STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS T. JOHNSON,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and in defense of another?

STATEMENT OF THE CASE

Appellant was indicted for murder, two counts of assault and battery with intent to kill, and possession of a weapon by the Lexington County Grand Jury. He was tried along with his brother, Kerwin Parker. Trial was held September 14-18, 2009, before the Honorable Robin B. Stilwell and a jury. Appellant was found guilty of voluntary manslaughter and was sentenced to thirty (30) years imprisonment. He was found guilty of two counts of assault and battery of a high and aggravated nature and was sentenced to ten (10) years imprisonment on both charges. He was found guilty of possession of a weapon and was sentenced to five (5) years consecutive on that charge. Co-defendant Parker, was convicted of one count of assault and battery with intent to kill and possession of a weapon. Respective sentences of twenty (20) years and five (5) years were imposed. Appellant was represented by Elizabeth C. Fullwood, Esquire. Co-defendant Parker, was represented by Jack Duncan, Esquire. The State was represented by Donald Myers, Esquire and Colleen Dixon, Esquire. Because certain portions of the transcript were not able to be transcribed, a reconstruction hearing was held on October 3, 2011. The reconstruction hearing transcript will be included in the record on appeal.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charges against appellant because his actions were in self-defense and in defense of another.

Appellant was tried in the shooting death of Isaac Wilson, the assault of A. J. Wilson, the vehicular assault of Walter Gadson, and for possession of a firearm. The State's theory of the case was that in the late night hours of November 19 and the early morning hours of November 20, 2006, there was a confrontation between appellant and Isaac Wilson and Wilson's roommate Walter Gadson in Richland County. This fight was over a woman that both appellant and Wilson had affections for. After the fight was over Wilson and Gadson went to their residence in Lexington County. Appellant and his older brother, Kerwin Parker, followed them to their apartment where there was a verbal altercation. That ended up with the car appellant was driving impacting Gadson and then gunshots being fired by appellant. (ROA p. 71, line 3 – p. 74, line 3).

The defense's theory of the case was the appellant and his girlfriend had broken up but she was pregnant with his child so they were still friends. The girlfriend started dating Wilson and Wilson hated appellant. Wilson and Gadson got behind appellant at a stoplight, pulled him out of his car, punched him, and held a gun to him. Appellant went home and told his older brother and they decided they needed to go talk to Wilson and Gadson to straighten things out. (ROA p. 75, line 17 – p. 77, line 19). When appellant and his brother got over to Wilson's apartment they were approached by men with guns which they pointed and one was cocked at Kerwin Parker. Appellant was scared and honked his horn. Walter Gadson pointed a shotgun at him. In order to save his life, appellant hit Gadson with his car. He then saw Isaac Wilson holding a shotgun at his brother while A.J. Wilson was beating

him. Appellant remembered his brother had a gun in the car. He got the gun and fired a warning shot but it did not help. Out of fear for his brother, appellant shot until the gun was empty. Appellant fought to defend his life and to defend his brother's life. (ROA p. 77, line 20 – p. 79, line 6).

Appellant testified that they went over to Isaac Wilson's apartment to talk about the situation and find some peace about it. (ROA p. 686, lines 1-9). When they got over there three men came running out with shotguns. He knew two of them – Isaac Wilson and Walter Gadson. (ROA p. 687, line 25 – p. 688, line 6). They walked in a direction toward the vehicle appellant was in. Isaac Wilson said he was going to shoot them. Appellant said he was terrified and scared that he and his brother were going to lose their lives. (ROA p. 690, line 13 – p. 692, line 18).

(At this point the remaining portion of appellant's testimony was missing. It will be supplemented with appellant's testimony from the reconstruction hearing held on October 3, 2011).

Appellant said his brother was trying to get back to the vehicle. His brother saw that Walter, Isaac, and A.J. had shotguns pointed toward him. (ROA p. 21, lines 10-16). His brother asked for them to put the guns down. He said they just came to talk. (ROA p. 22, line 23 – p. 23, line 8). His brother started walking to the truck. Walter Gadson cocked his shotgun and ran towards his brother. Appellant pressed the gas on his vehicle toward Gadson. When Gadson saw the vehicle coming, he turned his shotgun toward appellant and appellant drove toward Gadson trying to stop him from shooting his brother and himself. (ROA p. 24, line 6 – p. 27, line 5). Then appellant saw A. J. holding his brother back and Isaac Wilson pointing his shotgun at his brother. Appellant said he needed to save his

brother's life and got his brother's gun out of the glove box. He shot a warning shot hoping they would get off of his brother but they did not. Appellant ran toward him and shot at A. J. five times and at Isaac two times to save his brother's life. (ROA p. 30, line 16 – p. 33, line 3).

At the end of the State's case defense counsel moved for a directed verdict based on the sufficiency of the evidence. That motion was denied. (ROA p. 627, line 24 - p. 629, line 23)[1] At the conclusion of all the testimony, defense counsel renewed the direct verdict motions recognizing that appellant's testimony established self-defense and defense of another as a matter of law. The trial court denied the motions. (ROA p. 765, line 21 – p. 766, line 3). That ruling was in error.

Due process as guaranteed by the Fourteenth 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, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

[1] These page numbers reflect the original trial transcript page numbers.

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

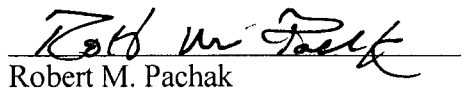
In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir. 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir. 1994).

In this case appellant established both self-defense and defense of another as a matter of law. The State had the duty to disprove these defenses. This they have not done. There is no "rationally supportable state of near certitudes" that appellant was not acting in self-defense or defense of another.

CONCLUSION

A directed verdict should be granted to the charges against appellant.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of June, 2012.

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CURTIS T. JOHNSON,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Curtis T. Johnson 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 Robin B. Stilwell, which was held on October 21, 2009, 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 Curtis T. Johnson.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of June, 2012.

CERTIFICATE OF COUNSEL

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

June 4, 2012

Robert M. Pachak
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Anders Brief of Appellant and Record on Appeal has been served on Curtis T. Johnson, #337543 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210; this 4th day of June, 2012.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020 .