

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravelly, Circuit Court Judge

ORIGINAL
RECEIVED
SEP 29 2017
SG Court of Appeals

THE STATE,

RESPONDENT,

V.

JIMMY EDWARD DUNCAN,

APPELLANT

APPELLATE CASE NO 2016-002126

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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT 3

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL..... 9

TABLE OF AUTHORITIES

Cases

<u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)	6, 7
<u>Payton v. Kears</u> e, 329 S.C. 51, 495 S.E.2d 205 (1998)	7
<u>Powers v. Ohio</u> , 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)	6, 7
<u>Robinson v. State</u> , 278 Ga. 134, 598 S.E.2d 466 (2004)	6
<u>Skilling v. U.S.</u> , 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010)	7
<u>State v. Cochran</u> , 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006)	7
<u>State v. Hicks</u> , 330 S.C. 207, 499 S.E.2d 209 (1998)	6
<u>State v. Tucker</u> , 334 S.C. 1, 512 S.E.2d 99 (1999)	7
<u>State v. Watts</u> , 320 S.C. 377, 465 S.E.2d 359 (Ct. App. 1995)	7
<u>State v. Williams</u> , 379 S.C. 399, 665 S.E.2d 228 (Ct. App. 2008)	7

Statutes

S.C. Code Ann. § 14-7-1110	5, 7
S.C. Code Ann. § 16-13-10	6
S.C. Code Ann. § 16-13-230	6
S.C. Code Ann. § 16-13-30	6
S.C. Code Ann. § 16-9-10	6
S.C. Code Ann. § 16-9-30	6
S.C. Code Ann. § 44-53-375	6

Constitutional Provisions

U.S. Const. amend. XIV	6
------------------------------	---

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by not providing Appellant with five additional jury strikes, where defendants charged with crimes that entail shorter maximum sentences are provided ten strikes yet Appellant was only allowed five?

STATEMENT OF THE CASE

Appellant, along with twenty-six other co-defendants, was indicted for a drug-related offense by the State Grand Jury of South Carolina on April 12, 2016. R. 581. In particular, Appellant was charged with conspiracy methamphetamine trafficking, four hundred grams or more. R. 585. The State, represented by Joshua Underwood and David Fernandez, called the case for trial on October 3, 2016 before the Honorable Perry H. Graveley and a jury. R. 1. Richard Warder represented Appellant. R. 1. After a four-day trial, the jury found Appellant guilty. R. 537, l. 22 – R. 574, l. 6. Judge Graveley sentenced Appellant to a period of twenty-eight years' incarceration. R. 579, ll. 8 – 10.

This brief follows.

ARGUMENT

The trial judge erred by not providing Appellant with five additional jury strikes, where defendants charged with crimes that entail shorter maximum sentences are provided ten strikes yet Appellant was only allowed five.

Background

Appellant was convicted largely through the testimony of his co-defendants. Nicole Hogue alleged that she and Appellant, along with another co-defendant, purchased methamphetamine from a man nicknamed Cheese on multiple occasions. R. 96, ll. 10 – 24; R. 104, ll. 5 - 8. In exchange for her testimony, Hogue's charge was reduced from trafficking over 400 grams to trafficking between 28 and 100 grams. R. 84, ll. 2 – 13. As a result, the accompanying recommended sentence for Hogue was fifteen years rather than the twenty-five to thirty which Appellant was facing. R. 84, ll. 10 – 13.

Similarly, Stacey Kelley was charged as a result of the same investigation which led to Appellant being indicted. R. 162, ll. 10 – 13. She was charged with trafficking 400 grams or more of methamphetamine as well as distribution, possession, and possession with intent to distribute. R. 162, ll. 14 – 25. She cooperated with law enforcement and testified at Appellant's trial. R. 163, ll. 1 – 11. Kelley testified that she sold methamphetamine which she received from Appellant. R. 166, l. 1 – R. 168, l. 25.

Jeffrey Mauldin likewise testified at Appellant's trial. R. 183. As a co-defendant, he had already pled guilty to two charges. R. 184, ll. 2 – 10. He entered into a plea agreement with the prosecution, and as a result, the State reduced his trafficking charge. R. 184, ll. 11 – 25. He faced a maximum of seven years' incarceration. R. 185, ll. 1 – 3. He claimed to have gone with

Appellant to purchase methamphetamine from a Waffle House in Greenville. R. 191, l. 13 – R. 192, l. 8.

Additional co-defendant also pled guilty or received favorable recommendations from the State. R. 209 – 210; R. 226 – 229; R. 240 – 241; R. 264 -266. Each testified that Appellant was somehow involved with methamphetamine distribution.

Brandy O'Bryant also testified on behalf of the State. R. 282. She claimed to have met Appellant in 2014. R. 285, ll. 18 – 19. She alleged that Appellant sold her methamphetamine “a couple of times a week.” R. 285, ll. 11 – 13; R. 287, ll. 13 – 14. O'Bryant testified that Appellant stored the methamphetamine at a safe in his bedroom. R. 291, ll. 2 – 7. O'Bryant participated in a controlled buy and recorded audio and video of Appellant. R. 326, ll. 7 – 19.

Discussion

At the outset of trial, counsel for Appellant sought ten jury strikes due to the fact that other crimes which are subject to a ten year maximum sentence provide a criminal defendant with ten jury strikes, whereas Appellant was only afforded five even though he faced a twenty-five minimum sentence. R. 12, l. 10 – R. 13, l. 2. As defense counsel articulated:

Your Honor, I would respectfully move for 10 strikes. I think that I understand the statute lists crimes for which it provides for 10 strikes, and this is not one of them. However, Your Honor, the crimes that you do 10 strikes for include Grand larceny, Breach of Trust. I think Forgery's in there. The maximum on those crimes is just 10 years. My client is facing a maximum of 30 years, and I would respectfully propose that is a denial of equal protection with a man that's facing up to 30 years [who] gets no more strikes than a crime that carries much less.

