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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Abbeville County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KARLITA DESEAN PHILLIPS,

APPELLANT

APPELLATE CASE NO. 2015-002334

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Whether the trial court erred in only allowing 5 peremptory challenges for accessory before the fact of murder when it carries the same sentence as murder?

II. Whether the trial court erred in denying defense counsel's motion for a directed verdict to the charge of accessory before the fact of murder when appellant was present at the scene of the murder?

STATEMENT OF THE CASE

Appellant was convicted of accessory before the fact of murder and using a minor to commit a violent felony after a jury trial held on July 15, 2015, and from July 20-23, 2015, before the Honorable Frank R. Addy in Abbeville County. Respective sentences of life imprisonment and fifteen (15) years were imposed. Patricia Bolen, Esquire and Janna Nelson, Esquire were the defense attorneys. David M. Stumbo, Esquire and Yates Brown, Esquire were the solicitors.

This appeal follows.

ARGUMENT I

The trial court erred in only allowing 5 peremptory challenges for the charge of accessory before the fact of murder because it carries the same penalty as murder which allows 10 peremptory challenges.

The trial judge announced to the jury panel that they were going to proceed with selecting a jury and that the defense would have 10 strikes and the State would have 5 strikes. (R. p. 20, ll. 8-11)[1] There was a notation of a sidebar being held and the trial judge said, "Corrections. Strikes will be five and five." (R. p.21, ll. 7-9) After the jury exited the courtroom, the trial judge put on the record what was said at the sidebar. After he said the defense would be allowed 5 challenges, defense counsel said they felt they should have 10. The judge showed them S.C. Code §14-7-1110 which identifies what crimes are entitled to 10 challenges. (R. p. 31, line 25 – p. 32, line 16)

Defense counsel noted that 10 strikes should have been allowed as the accessory charge carried the same penalty as murder. She also said if she had been given 10 strikes she would have used one of them to strike the young woman, Ms. Stone, whose grandfather was the Abbeville County Sheriff. The trial judge noted the objection when it was made and said the record was protected. (R. p. 32, line 19 – p. 33, line 17)

The trial court's decision in this case was in error. The pertinent part of the S.C. Code §14-7-1110 reads as follows:

> 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

[1] All transcript page numbers refer to the July 20-23, 2015 transcript unless noted otherwise.

> 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.

Against this legal background one should note, the legal maxim that penal states are to be construed strictly against the State and in favor of the defendant. State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). Accessory before the fact of murder carries the same penalty as murder and should be allowed ten peremptory challenges as does a charge of murder. To interpret the statute otherwise leads to an absurd result. State v. Allen, 314 S.C. 539, 541, 431 S.E. 2d 563, 564 (1993).

ARGUMENT II

The trial court erred in denying defense counsel's motion for a directed verdict to the charge of accessory before the fact of murder because appellant was present at the scene of the murder.

The indictment charging appellant with murder alleged that on or between the dates of February 1, 2013, and March 25, 2013, in Abbeville County she did feloniously, willfully, and unlawfully aid in the commission of a felony or was an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed, to wit: murder.

Appellant was also charged with using a minor to commit a felony in that she did willfully, unlawfully, and knowingly did use, solicit, direct, hire, persuade, induce, entice, coerce, or employ a person under 18 years of age, Tavarious Settles, to commit the crime of murder.

The State's theory of the case was that appellant wanted her estranged husband, Dale Phillip, Jr., murdered. Dale lived with his parents along with his younger brother Jamil Phillips. On March 25, 2013, appellant's car was used to drive to the Phillip's residence and Tavarious Settles, also known as, Purp, thought he was shooting Dale Phillips when in reality he shot Jamil Phillips. Cigarette butts found at the scene of the shooting had DNA which matched that of Purp's DNA. (R. p. 34, line 22 – p. 38, line 15)

Appellant gave several statements to the police. First she denied any involvement in the incident. (R. p. 155, line 12 – p. 156, line 9) Then she admitted loaning her car to Purp. She said she did not pull the trigger but she then said she took Purp to the house. She said she got the ball rolling. (R. p. 184, ll. 1-20) Later, she said in another statement that she just wanted somebody to beat her husband up. It would be better to do it at his house. Purp said he would do it. She said she never wanted her ex-husband murdered by Purp. (R. p. 234, line 24 – p. 296, line 16)

Purp testified for the State. He was 16 years old back in March of 2013. He was in a relationship with appellant. He shot Jamil Phillips with a .38 caliber revolver. The intended target was appellant's husband. Appellant wanted the insurance money. (R. p. 338, line 20 – p. 340, line 14) Appellant drove her car to the Phillip's residence on the evening of the shooting. She took Purp with her. Purp was in the bushes before he shot Jamil. He was on the side between the house and the car. He was smoking cigarettes at the scene. (R. p. 341, ll. 1-17) Purp said he ran up and started shooting when Jamil was on the front porch. Appellant was in her car. (R. p. 342, ll. 1-14)

After the State rested their case, defense counsel moved for a directed verdict to the charge of accessory before the fact of murder because the State failed to prove an essential element of the crime which was appellant's absence from the scene of the crime. The corpus delicti of the crime has to be proven without appellant's statement.[2] The evidence that appellant was at the scene of the crime came from Purp's testimony during the trial. (R. p. 356, line 6 – p. 357, line 13)

It is obvious that the State was relying on their theory of the case as an accessory before the fact before they heard Purp's testimony which showed appellant was at the scene. If appellant had driven Purp to the scene of an armed robbery and then drove him away from the scene she would not have been an accessory before the fact of armed robbery. Rather, she would have been charged under the theory of the hand of one is the hand of all. The State could have done that also in this case.

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[2] The concept of having to have proof from other than a Defendant's statement is not new in South Carolina. A conviction cannot be had on the extra-judicial confessions of a defendant unless they are corroborated by proof aliunde of the corpus delicti. State v. Osborne, 335 S.C. 172, 516 S.E.2d 201 (1999); State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996); Brown v. State, 307 S.C. 465, 415 S.E. 2d 811 (1992). See also, "Proof of the Corpus Delicti Aliunde the Defendant's Confession," 103 U. Pa. L. Rev. 638 (1955).

The trial court denied the motion for a directed verdict to the accessory before the fact of murder charge finding that even independent of appellant's statements, a jury could find that appellant was not at the scene of the crime! (R. p. 360, ll. 7-22) That ruling was in error. It is clear that to be an accessory before the fact of murder the accused cannot be present at the scene when the crime was committed. State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In Smith, the lower court's grant of a new trial was upheld by the Supreme Court on the accessory before the fact of a murder charge. The court noted that there was no evidence to support the accessory charge but Smith did not appeal the denial of the directed verdict motion, so the only relief they could give him was a new trial. In Gentry, there was a factual basis for sending the case to the jury because a second shooter and the defendant both testified that the defendant was not at the scene.[3]

[3] The dissent in Gentry also said it took a more expansive view of what constituted presence at the scene. J. Pleicones, 363 S.C. at 109, 610 S.E.2d at 503.

CONCLUSION

This court should grant a new trial for not allowing appellant 10 peremptory strikes. This court should grant a directed verdict of the charge of accessory before the fact of murder.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2016.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Final 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."

December 16, 2016

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