

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Newberry County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

v.

TERRANCE LAMAR TYSON,

RESPONDENT,

APPELLANT

RECEIVED
FEB 05 2018
SC Court of Appeals

APPELLATE CASE NO 2017-000295

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing the State to reference in closing argument the fact that Appellant hired counsel after the incident but before arrest warrants were issued as the reference constituted an improper comment on Appellant's invocation of the privilege against self-incrimination?

STATEMENT OF THE CASE

In October of 2015, the Newberry County Grand Jury indicted Appellant Tyson for assault and battery first degree, indictment #2015-GS-36- 0544. In 2016, the Newberry County Grand Jury indicted Appellant for burglary first degree, indictment #2016-GS-36-0667. On February 6, 2017, Appellant proceeded to jury trial before the Honorable Donald B. Hocker. John Mobley represented Appellant at trial. Dale Scott and Taylor Daniel prosecuted the case. The jury found Appellant not guilty of burglary first degree but guilty of assault and battery first degree. Judge Hocker sentenced Appellant to seven (7) years in prison. A timely notice of intent to appeal was served on February 16, 2017. This appeal follows.

ARGUMENT

The trial judge erred in allowing the State to reference in closing argument the fact that Appellant hired counsel after the incident but before arrest warrants were issued as the reference constituted an improper comment on Appellant's invocation of the privilege against self-incrimination.

The jury found Appellant guilty of biting his wife's boyfriend's ear on June 19, 2015. At trial the State asked a detective if he knew where Appellant was following the incident. (R. p. 220, line 22 – p. 221, lines 1-2). The detective answered, “No. Did not know where he may have been. However, on the 22nd, attorney John Mobley sent me a facsimile indicating that he was pre-arrest counsel to Mr. Terrance Tyson and the he was formally invoking his Fifth amendment right as well as his--” (R. p. 221, lines 3-7). Counsel for Appellant objected and the judge held a bench conference. (R. p. 221, lines 8-15). The judge then instructed the jury, “Ladies and Gentlemen of the jury, concerning anything else related to this letter of representation from Mr. Mobley, you are not to consider anything else other than the fact it existed and was sent to Captain Dennis.” (R. p. 221, lines 19-23).

At the close of the case counsel for Appellant made the following motion in regard to the State's closing argument:

Based on the, the testimony of Captain Dennis and the nature thereof, my first motion is I'm requesting the Court to bar the State from arguing any type of negative inference at the result of my client exercising his right to counsel and the Sixth Amendment. On the sidebar Mr. Scott making the statement about oh, he got a lawyer, it being evidence of guilt instead of turning himself in. That is completely improper. It's completely improper for the State or the jury to make a negative inference from a Defendant exercising his constitutional right to counsel. And I would ask they'd be barred from making such an argument at closing arguments, Your Honor.

(R. p. 234, lines 6-18). The judge heard arguments from both sides. (R. p. 234, line 21 – p. 235, 236, 237, line 1). Appellant additionally argued that the testimony about the letter of

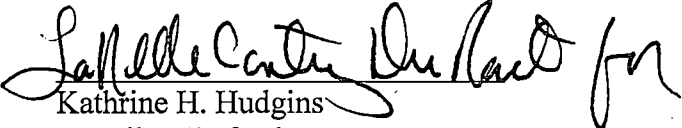
representation was irrelevant. (R. p. 236, line 22 – p. 237, line 1). The judge took the motion under advisement. (R. p. 237, lines 2-3). The judge later denied the motion citing Rothgery v. Gillespie Cnty., 554 U.S. 191, 128 S.Ct. 2578, 2592, 171 L.Ed.2d 366 (2008). (R. p. 242, line 24 – p. 243, lines 1-22).

During closing argument the State told the jury, “Where does Mr. Tyson go after that? I don’t know. I don’t know and neither does law enforcement because they go to his home and he’s not there. Where did he go that night? June 19th is our incident date. June 22nd law enforcement gets a letter from Mr. Mobley, the lawyer, saying I’m representing him now. The next day arrest warrants are issued. You know when he finally turns himself in? Seventeen days after the incident on July 6th.” The judge erred in allowing the State to reference the fact that Appellant hired counsel.

In State v. Cockerham, 294 S.C. 380, 381, 365 S.E.2d 22, 23 (1988), the South Carolina Supreme Court wrote, “It is improper for the state to refer to a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) (right to plead not guilty and put state to its burden of proof); see also Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (right to remain silent).” The prosecutor’s statement in closing argument was an improper comment on Appellant’s Fifth Amendment privilege against self-incrimination. The trial judge’s reliance on Rothgery is misplaced as Rothgery involved the Sixth Amendment right to counsel. While Appellant’s Sixth Amendment right to counsel had not yet attached prior to service of the arrest warrants, Appellant had a privilege against self-incrimination pursuant to the Fifth Amendment and Appellant invoked that constitutional right, as evidenced by counsel’s letter of representation to the detective. It was improper for the State to refer to Appellant’s exercise of a constitutional right.

CONCLUSION

Based on the above argument, this Court should reverse the sentence and conviction and remand the case for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of February, 2018.

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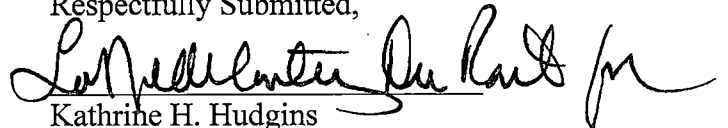
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terrance Lamar Tyson 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 Donald B. Hocker, which was held on February 7, 2017, 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 Terrance Lamar Tyson.

Respectfully Submitted,



Kathrine H. Hudgins

Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of February, 2018.

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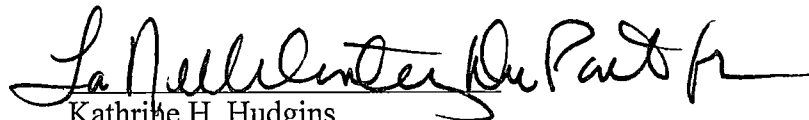
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment and sentencing sheet;
- (2) Trial transcript pages 1-322 – entire trial transcript;
- (3) State's Exhibit #6 – CD of 911 call – To be transported.

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

February 05, 2018



Kathrine H. Hudgins
Appellate Defender

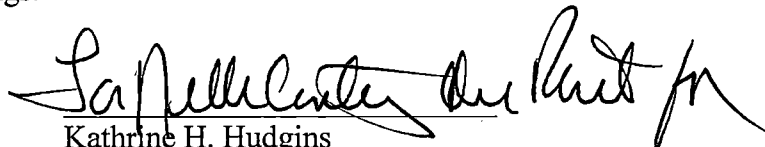
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CERTIFICATE OF COUNSEL

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

February 05, 2018.



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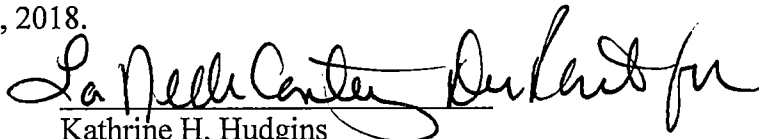
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CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Terrance Lamar Tyson, 371430, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 5th day of February, 2018.



Kathrine H. Hudgins

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of February, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.