

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable Thomas L. Hughston, Circuit Court Judge

RECEIVED
NOV 16 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

v.

KYRIEF DESHAWN LARNELLE KELLY,

APPELLANT

APPELLATE CASE NO. 2017-002555

ANDERS BRIEF OF APPELLANT.

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1330

ATTORNEY FOR APPELLANT

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The court erred by admitting hearsay evidence, including the incident reports, State’s Exhibits 19 and 20, that some unidentified person allegedly told the police it looked like a man being chased by the police threw an object over a fence, and another person had reported the gun stolen from his automobile, since this evidence was hearsay testimony offered to prove the ultimate issue before the jury – whether appellant was illegally in possession of a stolen weapon4

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting hearsay evidence, including the incident reports, State's Exhibits 19 and 20, that some unidentified person allegedly told the police it looked like a man being chased by the police threw an object over a fence, and another person had reported the gun stolen from his automobile, since this evidence was hearsay testimony offered to prove the ultimate issue before the jury – whether appellant was illegally in possession of a stolen weapon?

STATEMENT OF THE CASE

Appellant was indicted at the November 2015 term of the Charleston County Grand Jury for the offenses of possession of a stolen handgun, and unlawful carrying of a pistol. R. 233 – 236. Appellant's case came on for trial on December 11, 2017, for jury selection only, before the Honorable R. Markley Dennis, Jr., and a jury. Appellant represented himself. Nicholas Smit was standby counsel. Alexandra Ginsberg and David Osborne were the assistant solicitors. R. 1.

On December 12, 2017, before the Honorable Thomas Hughston, Jr., the jury heard the case and found appellant guilty on both counts. R. 211, ll. 4-8. Judge Hughston sentenced appellant to five years imprisonment, suspended on the service of four years, and two years' probation. R. 217, ll. 12-19.

This appeal follows.

STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id. at 429–30, 632 S.E.2d at 848.

ARGUMENT

The court erred by admitting hearsay evidence, including the incident reports, State's Exhibits 19 and 20, that some unidentified person allegedly told the police it looked like a man being chased by the police threw an object over a fence, and another person had reported the gun stolen from his automobile, since this evidence was hearsay testimony offered to prove the ultimate issue before the jury – whether appellant was illegally in possession of a stolen weapon.

Relevant Facts

Sergeant Jeffrey Thom worked the K-9 unit, and he was also on the Charleston SWAT team. R. 60, l. 4 – 61, l. 14. Thom remembered that on August 28, 2015, while returning from his SWAT team duties in his police vehicle, he noticed Officer Mallek attempting to stop a vehicle. When the vehicle ultimately stopped, Thom observed “the defendant exit the passenger side of the vehicle . . . and run away.” R. 61, l. 9 – 65, l. 12.

Thom chased after appellant, and he maintained he gave a description to dispatch of appellant while he was chasing after him. R. 75, l. 13 – 76, l. 24. Thom maintained, “while we were in foot pursuit, concerned citizens in the area of 69 Nassau Street called the police.” At this point, appellant interjected a hearsay objection which was overruled. Thom then said the “concerned citizen” said appellant “tossed an object over the fence which was a handgun recovered in this case.” R. 76, l. 8 – 77, l. 18. Thom described the gun as a black semiautomatic pistol. R. 79, ll. 7-11.

Over appellant's continuing hearsay objections, Thom testified he learned from the dispatcher that the handgun was stolen. R. 84, l. 18 – 85, l. 14.

Tonia Mallette was a dispatch analyst worker. R. 101, l. 18 – 103, l. 13. When the state went to introduce incident reports regarding this case, appellant again objected on the basis of

hearsay. R. 105, l. 9 – 110, l. 24; R. 114, l. 3 – 117, l. 24; R. 119, ll. 8-21. These hearsay objections were also overruled. State's Exhibit 19 references the August 28, 2015 incident in this case. R. 220 – 226. It notes that the caller to dispatch said a man “was being chased by officers . . . looks like he threw a gun over the fence.” R. 221.

State's Exhibit 20 pertains to an incident that happened on June 23, 2015, two months before the incident in this case, which was a report of a theft from an automobile. R. 227. The report names the caller as Jamal McCray. The stolen item was a pistol. R. 229. The pistol was valued at three hundred fifty dollars. R. 229.

The state would call Raymond Haupt, an employee of the Ninth Circuit Solicitor's Office, to testify as a reply witness that he “tried to track down Jamal McCray” but could not find him. R. 186, l. 15 – 188, l. 4. McCray, again, was the person who allegedly called in the report of a stolen gun which police attempted to link to appellant.

