

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County

Honorable J. Derham Cole, Circuit Court Judge

ORIGINAL

IN THE MATTER OF THE CARE AND
TREATMENT OF DONALD HULON,

APPELLANT.

APPELLATE CASE NO. 2018-001844

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court err in refusing to strike a juror for cause when she and her sister had been molested by her grandfather and one of appellant's predicate convictions was for abusing a girl and her sister?

STATEMENT OF THE CASE

When appellant Donald Hulon neared serving all of his sentence for a criminal conviction, the Attorney General sought his commitment as a sexually violent predator and on September 25, 2018, appellant was tried in Marlboro County before the Honorable J. Derham Cole and a jury. R. 1. James Bogle represented the Attorney General. R. 1. James Falk represented appellant. R. 1. The jury concluded that appellant is a sexually violent predator and Judge Cole ordered him committed. R. 310-11. This appeal follows.

STANDARD OF REVIEW

“A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence.” State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996).

ARGUMENT

In this sexually violent predator case, the trial court erred in refusing to strike a juror for cause when she and her sister had been molested by her grandfather and one of appellant's predicate convictions was for abusing a girl and her sister.

In criminal trials, propensity evidence is forbidden. Rule 404(a), SCRE. See also, State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) (holding evidence tending to show defendant was a pedophile was inadmissible in sexual assault prosecution). Conversely, sexually violent predator cases are only about propensity. The jury is required to find whether the defendant is “likely to engage in acts of sexual violence” if he is not incarcerated. S.C. Code Ann. § 44-48-30(1)(b). Juries hear the entirety of the defendant’s criminal history from the Attorney General’s expert witnesses who routinely tell jurors, as Dr. Marie Gehle did in appellant’s case, that “a person’s past sexual behavior is the best indicator of their future sexual behavior. . . .” R. 117.

This inquiry into a defendant’s past and the inevitable presentation by the Attorney General’s expert witness of the lurid details of an SVP defendant’s sexual crimes increases the need for the trial judge to ensure the defendant receives a fair and impartial jury as is guaranteed by the state and federal constitutions. U.S. Const. amend. VII; S.C. Const. art. I, § 14 (“The right of trial by jury shall be preserved inviolate.”). South Carolina guarantees the right of a party to have partial jurors set aside. S.C. Code Ann. § 14-7-1020. “The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he . . . is sensible of any bias or prejudice therein.” Id. “If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.” Id.

During jury selection, the court asked the panel whether anyone had a family member accused of a sex offense or had been a victim of a sex offense. R. 60-61. Judge Cole said he would speak with those jurors privately. R. 60-61, Juror 31 responded and when Judge Cole asked, "Was it a victim or an accused," she responded "Both." R. 61. Judge Cole, the court reporter, and the attorneys then went into chambers to hold private discussions with the jurors who responded. R. 62.

In chambers, Juror 31 told Judge Cole that, "It was my grandfather, and it was me and my sister." R. 67. She was a victim of abuse from her grandfather. R. 67-68. The abuse was not reported to law enforcement. R. 68. Judge Cole asked whether the abuse would affect her judgment in the case and Juror 31 replied, "I don't think so. It was a long time ago." R. 68. When asked if she could be fair and impartial to appellant, she replied, "Yes, sir."

Appellant asked the court to strike Juror 31 for cause. R. 74. Trial counsel explained that appellant "had that sort of role in this family with two girls. She was about that same age it sounds like at the time. . . . I have concerns about whether she could be fair when she really has to start listening to the facts." R. 74. Judge Cole ruled that he could not "strike her for cause if she tells me she can be fair." R. 75. He stated that when jurors "tell me they can do something, I really have to accept that they can. Otherwise, I have to make my own judgment somebody is lying to me, **and I'm not willing to do that.**" R. 74-75 (emphasis added). Appellant was forced to use one of his peremptory strikes on Juror 31 and also used all of his strikes. R. 314.

