

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

MAJOR DONNARD DUBOSE III

APPELLANT

APPELLATE CASE NO 2017-002167

ANDERS BRIEF OF APPELLANT

RECEIVED

AUG 29 2018

SC Court of Appeals

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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	3
ARGUMENT	
The trial judge erred in denying defense counsel’s motion for relief on a vindictive prosecution claim because the drug indictment levied against appellant was punishment in response to his (appellant’s) testimony that ultimately led to the acquittal of another individual whom police officers identified as the one who was guilty of drug trafficking on the day in question. ¹	4
CONCLUSION.....	10
PETITION TO BE RELIEVED AS COUNSEL.....	11

¹ Crack cocaine was found near an abandoned vehicle that belonged to Cedric Shaw after Cedric Shaw was seen smoking marijuana in the same vehicle moments prior to the events that led to the abandonment of the same vehicle; but at Shaw’s trial, appellant stated that he drove the vehicle in question and that the crack was his, and then Shaw was acquitted. R. 52, l. 6-9.

TABLE OF AUTHORITIES

Cases

<u>Patrick v. State</u> , 349 S.C. 203, 562 S.E.2d 609 (2002).....	9
<u>State v. Blakely</u> , 402 U.S. 650, 742 S.E.2d 29 (Ct. App. 2013).....	9
<u>State v. Fletcher</u> , 322 S.C. 256, 471 S.E.2d 702 (S.C. Ct. App. 1996).....	8, 9
<u>State v. Odom</u> , 412 S.C. 253, 772 S.E.2d 149 (2015)	3, 9, 10
<u>United States v. Bell</u> , 523 Fed. Appx. 956, 959 (4 th Cir. 2013).....	9
<u>United States v. Goodwin</u> , 457 U.S. 368 (1982)	8
<u>United States v. Sanders</u> , 211 F.3d 711, 716-17 (2d Cir. 2000)	9

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying defense counsel's motion for relief on a vindictive prosecution claim because the drug indictment levied against appellant was punishment in response to his (appellant's) testimony that ultimately led to the acquittal of another individual whom police officers identified as the one who was guilty of drug trafficking on the day in question.²

² Crack cocaine was found near an abandoned vehicle that belonged to Cedric Shaw after Cedric Shaw was seen smoking marijuana in the same vehicle moments prior to the events that led to the abandonment of the same vehicle; but at Shaw's trial, appellant stated that he drove the vehicle in question, and that the crack was his, and then Shaw was acquitted. R. 52, l. 6-9.

STATEMENT OF THE CASE

Appellant Major Donnard Dubose was convicted of trafficking in crack cocaine per jury trial held during the September 2017 term of the Florence County General Sessions Court before Judge Thomas A. Russo. Appellant was sentenced to imprisonment for a period of ten years. James T. McBratney represented appellant at trial, and Assistant Solicitor Angel I. Daniels appeared on behalf of the state.

Appellant appealed his trial court conviction and sentence. This brief follows.

STANDARD OF REVIEW

On a claim of vindictive prosecution, courts generally review the trial court's legal conclusion de novo and its findings of fact for clear error, and will reverse where the facts show actual vindictiveness or a sufficient likelihood of vindictiveness to warrant a presumption of vindictiveness. State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015).

ARGUMENT

The trial judge erred in denying defense counsel's motion for relief on a vindictive prosecution claim because the drug indictment levied against appellant was punishment in response to his (appellant's) testimony that led to the acquittal of another individual whom police officers identified as the one who was guilty of drug trafficking on the day in question.³

On June 7, 2011, two off duty police officers were riding in traffic on West Palmetto Street in Florence, SC when they saw a man in a vehicle in the next lane sitting there smoking a marijuana cigarette. Officer Ben Price, who was a passenger in Officer Brad McDowell's car, testified that he told Officer McDowell, who was driving, to in effect look over and confirm if what he saw was accurate. Officer McDowell confirmed and called on-duty Police Officer Shane Keith to handle the matter. Officer Price stated that he looked at a picture of Cedric Shaw and recognized and identified Shaw as the individual who was driving and smoking a marijuana cigarette on the date in question, and Officer McDowell made the same identification of Shaw as the perpetrator. Both Officers Price and McDowell testified to the same at Shaw's drug trial, but Shaw was acquitted because appellant testified at Shaw's trial and stated that he was the man the officers' saw (not Shaw) smoking marijuana in the car on that day. R. 47, l. 19 – p. 52, l. 9; R. 53, l. 17 – p. 54, l. 4. The driver abandoned the car and crack cocaine was found near the car.

Officer Shane Keith responded to Officer McDowell's call and made contact with the vehicle driven by Shaw and gave chase. At some point during the chase, the driver of the vehicle spun out into a nearby cornfield and fled. When backup arrived, the car was found abandoned and Shane Keith testified that he saw marijuana in the vehicle door and found crack cocaine a

³ Crack cocaine was found near the abandoned vehicle that belonged to Cedric Shaw after Cedric Shaw was seen smoking marijuana in the same vehicle moments prior to the events that led to the abandonment of the same vehicle; but at Shaw's trial, appellant stated that he drove the vehicle in question, and that the crack was his and then Shaw was acquitted. R. 52, l. 6-9.

few yards from the vehicle. R. 56, l. 8 – p. 66, l. 5. Also, Officer Keith discovered the bill of sale for the vehicle which reflected Cedric Shaw as the owner. R. 66, l. 9-25. Keith stated that he only saw one person in the vehicle. R. 68, l. 22 – R. 69, l. 5.

