Hopkins, Debbie

From: John J. Kozelski <JKozelski@charlestoncounty.org>
Sent: Friday, May 24, 2019 11:54 AM
To: Hopkins, Debbie
Cc: Zelenka, Don; Stephanie Linder
Subject: State v. Devin Johnson (App. Case No. 2019-000844)
Attachments: GS - Motions - M640238 - MOFREE - JOHNSON, DEVIN JAMEL.pdf

Debbie,

Thank you for taking the time to help me figure out this jurisdictional situation. As we discussed on the phone, my client, Devin Johnson, had a trial on April 1-4, 2019. Following a guilty verdict on the charge of murder, I filed a timely motion for a new trial (attached) with our court on April 15, 2019. A hearing for that motion is currently scheduled for the morning of May 29, 2019; however, during the pendency of this motion, Mr. Johnson wrote a letter to the Supreme Court asking the Court to quash his indictment. This letter was construed as a notice of appeal from conviction and sentence in his case, which was not our intention at this stage of litigation.

I hope this email will suffice to withdraw the notice of appeal in Mr. Johnson's case, so that we can go forward with his motion for a new trial on May 29th. If unsuccessful in our motion, our intent will then be to file a notice of appeal within ten (10) days of the court's ruling. Please let me know if you have any concerns or if you need additional paperwork. Thank you again for your time.

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STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	)	**IN THE COURT OF GENERAL SESSIONS** **MOTION COVERSHEET**
	)	WARRANT/TICKET/ INDICTMENT #'s M640238
STATE OF SOUTH CAROLINA	)	
-vs- Devin Johnson DEFENDANT	)	

Solicitor:	Defendant's Attorney:
Stephanie Linder, Bar No.	John Kozelski, Bar No. 100153
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FILED
2019 APR 15 PM 2:
BY JUDI ARMSTRONG CLERK OF COURT

☒ **MOTION HEARING REQUESTED**
☐ **FORM MOTION, NO HEARING REQUESTED**
☐ **PROPOSED ORDER/CONSENT ORDER**

SECTION I: Hearing Information

Nature of Motion: Motion for a New Trial

Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of ☐ Solicitor ☑ Attorney for Defendant — Date submitted: 4/15/19

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF GENERAL SESSIONS**
	)	**FOR THE NINTH JUDCICIAL CIRCUIT**
COUNTY OF CHARLESTON	)	
	)	**Case No:** 2018GS1006264
STATE OF SOUTH CAROLINA	)	**Warrant No:** M640238
	)	**Charge:** Murder
	)	
	)	
vs.	)	
	)	
DEVIN JOHNSON,	)	**MOTION FOR NEW TRIAL**
	)	
	)	
Defendant	)	
	)	

The Defendant, indicted for murder, proceeded to trial on April 1, 2019. The jury returned a verdict on Thursday, April 4, 2019, finding the Defendant guilty.

The Defendant hereby moves for a new trial on the following bases:

1. All defense motions made, but denied;

2. All defense objections made, but overruled.

Respectfully submitted,

John J. Kozelski, III
Assistant Public Defender
Attorney for Devin Johnson

Charleston, South Carolina

Dated: April 15, 2019.

CERTIFICATE OF SERVICE

I hereby certify that this document was served on the Solicitor for the Ninth Judicial Circuit on April 15, 2019.

Charleston County Public Defender's Office

STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	)	**IN THE COURT OF GENERAL SESSIONS FOR THE NINTH JUDCICIAL CIRCUIT**
STATE OF SOUTH CAROLINA	)	**Case No:** 2018GS1006264 **Warrant No:** M640238 **Charge:** Murder
vs. **DEVIN JOHNSON,** **Defendant**	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENSE'S MOTION FOR A NEW TRIAL**

I. FACTS

On June 8, 2011, Akeem Smalls was found by Officer Matthew Jahngen of the Charleston Police Department (CPD) near the Georgetown Apartments in West Ashley with a gunshot wound in his back. After expressing to Officer Jahngen where he believed he was shot and that he was having difficulties breathing, Smalls was taken to the emergency room where he died an hour later. At no point does Smalls ever tell Officer Jahngen who shot him during their interaction before EMS arrived. Authorities ultimately developed Devin Johnson as one of two suspects and charged him, along with Diangelo Bumcum, with Smalls' murder on June 11, 2011.