The trial judge erred in not striking Juror 31 under the enhanced need for impartial jurors in SVP cases. South Carolina has several per se rules for excusing jurors for cause and should adopt such a rule excusing prior sexual assault victims in SVP cases. South Carolina requires that any stockholder in a corporation be excused in a lawsuit involving that corporation. S. Bell

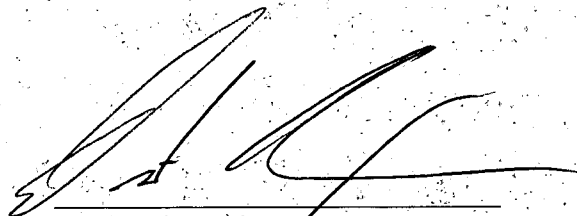
Tel. & Tel. Co. v. Shepard, 262 S.C. 217, 222, 204 S.E.2d 11, 12 (1974). “That a stockholder in a company which is a party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law. . . . The district court's refusal to strike the Ford stockholder for cause . . . is reversible error.” Id. quoting Chestnut v. Ford Motor Co., 445 F.2d 967, 971 (4th Cir. 1971). South Carolina also has a per se rule excluding jurors who are customers of an electric co-operative under the theory that they are also owners of the co-operative. Alston v. Black River Elec. Co-op., 345 S.C. 323; 327-29, 548 S.E.2d 858, 860-61 (2001).

A person who owns a few shares of a stock or whose electric bill may go up by a few cents if an electric co-operative loses a lawsuit has much less potential bias than a former victim of sexual abuse. The small and attenuated pecuniary interest of jurors cannot compare to the lifelong trauma of sexual assault. South Carolina should disqualify for cause all victims of sexual assault in SVP cases where these jurors will hear not that the person may have committed a sexual crime, but that they were convicted of such crimes in the past.

Furthermore, as defense counsel pointed out, the history of Juror 31 was so similar to one of appellant's predicate convictions, that even without such a rule, she should have been excused. Appellant was convicted of having sex with a young girl and her sister and forcing her to perform sexual acts with other men. R. 137-53. The Attorney General's expert claimed appellant referred to the twelve-year-old girl as “a whore” in his evaluation. R. 144. Appellant was much older—he was 67 years old at the time of trial. R. 237. Juror 31 could not have retained any sense of impartiality upon hearing this evidence. The trial judge erred in not granting appellant's motion to strike for cause and appellant was therefore denied his constitutional and statutory right to trial by an impartial jury. This case should be reversed.

CONCLUSION

For the foregoing reasons, appellant's confinement in the SVP facility should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of September, 2019.

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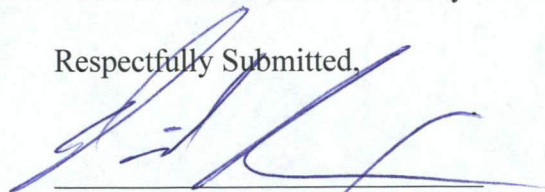
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald Ray Hulon 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 J. Derham Cole, which was held on September 25 & 26, 2018, 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 Donald Ray Hulon.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 16th day of September, 2019.

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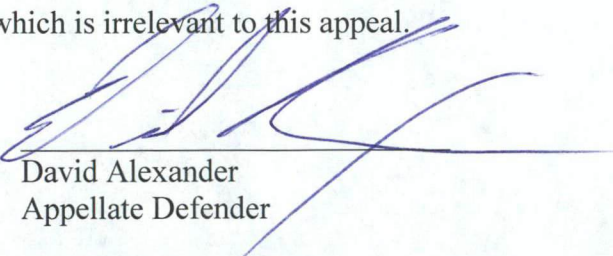
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Trial Transcript dated September 25-26, 2018
- (2) State's Exhibit Nos. 1-4 (Sentencing Sheets and Indictments)
- (3) Court's Exhibit No. 1 (Proposed Jury Charges)

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

September 16, 2019


David Alexander
Appellate Defender

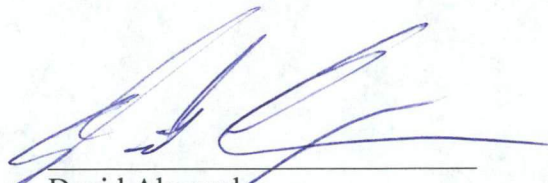
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ATTORNEY FOR APPELLANT

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."

September 16, 2019.



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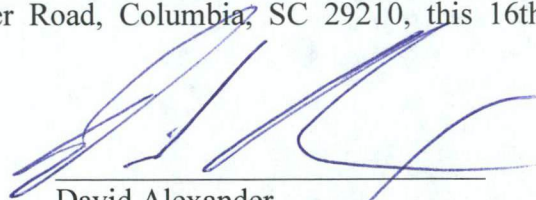
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CERTIFICATE OF SERVICE

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 Deborah R.J. Shupe, 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 Donald Ray Hulon, at 4546 Broad River Road, Columbia, SC 29210, this 16th day of September, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of September, 2019.

Kimberly M. Matthews (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024