

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY

The Honorable D. Garrison "Gary" Hill, Circuit Court Judge

Billy John Geisendorff, Appellant

State of South Carolina Respondent

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OCT 05 2017

SC Court of Appeals

PRO SE BRIEF OF APPELLANT

Appellate Case No. 2016-1901

Billy John Geisendorff, #369685
Broad River C.I. - Murray 174
4460 Broad River Rd.
Columbia, SC 29210
Pro Se Appellant

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STATEMENT OF ISSUES ON APPEAL

I

Appellant objects to John H. Strom's petition to be relieved as counsel of record, and that the granting of John H. Strom's petition would deny Appellant his right to Due process and his right to the effective assistance of appellate counsel on his first appeal of right, which is a violation of the Appellate's Sixth and Fourteenth Amendment rights to Due Process on Appeal.

II

The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense. This error was in violation of the appellant's U.S. Constitution 5th and 14th amendment rights of due process; and violated the appellant's South Carolina State constitution Article 1, section 3 due process rights. The state produced insufficient evidence beyond a reasonable doubt to prove the charge of murder.

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Appellant for murder, and possession of a weapon during the commission of a violent crime. R. 570-573. On September 6, 2016, Appellant appeared before the Honorable Eugene C. Griffith Jr. for an immunity hearing held pursuant to Protection of Persons and Property Act (the "Act"), S.C. Code Ann. § 16-11-410 et al. Judge Griffith denied Appellant immunity from prosecution. R. 110, L15-111, L21.

Appellant proceeded to trial before the Honorable D. Garrison Hill and a jury. R. 145-568. Benjamin A. Stitley and Robert T. Williams represented Appellant. Assistant Solicitors Suzanne Mayes and Robert McNair represented the state.

The jury found Appellant guilty of Murder and possession of a Weapon during the commission of a violent crime. R. p. 554, Ln. 15-p. 555, Ln. 18. The trial court sentenced Appellant to a total of thirty years imprisonment. R. p. 568, Lns. 4-7.

I

Appellant objects to John H. Strom's petition to be relieved as counsel of record, and that the granting of John H. Strom's petition would deny Appellant his right to Due Process and his right to the effective assistance of appellate counsel on his first appeal of right; which is a violation of the Appellate's Sixth and Fourteenth Amendment rights to Due Process on Appeal of the U.S. Constitution and violate his S.C. Constitution Article I, section 3 Due Process Rights.

John H. Strom, Esquire was appointed to represent Appellant on direct appeal. On July 7, 2017 filed a no merit appeal pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) claiming the appeal is without legal merit sufficient to warrant a new trial/acquittal while subsequently motioning this court to be relieved of counsel. Appellant objects to John H. Strom's petition to be relieved as appellate counsel on the grounds there are meritorious and substantive issue(s) available and unbriefed that were properly preserved for appellate review during trial.

Appellant asserts he has a right to the effective assistance of appellate counsel on his first appeal as a matter of right of due process on appeal. John H. Strom should not be relieved as counsel and this court should order John Strom to brief the substantive issue(s) Appellant has raised in his Pro-se Merit brief. Appellant believes John H. Strom's petition to be relieved of counsel should be denied and John H. Strom should be ordered to redraft Appellant's brief to contain the underlying substantive issue(s).

Accordingly the Sixth Amendment as applied to the States through the Fourteenth Amendment, guarantees a criminal defendant the right to counsel on his first appeal as of right. See Douglas v. California, 372 U.S. 353, 356 (1963). It also guarantees his the effective assistance of counsel on appeal, Lucy v. Ewitt, 469 U.S. 396 (1985). In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 3311, the court held that since Anders v. California, 386 U.S. 738 (1967) the court has held that since Anders bars counsel from abandoning a non-frivolous appeal, it also bars counsel from abandoning a non-frivolous issue on appeal.

Under Anders v. California, 386 U.S. 738 (1967), the Court held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a non-frivolous appeal -- appointed counsel must present on appeal all non-frivolous arguments requested by his client. In the instant matter Mr. Strom has abandoned substantive meritorious issue(s) that in granting Mr. Strom's petition to be relieved as counsel will result in a denial of effective assistance of counsel on appeal and a denial of due process. The underlying substantive claim(s) that Mr. Strom's has abandoned are raised pro-se herein the instant pro-se merits brief.