After his arrest, Johnson initially waived his rights and agreed to speak with detectives at CPD Headquarters. In the interrogation room, Johnson was questioned for several hours by David Osborne and Craig Kosarko, two veteran CPD detectives. Although Johnson began his interrogation by telling the detectives that he was in Orangeburg, South Carolina on June 8, Johnson ultimately revealed that he was at the Georgetown Apartments to pick up some clothing from his sister's apartment when he

witnessed Diangelo Bumcum[1] shooting at Smalls. Bumcum, who was being questioned by the same detectives in an adjacent interrogation room, also denied involvement in the crime and testified at trial that he did not know who Johnson was.

Throughout the trial, the State presented one consistent story of the case – that Devin Johnson shot Smalls. The State claimed that Johnson had a motive to kill Smalls—a $400 debt; Johnson had the opportunity to kill Smalls; Johnson initially lied to the police about being at the Georgetown Apartments that night; Johnson attempted to recruit Terry Stevens[2] via text messages to help with the killing; Johnson attempted to cover up the killing; and Johnson's fingerprint was located on an unfired shell casing found in a bedside table of his sister's apartment a week after the shooting. During the State's closing, the prosecutor placed these individual claims on puzzle pieces within her PowerPoint, which when placed together formed Johnson's mugshot.

At no point during the trial did the State offer any evidence of who Johnson was with that night, except for the fact he was associated with Johnson, whom only knew him as "Creep." The State presented evidence of Creep being a passenger in Johnson's vehicle, but offered no evidence to show his involvement in the crime beyond being merely present at the scene. When pressed upon this issue on cross-examination, Detective Osborne, the lead case agent, testified that he would not have served a murder warrant on Creep because he was the passenger, and as the passenger, Osborne would want to speak to Creep to find out what he knew about the incident and how, if at all, he was involved. Even the prosecutor during her closing argument repeatedly stated the phrase "we don't know," when expressing any involvement of Creep or anyone else that could have been involved.

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[1] During his interrogation with Detective Osborne, Johnson was shown a single-photo identification of Diangelo Bumcum, who he ultimately identified as the shooter.

[2] Testimony at trial revealed that CPD detectives spoke to Terry Stevens shortly after the incident, reviewed his phone records, and eliminated him as the possible unknown individual.

In essence, the State asked the jury to engage in a process of elimination despite presenting no evidence that the perpetrator could be someone else. While the jury's verdict ultimately found Johnson not to be the shooter, they were inevitably confronted with a decision that, by all reasoning, would have convicted this unknown individual of murdering Smalls. The State effectively argued for the jury to infer that any association with Johnson while being present at the scene constitutes guilt, thus rendering a guilty verdict under the hand of one charge.

II. DISCUSSION

"'The law to be charged must be determined from the evidence presented at trial.'" State v. Ward, 374 S.C. 606, 614 (Ct. App. 2007)(quoting State v. Knoten, 347 S.C. 296, 302 (2001)). There must be some evidence in the record to support the charge to the jury. Id. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally from everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194 (citing State v. Langley, 334 S.C. 643, 648 (1999)). According to the South Carolina Supreme Court, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Langley, 334 S.C. at 648.

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" Id. at 648-649(quoting State v. Austin, 299 S.C. 456, 459 (1989)). Mere association with admitted members of a conspiracy or an admitted perpetrator of a crime is insufficient to constitute the guilt of the defendant on trial. See State v. Barroso, 328 S.C. 268 (1997); State v. Kelsey, 331 S.C. 50 (1998); State v. Sullivan, 277 S.C. 35 (1981); State v. Mouzon, 326 S.C. 191 (1997). Further, "[p]rior knowledge that a crime is going to be committed,

without more, is not sufficient to make a person guilty of the crime." Wilson v. Wilson, 319 S.C. 370, 373 (1995); see also State v. Thompson, 347 S.C. 257 (Ct. App. 2007). "mere presence at the scene is not sufficient to establish guilt as an aider or abettor." State v. Mattison, 388 S.C. 469, 480 (2010)(quoting State v. Leonard, 292 S.C. 133, 137 (1987)). Rather, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal." State v. Hill, 268 S.C. 390, 395-396 (1977).

