

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

The State,

Respondent,

v.

Kevin Tyrone Bryant,

Appellant,

APPELLATE CASE NO. 2016-002490

PRO-SE BRIEF OF APPELLANT

By: Kevin Tyrone Bryant
BRCI-Wateree Unit
4460 Broad River Road
Columbia, S.C. 29210

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SC Court of Appeals

PROCEDURAL STATEMENT OF CASE

In April of 2015, the Appellant was Indicted out of Horry County South Carolina, charged with Murder. (2015-GS-26-1708). Based on his innocence, Appellant elected to proceed to trial by an impartial judge and jury. Appellant was represented by Ms. Kia T. Wilson, during trial. The State was represented by Joshua D. Holford and Seth A. Oskin.

The trial lasted from December 5-8, 2016, and thereafter, the jury found Appellant guilty of the charge of murder. And Judge John sentenced Appellant to life in prison.

A timely notice of appeal was served on December 12, 2016, and Appellant was represented on appeal by Ms. Katerine H. Hudgins, of the South Carolina Commission on Indigent Defense. To which compiled a appeal brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

This Court admonished Appellant that "he has forty-five (45) days for which to construct a pro-se appeal brief". To which Appellant contacted appeal counsel to inform; "he had not received the Anders brief as of the second week of October 2017". Shortly thereafter, "Appellant received the Anders Brief". But requested 'an extension' based on the tardiness of receiving the brief, and issues dealing with institutional lock-downs. Which Appellant now brings forth his to outline "any issues he believes the Court should consider".

Appellant's Pro-Se Brief, Argu. One.

Appellant begins, as a housekeeping matter. Opposes the initiation of the case to the Court of Appeals by Anders procedures, when there are obvious issues which could have been raised in connection with the issue asserted by the Indigent Defense.

As a result, in accordance with Anders, that Court noted beginning with Griffin v. Illinois, 351 U.S. 12 (1956); "that equal justice was not afforded an indigent appellant where the nature of the review depends on the amount of money he has", at 19, and continuing through Douglas v. California, 372 U.S. 353 (1963), this Court has consistently held invalid those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary finding that his case is without merit, is forced to shift for himself".

Appellant finds the above circumstance present in this case, whereas, a merits brief as opposed to an Anders, should instead have been filed. But due to the volume of cases assigned to the Commission on Indigent Defense attorneys. That alone result in countless appeals being misfiled pursuant to Anders, when the cases, such as the instant one at bar. "Deserves further review where a colorable claim of 'actual, factual innocence can be demonstrated".

OUTLINING TRIAL CIRCUMSTANCES

The trial of Appellant began with the official charge by Indictment, which reads as follows:

On February 15, 2015, the defendant did willfully, feloniously, and intentionally kill the victim, Sequan Vereen, with malice aforethought either expressed or implied, by means of lying in wait for the victim in a public place and did shoot the victim multiple times with a **semi-automatic handgun**, and the victim did die as a proximate result thereof on or about 2/15/2015, in Horry County, in violation of Section 16-3-10, S.C. Code Ann. (1976).

At the beginning of trial, the opening began by the State ~~attesting~~ testing with facts from it's internal investigation (or lack thereof). Claiming that Appellant was the shooter in a fatal shooting that occurred outside of Club Levels, in Myrtle Beach South Carolina.

Two private security officers claimed to have witnessed the shooting and returned fire. As Officer Daniel Eddy of the Myrtle Beach Police Department was in route to Club Levels, in response to the shooting call. He noticed an individual in the parking lot of the Human Resources Building, about a block away from the club. (R. p. 228, line 8, p. 229 1-23) The individual was later identified as Appellant. (R. p. 231, lines 13-16). The Appellant had in fact suffered a gun shot wound in the arm. (R. p. 227, lines 8-13). At the time Officer Eddy stopped; "he was not certain if Appellant was another victim of the shooting or a suspect". (R. p. 232, lines 2-8). Which in this instant case "says a lot".