Appellate counsel John H. Strom had provided Appellate with ineffective assistance of appellate counsel by failing to find non-frivolous arguable issues and failing to file a merits brief on issues that the Appellant would have prevailed on in his appeal. ("A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel.") Evitts v. Lucey, 469 U.S. 387, 398 (1985); U.S.C.A. Const. Amend. 6 ("Appellate counsel is required to raise every issue to which there is a reasonable likelihood of success.") U.S.C.A. Const. Amend. 6 - Id. Appellant counsel shouldn't have found Appellate's case wholly frivolous after his "conscientious examination" of it. Meritable issue(s) were raised to the trial court and preserved for appellate review. Appellant counsel was ineffective for not doing a merits brief on these issue(s) that were preserved for appellate review, thus not perfecting Appellant's appeal. ("Counsel found ineffective for not perfecting appeal for indigent defendant.") Frasier v. State, 410 S.E.2d 572 (1991)

Appellant counsel should of filed a merits brief on those preserved issues. ("Finding that even where appellate counsel believes his client's appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits brief and the challenge of appellate counsel's performance should be reviewed under Strickland.") Smith v. Robbins, 528 U.S. 259, 284 (2000) The issue(s) that Appellant briefed and Appellant counsel briefed are arguable issues of merit. The granting of Appellant counsel's petition to be relieved of counsel of record and the dismissal of Appellant's appeal

is an unfairness which makes the result of the dismissal of Appellant's appeal a denial of due process and violates other state and federal rights of petitioner. Appellant will show why the issue(s) that appellate counsel and Appellant raised are nonfrivolous and of arguable merit by addressing the arguable merit of these successful prevailing issues. Appellate ask this court to please after reviewing its decision on Appellant's appeal to reinstate his appeal and allow his appeal to proceed under the normal appellate process. The granting of Appellant Counsel's Anders petition would be a violation of the Appellant's sixth and fourteenth Amendment rights to Due Process on Appeal of the U.S. Constitution and also violates his S.C. constitution Article 1 section 3 Due process rights to effective appellate counsel on appeal.

II

The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense. This error was in violation of the appellant's U.S. Constitution 5th and 14th amendment rights of due process, and violated the appellant's South Carolina state constitution Article 1, section 3 due process rights. The state produced insufficient evidence beyond a reasonable doubt to prove the charge of murder.

Appellant's claim arises out of the Due Process clauses of the 5th and 14th Amendments of the United States Constitution, which protect an accused against conviction unless the state supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accused is charged. Due process as guaranteed by the 14th Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979); In re Winship, 397 U.S. 358, 364 (1970) similar protections are provided in the South Carolina State Constitution; see S.C. Const. Art. I, section 3 "The guilt of the accused, of course, must be proven beyond a reasonable doubt. The reason for this rule is that all presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved to be guilty." State v. Hyder, 131 S.E.2d 96, 100 (1963) "A conviction based on insufficient evidence violates a defendant's due process rights." Shoemaker v. Taylor, 730 F. 1778 (9th Cir. 2013) "once a state has created a liberty interest, the Due Process clause requires fair procedure for its vindication." Burnette v. Fahey, 687 F.3d 171 (4th Cir. 2012) "This principle prohibits the use of evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime." Sandstrom v. Montana, 442 U.S. 510 (1979)

"In Winship the court emphasized the societal interest in the reliability of jury verdicts: the requirement of proof beyond a reasonable doubt has a vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . . Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." Mullaney v. Wilbur, 421 U.S. 684, 699-700 (1975), In re Winship, 397 U.S. 363, 364 (1970) "Both the court's opinion and the concurring opinion of Mr. Justice Harlan in In re Winship, supra, stress the importance of proof beyond a reasonable doubt in a criminal case as "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 363, 372 (1970)

"Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." United States v. Bailey, 444 U.S. 394, 402 (1980) "A defendant may not be convicted of a criminal offense unless the state proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." State v. Ferguson, 395 S.E. 2d 182, 183 (1990) see also State v. Fennell, 531 S.E.2d 512, 515 (2000) (required mental state for particular crime may be purpose, intent, knowledge, recklessness, or criminal negligence) "Hence it is only necessary for us to ascertain the intent with which the act was committed." State v. Friend, 281 S.E.2d 106 (1981)

"Intent is a question of fact and is ordinarily for jury determination." State v. Tuckness, 185 S.E.2d 607 (1971) "Intent may be shown by acts and conduct from which a jury may naturally and reasonably infer intent." State v. Foust, 479 S.E.2d 50, 52 (1996) "Determining criminal intent may be