In Barber v. State, 393 S.C. 232, 236 (2011), the Supreme Court examined the propriety of an accomplice liability charge. The Court explained that "an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Id. Resolving the issue of whether the "hand of one" charge was correct, the Court asked whether there was any evidence that another co-conspirator was the shooter and the defendant was acting with him when the robbery took place. Id. at 237(citing State v. Dickerman, 341 S.C. 293 (2000); see also State v. Crowe, 258 S.C. 258 (1972). The evidence showed the robbers were clothed in black and wrapped shirts around their heads, that the defendant was involved in the planning and execution of the robbery, and that one of the robbers other than the defendant may have been the shooter. Id.

This Court concluded the trial judge correctly charged the jury concerning "the hand of one is the hand of all" where the evidence revealed the defendant and his co-defendant were with a large group of people during a confrontation, the co-defendant used language indicating the two were acting together, the defendant, and co-defendant go into a truck that chased after an individual in a car, and witnesses claimed the defendant shot his gun toward the car. State v. Ward, 374 S.C. 606, 614 (Ct. App. 2007). This evidence supported the theory that the defendant and his co-defendant joined together to accomplish an illegal purpose. Id.

Recently, this Court affirmed a grant of post-conviction relief where appellate counsel failed to raise on appeal the trial judge's error in instructing the jury on accomplice liability and mere presence where the evidence failed to support the charge. Wilds v. State, 407 S.C. 432, 435 (2014). On the afternoon of March 29, 1999, Wilds was walking down the street with two companions when they saw Rumph approaching them. Wilds commented to the others that he thought Rumph had some money. Id. Wilds stopped to talk to Rumph while his companions continued walking. Id. at 436. Wilds unexpectedly pulled out a pistol. Rumph handed over his wallet. Id. at 436. Wilds ordered his companions to hit Rumph and they complied. Wild's companions took items from Rumph, including a cigarette lighter and change. Wilds then shot Rumph. Id. After the shooting, Wilds and his companions ran. When they stopped, Wilds gave the companions money from Rumph's wallet and told them to stay quit. Id. One of the companions told Wilds to get rid of the gun. Id.

Wilds was charged with armed robbery and murder of Rumph. During the deliberations, the jury sent a note asking if the jury found Wilds guilty of murder, would that be finding that Wilds alone pulled the trigger. Id. at 437. Over Wilds' objection, the judge instructed the jury on accomplice liability, but refused to instruct the jury concerning mere presence. Id.

The Court explained that "no evidence ... indicated anyone other than Wilds was the shooter." Id. at 439. "The only evidence presented was that Wilds was the shooter, and [his companions] joined in the robbery after Wilds pulled the gun on Rumph." Id. This Court recognized that the jury may have had doubts about the companions' testimony; however, those doubts failed to support a charge on the alternate theory of liability, such as accomplice liability. An alternate theory "'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber, 393 S.C. at 236). The Court found prejudice to Wilds "[b]ecause the instruction was given in response to the jury's question regarding whether a conviction meant it found

Wilds actually pulled the trigger, and because the jury returned guilty verdicts after receiving the instruction." Id. at 439.

In the present case, the prosecution presented no evidence to support an instruction to the jury concerning accomplice liability or "the hand of one is the hand of all." The only evidence presented by the State was that Johnson was the shooter. This was clearly evident from the State's closing argument that ended with little puzzle pieces coming together to form Johnson's booking photo. There was no evidence that the passenger in the car was the shooter or that Johnson and the passenger agreed upon some criminal enterprise prior to the shooting. In fact, the State's own witness and lead detective, David Osborne, testified that he would not even serve a murder warrant on the passenger, because as the passenger Osborne would want to talk to him to see what he knew and how he was involved.

The evidence was not equivocal on some integral fact as would be required in order to instruct the jury on accomplice liability. The only fact-pattern presented by the State was that Johnson and an unknown passenger arrived at the apartment complex, walked in the direction where the shooting occurred, Johnson shot Smalls due to a debt, then Johnson and the passenger ran back to Johnson's car. There was no evidence presented that Johnson and the passenger had planned to engage in any action upon arrival at the apartment or that the shooting was the natural and probable consequence of any agreed upon action.

III. CONCLUSION

For all of the foregoing reasons, the Defendant moves that this Court grant a new trial based on the erroneous jury instruction of accomplice liability and "the hand of one is the hand of all" charge.

Respectfully submitted,

John J. Kozelski, III
Assistant Public Defender
Attorney for Devin Johnson

Charleston, South Carolina

Dated: April 15, 2019.