The trial court then directed both on the Niels v. Bigger, hearing, involving the witnesses identification of Appellant. (R. p. 48, lines 19-21) Where Mr. Pettengill was "one of the security officers returning fire" at an alleged suspect.

In Pettengill's testimony, he recounted the night in question, "that he turned once the gunshots were fired". (R. p. 63, lines 23-25) And returned fire. That he then recovered the 'weapon' from the street, gave a description of the suspect as (a) being approximately 185 to 200 pounds (b) and approximately 6 foot tall, wearing all black clothing.

Officer Michael Merfert, on Direct took the stand and recalled the night of the shooting. (R. p. 68, lines 10-25). Officer Merfert testified after he arrived on scene, he met with Officer Poston, who was on the scene and returned fired at the shooter. (R. p. 69, lines 20-25)

Officer Merfert "also explained that Officer Poston, after he returned fired noticed the suspect limping, and running away in a northern direction". (. p. 71, lines 23-25). However, "neither witness that returned fire could attest to seeing the suspect's face". Moreover, Officer Poston also testified 'himself'; that when the shooting occurred, "he was facing away from the incident". (R. p. 78, lines 1-13)". Just turned and began shooting.

The private security officers "Sean Pettengill and Ronald Poston" were taken from Club Levels to the Human Resource Building for

a show-up identification. (R. p. 47, lines 1-25, p. 48, lines 1-25); (R. p. 70, lines 1-25). Prior to the show-up identification, Pettengill described the shooter as an approximately six feet tall black male wearing all black pants and a black hoodie. (R. p. 54, lines 18-24). Pettengill admitted that he may have initially described the shooter as having short dreadlocks. (R. p. 61, lines 9). Pettengill also admitted "he never saw the shooter's face". (R. p. 61, lines 5-9).

The second officer, Officer Poston (R. p. 83, lines 21-25) also testified, "he never saw the suspect's face". But noticed the suspect had been hit, and "seen limping away". (R. p. 71, lines 21-23). (According to Poston's statement to Officer Merfert, R. p. 69, lines 20-23).

More importantly however, "is the testimony of Officer Kelly Lynn Matterson (R. p. 478, lines 5-10), wherein she stated she was called out to the scene to administer a GSR (Gun Residue Test) of the Appellant", soon after the shooting incident had occurred. Needless to say; "No DNA or GSR connected Appellant to the murder weapon, or for that matter, connected Appellant to 'recently having fired a gun". And the State intentionally omitted the forensic findings, "knowing if it had done so, the State would have certainly lost this case".

ISSUE AND ARGUMENT TWO

WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A DIRECTED VERDICT IN THIS CASE. Where "NO" evidence existed to PLACE APPELLANT IN POSSESSION OF A FIREARM, OR HAVING RECENTLY DISCHARGED ONE?

Again, Appellant was charged with the murder of Saequan Varen, outside Club Levels in the Myrtle Beach area of South Carolina. The Indictment in this case specifically entails "the murder was committed with the firearm recovered from the scene". Appellant was placed in custody minutes later. Whereas, all law enforcement present "could not discern whether Appellant was the shooter, or whether he was hit with a stray bullet".

Under the United States Constitution, the Sixth Amendment requires "proof beyond a reasonable doubt of every essential element of the crime in which the accused is charged", beyond a reasonable doubt. See also the Fifth Amendment, U.S.C.A.

And a conviction in circumstantial evidence cases "will be reversed if evidence points equally to a theory of innocence and guilt". See U.S. v. Mulderig, 120 F.3d 354 (5th Cir. 1997). When the State opted to accuse the Appellant of fatally shooting a semi-automatic weapon into another person resulting in death. They are required to suffer the minimum "of proving Appellant had possession of the murder weapon. Or, explain to the satisfaction of jurors, why didn't the State prove possession of the murder weapon.

What's more suspicious is where "the proper investigations had been performed (DNA and GSR Tests), yet the State intentionally withheld the results". That could have meant one thing; "Appellant never had possession of the murder weapon. And thus, could not have committed the crime."

