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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY J. GALLOWAY,

APPELLANT

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
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

Whether the trial court erred in refusing to grant a directed verdict to the charge of safecracking when the object broken into was not a safe?

STATEMENT OF THE CASE

Appellate was convicted of second degree burglary and safecracking after a jury trial held before the Honorable R. Lawton McIntosh on March 12-13, 2012, in Anderson County. A fifteen (15) year sentence was imposed for second degree burglary and a concurrent fifteen (15) year sentence was imposed for safecracking. Aaron J. Angell, Esquire, was defense counsel.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of safecracking when the object broken into was not a safe.

Randall Moon testified that he worked at Moon's Tile. On September 24, 2010, he was working late because he was hoping to catch a thief. He has recently been broken into several times. Money was stolen out of their filing cabinet. It was a locking filing cabinet that they used as a safe. (Tr. p. 19, line 21 – p. 20, line 23).

At the conclusion of the State's case, defense counsel moved for a directed verdict on the safecracking charge. The trial court denied the motion. (Tr. p. 82, line 13 – p. 83, line 6). 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].

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 from 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 the 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).

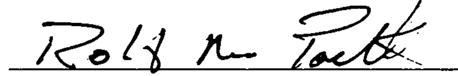
The statute on safecracking, S.C. Code §16-11-390 provides: "It is unlawful for a person to use explosives, tools, or any other implements in or about a safe used for keeping money or other valuables with intent to commit larceny or any other crime." The above statute fails to define what a safe is. In this case, we just have a filing cabinet with a lock on it. Is that a safe? What about a desk drawer with a lock on it? What about people who keep money in their locked glove box in their car?

The statute is overbroad and does not give one any notice of what a safe is. Because a filing cabinet is not a safe, a directed verdict should have been granted to that charge.

CONCLUSION

A directed verdict should be granted on the charge of safecracking.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of September, 2012.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Henry J. Galloway states:

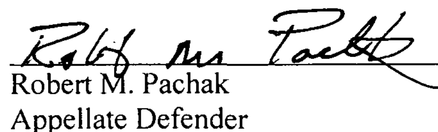
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge R. Lawton McIntosh, which was held on March 13, 2012, 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 Henry J. Galloway.

Respectfully submitted,



Robert M. Pachak
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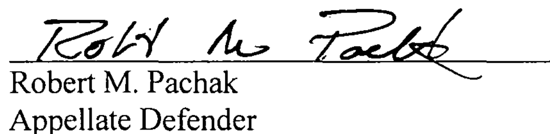
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictments;
(2) Jury Voir Dire Transcript;
(3) Entire Trial Transcript

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

September 4th, 2012



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Attorney for Appellant

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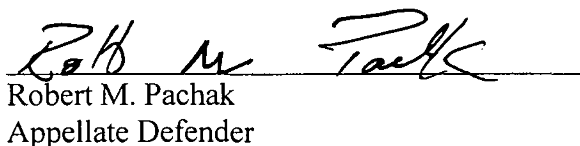
HENRY J. GALLOWAY,

APPELLANT

CERTIFICATE OF SERVICE

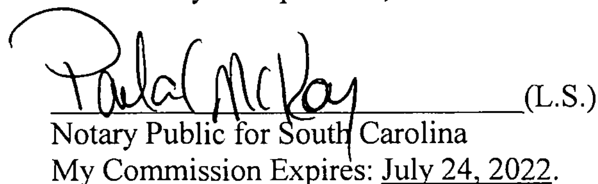
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and a copy of the Anders Brief of Appellate and Record on Appeal have been served on Henry J. Galloway, #236967 at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 4th day of September, 2012.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 4th day of September, 2012.

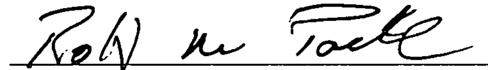


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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 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 4, 2012



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