

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN WAYNE BRANNON,

APPELLANT

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) 734-1343

ATTORNEY FOR APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in sentencing appellant to life without the possibility of parole pursuant to S.C. Code §17-25-45 when the notice of intent to seek life without parole states upon a conviction for attempted murder and the jury acquitted appellant of attempted murder and found him guilty of assault and battery of a high and aggravated nature?

STATEMENT OF THE CASE

On July 22, 2011, the Spartanburg County Grand Jury indicted Brannon for attempted murder, indictment #11-GS-42-4694. On December 12, 2011, Brannon proceeded to jury trial before the Honorable Roger L. Couch. Attorney Tanya Jones represented Brannon at trial. Attorney Wes Boyd prosecuted the case. The jury found Brannon not guilty of attempted murder but guilty to the lesser included offense of assault and battery of a high and aggravated nature [ABHAN]. Judge Couch sentenced Brannon to life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was timely served on December 21, 2011. This appeal follows.

ARGUMENT

The trial judge erred in sentencing appellant to life without the possibility of parole pursuant to S.C. Code §17-25-45 when the notice of intent to seek life without parole states upon a conviction for attempted murder and the jury acquitted appellant of attempted murder and found him guilty of assault and battery of a high and aggravated nature.

Brannon was tried for attempted murder for hitting his cousin over the head with a rock. The jury found Brannon guilty of the lesser included offense of ABHAN. During sentencing the State sought a sentence of life without parole pursuant to South Carolina Code §17-25-45. The State introduced the affidavit of service of notice of intent to seek life without parole, the notice of intent to seek life without parole pursuant to S.C. Code §17-25-45 and certified copies of prior convictions. (Tr. p. 220, lines 21 –p. 221, lines 1-20; Court's Exhibits #2, #3 and #4). Counsel for appellant objected and stated:

In accordance with the notice of life sentence to Section 25 or 17-25-45(a), it indicates that the defendant will receive a life sentence if he is convicted of attempted murder on the above indictment. We did not, according to the statute, you need 10 days notice by the solicitor to the defendant seeking life without parole, Your Honor.

He was not convicted of attempted murder. This is a lesser included offense. This is ABHAN. Therefore, we were not given proper notice of the lesser included offense, and the statute was amended now to require that ten day notice. We weren't given notice. Also, attempted murder is a most serious, and ABHAN is serious. So, we would – it is our contention that if they wanted to seek life on the ABHAN, we would of needed specific notice ten days prior to trial on that lesser included offense. We were not given that. We did not receive that, and. Therefore, we do not believe that he is eligible for an L.W.O.P. sentence today.

(Tr. p. 222, lines 3-20).

After asking for submission of briefs, the judge overruled the objection. The judge stated:

Based upon the cases that I've reviewed in the memorandum and the fact that the statute concerning assault and battery of a high and aggravated nature specifically refers to it being a lesser included offense of attempted murder, I find the notice was sufficient to place him on notice of the State's intention to seek the sentence under the recidivist statute, and that he would have been on notice of not only the original charge, but the lesser included charges as well. So, therefore, the motion in the case is denied.

(Tr. p. 226, lines 19 – p. 227, lines 1-3). The judge erred.

S.C. Code §17-25-45(H) provides, "Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial." In State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999), the South Carolina Supreme Court found that the notice requirement of §17-24-45 did not require listing of the specific prior convictions. The Court wrote:

The indictment, along with the notice that the recidivist statute would apply, satisfied the fully informed requirement of S.C. Const. article I, sec. 14. Once the indictment informs a defendant of the charges against him, section 17-25-45(H) only requires the solicitor to inform the defendant that the recidivist sentencing statute will be applied upon conviction. Specifically listing the triggering charge from the current case is unnecessary because Defendant has been fully informed of the charges against him in the indictment, and he has been informed that the State will apply the recidivist statute. Determining which of the indicted offenses triggers the statute merely requires looking at the list of offenses listed in section 17-25-45.

Burdette, 335 S.C. at 39-40, 515 S.E.2d at 528.

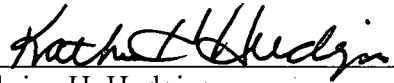
The challenge in the present case is not to notice of the prior convictions but to notice of the actual charge which, upon conviction, would trigger sentencing pursuant to §17-25-45. The notice provides upon a conviction for attempted murder and does not include lesser included offenses. Brannon was found not guilty of attempted murder. As argued by Brannon at trial, the State should have included any lesser included offense in

the notice of intention to seek life without parole. (Tr. p. 223, lines 10-23). The trial judge erred in sentencing Brannon to life without parole when the State failed to meet the notice requirement of S.C. Code §17-25-45.

CONCLUSION

Based on the above argument, the case should be remanded for new sentencing outside of §17-25-45.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of December, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN WAYNE BRANNON,

APPELLANT

APPELLATE CASE NO. 2012-206386

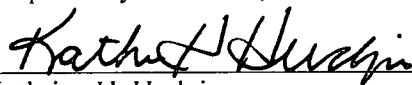
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Wayne Brannon 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 Roger L. Couch, which was held on December 15, 2011, 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 John Wayne Brannon.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

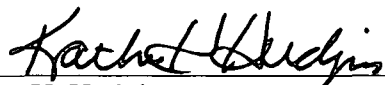
ATTORNEY FOR APPELLANT

This 21st day of December, 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."

December 21st, 2012



Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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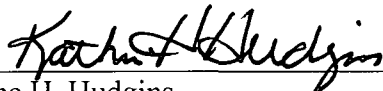
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CERTIFICATE OF SERVICE

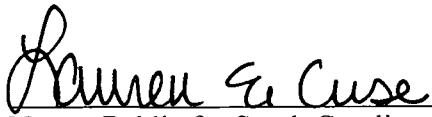
The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on John Wayne Brannon, #209650 at Kirkland Correctional Institution, this 21st day of December, 2012.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of December, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.