

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OCT 10 2016

SC Court of Appeals

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RASHEED TAMIR GLOVER,

APPELLANT

APPELLATE CASE NO 2016-000675

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the judge who unsealed and pronounced sentence following a trial in the Appellant's absence abuse his discretion in refusing to reconsider the twenty five year sentence imposed by the trial judge when a co-defendant received a lesser sentence and the record fails to reflect an appropriate basis for the disparate sentence?

STATEMENT OF THE CASE

In March of 2015, the Horry County Grand Jury indicted Appellant Glover for armed robbery, indictment #2015-GS-26-1237. On October 12, 2015, Appellant was tried in his absence before a jury with the Honorable R. Ferrell Cothran presiding. Johnny Gardner represented Appellant in his absence. Lauree Richardson and Thomas G. Terrell, III prosecuted the case. The jury returned a verdict of guilty and Judge Cothran sealed the sentence. On March 15, 2016, Appellant appeared before the Honorable Steven H. John for sentencing. Judge John unsealed and pronounced that Judge Cothran sentenced Appellant to twenty-five (25) years. On March 17, 2016, Appellant moved to reconsider sentence which Judge John denied. A timely notice of intent to appeal was served on March 24, 2016. This appeal follows.

ARGUMENT

The judge who unsealed and pronounced sentence following a trial in the Appellant's absence abused his discretion in refusing to reconsider the twenty five year sentence imposed by the trial judge when a co-defendant received a lesser sentence and the record fails to reflect an appropriate basis for the disparate sentence.

On January 2, 2015, the Scotchman convenience store in Conway was robbed. The clerk working on the night of the robbery testified that two young men came into the store and one of the men pointed a silver gun at her. (R. p. 44, lines 1-8). The other young man, wearing a red sweatshirt, ran behind her. (R. pp. 44-45). The clerk testified that the young man with the silver gun was wearing studded round fake diamond earrings, skinny blue jeans and white above the ankle Nike sneakers. (R. p. 45, lines 6-13). She testified that the young man wearing the red sweatshirt was wearing red above the ankle sneakers with a white emblem. (R. p. 45, lines 19-23). Both young men had mud on their shoes. (R. p. 45, lines 24-25). They demanded money from the register and as they were leaving the store the young man in the red sweatshirt pointed a black gun at the clerk. (R. p. 47, lines 1-7). In addition to money, the men took a box of cigarillos and the clerk's phone. (R. pp. 48-49).

Officer Steven Dailey with the Horry County Police Department testified that he was notified by dispatch about an armed robbery involving individuals, one of whom was described as a young black male wearing a red shirt. (R. p. 59, lines 6-13). Officer Dailey testified that he saw a young black male in a red shirt riding in the front passenger seat of a taxi van. (R. p. 60, lines 6-24). Officer Dailey stopped the van and identified the front passenger in the red shirt as Tyreke. (R. pp. 63-65). The store clerk identified Tyreke as the robber. (R. p. 65, lines 5-16). There were three other passengers in the taxi van. (R. p. 86, lines 15-24). Appellant Glover was seated in the far back of the taxi van, wearing a white t-shirt. (R. pp. 88-90).

One of the other passengers in the van, Amontre Ellerbe, testified against Appellant at trial. According to Ellerbe, he and Appellant went in the store and committed the armed robbery while Tyreke Phillips and Aikeem Coles, other passengers in the taxi van, stood behind the store. (R. pp. 162-165). When officers searched the taxi van they found a black gun and the clerk's cell phone in the front passenger area where Tyreke Phillips had been seated. (R. p. 98, lines 4-8). A red sweatshirt was found behind the front seat. (R. p. 105, lines 11-17). Ellerbe claimed that Appellant changed clothes and shoes after the robbery. (R. pp. 165-166). The silver gun and the box of cigarillos were found in a bag on the far back seat of the van. (R. p. 106, lines 6-15). Ellerbe admitted having the silver gun. (R. p. 163, lines 14-15). Ellerbe also admitted taking the cigars but denied taking the clerk's cell phone. (R. p. 164, lines 19-24).

Asia Collier, Appellant's former girlfriend, admitted that she drove Appellant, Ellerbe, Phillips and Coles to the Scotchman. (R. pp. 136-139). The four approached the store but Collier could not see who went inside. (R. p. 140, lines 1-5; R. p. 154, lines 14-23). Collier testified that when the four returned to the car, Ellerbe and Tyreke Phillips had weapons. (R. p. 140, lines 11-25). Collier drove the four to a neighborhood where the four caught the taxi van that was stopped shortly later by Officer Dailey. (R. pp. 142- 145).

Appellant, Ellerby, Phillips, Coles and Collier were all charged with armed robbery. Phillips and Coles pled guilty and received ten year sentences. (R. p. 215, lines 7-11). Ellerby initially pled guilty and received a fifteen year sentence. (R. p. 215, lines 12-13). Ellerby's sentence was later reduced to ten years as a result of his cooperation in the case against Appellant. (R. p. 215, lines 14-24).