Again, appellant was convicted of possession of a stolen weapon, and for unlawfully carrying a weapon.

Discussion

The hearsay evidence in this case went to the ultimate issue before the jury, which was whether appellant was unlawfully in possession of a stolen weapon. The state presented hearsay testimony that someone told the police appellant, the fleeing suspect, threw an object -- the gun -- over a fence. Officer Thom also presented hearsay testimony that the gun was stolen. R. 76, l. 18 – 77, l. 18; R. 84, l. 2 – 86, l. 3. This hearsay testimony went to the ultimate issues to be decided by the jury: Was appellant unlawfully in possession of a pistol; and, was the gun stolen?

In State v. Gullede, 277 S.C. 368, 287 S.E.2d 488 (1982), the defendant was convicted of ABHAN. The radio communication between a patrolman who had been shot was recorded

and transcribed. The tape was played in court as part of the res gestae exception to the hearsay rule.

However, the Supreme Court found that the trial judge abused his discretion in allowing the jury to take the transcript of the tape into the jury room because it unduly emphasized that evidence. See State v. Plyler, 275 S.C. 291, 270 S.E.2d (1980). State v. Gullede, 277 S.C. 368, 371-72, 287 S.E.2d 488, 490 (1982).

Here, also, the judge compounded the error in admitting Officer Thom's hearsay testimony by admitting incident reports, State's Exhibits 19 and 20, which went into the jury room for deliberations where these incident reports stated that the fleeing suspect, appellant, threw an object, the gun, while the police were chasing him. The police then found the gun the unidentified caller said he saw appellant throw.

In addition, an incident report was admitted which stated that Jamal McCray had reported his gun stolen from his car two months earlier, on June 23, 2015. This gun was matched to the gun in appellant's possession. R. 220 – 232.

In State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), the Supreme Court affirmed the opinion of this Court as modified. In King, the state sought to show that the defendant's contention that the single gunshot fired at the cab driver was accidentally shot when the cab driver's elbow hit the gun was not true. The state presented evidence that while canvassing the neighborhood an officer allegedly learned from several people who lived there that there were four or five shots heard at the time of the attempted cab driver robbery. This Court, and the Supreme Court held that this was inadmissible hearsay evidence that required reversal.

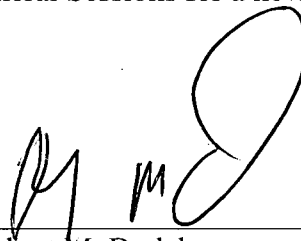
The Supreme Court noted that "hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the

matter asserted. State v. Brockmeyer, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013).” State v. King, 422 S.C. 47, 66, 810 S.E.2d 18, 28 (2017).

Again, the inadmissible hearsay testimony and incident reports admitted here, where those reports went to the jury, were purportedly dispositive of the ultimate issues to be decided by the jury. The court committed reversible error in these erroneous hearsay evidentiary rulings.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of November, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable Thomas L. Hughston, Circuit Court Judge

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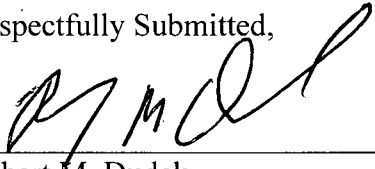
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Counsel for Kyrief Deshawn Larnelle Kelly states:

1. He is Chief 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 Thomas L. Hughston, which was held on December 11 - 12, 2017, 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 Kyrief Deshawn Larnelle Kelly.

Respectfully Submitted,


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 16th day of November, 2018.

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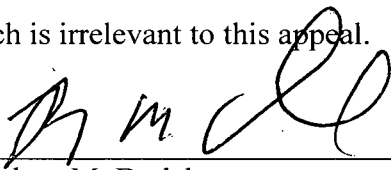
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments;
- (2) Trial Transcript;
- (3) State's Exhibit 19 (Incident Report)
- (4) State's Exhibit 20 (Incident Report)

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

November 16, 2018



Robert M. Dudek
Chief Appellate Defender

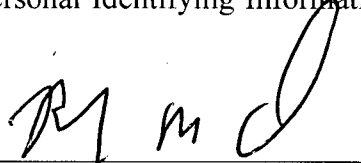
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ATTORNEY FOR APPELLANT

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."

November 16, 2018.



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Chief Appellate Defender

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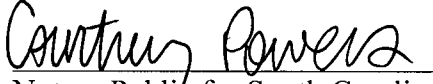
APPELLANT

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 Kyrief Deshawn Larnelle Kelly, 374858, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 16th day of November, 2018.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of November, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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