

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

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MAY 02 2019

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT LEN GAINEY,

APPELLANT

APPELLATE CASE NO. 2018-001396

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by denying Appellant's motion to relieve counsel when trial counsel failed to (1) adequately communicate with Appellant, (2) advise Appellant that his case was being called to trial, and (3) conduct a reasonable investigation, including interviewing available witnesses to testify in Appellant's defense?

STATEMENT OF THE CASE

A Darlington County grand jury indicted Appellant on October 8, 2015 for trafficking cocaine. R. 134-135. His case was called to trial on January 29, 2018 before the Honorable Roger E. Henderson, and a jury. R. 1. Appellant was tried in his absence after he did not appear for trial. R. 36, l. 20 – 37, l. 11. Assistant Solicitors Samuel Thomas and Kelly Jackson represented the state, and James C. Cox, Jr. represented Appellant. R. 1.

On January 30, 2018, the jury found Appellant guilty as indicted. R. 108, l. 25 – 109, l. 9. The sealed sentenced was opened by the Honorable Paul M. Burch on July 19, 2018. R. 114. Appellant was sentenced to ten years imprisonment. R. 126, ll. 8-14; R. 136.

This appeal follows.

STANDARD OF REVIEW

“A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citing State v. Hyman, 276 S.C. 559, 562, 281 S.E.2d 209, 211 (1981)); See State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007).

ARGUMENT

The trial judge abused his discretion by denying Appellant's motion to relieve counsel when trial counsel failed to (1) adequately communicate with Appellant, (2) advise Appellant that his case was being called to trial, and (3) conduct a reasonable investigation, including interviewing available witnesses to testify in Appellant's defense.

Trial counsel began representing Appellant in 2009 after he was arrested for murder, possession of a weapon during the commission of a violent crime, and possession of cocaine. R. 5, ll. 9-11. These charges, despite being nearly ten years old, were still pending in July 2018 when Appellant was sentenced in this case. Appellant posted bond in 2009 for the murder offense and related charges. However, he was later arrested on a bench warrant in 2015. During a search incident to arrest on the bench warrant, law enforcement allegedly found approximately 10.5 grams of crack cocaine on Appellant's person leading to his indictment in this case.

Deputy Tony Hayes with the Darlington County Sheriff's Office was conducting routine patrol during the early morning hours of May 30, 2015 when he was approached by a "bondsman" at a local gas station. R. 50, l. 22 – 51, l. 25. The bondsman told Hayes that Appellant had an active warrant for his arrest and informed Hayes where Appellant could be found. R. 51, l. 25 – 52, l. 4. Hayes confirmed with dispatch that Appellant did in fact have an active warrant. R. 53, ll. 5-17. He then proceeded to Katie's Lounge, a nightclub where the bondsman stated Appellant could be found, and looked for a small gray sedan, the car Appellant had allegedly been seen driving. Hayes found Appellant sitting in a car in the parking lot of the club. The driver's door was open, and Appellant was sitting in the driver's seat. R. 53, l. 18 – 54, l. 5. After Hayes confirmed the individual was Appellant, he told Appellant he had an active

warrant and placed him under arrest. R. 54, ll. 6-15. Appellant was very cooperative and compliant. R. 52, ll. 9-10; R. 59, ll. 5-6.

During a search incident to arrest, Hayes observed a bulge in Appellant's left front pocket. Hayes ultimately found a clear plastic bag containing a white powdery substance that he believed was crack cocaine. R. 52, ll. 10-15. The substance field tested positive for cocaine base with a field weight of 10.8 grams. R. 52, l. 16 – 53, l. 4.

A forensic chemist with the South Carolina Law Enforcement Division, who was qualified as an expert in drug analysis, determined the substance allegedly seized from Appellant was cocaine with a weight of 10.54 grams. R. 84, l. 19 – 85, l. 12.

Appellant moved pretrial for a continuance and to relieve counsel. Appellant's counsel told the judge that Appellant "thinks the evidence against him, the case against him has been changed, that it's not the facts that he was originally charged with." Furthermore, counsel explained, "He [Appellant] thinks that I'm part of the system and I'm working against him. That I failed to stand up for his rights." R. 5, ll. 19-21. Counsel concluded that Appellant had no confidence in him as his attorney. R. 6, ll. 4-6.

When Appellant was given an opportunity to speak, he explained to the trial judge that he did not know his case was being called to trial because his counsel failed to properly communicate with him. He said he had only met with trial counsel three times in the nearly ten years that counsel represented him. R. 7, ll. 10-13. Appellant asserted this was his first opportunity ever to speak with a judge and move to relieve his counsel. He explained that he had spoken to other attorneys about representing him, but none of the attorneys would speak with him until trial counsel was relieved. R. 7, l. 21 – 8, l. 3.