Appellant moved before the Honorable Judge Steven H. John for reconsideration of the twenty five year sentenced imposed by the Honorable R. Ferrell Cothran. (R. p. 214, lines 12-

22). When Judge Cothran sealed the sentence he stated, "Okay. Well, when he's arrested, I don't know if I'll still be here or not but you can bring him before some judge and he'll open this sentence and read it to him and see what happens." (R. p. 206, lines 18-21). Judge John denied the motion to reconsider sentence. (R. p. 217-218). The judge erred in refusing to reconsider the twenty five year sentence imposed.

In denying the motion to reconsider sentence Judge John acknowledged that he was not the trial judge who heard the testimony and he did not have a transcript of the trial to review. (R. p. 217, lines 2-7). Judge John stated:

I'm basing my decision based upon the obvious thing, the sentence for armed robbery for a minimum of ten up to thirty years. It's a – classified as a violent and most serious offense by the State of South Carolina. It – I'm taking into consideration what the State has said as far as the facts and circumstances relayed to the Court of the fact that this Defendant was an actual participant in the crime in which was armed, there was – and as indicated, an armed robbery and he was one of the participants in that particular matter in the Scotchman store. Based upon that, I respectfully decline to grant the request of the Defense to change the sentence of Judge Cothran.

(R. p. 217. 9, lines 7-18).

A review of the trial testimony reflects that Ellerby and Appellant were equal participants in the robbery. Prior to Ellerby cooperating with the State and testifying against Appellant, he received a fifteen year sentence. Appellant, however, received a twenty five year sentence after exercising his right to a jury trial.

In State v. Follin, 352 S.C. 235, 257–58, 573 S.E.2d 812, 824 (Ct. App. 2002) (emphasis in original), the South Carolina Court of Appeals wrote:

We rule a sentencing judge may *NOT* improperly consider a defendant's decision to proceed with a jury trial. We conclude that, when the record clearly reflects an appropriate basis for a disparate sentence, the sentencing judge may impose a different sentence on a co-defendant in a criminal trial. We caution the Bench that a trial judge abuses his or her discretion in sentencing when the judge considers the fact that the defendant exercised the right to a jury trial.

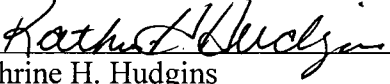
The record in the present case does not reflect an appropriate basis for the disparate initial fifteen year sentence imposed upon Ellerby and the twenty five year sentence imposed upon Appellant. Appellant received a ten year trial tax. The judge abused his discretion in refusing to reconsider the twenty five year sentence imposed when the sentencing judge considered Appellant's decision to proceed with a jury trial when he imposed the disparate sentence. In Castro v. State, 417 S.C. 77, 789 S.E.2d 44, 47 (2016), the South Carolina Supreme Court wrote:

When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion. See Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999) (holding counsel was ineffective in failing to object when the trial judge indicated the reason he sentenced Davis more harshly than two similarly-situated offenders who, unlike Davis, had pled guilty was because those offenders admitted their guilt); State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995) (holding the trial judge abused his discretion when the judge considered the fact that Hazel did not plead guilty in declining to grant Hazel's request for sentencing under the Youthful Offender Act).

See also State v. Brouwer, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) (remanding for a new sentencing hearing pursuant to Hazel, supra, stating, "Although the [trial judge] herein also stated it had never, and never would, 'punish someone for exercising their right to a jury trial,' we believe the mere disavowal of wrongful intent cannot remove the taint inherent in the [trial judge's] commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence."). The record in the present case fails to reflect an otherwise appropriate basis for Appellant's disparate sentence. The judge abused his discretion in refusing to reconsider the sentence.

CONCLUSION

Based on the above argument, Appellant's sentence should be reversed and the case remanded for a new sentencing hearing.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of October, 2016.

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Honorable Steven H. John, Circuit Court Judge

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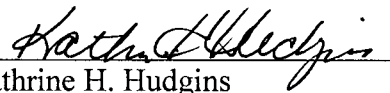
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rasheed T. Glover states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Steven H. John, which was held on October 12-13, 2015 (Trial), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Rasheed T. Glover.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 10th day of October, 2016.

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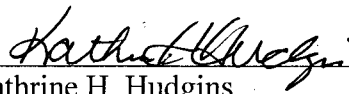
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment and sentencing sheet;
- (2) Trial Transcript October 12-13, 2015;
- (3) Sentencing Transcript, March 15, 2016, and Motion to Reconsider Sentence Transcript, March 17, 2016.

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

October 10, 2016


Kathrine H. Hudgins
Appellate Defender

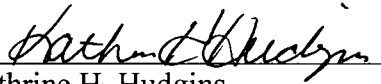
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ATTORNEY FOR APPELLANT

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."

October 10, 2016.


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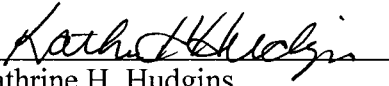
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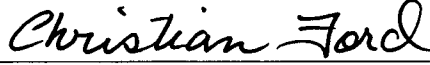
APPELLANT

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 Rasheed T. Glover, #367438, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 10th day of October, 2016.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of October, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 03/01/2026