In State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (S.C. 2016), the state argued the court of appeals erred in reversing the trial court's denial of a directed verdict motion. On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in light most favorable to the State. State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). The Court is limited to considering the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004).

When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on the facts or circumstances which do not amount to "PROOF". State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). Nevertheless, a court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. See State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996).

Thus, this is not a case "where a witness stated they saw the Appellant kill the victim". Or for that matter, a case in which t
the

the accused remained at large with a opportunity to rid himself of his DNA from the firearm; or rid himself of gun-shot residue on himself and clothing, after multiple shots had been fired. Instead, "what the state's case suggest Appellant did, without any "physical evidence" (i.e. DNA or Gun Shot Residue), is a impossibility. Thus, "there is a nonexistence of physical evidence in this respect". And a directed verdict was logically required.

In conclusion of this issue. This case presents a clear episode of misidentification. Based on the security guards shooting the wrong person (the limping individual), and was afraid to live up to the consequences of their actions. But the State had begun "the ball rolling" against Appellant. And after obtaining the SLED Lab Reports (DNA and GSR). The "unconstitutional win at all cost" kicked in, and they tried a innocent person for a crime in which logic dictates a different result. All the while "concealing the DNA results from the defense, which is another matter entirely". Under Brady v. Maryland, where such evidence "or the nonexisting as it remains in this case", would have been an exculpatory matter. (Proving one's innocence) And therefore, reversal is compelled under the circumstances of this case.

As in Bennett, his DNA was found at a place putting him at the crime scene. Coupled with his fingerprints which raised only a suspicion in the court's view. The court weighed the evidence and reversed based on its conclusion that "there was a plausible alternative theory inconsistent with Bennett's guilt". For that reason also, this case should be reversed and remanded.

WHETHER THE LOWER COURT ERRED IN DENYING
THE MOTION FOR A DIRECTED VERDICT BASED
ON THE FACT APPELLANT HAD SUSTAINED A GUN
SHOT WOUND, AND BEING IN CLOSE PROXIMITY?

Here it is undisputed 'several officers' arrived on the scene of Club Levels immediately after the shooting incident. In particular, Officer Jeffery K. Thomas, testified the Appellant "kept saying to him; "he got shot, he got shot for nothing". (R. p. 160, lines 14-22)

Attorney Kia Wilson, (R. p. 571, lines 4-10) moved for a directed verdict because the state's case only raised a suspicion of guilt based on circumstantial evidence. And under such conditions, a directed verdict may be granted.

The lower court came back (R. p. 572, lines 12-25; p. 573, lines 1-7) with the following explanation to deny such request:

"In this particular case, we have certain direct evidence and substantial circumstantial evidence. We have evidence of an individual matching the description of the Defendant, who clearly was the shooter of the victim, and within an extremely short period of time the Defendant is found matching the description of the shooter with a gunshot wound. When he is treated with the gunshot wound, a bullet falls from the wound out of his clothing. That bullet is seized into evidence, it is matched through scientific evidence to the weapon fired by the security guard at the shooter. That in and of itself, is more than sufficient evidence to bring this matter to the jury's attention disregarding all other evidence produced in this matter". Id.

Holding in mind the above lower court's reasoning for denying the motion for directed verdict. Was not based on sound objective judicial determinations in light of the defense theory in this case..Even in light most favorable to the state.

For instance; "even when investigators arrived on sight which had the opportunity to confront the Appellant". Rather than "run-away" from police presence. Appellant walked towards police and gave this statement; "I just heard shots and began running" (R. p. 145, lines 9-14; R. p. 148, lines 10-14), and believed 'He' had gotten shot. The Club video confirms "everybody on the outside scattered" once gun shots rang out.

This created more than an "equal theory of innocence", when comparing the theory of guilt. See U.S. v. Mulderig, 120 F.3d 354 (5th Cir. 1997). Because, "Appellant sustained a gunshot wound by the security officers", that in and of itself cannot connect the shooting to Appellant without more. This is why.

