

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH LIPSEY,

APPELLANT

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court violate appellant's constitutional rights by sentencing him to a disproportionate sentence without considering his willingness to testify for the state?

STATEMENT OF THE CASE

On June 7, 2011, the Greenville County Grand Jury indicted Kenneth Lipsey, Jr. on three counts of armed robbery (AR) and a possession of marijuana with intent to distribute (PWID). On January 11, 2012, Lipsey, along with his co-defendant Patrick Connor, appeared before the Honorable C. Victor Pyle, Jr. and entered a guilty plea to the four charges as indicted. Lipsey was represented by Daniel Farnsworth, and the state was represented by Mark Moyer. Judge Pyle sentenced Lipsey to twenty five years on each AR and five years on the PWID with all sentences to run concurrently. Tr. 20, ll. 4 – 16. Lipsey's attorney filed a notice of appeal.¹ This appeal follows.

¹ Lipsey's attorney filed, along with the Notice of Appeal, an Explanation of Issues for Review on Appeal which provided that the issue for appellate review was the length of the sentence which was imposed without the court considering Lipsey's role as a potential state's witness.

ARGUMENT

The trial court violated appellant's constitutional rights by sentencing him to a disproportionate sentence without considering his willingness to testify for the state.

Kenneth Lipsey and Patrick Connor were visiting friends on June 29, 2010. They borrowed the car of a female friend at the party, and left around 1:30 early morning. They stopped three different times and took money, cell phones, and wallets of people they randomly saw along the street. Lipsey drove the car while Connor got out and robbed the people. Tr. 9, ll. 12 – Tr. 11, ll. 13.

They then returned to their friends' apartment. The police were able to identify the car, and the owner. The owner of the car told the police that Lipsey and Connor borrowed the car. Lipsey and Connor were then arrested. Lipsey gave a statement to police admitting his involvement. Tr. 11, ll. 14 – 24.

Lipsey also pled guilty to a PWID marijuana from a different incident on March 5, 2011. He was riding with friends when the police stopped the car. A search of the car found a bag of marijuana weighing 200 grams. Tr. 12, ll. 1 – 6.

During the guilty plea, Lipsey's attorney argued to the court that Lipsey offered all along to testify for the state as he admitted his guilt upon arrest. Lipsey did not have the gun, and did not assault anyone. Tr. 15, ll. 15 – 25; Tr. 16, ll. 1 – 21.

The judge learned that Lipsey was released on bond after serving 182 days in detention. During mitigation, the judge learned that Lipsey conceived a child while he was out on bond. Tr. 18, ll. 1 – 24; Tr. 19, ll. 1 – 16.

The judge then sentenced Lipsey to twenty five years incarceration. Tr. 20, ll. 4 – 16.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. The Eighth Amendment to the United States Constitution provides that excessive bail should not be required, nor cruel and unusual punishment inflicted. There exists in every court an inherent power to see that a defendant's fundamental rights are protected. State v. Kimbrough, 212 S.C. 348, 46 S.E.2D 273 (1948).

Generally, a sentence that falls within the limits fixed by statute is not "cruel and unusual." Id. However, even if it is not cruel or unusual "in kind," a particular sentence may be so severe in duration that it violates the constitutional prohibitions against cruel and unusual punishment. Id. construing S.C. Const. art 1, § 19; see also Hart v. Coiner, 483 F. 2d 136 (4th Cir. 1973); Stockton v. Leeke, 269 S.C. 459, 237 S.E. 2d 896 (1977).

In Stockton v. Leeke, Id., and State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001), the Supreme Court wrote that they had no jurisdiction to disturb a sentence if it were within the limits prescribed by the statute, unless the sentence was the result of partiality, prejudice, oppression or corrupt motive.

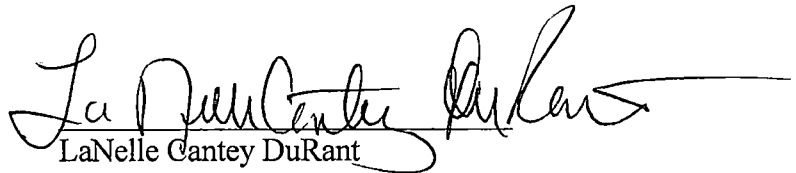
The judge demonstrated prejudice when he asked if Lipsey fathered a child while he was out on bond.

The sentence was cruel and unusual punishment for the circumstances in that Lipsey did not assault anyone and did not have the gun; Lipsey was willing to testify for the state; Lipsey gave a statement admitting his role as the driver of the car; and he was willing to plead guilty.

CONCLUSION

Based on the above, the sentence of the circuit court should be reversed and the case remanded for a new sentencing hearing.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2012.

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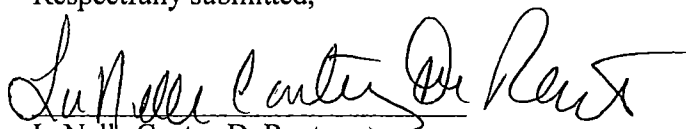
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Lipsey, Jr. states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge C. Victor Pyle, Jr., which was held on January 11, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Kenneth Lipsey Jr..

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2012.

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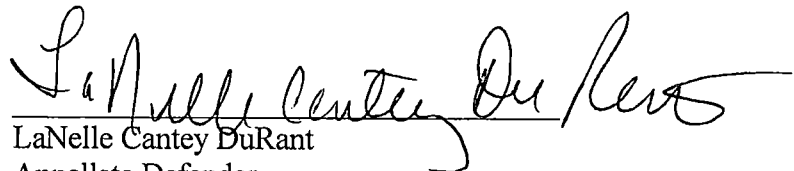
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Sentencing Sheets
- (3) Entire Transcript January 11, 2012
- (4) Explanation of Issues for Review on Appeal

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

September 12th, 2012


LaNelle Cantey DuRant
Appellate Defender

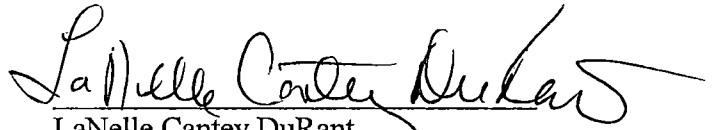
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 12th, 2012

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

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Division of Appellate Defense
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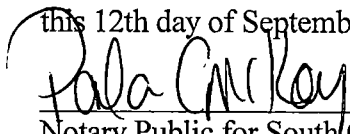
CERTIFICATE OF SERVICE

The undersigned attorney 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 Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and a copy of the Anders Brief of Appellate and Record on Appeal have been served on Kenneth Lipsey, Jr., #349281 at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 12th day of September, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.