When questioned by the judge as to his efforts to communicate with Appellant, trial counsel maintained that he corresponded mostly with Appellant's sister whom Appellant lived with at one point in time. He said he communicated with her "because she would return my phone calls." R. 8, ll. 6-12. However, counsel claimed Appellant never answered his telephone and his voicemail was always full so counsel could never leave a message. R. 8, ll. 12-13. Ultimately counsel conceded, "It is true that I have not talked to him that many times," but claimed the "problem" was Appellant. R. 8, ll. 15-17.

As to any confusion regarding the charge for which Appellant was being tried, counsel stated, "I can't give a reason why he would say he didn't understand the charges against him. I have nothing to show that the State has altered or changed the charges. March 30, 2015, trafficking cocaine. We've discussed that. We've plan[ned] for it. I mean, *this is on a yearly basis.*" R. 8, l. 25 – 9, l. 5 (emphasis added).

The trial judge ultimately denied Appellant's motion to relieve counsel. He stated, "I'm not going to allow you to come in here at the eleventh hour and seek a continuance of the case that's been pending for two years. I deny your motion to have Mr. Cox relieved. He'll continue to serve as your attorney and this matter will not be continued." R. 12, ll. 4-12.

Discussion

"An accused has the right to the assistance of counsel." State v. Justus, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011) (citing U.S. Const. amend. VI and Gideon v. Wainwright, 372 U.S. 335 (1963)). "A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." Id. at 418-419, 709 S.E.2d at 670 (quoting State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005)); See State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001)).

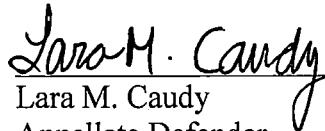
It is apparent, based on the record before this Court, that there was a breakdown in the attorney/client relationship between trial counsel and Appellant, which effectively denied Appellant his Sixth Amendment right to counsel. Trial counsel failed to properly communicate with Appellant, advise him that his case was being called to trial, and investigate his case. Counsel admitted that in the nearly ten years he represented Appellant he had “not talked to him that many times” and suggested he only talked to Appellant on a yearly basis. R. 8, l. 15 – 9, l. 5. Moreover, Appellant identified several individuals who he intended to call as witnesses in his defense, but it was evident that trial counsel never interviewed any of them before trial or conducted any sort of investigation. See R. 20, ll. 4-7; R. 36, ll. 6-17. In fact, the record shows counsel presented absolutely no defense during trial and admitted Appellant’s guilt during his closing argument. See R. 93, ll. 8-24.

Consequently, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

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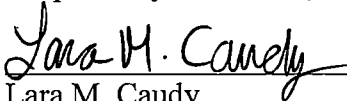
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Len Gainey states:

1. She is an 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, which was held January 29-30, 2018 before the Honorable Roger E. Henderson, 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 (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 Robert Len Gainey.

Respectfully Submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of May, 2019.

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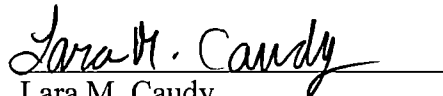
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-Billed Indictment;
- (2) Sentence Sheet;
- (3) Complete Trial Transcript dated January 29-30, 2018;
- (4) Complete Sentencing Transcript dated July 19, 2018;
- (5) State's Exhibit No. 2 (SLED Report);
- (6) Court's Exhibit No. 1 (Jury Note).

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

May 2, 2019


Lara M. Caudy
Appellate Defender

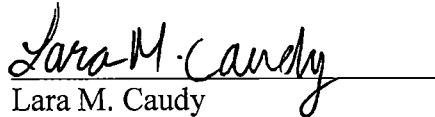
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(803) 734-1330

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."

May 2, 2019.


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Appellate Defender

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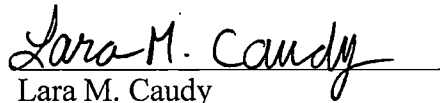
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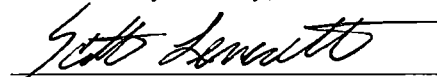
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal in the above referenced case have been served on Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant, Designation of Matter, and Record on Appeal have been served on Robert Len Gainey, #377140, at Allendale Correctional Institution, PO Box 1151, Highway 47, Fairfax, SC 29827, this 2nd day of May, 2019.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of May, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.