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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE MALCOLM BENN,

APPELLANT

APPELLATE CASE NO 2016-000846

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Sergeant Niemiec to testify over appellant's hearsay objection that the victim's family confirmed his suspicions that appellant was the shooter since this was very prejudicial inadmissible hearsay evidence in a case where the identity of the shooter was the only issue?

STATEMENT OF THE CASE

Appellant was indicted by the Charleston county Grand Jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 382-385. This case was called to trial on April 11, 2016 before the Honorable Deadra Jefferson. Appellant was represented by W. Ted Smith and Shirene Hansotia. Burns Wetmore was the assistant solicitor. R. 1.

On April 13, 2016 the jury found appellant guilty. R. 364, ll. 8-21. Judge Jefferson sentenced appellant to life imprisonment for murder, and she imposed a five-year concurrent prison term for possession of a weapon during a violent crime. R. 379, l. 22 – 380, l. 8.

This appeal follows.

ARGUMENT

The court erred by allowing Sergeant Niemiec to testify over appellant's hearsay objection that the victim's family confirmed his suspicions that appellant was the shooter since this was very prejudicial inadmissible hearsay evidence in a case where the identity of the shooter was the only issue.

Relevant facts

The murder in this case was videotaped by a surveillance camera outside the Circle A convenience store in Charleston on July 12, 2014. R. 77, l. 9 – 81, l. 20. The only issue in this case was the identity of the shooter.

Sergeant Joseph Niemiec testified over the defense hearsay objection that he developed appellant as a suspect in the shooting. He said the victim's family "confirmed my initial suspicions." Tr. 129, l. 20 – 131, l. 25. Sergeant Niemiec also said that after "talking to the family members and so forth, that was my conclusion at the time [that appellant was the shooter]." R. 130, l. 3 – 132, l. 22.

Charles Martin, a neighborhood resource officer, claimed that he recognized appellant as the shooter on the video. R. 155, l. 21-23. Officer Martin maintained that he recognized appellant's long dreadlocks, and his "funny gait, a run" on the videotape of the shooting. R. 156, l. 14 – 157, l. 13.

The decedent was shot one time in the head from about three feet away. R. 232, l. 3 – 237, l. 15. The state also claimed that appellant made a suspicious statement in a jail call which the state claimed was a confession. R. 324, l. 3 – 326, l. 17. The solicitor maintained that appellant said during the jail call: "Man, I killed that boy. Man, I killed that boy . . ." R. 326, ll. 6-17.

Discussion

The only issue in this case is the identity of the shooter on the videotape. The state claimed that appellant altered his appearance for trial, and the state was obviously worried that the jury might not agree that appellant was the shooter. For that reason the solicitor admitted he was going to allow appellant to plead guilty to voluntary manslaughter based on the problems with the identification. Appellant obviously refused to plead guilty.

Against this backdrop, the state used the patently inadmissible hearsay testimony of Sergeant Niemiec that he “confirmed” with the victim’s family and others that appellant was the shooter.

In Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) the Supreme Court held that defense counsel was ineffective for failing to object to hearsay evidence that corroborated the victim’s statement. The Court noted that the rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the hearsay rule applies. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). The Court wrote that the testimony from other witnesses corroborating the victim’s identification of the perpetrator does not fall within a hearsay exception. See, State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985).

The testimony of Sergeant Niemiec that the victim’s family and others confirmed his suspicions that appellant was the shooter was rank hearsay, it was explosively prejudicial, and it should not have been allowed by the trial court. Appellant was denied the opportunity to confront and cross-examine those other people who allegedly “confirmed” Sergeant Niemiec’s suspicion that appellant was the shooter. See, State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985); State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971).

Appellant should be granted a new trial based on this highly prejudicial inadmissible hearsay evidence that others allegedly "confirmed" appellant was the shooter where identification was the only issue before the jury.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of February, 2017.

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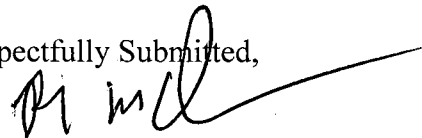
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrone Malcolm Benn states:

1. He is Chief 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 Deadra L. Jefferson, which was held on April 11-13, 2016 (Trial), 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 Tyrone Malcolm Benn.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of February, 2017.

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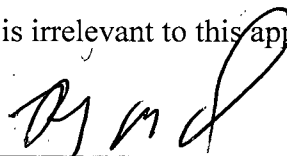
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments:
- (2) Trial Transcript

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

February 28, 2017



Robert M. Dudek
Chief Appellate Defender

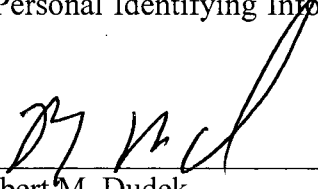
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ATTORNEY FOR APPELLANT

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."

February 28, 2017.



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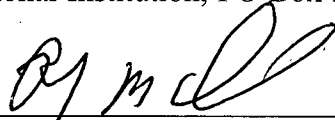
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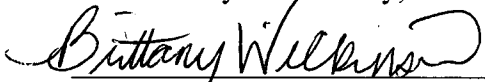
CERTIFICATE OF SERVICE

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 Donald J. Zelenka, 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 Tyrone Malcolm Benn, #306805, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of February, 2017.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of February, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: November 3, 2026.