According to South Carolina Law Enforcement (SLED). Gun shot residue testing is still a viable from of obtaining physical evidence in cases involving discharging a firearm. Gun shot residue, or simply GSR, is a means of testing for the presence of certain materials on the hands and the clothing of a suspect in hopes of determining that this individual may have discharged a firearm. With the only controversy surrounding GSR testing involves "the mistaken transfer of residue from the shooter to other persons, or surfaces".

The state was aware of the significance of a GSR test in this case. And Officer Kelly Lynn Matteson, was called "to collect items of clothing from Appellant, as well as secure his hands in order to perform the GSR test". (R. p. 478, lines 5-10).

Thus, the lower court was aware; "because Appellant was shot by the security officer, any person wearing the same type of clothing would also be a shooting suspect" in this case. But the scientific evidence cannot merely be overlooked, or rather, "the omission thereof. "Knowing the GSR test was performed".

A equal theory of guilt and innocence compels reversal by this Court of Appeals. See U.S. v. Holmes, 406 F.3d 337, 2005 WL 768942 (5th Cir. 2005). Holding; "in reviewing a challenge to the sufficiency of the evidence, courts of appeal view all the evidence and the reasonable inferences drawn therefrom in the light most favorable to the verdict, and ask 'whether a rational trier of fact could have found that the evidence established the elements of the offense beyond a reasonable doubt'". United States v Smith, 296 F.3d 344, 346 (5th Cir. 2002)

Thus, even the Appellant in his defense to said allegations of murder. Agreed he'd been in close proximity to the club during the shooting, and was shot as a result thereof. The court's conclusion that this in and of itself "makes Appellant the shooter", under any objective standard of review is wrong, and incorrect, when the defense position was; "Appellant was not the shooter and instead a innocent by-stander that caught a stray bullet. And such

could not have come from any other entity except the security officers, "that panicked and shot wildly". Hitting Appellant in the arm. (whereas, someone else had to have been shot in the leg, as testimony saw a suspect 'limping away'). (R. p. 56, line 1; p. 71 line 23)

In conclusion, "because we have evidence the state performed both the GSR and DNA test on the weapon immediately after the firearm was discharged". And sent Appellant's DNA and GSR kit to SLED to be tested. Appellant claims (as did Mulderig), "the State committed reversible error by its failure to supply the defense with the "RESULTS" of the GSR test". See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

Thus, "although the indictment accused Appellant as being the shooter". Scientific, forensic evidence irrefutable demonstrated "Appellant had not discharged a firearm", within the 6 to 8 hours of which gun residue would have been present "either on the hands or clothing or both. And as a objective court, "such weighed heavily in favor of the accused". As "no connection was ever established to pin-point the Appellant as the shooter". And the case should not have passed onto the jury

Based on these grounds, the Appellant is entitled to have this case reversed and remanded based on "insufficient evidence", as well as being "ACTUALLY INNOCENT" of the crimes charged.

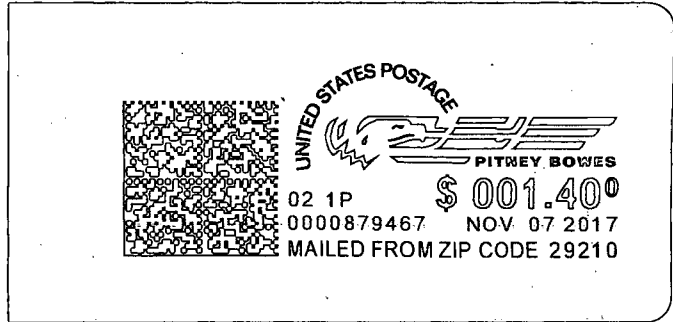
Respectfully Submitted,

/s/ Kevin Tyrone Bryant
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Because the Broad River Institution "is locked down" when Appellant passed this pro-se brief to guards from inside his cell on November 1, 2017. This counts as the date of forwarding the petition to this court. See Houston v. Lack. (Mailbox Rule).

cc: filed
11/1/2017

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