found by the jury upon consideration of words, conduct, demeanor, motive, and all other circumstances connected with the prosecuted act." Terrell v. State, 601 S.E.2d 500 (2004) Concomitantly, a person "is said to act knowingly if he is aware the result is practically certain to follow from his conduct, whatever his desire may be as to that result." United States v. Bailey, 444 U.S. 394, 405 (1980); State v. Jefferies, 446 S.E.2d 427, 431 (1994) "Intent or mental state is subjective, but it may, and usually must, be proven objectively from the circumstances." Harrell v. Commonwealth of Virginia, 396 S.E.2d 680, 682 (1990) "Intent may be proved with evidence of the character of the means or instrument used." Foust, 479 S.E.2d at 51 (1996); 41 C.J.S. Homicide § 195 (1991), see also 41 C.J.S. Homicide § 179 (1991) (Intent to Kill may be inferred from "the character of the assault, the use of a deadly weapon with an opportunity to deliberate, or the use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm") "Likewise, the manner in which the instrument was used, the purpose to be accomplished, and the resulting injuries may also prove intent." see 41 C.J.S. Homicide § 195 (1991) "General Intent" is defined as "the state of mind required for the commission of certain common law crimes not requiring specific intent," and it "usually takes the form of recklessness, or negligence." Black's Law Dictionary 813 (7th ed. 1999)

In this case the Appellant was charged with Murder and the charge of possession of a weapon during the commission of a violent crime. The Appellant's defense against these charges was self-defense. At the end of the State's case, trial defense counsel for the Appellant moved for a directed verdict motion on the fact that the evidence as a whole is insufficient as a matter of law to proceed forward to a jury. (Trip. 491, Lns. 11-14) The trial court denied the motion with its ruling on directed verdict (Trip. 491, Lns. 15-22) Later in the Appellant's case trial defense counsel rested Appellant's case and renewed all previous motions including our directed verdict motion as they were done with the case. (Trip. 507, Ln. 2 - p. 508, Ln. 8) At the end of trial after the jury's verdicts, trial defense counsel for appellant made a motion to set aside the jury verdict

as the evidence was insufficient for conviction; and counsel requested for a new trial. Additionally, counsel renewed all previous objections to all rulings both pretrial and during trial. The trial court denied those motions. (Tr. p. 555, Ln. 25 - p. 556, Ln. 12) This motion preserved all the other motions, issues, and especially the Directed Verdict motion for appellate review. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court." State v. Turner, 644 S.E.2d 693, 696 (2007) "Sufficiency of evidence not properly presented in absence of motion for directed verdict or new trial." State v. Bethea, 120 S.E. 239 (1923) "Contention that evidence was insufficient to sustain convictions was not available on appeal where no motion for directed verdict or for new trial on ground that evidence was insufficient to support convictions was made in trial court." Circuit Court Rules, rule 76; State v. McCrary, 131 S.E.2d 687 (1963); State v. Todd, 213 S.E.2d 99 (1975) "objection to sufficiency of evidence cannot be raised for first time in motion for new trial" motion for directed verdict is prerequisite to motion for new trial on ground that evidence does not support verdict." Peay v. Ross, 357 S.E.2d 482 (1987)

Appellant's case is one of self-defense; in where Appellant had to protect himself from the deceased Bobby Christofoli. The Appellant didn't testify at trial because trial counsel told Appellant not to testify; but there was evidence at trial that shown that the Appellant didn't commit the crime of Murder. At the Appellant's sentencing phase of his trial, Appellant testified that he was sorry for the family's loss and that he didn't want what happened to the deceased to happen. He didn't want that night to happen, where the deceased was killed and he was deeply sorry for the family's loss again. (Tr. p. 566, Lns. 4-8) Appellant further stated that the deceased attacked him and that he would take a lie detector test to prove that he was innocent. (Tr. p. 566, Ln. 9 - p. 567, Ln. 18) Evidence presented at trial showed that the deceased was physically a lot bigger than the Appellant. (Tr. p. 66, Lns. 16-24), (Tr. p. 71, Lns. 7-17), (Tr. p. 120, Lns. 7-11), (Tr. p. 135, Lns. 6-9), (Tr. p. 214, Lns. 2-21) The deceased was also drunk that night after he had drunken many beers. (Tr. p. 62, Lns. 16-24), (Tr. p. 67, Lns. 2-7), (Tr. p. 68, Lns. 1-2), (Tr. p. 86, Lns. 12-21), (Tr. p. 87, Lns. 20-21), (Tr. p. 402, Ln. 8 - p. 404, Ln. 1d)

(11)

The deceased kept going to the Appellant's residence, even when he was told to let things go, and he was told to leave the property. The deceased went to the Appellant's residence to threaten the Appellant and cause problems. (Trip. 68, Lns. 3-24), (Trip. 69, Lns. 3-15), (Trip. 69, ^{Ln} 22 - p. 70, Ln. 16) (The deceased even provoked the Appellant to use his weapon.) (Trip. 70, Lns. 19-22), (Trip. 73, Lns. 2-12), (Trip. 85, Lns. 12-15), (Trip. 88, Lns. 7-16), (Trip. 98, Lns. 4-6), (Trip. 99, Ln. 21 - p. 100, Ln. 4), (Trip. 195, Lns. 23-25), (Trip. 198, Ln. 24 - p. 199, Ln. 4), (Trip. 199, Lns. 14-25), (Trip. 217, Lns. 12-20), (Trip. 223, Lns. 1-10)

