

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Sumter County

MAR 14 2017

Honorable W. Jeffrey Young, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

RASHAD CORNEAL BRISBON,

APPELLANT

APPELLATE CASE NO. 2016-001949

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) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to instruct the jury at appellant's partial trial in his absence that they could not consider his absence as an admission of guilt?

STATEMENT OF THE CASE

Appellant was convicted of failure to stop for a blue light after a jury trial held before the Honorable W. Jeffrey Young on June 14, 2016, in Sumter County. Appellant was tried partially in his absence. A sentence of five (5) years was read on September 12, 2016, by the Honorable Roger M. Young. Stephen B. Story, Jr., Esq., represented appellant. Tyler B. Brown was the assistant solicitor.

This appeal follows.

ARGUMENT

The trial court erred in failing to instruct the jury at appellant's partial trial in his absence that they could not consider his absence as an admission of guilt.

The assistant solicitor gave a synopsis of the case during his opening statement.

In this particular case, see the video of what happened on October 2, 2014. And determine whether or not Mr. Brisbon violated the law, whether or not he failed to stop his vehicle when required to do so. Whether or not he operated his motor vehicle on a highway or road of our state. Whether he was signaled to stop by law enforcement and whether that signal to stop was done with blue lights and siren or sirens, and whether or not he failed to stop.

He's here today because the State intends, and we believe we will prove in this case, that he failed to do that. What you're going to hear in this case and what you're going to see in this case, is testimony and a video of what happened on October 2nd, 2014 on Brewington Road. Probably not more than 10 miles from where you sit today. Not very far from our local airport. At 4 o'clock in the morning, this Trooper Lowder, was patrolling that particular area. You're going to I suspect hear testimony about how Trooper Lowder observed suspicious driving.

I'll let him explain it better, because quite candidly he is better at explaining. And you're going to hear about how he initiated a traffic stop. And what I'll suspect y'all hear and see in this video is that initially Mr. Brisbon stopped his car. He pulled over right on the intersection. The same area that Trooper Lowder wanted him to pull over, because there was a safe spot to pull over both for Mr. Brisbon and for the trooper. And what I suspect you will see in the video and what you will hear from Trooper Lowder is, that as he got out of his vehicle, approached the vehicle on the passenger side for his safety, got up to the car. Tapped on the window and opened the door to make contact with the driver; that he saw the defendant reach down, grab the gear shift and go put it in drive, and go.

What you will see in the video from there, and once again what you'll hear from the testimony is, that Trooper Lowder managed to get in the patrol care quickly. He was able to get pursuit. He was able maintain visual on the cars as he drove. And as he drove down Brewington Road hitting close to 90 miles per hour trying to catch up with this driver, the same driver that's here today. He watched

his car blew through the stop sign. Turned his lights off trying to evade his arrest. And ultimately stopped his vehicle and got out and tried to run.

(R. p. 57, l. 7 – p. 59, l. 7)

After the State presented its evidence it rested its case. The trial court gave the jury a break. (R. p. 96, ll. 16-22) During the break the trial court put the following on the record:

THE COURT: And I am not going to give him 5 minutes and I am going to start without him. That's going to prejudice his case, however, that's his fault.

MR. STORY: Yes, Your Honor.

THE COURT: He was late when he started the trial as well. The trial will proceed without him.

MR BROWN: And I think it's already on the record that his bond paperwork did say that.

THE COURT: It was. Let me put this on the record. We broke and I told them they could have a break and we would be back in 10 minutes. And at that time it was roughly 2:30. 10 minutes, would have been 20 till 3. Everyone else was back here at 20 minutes till 3. We have been waiting for the defendant 15 minutes. We have had the bailiffs and the deputy go into the hallway. The assistant, and other public defenders have gone to find him. Although he has not answered the ultimate question verbally that he did not want to testify, his actions have now shown that he obviously does not want to testify.

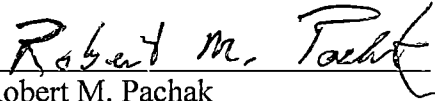
This is not necessarily a trial in absence at this point, because he was here during the testimony of the State. And apparently that's going to be all the evidence that is going to be testified, so he was here during his trial. The fact that he does not want to be here at this point and time, clearly answers the question, do you want to testify, which is a resounding no, based upon his actions. We will continue with this trial at this time. Please bring our jury in.

(R. p. 103, l. 11 – p. 104, l. 18)

While the trial court admitted that continuing the trial in appellant's absence would prejudice appellant's case, it failed to give a jury instruction that appellant's absence may not be construed as an admission of guilt. State v. Jackson, 301 S.C. 49, 389 S.E.2d 654 (1990). That instruction should also be given if a defendant comes to trial and then fails to appear. McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000). While defense counsel did not object to the lack of the jury instruction, the trial court still has an obligation under Article V, Section 21 of the South Carolina Constitution to charge the jury the correct law.

CONCLUSION

Appellant's conviction should be reversed.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2017.

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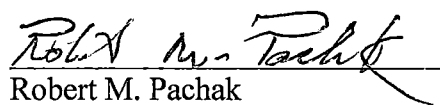
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rashad Corneal Brisbon states:

1. He is an 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 Michael G. Neetles, which was held on June 14 2016 and September 12, 2016, 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 Rashad Corneal Brisbon.

Respectfully Submitted,


 Robert M. Pachak
 Appellate Defender
 ATTORNEY FOR APPELLANT

This 14th day of March, 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) Entire Guilty Plea Transcript
- (2) True-billed indictment
- (3) Sentence Sheet

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

March 14, 2017



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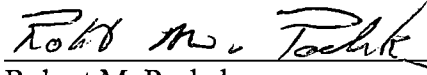
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CERTIFICATE OF COUNSEL

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."

March 14, 2017.



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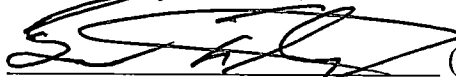
CERTIFICATE OF SERVICE

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 Rashad Corneal Brisbon, #302692, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 14th day of March, 2017.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of March, 2017.



(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

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