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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

COMEST SABATINO ALLEN,

APPELLANT

Appellate Case No. 2012-212619

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief 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

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT

The trial judge erred in considering knowledge beyond the
scope of sentencing information allowed in appellant’s case
because the prejudicial impact of this resulted in the denial of
appellant’s right to a fair sentencing proceeding in the case..... 5

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL 8

TABLE OF AUTHORITIES

Cases

State v. Franklin, 267 SC 240, 226 S.E. 2d 896 (1976)..... 7

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in considering knowledge beyond the scope of sentencing information allowed in appellant's case because the prejudicial impact of this resulted in the denial of appellant's right to a fair sentencing proceeding in the case.

STATEMENT OF THE CASE

Appellant Comest Sabatino Allen was convicted of driving under the influence, leaving the scene of an accident, failure to stop for blue lights, and assault and battery of a high and aggravated nature per jury trial held during the Greenville County General Sessions Court before Judge G. Edward Welmaker. Appellant was sentenced to imprisonment for an aggregate period of two hundred and twenty months. Tim Sullivan represented appellant at trial.

Appellant appealed his trial court convictions and sentences. This brief follows.

ARGUMENT

The lower court erred in considering knowledge beyond the scope of sentencing information allowed in appellant's case because the prejudicial impact of this resulted in the denial of appellant's right to a fair sentencing proceeding in the case.

Only three witnesses testified at trial in this case: Tina Harwood and Police Officers Richard Coury and James Culbertson. Appellant did not testify at trial or present any witness on behalf of the defense.

At trial, Officer Richard Coury testified that on the night of October 31, 2010, he was patrolling the Hunter Woods neighborhood in Greenville County when he observed three cars driving recklessly. In particular, Officer Coury noticed that the driver of one vehicle would drive up close to his bumper and then back away. When Officer Coury activated his blue lights, the driver of that particular vehicle pulled off on the side way. Then, as Officer Coury walked up to the vehicle, that driver accelerated, drove towards him, hit him on the left shoulder via the car rear view mirror, and kept driving. Officer Coury added that he got back in car and recorded the tag number of the vehicle. Immediately thereafter, Officer Coury turned on his sirens and gave chase because the driver of the vehicle did not stop. As the chase continued, the driver of the vehicle collided with another car (belonging to Tina Howard) parked in a parking lot nearby. Shortly thereafter, the driver exited his vehicle and fled. Officer Coury gave chase on foot and soon apprehended the driver. R. 30, l. 7-p. 40, l. 7. The driver, who was identified as appellant, refused to submit to a breathalyzer test. R. 53, l. 9-10. Officer Coury stated that the person he apprehended was appellant, and that he (appellant) had a very strong odor of alcohol upon him. R. 43, lines 3-20.

Tina Howard was parked in her car when appellant's vehicle struck her car. Howard's husband and two children were inside her car. R. 68, l. 18-p. 76, l. 8. Officer Culbertson arrived on the scene shortly thereafter and rendered assistance to the Harwood family. R. 73, l. 20-p. 76, l. 8.

At the sentencing, the trial judge asked for a list of appellant's "prior offenses" and thereafter, the priors were presented.¹ R. 114, l. 24-p. 115, l. 1. Then, the colloquy continued as follows:

The Court: When did you last do some time? When did you get out last?

Defendant Allen: Probably 2004 or 5, somewhere along in there.

Mr. Sullivan: Do you have his jail time?

Ms. Townsend: I do not have an updated one. I apologize for that. He has been in since the incident. He was out for, I think, approximately six months and then the bondsman went off bond when he got new charges.

The Court: New charges in addition to these?

Ms. Townsend: Yes, sir.

Mr. Sullivan: I think these are going to clear those out maybe. I'm not sure.

