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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

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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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to strike testimony from the investigator that Appellant did not want to talk and wanted the representation of an attorney because the testimony constituted an improper comment on Appellant's constitutional right to remain silent and right to an attorney?

STATEMENT OF THE CASE

In December of 2011, the Beaufort County Grand Jury indicted Johnson for two counts of attempted murder, indictments #2011-GS-70-2269, 2270. On June 18, 2012, Johnson proceeded to jury trial before the Honorable Carmen t. Mullen. Attorney Eric Erickson represented Johnson at trial. Attorney Jeffrey S. Stephens prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Mullen sentenced Johnson to fifteen (15) years concurrent for each charge. A timely notice of intent to appeal was served on June 28, 2012. This appeal follows.

ARGUMENT

The trial judge erred in failing to strike testimony from the investigator that Appellant did not want to talk and wanted the representation of an attorney because the testimony constituted an improper comment on Appellant's constitutional right to remain silent and right to an attorney.

The jury found Appellant guilty of shooting at Desiree Constantineau and Frank Babecki as they were driving out of their apartment at the Cross Creek Apartment Complex. The Appellant, Johnson, also lived in the apartment complex and Babecki admitted that he purchased marijuana from Johnson. (R. p. 181, lines 2-7). Both Constantineau and Babecki identified Johnson as the shooter. (R. p. 174, line 20 – p. 175, lines 1-2; p. 202, line 4 – p. 203, lines 1-22).

Investigator Joshua Dowling with the Beaufort Police Department investigated the incident. At trial Investigator Dowling testified that after Johnson was taken into custody, "Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information." (R. p. 103, lines 13-16). During a pre-trial hearing Investigator George Erdel with the Beaufort Police Department testified that Johnson was mirandized before invoking his rights. (R. p. 24, lines 3-13). The judge erred in failing to strike Investigator Dowling's comments on Appellant's invocation of the right to remain silent and the right to an attorney.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the due process clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story, told for the first time at the trial, by cross-examining him about his post-arrest silence after receiving Miranda warnings. Doyle also prohibits the State from commenting upon the defendant's request for an attorney. See Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986); Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). The rationale for Doyle is

that it would be a violation of due process to allow comment on the silence which Miranda warnings have encouraged.

Subsequent to Doyle, in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Supreme Court clarified that Doyle was applicable only in situations in which the government had induced, via Miranda warnings, a defendant's belief that his exercise of a constitutional right would not be used against him. 455 U.S. at 607, 102 S.Ct. 1309 ("in the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post arrest silence when a defendant chooses to take the stand.") See also State v. Bell, 347 S.C. 267, 554 S.E.2d 435 (Ct.App.2001) (recognizing that Doyle is applicable only after Miranda warnings have been given).


State v. Weston, 367 S.C. 279, 291-292, 625 S.E.2d 641, 648 (2006).

Investigator Dowlings testimony constituted a Doyle violation as the testimony was an improper comment on appellant constitutional right to remain silent and right to an attorney. The judge's failure to strike and give a curative instruction to the jury requires reversal of the conviction and sentence.

CONCLUSION

Based on the above argument the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

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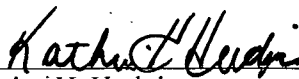
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mykel Johnson 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 Carmen T. Mullen, which was held on June 20, 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 Mykel Johnson.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

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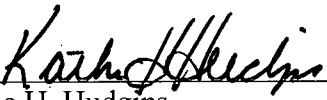
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and sentencing sheets;
- (2) Entire trial transcript.

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

August 19th, 2013


Kathrine H. Hudgins
Appellate Defender

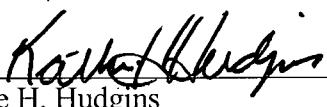
South Carolina Commission on Indigent Defense
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(803) 734-1343

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 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."

August 19, 2013



Kathrine H. Hudgins
Appellate Defender

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Columbia, South Carolina 29211-1589

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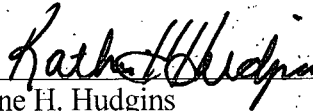
MYKEL JOHNSON,

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APPELLATE CASE NO. 2012-212478

CERTIFICATE OF SERVICE

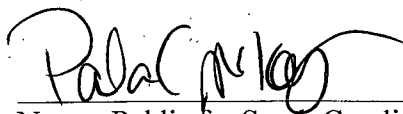
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Mykel Johnson, # 351916 at Lee Correctional Institution, 990 Wisacky Hwy. Bishopville, SC 29010 this 19th day of August, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2013.



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