

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Howard P. King, Circuit Court Judge

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FEB 16 2017

Court of Appeals

THE STATE,

RESPONDENT,

v.

ARTHURO RIOS TORRES,

APPELLANT

APPELLATE CASE NO 2015-002645

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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Cases

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State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981)..... 3

Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984) 4

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion for reconsideration where Appellant's sentence was the result of passion and emotion while also based upon a prior record which included a pending charge that had not yet been adjudicated?

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant at the July 2015 term of General Sessions for felony DUI resulting in death, leaving the scene of an accident involving death, motor vehicle habitual offender causing death, and hit and run involving property damage. R. 52 - 59. On December 15, 2015, Appellant pled guilty before the Honorable Howard King. Josh Golson represented the State, and John O'Leary appeared on Appellant's behalf. R. 1.

Judge King accepted Appellant's guilty plea and sentenced him to twenty years' imprisonment for the felony DUI charge, twenty years for leaving the scene of an accident involving death, five years for the habitual offender charge, and one year for the hit and run with property damage, with the sentences to be served concurrently. R. 28, l. 24 - R. 29, l. 12; R. 35, l. 23 - R. 36, l. 19.

The Notice of Appeal in Appellant's case was filed on December 18, 2015. R. 39 - 40. Plea Counsel O'Leary filed a motion to be relieved as counsel on or about January 11, 2016. R. 41 - 42. He filed an affidavit in support of his motion on January 12, 2016. R. 43 - 45. The matter was remanded to the Circuit Court on January 22, 2016 in order to obtain a ruling on Appellant's motion to reconsider his sentence. R. 46. By way of an Order dated February 2, 2016, the reconsideration request was denied. R. 47 - 48. This Appeal follows.

ARGUMENT

The trial court erred in denying Appellant's motion for reconsideration where Appellant's sentence was the result of passion and emotion while also based upon a prior record which included a pending charge that had not yet been adjudicated.

While discussing Appellant's prior record, the Assistant Solicitor notified the trial court about a pending DUI charge that had not yet been tried at the time of Appellant's guilty plea: "[L]astly and most regrettably, he had a pending DUI charge here in Richland County that originated with an arrest in August of 2013." R. 22, ll. 20 – 22. Judge King followed up with two questions and elicited the fact that Appellant had a pending charge and was on bond at the time of the underlying accident in this case. R. 22, l. 23 – R. 23, l. 13.

Following acceptance of the guilty plea, the trial court took a ten-minute recess to "reflect on what [was] presented to the Court." R. 33, ll. 1 – 2. After returning, Judge King remarked:

[W]e take into consideration the purposes of punishment, rehabilitation, retribution and punishment itself, and I can say that no case that I have heard - - or none that I have heard in the last 19 years are more difficult than felony DUI cases. They are the most difficult cases that we have to consider.

R. 34, l. 8-13.

Over a number of years I have heard a number of these cases, and this is one of the worst from the standpoint of an individual's prior driving record. As I said, he is simply not an individual that one time had too much to drink and caused an accident causing death. It's a pattern of behavior. It's a wonder that he has not caused a serious accident before now with his driving record and his DUI record.

R. R. 35, ll. 12-19.

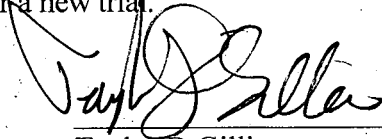
The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an

appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

Appellant filed a timely notice of appeal wherein he sought to appeal the imposed sentence. R. 39 - 40. As evidenced above, the sentence was partially based upon a prior charge which had not yet been adjudicated. One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Appellant's right to have his guilt or innocence determine was violated when the trial court used a pending charge against him during sentencing.

CONCLUSION

Appellant's sentence should be reconsidered, or in the alternative, his case remanded to the Richland County Court of General Sessions for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of February, 2017.

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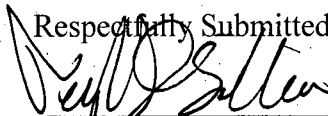
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Arturo Rios Torres 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 plea before Judge Howard P. King, which was held on December 15, 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 Arturo Rios Torres.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 16th day of February, 2017.

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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;
- (2) Guilty plea transcript;
- (3) Notice of Appeal;
- (4) Motion to be Relieved as Counsel;
- (5) Affidavit of John A. O'Leary;
- (6) South Carolina Court of Appeals Remand Order;
- (7) Court of General Sessions Order dated February 2, 2016;
- (8) Return to the Motion to Relieve Counsel; and
- (9) South Carolina Court of Appeals Order Substituting Counsel

(signature page to follow)

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

February 16, 2017



Taylor D Gilliam
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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."

February 16, 2017.



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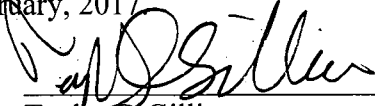
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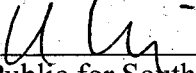
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, 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 have been served on Arturo Rios Torres, 366476, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of February, 2017.


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of February, 2017.


Notary Public for South Carolina
My Commission Expires:

(L.S)

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