R. 117, lines 4-16.

Clearly, in the case at bar, the trial judge asked for two pieces of information: appellant's "prior offenses" and "when appellant was last released from jail." The solicitor submitted the prior offenses to the trial judge and acknowledged that appellant had been released from jail since 2004/2005. Then, the solicitor went on to volunteer to the trial judge unsolicited information about other current offenses pending against appellant in addition to the instant charges for which he was on trial. Clearly, the judge was surprised to learn that there were other serious charges pending against appellant that he amassed after being freed from prison in addition to the offenses for which he was on trial, which in effect established that appellant was an undisciplined recidivist who had issues with being rehabilitated, obviously; and more

¹ The solicitor listed appellant prior offenses as follows: 1976, shoplifting; 1978, attempted housebreaking; 1981, grand larceny of vehicle; 1984, hit and run, uninsured vehicle; 1986, failure to stop for a blue light, resisting arrest; 1987, fraud check, receiving stolen goods; 1989, stolen tag, uninsured vehicle, driving under suspension, resisting arrest; 1994, shoplifting, seven counts of fraud check, petit larceny, twelve counts of forgery, obtaining goods under false pretenses; 1997, use of vehicle without consent, financial transaction card theft; 1999, shoplifting, breach of trust and with fraud, less than a thousand; 2000, receiving stolen goods; 2002, receiving stolen goods; 2005, use of vehicle without consent, failure to stop for blue light; 2010, improper tag; 2010, two counts of no driver's license. R. 115, lines 3-16.

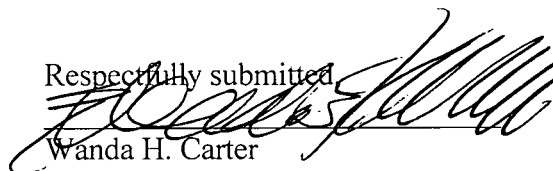
importantly, the volunteered unsolicited information prejudiced appellant because the other charges were not convictions, but rather other pending charges against appellant. Furthermore, counsel for appellant stated that the other pending charges were likely to be “clear[ed]” out. R. 117, l. 15-16. Undoubtedly, this unsolicited misinformation factored into the equation by the trial judge at sentencing. How can one unring a bell? Surely, the trial judge considered the other pending charges before sentencing appellant on the instant convictions.

As a rule, a sentencing judge should know all of the material facts of a case in order to ensure that the defendant’s sentence is based on insight and understanding rather than on surmise or suspicion. State v. Franklin, 267 SC 240, 226 S.E. 2d 896 (1976). In the case at bar, the trial judge erred in considering other pending charges, i.e. unsolicited information, to be disposed of in the end where the trial judge asked only to be apprised of appellant’s “priors” from his record. The lower court erred in considering knowledge beyond the scope of what was allowable information to be regarded at appellant’s sentencing because this denied him of the right to a fair sentencing hearing in the case.

CONCLUSION

Based on the foregoing argument, appellant requests that the Court remand the case for a new sentencing proceeding.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2013.

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IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

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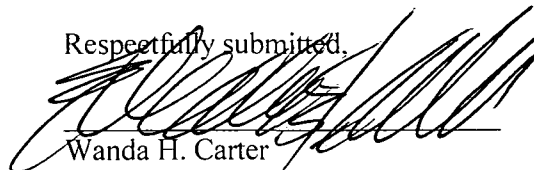
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Comest Sabatino Allen states:

1. She is Deputy Chief 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 G. Edward Welmaker, which was held on July 18, 2012, 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 Comest Sabatino Allen.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2013.

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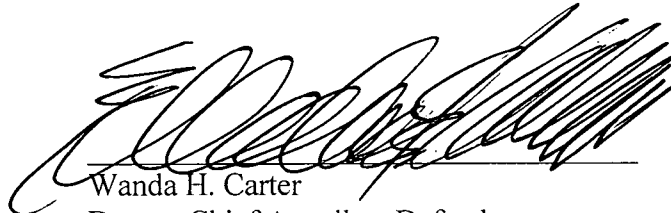
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript

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

February 11th, 2013



Wanda H. Carter
Deputy Chief Appellate Defender

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Attorney for Appellant

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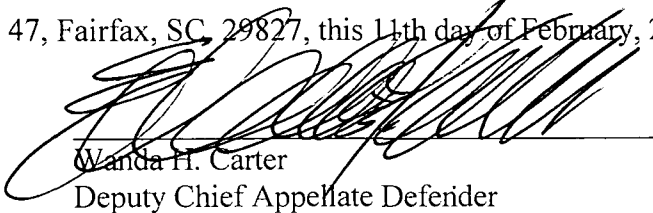
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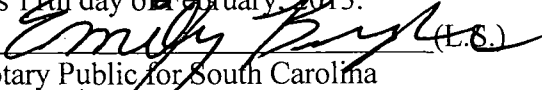
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal, 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 Comest Sabatino Allen, #300353 at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 11th day of February, 2013.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of February, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.