R. 12, l. 10 – R. 13, l. 2.

The trial judge characterized this as “an interesting and novel argument” but denied the motion. R. 13, ll. 3 – 20. He also indicated the law “clearly states that” all crimes not listed in

S.C. Code Ann. § 14-7-1110, shall have only five strikes. R. 13, ll. 11 – 15. Counsel for Appellant posited that this was a denial of equal protection. R. 13, ll. 16 – 17.

During jury selection, counsel for Appellant exhausted all of his peremptory challenges. R. 31, l. 18. Three jurors were thereafter selected at a time when Appellant was unable to strike them except for cause. R. 31 – 34. Appellant preserved his objection and the trial proceeded. R. 34, ll. 3 – 8. Appellant was convicted and sentenced to twenty-eight years' incarceration. R. 573, l. 22 – R. 574, l. 3; R. 579, ll. 8 – 10.

As defense counsel correctly articulated, the maximum sentence facing Appellant was up to three times the maximum penalty for some of the crimes enumerated in the peremptory challenge statute:

Any person who is arraigned for the crime of murder, manslaughter, burglary, arson, criminal sexual conduct, armed robbery, grand larceny, or breach of trust when it is punishable as for grand larceny, perjury, or forgery is entitled to peremptory challenges not exceeding ten, and the State in these cases is entitled to peremptory challenges not exceeding five. Any person who is indicted for any crime or offense other than those enumerated above has the right to peremptory challenges not exceeding five, and the State in these cases is entitled to peremptory challenges not exceeding five.

S.C. Code Ann. § 14-7-1110.

Appellant faced a minimum sentence of twenty-five years and a maximum sentence of thirty years if convicted:

A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine... is guilty of a felony which is known as "trafficking in methamphetamine..." and, upon conviction, must be punished as follows of the quantity involved is:

four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory

minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars.

S.C. Code Ann. § 44-53-375(C)(5).

An individual in South Carolina convicted of grand larceny can be sentenced to a maximum of ten years if the value of the property is ten thousand dollars or more. S.C. Code Ann. § 16-13-30. Breach of trust with fraudulent intent contains a maximum sentence of ten years if the amount in controversy exceeds ten thousand dollars. S.C. Code Ann. § 16-13-230. A person convicted of forgery can be sentenced to a maximum of ten years if the amount of the forgery is ten thousand dollars or more. S.C. Code Ann. § 16-13-10. The maximum sentence associated with a perjury conviction is five years. S.C. Code Ann. § 16-9-10(B)(1); S.C. Code Ann. § 16-9-30.

States such as Georgia, Alabama, and New Jersey frequently provide more jury strikes to the defendant rather than the prosecution. Robinson v. State, 278 Ga. 134, 598 S.E.2d 466 (2004). “The [Georgia] General Assembly has seen fit to grant to the defendant a greater number of peremptory challenges than it grants to the prosecution in an effort to afford the defendant a fair and impartial jury.” Id. at 135, 598 S.E.2d at 468; see also n.2.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venireperson on the basis of race. State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (citing Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) holding modified by Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411

(1991)), cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998); Payton v. Kears, 329 S.C. 51, 495 S.E.2d 205 (1998).

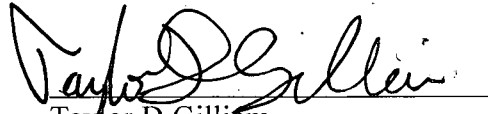
However, a party at trial has a statutory right to exercise peremptory challenged against a proposed juror. S.C. Code Ann. § 14-7-1110. There are many race-neutral reasons why a defendant may want to exercise a peremptory challenge. Counsel may strike venire persons based on their demeanor disposition. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). Additionally, place of employment is a well-understood and recognized consideration in the exercise of peremptory challenges. State v. Williams, 379 S.C. 399, 402-03, 665 S.E.2d 228, 230 (Ct. App. 2008). Perceived prejudice of a juror may also serve as a basis for exercising a peremptory challenge. State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006). A reason offered for the use of a peremptory strike will be deemed race neutral unless discriminatory intent is inherent in the explanation for use. State v. Watts, 320 S.C. 377, 465 S.E.2d 359 (Ct. App. 1995).

The purposes of Batson and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process. Powers v. Ohio, *supra*.

Appellant sought fairness with his pre-trial request. Peremptory challenges provide protection against prejudice. Skilling v. U.S., 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). Five additional strikes would have fallen in line with the number of strikes allowed defendants charged with lesser crimes and thereby protected Appellant's interest in ensuring a fair trial.

CONCLUSION

For the reasons listed above, Appellant respectfully requests this Court reverse his conviction and sentence.

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 29th day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY EDWARD DUNCAN,

APPELLANT

RECEIVED

PETITION TO BE RELIEVED AS COUNSEL

SEP 29 2017

SC Court of Appeals

Counsel for Jimmy Edward Duncan 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 trial before Judge Perry H. Gravely, which was held on October 3 - 6, 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 Jimmy Edward Duncan.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

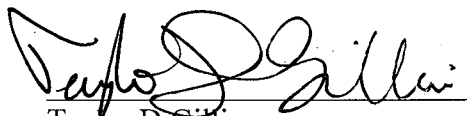
ATTORNEY FOR APPELLANT

This 29th day of September, 2017.

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."

September 29, 2017.



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

RECEIVED

SEP 29 2017

SC Court of Appeals