Officer Brad McDowell stated that he looked over in traffic and saw a male in a vehicle who appeared to be smoking marijuana. Officer McDowell stated that he identified Cedric Shaw as the driver of the vehicle who was smoking marijuana on the day in question, and that he showed a picture of Shaw to Officer Price, who also agreed that Shaw was with the driver of the vehicle who was smoking marijuana on that day. R. 105, l. 19 – p. 110, l. 20. Officer McDowell stated that he recalled appellant's testimony during Shaw's trial wherein appellant informed the jury that he (appellant) was the driver smoking marijuana on that day and that he was in possession of the crack cocaine, and that Shaw was acquitted on the drug charge as a result. R. 114, l. 3 – p. 115, l. 1. McDowell admitted that he knew that the drugs did not belong to appellant because he knew and identified Shaw as the driver and testified regarding the same as follows:

A. He (appellant) admitted that the stuff belonged to him, yes.

Q. And he (appellant) blew up your case?

A. Absolutely.

Q. And you were angry?

A. I wasn't angry.

Q. You weren't? You went out immediately and got an arrest warrant charging him (appellant) with trafficking.

A. I mean, that wasn't done out of anger. It was done out of him admitting that the stuff was his.

Q. Okay. But you didn't have any other evidence, did you?

A. Other than him getting up and admitting under oath that it was him, no, sir.

Q. But you knew it wasn't him, didn't you?

A. I identified Cedric Shaw as – as the person driving the vehicle.

Q. So you knew it wasn't Major Dubose that had those drugs, didn't you?

A. He admitted it was his.

Q. So you knew he was lying when he took the witness stand, didn't you?

A. Yes.

Q. Okay. But you knew he was lying?

A. I figured he was lying, yes. R. 120, l. 1 – p. 121, l. 11.

Note that Officer McDowell insisted and was adamant about the fact that the man he saw smoking marijuana in the vehicle on the day in question was Shaw, and his (Officer McDowell's) testimony, which follows, affirmed this:

Q. You pull up to the intersection and you look and both you and Ben Price have testified you see Cedric Shaw sitting in the car smoking a joint?

A. Yes, sir.

Q. And there's no question in your mind that Cedric Shaw was in the car?

A. No question.

Q. And you didn't see anybody else in the car, did you?

A. No, sir.

Q. Okay. But there's no question in your mind that he was the only one in that silver Crown Vic?

A. That's correct. R. 117, l. 17 - p. 118, l. 13.

Before the state rested its case, a transcript of appellant's testimony from the Shaw trial wherein he (appellant) claimed ownership of the of the crack cocaine was read to the jury. The transcript reflected appellant's admission that he previously sold crack, and that on the date in question, he drove Shaw's vehicle, and that he was the individual driving Shaw's vehicle and smoking marijuana while driving Shaw's vehicle on that day, which meant that the police officers who identified him were in error obviously, and the jurors believed appellant's testimony and acquitted Shaw on the drug charge against him. R. 133, l. 3 – R. 159, l. 22.

At the close of the state's case at **appellant's** trial on the drug charge, counsel argued for relief under a vindictive prosecution claim because Officer McDowell admitted that he knew appellant was not guilty of trafficking in crack cocaine, **despite appellant's** testimony at Shaw's drug trial that he (not Shaw) was guilty of trafficking in crack cocaine instead, but went on to swear out an arrest warrant against appellant on the drug charge to ensure an indictment on the same in retaliation over the anger and embarrassment of Shaw's acquittal. The Court denied the motion. R. 175, l. 14 – R. 186, l. 8.

It is a due process violation to punish a person for exercising a constitutional right and there are rules to protect defendants against vindictive prosecutions. State v. Fletcher, 322 S.C. 256, 471 S.E.2d 702 (S.C. Ct. App. 1996), citing to United States v. Goodwin, 457 U.S. 368 (1982). To warrant the application of vindictiveness by a prosecutor, the inquiry is not focused solely on the presence or absence of an actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses a reasonable likelihood of vindictiveness as to require a presumption of vindictiveness; and if this is not established, then the movant must show actual vindictiveness by the prosecutor. State v. Blakely, 402 U.S. 650, 742 S.E.2d 29 (Ct. App. 2013); Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). In

Patrick, retaliation was the motive when additional charges were brought against the defendant because he exercised his right to appeal and the presumption of vindictiveness was proved and not rebutted by the state. In Blakely, where the defendant was acquitted on one charge (murder) after she exercised her right to a jury trial, but was then indicted on another charge (accessory after the fact), the Court held that this new indictment did not rise to a reasonable likelihood of a presumption of vindictiveness as there was no heightened or increased punishment and no actual showing of vindictiveness. Compare also Fletcher, where the issue was whether prosecutorial vindictiveness occurred after the defendant's municipal charges were reversed on appeal and the prosecution indicted on related charges in General Sessions Court. The Court in Fletcher held that there was no proof of actual vindictiveness on behalf of the prosecution. Listed below from State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015), are the factors that are relevant to establish actual vindictiveness:

