Young should not be relieved as counsel and this Court should order Young to brief the substantive issues appellant has raised in his pro-se Anders brief.

Appellant believes Young's petition to be relieve of counsel should be denied and Young should be ordered to redraft appellant's brief to contain the underlying substantive issues.

ARGUMENT

Accordingly, the sixth Amendment as applied to the States through the Fourteenth Amendment, guarantees a criminal defendant the right to counsel on his first appeal as of right. See Douglas v. California 372 U.S. 353, 356, 83 S.Ct. 814 (1963). It also, guarantees his the effective assistance of counsel on appeal. Lucy v. Elvitts, 469 U.S. 346, 105 S.Ct. 830 (1985).

In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 3311, the Court held that since Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) the Court has held the since Anders bars counsel from abandoning a non-frivolous appeal, it also bars counsel from abandoning a non-frivolous issue on appeal.

Under Anders v. California 386 U.S. 738, 87 S.Ct. 1396 (1967), the Court held that an appointed attorney must advocate his client's cause rigorously and may not withdraw from a non-frivolous appeal - appointed counsel must present on appeal [all] non-frivolous arguments requested by his client.

In the instant matter, Young has abandoned substantive meritorious issues, that in granting Young's petition to be relieved as counsel will result in a denial of effective assistance of counsel on appeal and a denial of due process.

The underlying substantive claims that Young has abandoned is raised pro-se herein the instant pro se brief.

ARGUMENT TWO

Whether the Court erred when it overruled appellant's motion for a directed verdict, since there was not substantial circumstantial evidence to sustain the finding that he was guilty of possession of a weapon "in the commission" of attempted murder, that he "display" and "present" a handgun; likewise, there was not evidence from which a rational trier of fact could find beyond a reasonable doubt that appellant was guilty, in violation of the federal due process standard?

FACTS

"I would ask the Court for a directed verdict specifically on the charge of the attempted murder. I do not believe that there's been any evidence that has been presented to support the element of specific intent to kill in this particular case." R. 287 11.1-3. -- for the lack of any type of specific intent to kill with regards to the attempted murder charge. And coupled with the attempted murder charge would be possession of a firearm during the commission of a violent crime. R. 288, 11. 21-25.

ARGUMENT

It is clear that possession of a weapon "during the commission" (of a violent crime), brings the question as to what was done as opposed to what they might do. Appellant was only in possession of a unlawful

weapon. Criminal liability attached to appellant because of such possession. Therefore, unlawful possession alone was enough for the State to have a proper basis for criminal prosecution.

Appellant contends the directed verdict should not stand because there was 'no plan' during the commission of a violent crime. Appellant was convicted of attempted murder, in possession of a weapon during the commission of a violent crime. Appellant indictment alleges:

"That Billy Ray Smith did in Anderson on or about April 22, 2014, did unlawfully with malice aforethought and with the intent to kill, attempted to [kill] Sandra Smith. This is in violation of 16-3-29 of the South Carolina Code of Law (1976) as amended."

The indictment states the intent to kill and attempt [I]. requires a specific plan, such as homicide, bank robbery and passport offense. Appellant's wife, Sandra Smith, testified they been drinking that day. The wife say they often drank. In fact, everyone involved, Billy Paul Smith and David G. Hogg corroborated this fact. Contrary no testimony to corroborate wife testimony that they been arguing. The wife could not remember the subject of the argument but added: The appellant came and went from the house during the day, but "when he would come home, he was drinking." R. 293, ll. 15-23.

There is a substantive issue of the State case was to prove intent of some assault with intent to

to commit another crime or be in commission of.

Generally, intent includes only attempt, as the State alleged in opening statement that "the defendant was previously convicted of six (6) counts of house-breaking and grand larceny from November 6, 1978 - that appellant is capable to commit a violent crime. R. 77, II. 24-25, R. 78, II. 1.

Felony murder is an unintentional killing during the commission of a dangerous felony. ABIK carries a specific intent. The recklessness of appellant being on prescription drug and intoxication does mitigate and move a reasonable person to heed on the quirks of an individual personality. The record is clear of provocation between husband and wife emotional disturbance without allowing appellant a "cooling down period" that allow the appellant to form a deliberate plan to murder. Appellant reckless carried no specific intent but a general intent to commit the act that done. Harrod v. State, 65 Md. App 128, 499 A2d 959 (1985).

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for appellate review.

Billy Ray Smith

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386 Redemption Way
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Appellant's Pro-Se In Response To Anders upon the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201 has been placed in the U.S. mail at McCormick, 386 Redemption Way, McCormick, SC 29899, this day of December 22, 2016

Billy Ray Smith

Billy Ray Smith 274709

MCCI F-2-124

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