There was also evidence presented that the Appellant gave warning shots before he shot the deceased. The evidence also showed that the defendant was attacked and had no choice but to defend himself. The Appellant had to act in self-defense, the Appellant was scared for his life. (Trip. 117, Lns. 10-17), (Trip. 118, Ln. 24 - p. 119, Ln. 3), (Trip. 119, Lns. 14-15), (Trip. 133, Lns. 11-15), (Trip. 134, Lns. 16-20), (Trip. 135, Lns. 6-9)

All of the above evidence shows that the Appellant did not commit the crime of murder. The evidence shows that the defendant did act in self-defense, and if anything the state did not prove murder beyond a reasonable doubt. "The state bears burden of proving all elements of a criminal offense beyond a reasonable doubt," State v. Head, 498 S.E.2d 389 (1997) "The state is required to prove every element of a charged offense to obtain a conviction," State v. Jackson, 527 S.E.2d 367 (2000) "A defendant may not be convicted of a criminal offense unless the state proves beyond a reasonable doubt that he acted with criminal intent, or mental state, required for a particular offense," State v. Fennell, 531 S.E.2d 512 (2000) "A conviction based on insufficient evidence violates a defendant's due process rights," Shoemaker v. Taylor, 730 F.778 (9th Cir, 2013) "The guilt of the accused, of course, must be proven beyond a reasonable doubt. The reason for this rule is that all presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved to be guilty," State v. Hyder, 131 S.E.2d 96/100 (1963) "Claims of insufficiency of evidence to support conviction are

Cognizable claims of due process violations,") Jackson V. Virginia, 443 U.S. 307, 316 (1979)

As such, the Appellant should receive an acquittal of the charge of murder because the state did not prove murder beyond a reasonable doubt and there was insufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the Appellant committed the crime of murder, this conviction is a violation of the Appellant's Due Process Rights of the U.S. constitution 5th and 14th Amendments and the S.C. Constitution Article I, section 3 due process rights, for this, the Appellant should be acquitted of the murder charge and released from incarceration.

CONCLUSION

Wherefore, Appellant respectfully ask this Honorable court to please reconsider its decision in dismissing the Appellant's appeal and please reinstate his appeal, and order Appellant's appeal counsel to rebrief and file a merits brief for Appellant on these meritable prevailing issues; when these issue are of arguable merit. "Had counsel presented these issues and other issues in a competent manner there is a reasonable probability the court of appeals would have rule in his favor." United States v. Saint Prix, 672 F.2d 1077 (2nd cir. 1982). Appellant prays that the Appellate court will reinstate his appeal, direct the parties to file merit briefs, and allow the case to proceed under the normal appellate process.

Respectfully submitted,

Billy Geisendorff

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY

The Honorable D. Garrison "Gary" Hill, Circuit Court Judge

Appellate Case No. 2016-1901

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Billy John Geisendorff, Appellant

OCT 05 2017

State of South Carolina, Respondent

SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned Pro Se Appellant hereby certifies that a true copy of the Appellant's Pro se Appeals Brief has been placed in the U.S. Postal Mail, postage paid and addressed to the clerk for the South Carolina Court of Appeals at the following address, on this 26 day of September, 2017

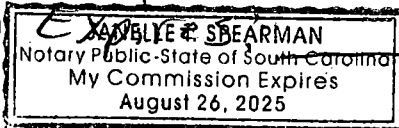
Jenny Abbott Kitchings, clerk
1220 senate street
Columbia, South Carolina 29201

Subscribed and sworn to before me
this 26th day of September 2017

[Signature]
Notary Public for South Carolina

[Signature]
Billy John Geisendorff, 36968!
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My commission



Billy John Geisendorff, 369685
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September 24, 2017

Jenny Abbott Kitchings, clerk - S.C. court of Appeals
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RE: Filing of Pro se Appellant brief; case no: 2016-001901

Dear Mrs. Kitchings,

Hello, this letter comes asking for you to please file my Pro se Appellant brief with the Court of Appeals. I ask that you also please clock/dated stamp my prose brief and please send back to me a clock/dated stamped copy of the prose brief that I sent in to you.
I thank you for all of your help and concern.

Sincerely,

Billy John Geisendorff

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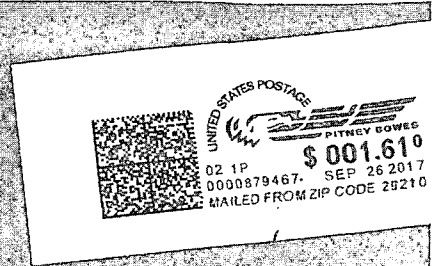
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