“To demonstrate actual vindictiveness, a defendant must show that the government harbored ‘vindictive animus’ and that the superseding indictment was brought ‘solely to punish’ him.” United States v. Bell, 523 Fed. Appx. 956, 959 (4th Cir. 2013) (quoting Wilson, 262 F.3d at 316). In other words, to prove a claim of actual vindictiveness, “a defendant must show, through objective evidence, that (1) the prosecutor acted the genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus.” Wilson, 262 F.3d at 314 (citations omitted); see also United States v. Sanders, 211 F.3d 711, 716-17 (2d Cir. 2000) (“To establish an actual vindictive motive, a defendant must prove objectively that the prosecutors charging decision or the resultant indictments were a direct and unjustifiable penalty, that resulted solely from the defendant’s exercise of a protected legal right.” (internal citations and quotation marks omitted)).

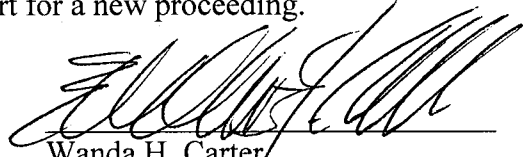
Also, in Odom, the Court outlined what happens if a defendant creates a presumption of vindictiveness:

“if the defendant creates a presumption of vindictiveness the burden shifts to the government to show that legitimate reasons exist for the prosecution.” Barrett, 585 S.E.2d at 365 (citations omitted). When determining if a presumption of vindictiveness is warranted...the appropriate inquiry is whether.....for example where, after the defendant’s prior exercise of a procedural or substantive legal right, or his having succeeded in reversing a conviction on appeal, the prosecution acts arguably to punish the exercise of such rights, by increasing the measure of jeopardy by bringing additional or more severe charges, or where the judge assesses a larger penalty upon subsequent conviction for the same offense following an earlier reversal.

In the case at bar, state officials suffered the humiliation of the acquittal of Cedric Shaw at his drug trial after the jury heard the testimony of appellant, who exercised his constitutional right to testify. Appellant’s testimony was in direct contravention of the testimony from police officers, who identified Shaw as the marijuana-smoking driver that had crack in the car he drove, and the jury believed appellant and disbelieved the agents for the state. The officers knew appellant lied, but rather than indict appellant for **perjury**, the solicitor indicted appellant on the drug charge of trafficking in crack cocaine as punishment (seeking an increased sentence as a perjury conviction carries less time than the drug charge). Vindictive prosecution and retaliation violates one’s Fifth Amendment right to due process. See State v. Odom, supra. Here, appellant was the target of vindictive animus by the prosecution and the drug indictment against him was the resulting retaliation. Based on the argument outlined above, appellant established a presumption of prosecutorial vindictiveness and actual prosecutorial vindictiveness and the resulting due process violation that followed.

CONCLUSION

Based on the foregoing argument, appellant requests that his conviction and sentence be reversed on his case remanded to the lower court for a new proceeding.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of August, 2018.

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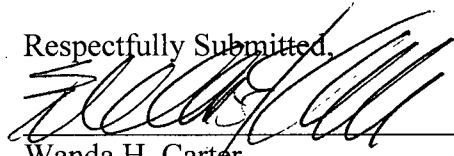
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Major Donnard Dubose III states that:

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 Thomas A. Russo, which was held on September 11-12, 2017, 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 Major Donnard Dubose III.

Respectfully Submitted,


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of August, 2018.

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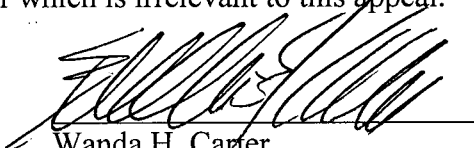
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire Trial transcript dated September 11-12, 2017
- (2) Entire Trial Transcript dated September 13, 2017
- (3) True-billed indictment

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

August 29, 2018


Wanda H. Carter
Deputy Chief Appellate Defender

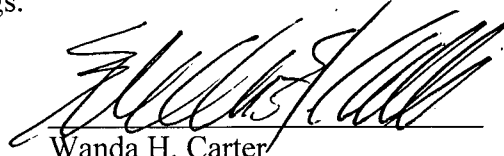
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ATTORNEY FOR APPELLANT

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 29, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

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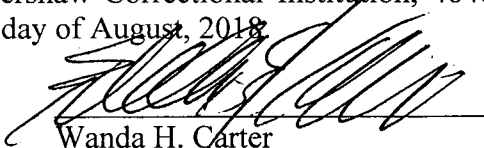
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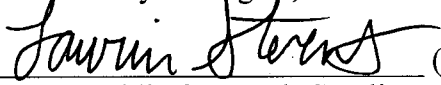
CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, 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 have been served on Major Donnard Dubose III, 373903, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 29th day of August, 2018.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of August, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.