

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County

Honorable George C. James, Circuit Court Judge

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

v.

BERNARD MCFADDEN,

APPELLANT

APPELLATE CASE NO 2016-002319

ANDERS BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to direct a verdict on the charge of burglary where the state presented no substantial circumstantial evidence that Appellant entered a convenience store with the intent to commit a crime.

STATEMENT OF THE CASE

Appellant was indicted for second degree burglary by a grand jury in Sumter County on February 18, 2010. App. 716. The prosecution, represented by R. Kirk Griffin, called the case for trial on November 16, 2010 before the Honorable W. Jeffrey Young and a jury. Willie Brunson represented Appellant. After a four-day trial, the jury found Appellant guilty as indicted. App. 458 l. 23 – App. 459 l. 6. Judge Young sentenced Appellant to a period of fifteen years' imprisonment. App. 468 ll. 1 – 9.

This brief, filed contemporaneously with a petition for writ of certiorari under Rule 243(i)(1), SCACR, follows.

ARGUMENT

The trial judge erred in failing to direct a verdict on the charge of burglary where the state presented no substantial circumstantial evidence that Appellant entered a convenience store with the intent to commit a crime.

At around 10:00 p.m. on July 2, 2009, Derrick McDonald was alerted to the presence of a man outside his home. App. 31 ll. 9 – 22; App. 133 ll. 10 – 19. This man, later identified as Appellant, was bleeding from the leg after falling off his bicycle. App. 31 l. 23 – App. 32 l. 7. Appellant asked McDonald for a ride home, and McDonald obliged. App. 32 l. 19 – App. 33 l. 10. McDonald put Appellant’s bicycle in the back of his truck and drove him home. App. 113 ll. 12 – 17.

At around 12:37 a.m. the next day, David Capell, an officer with the City of Sumter Police Department, responded to the Youngs Food Market following reports of a break-in. App. 76 ll. 7 – 17. Lottery tickets valued at one hundred and forty-three dollars were missing. App. 266 ll. 14 – 18. Cigarettes valued at approximately four hundred and eighty dollars were missing as well. App. 267 ll. 9 – 15.

After dropping Appellant off at his home, McDonald approached officers at Youngs and “stated that he might have some information.” App. 79 ll. 12 – 24. Capell did not see Appellant enter the store; because he did not participate in any investigations, he does not know whether Appellant broke into the store. App. 93 ll. 4 – 12.

An arrest warrant was obtained after McDonald identified Appellant:

I went to - - based on the witness identifying Mr. McFadden and based on information gathered by the other detectives when they had talked to Mr. McDonald, that he told them that he’d given him a ride and that they were passing

the store that Mr. McFadden slouched down in his seat and became very nervous. All that together, I went to the magistrate and he signed a warrant for his arrest.

App. 293 ll. 13 – 25.

Appellant was subsequently arrested. App. 294 ll. 6 – 8.

Following the close of the state's case-in-chief, counsel for Appellant moved for a directed verdict. App. 368 ll. 3 – 4. He asserted that "[t]he State has not proven facts sufficient to sustain a verdict." App. 368 ll. 5 – 6. In response, the State cited McDonald's testimony that Appellant acted nervous while driving by Youngs Food Market, and that blood matching Appellant's was found inside Youngs Food Market. App. 368 ll. 8 – 20.

Security cameras from Youngs Food Market were not working on July 2, 2009. App. 221 ll. 2 – 25. Law enforcement was unable to find a single fingerprint match to Appellant. App. 341 ll. 11 – 14. A gel lift was used to document a shoe impression from the passenger area of McDonald's truck. App. 319 l. 22 – App. 321 l. 6. However, no footwear was collected in this case. App. 321 ll. 4 – 6.

Nonetheless, the trial court denied Appellant's motion for a directed verdict, finding "that there is sufficient evidence to send it to the jury." App. 369 ll. 6 – 11.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.2d 1 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the

defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home

claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

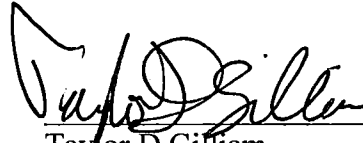
Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In one of the Supreme Court's more recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The prosecution failed to present substantial circumstantial evidence that Appellant entered Youngs and stole the cigarettes and lottery tickets.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and direct a verdict of acquittal in his favor.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of September, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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V.

BERNARD MCFADDEN,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bernard McFadden 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 George C. James, which was held on April 14, 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 Bernard McFadden.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 18th day of September, 2017.

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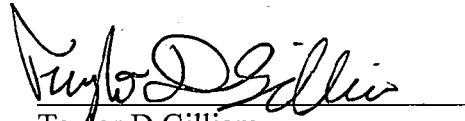
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BERNARD MCFADDEN,

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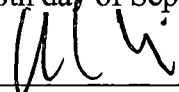
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant pursuant to White v. State has been served on Bernard McFadden, at P.O. Box 1622, Columbia, SC 29202, this 18th day of September, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of September, 2017.



Notary Public for South Carolina
My Commission Expires: 5/12/2025 (L.S)