

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Clifton Newman, Circuit Court Judge

RECEIVED

JAN 28 2013

SC COURT OF APPEALS

THE STATE,

RESPONDENT,

v.

KEVIN BROWN,

APPELLANT

APPELLATE CASE NO. 2012-212946

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
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 CONTENTS1

TABLE OF AUTHORITIES2

STATEMENT OF ISSUE ON APPEAL3

STATEMENT OF THE CASE4

ARGUMENT5

CONCLUSION7

PETITION TO BE RELIEVED AS COUNSEL8

TABLE OF AUTHORITIES

Cases

State v. Anthony, 817 S.W.2d 299, 305 (Tenn. 1991) 6

State v. East, 353 S.C. 634, 578 S.E. 2d 748 (Ct. App. 2003)..... 5

State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983)..... 5

Other Authorities

39 A.L.R. 5th 283 6

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charge of kidnapping when it was merely incidental to the offense of armed robbery?

STATEMENT OF THE CASE

Appellant was tried with two co-defendants before the Honorable Clifton Newman in Barnwell County on September 4 – 6, 2012, for the charges of armed robbery, kidnapping, conspiracy, and possession of a weapon. Appellant was found guilty on all charges. Respective sentences of fifteen (15) years, ten (10) years, five (5) years, and five (5) years were imposed. Charlie J. Johnson, Jr., Esquire, was trial counsel. Susanna M. Ringler, Esquire, was the assistant solicitor.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of kidnapping because it was merely incidental to the offense of armed robbery.

Donna Corell, a clerk at Jimbo's Mini Mart in Barnwell, testified about an armed robbery that occurred at the store on July 21, 2011. While she was restocking, she heard a chime on the door. She looked up and a gun was pointed at her face. She was told not to look at the man holding the gun and not to look at the other people. She needed to keep her eyes down and do what she was told. There were three men who came into the store. Their faces were covered. One man was standing in front of the door. The other one was standing right in front of Ms. Corell, and the third man was already behind the cash register trying to open it. He couldn't open it and he instructed her to go back behind the counter and open the register for him. (Tr. p. 111, line 1 – p. 112, line 18). After she helped with the register, she was told to get out of the way. (Tr. p. 113, lines 10 – 12).

After the State rested, defense counsel moved for a directed verdict to the charge of kidnapping because the State did not present any evidence to support the charge of kidnapping. (Tr. p. 246, lines 3 – 6). There was much discussion on the kidnapping charge and the trial judge wanted to know if every armed robbery was also always a kidnapping. (Tr. p. 148, line 24 – p. 258, line 10). The trial court ultimately denied the motion and relied on State v. East, 353 S.C. 634, 578 S.E. 2d 748 (Ct. App. 2003) and State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). (Tr. p. 258, line 11 – p. 261, line 8). The court wrote in State v. East:

The issue of whether the act of confinement can constitute the separate offense of kidnapping when it is incidental to the commission of another crime was raised in State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). In Hall, the victim was

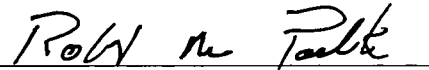
abducted by knifepoint as she placed a call from a phone booth near a clubhouse of an apartment complex. The perpetrator forced the victim to walk to an adjacent pool area where he sexually assaulted her and forced her to walk to different locations around the pool. At each location, the victim was assaulted. On appeal from his convictions for assault and battery of a high and aggravated nature, first degree criminal sexual conduct, and kidnapping, Hall argued the trial judge erred in failing to charge the jury that in order to establish kidnapping, the State must prove the confining and carrying away of the victim was more than incidental to the commission of another crime. The South Carolina Supreme Court disagreed, holding that Hall's restraint of the victim constituted kidnapping within the meaning of S.C. Code Ann § 16-3-910 (1976) "regardless of the fact that the purpose of this seizure was to facilitate the commission of a sexual battery." 280 S.C. at 78, 310 S.E.2d at 431.

The court went on to note that in other jurisdictions, the majority view is to the contrary and "kidnapping statutes do not apply to unlawful confinements on movements incidental to the commission of other felonies." Quoting, State v. Anthony, 817 S.W.2d 299, 305 (Tenn. 1991). It appears that 28 states agree that the mere seizure or detention of a victim with any accompanying movement is not sufficient to constitute the separate crime of kidnapping. "Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping." 39 A.L.R. 5th 283.

CONCLUSION

This State should adopt the majority view that not all instances of confinement or movement constitute a kidnapping and a directed verdict to that charge in appellant's case should be granted.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script, written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of January, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County
Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN BROWN,

APPELLANT

APPELLATE CASE NO. 2012-212946

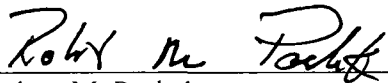
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin Brown 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 Clifton Newman, which was held on September 6, 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 Kevin Brown.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of January, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN BROWN,

APPELLANT

APPELLATE CASE NO. 2012-212946

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

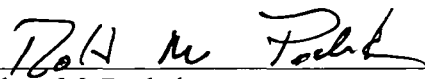
RECEIVED
JAN 28 2013
SC COURT OF APPEALS

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

- (1) True-billed indictment(s);
- (2) Entire Hearing Transcript (September 4 – 6, 2012)

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

January 28th, 2013


Robert M. Pachak
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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County
Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN BROWN,

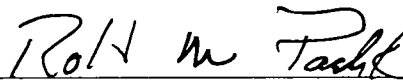
APPELLATE CASE NO. 2012-212946

APPELLANT
RECEIVED
JAN 28 2013

CERTIFICATE OF SERVICE

SC Court of Appeals

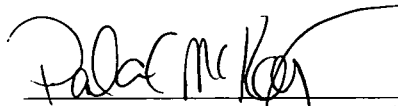
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Kevin Brown, #352266 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of January, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of January, 2013.

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