

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINALS

4/6/98

APPEAL FROM YORK COUNTY
Court of General Sessions

File Number 93-GS-46-4296
93-GS-46-4299
93-GS-46-4301
93-GS-46-4303

The State,.....Respondent,

v.

Mar-Reece Aldean Hughes,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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I.

The Trial Judge erred in admitting during the sentencing phase as "character" evidence an unadjudicated unrelated post-McCant's murder in violation of the Appellant's Eighth Amendment Rights. (Respondent's Argument I).

1. The Trial Judge erred in admitting during the sentencing phase as "character" evidence an unadjudicated unrelated post-McCant's murder in violation of the Appellant's Eighth Amendment Rights.

(A) In its Brief, page 23, Respondent argues:

"Appellant did not object to these references to the jailhouse murder in the opening statement."

"Once Appellant did not state any contemporaneous objection to exclude the evidence of the jailhouse stabbing based upon any of the grounds asserted in this appeal."

In its Brief, page 24, Respondent argues:

"The defense did not object to the use of the jailhouse murder in the Solicitor's closing argument."

To preserve the record, a contemporaneous objection is to be made. However, in this case, the record was preserved as to the issue of the admission of the unrelated second murder. The over-riding concern of a contemporaneous objection is to insure the trial court has the opportunity to rule on a given matter. A ruling from the trial court was made following a day of testimony. It was the Appellant's position that the unrelated second murder was not indicative of his character and therefore should have been excluded from admission during the sentencing phase.

Respondent fails to note in his brief that Appellant filed a detailed motion that resulted in a day long hearing where three doctors testified specifically to this issue of "character." Their testimony was that a persons psychosis and their resulting actions as it may arise out of psychosis is not indicative of character.

The actions arising out of psychosis is mental illness.

No one was blind-sided by the presentation of the second murder during the sentencing phase. The trial court heard testimony for a day, reviewed detailed motions and had analyzed briefs regarding this matter. Appellant filed a brief with the court in excess of ten (10) pages supporting their position. (ROA pp 3070 - 3083). In this case, the trial court not only took lengthy testimony but also had the opportunity to analyze the situation through the briefings of the parties. This matter was fully heard and fully ruled upon by the court. It would have been redundant and time consuming for Appellant to be required to object consistently throughout the trial on matters that the trial court had already made an abundantly clear ruling. Samples v. Mitchell, Opinion No. 2747, (S.C. App. 1997)

"Because the trial court's ruling was final, the defense had every right to rely on the ruling and raise the matter of the prior conviction strategically. To force a defendant to choose between challenging an incorrect final ruling on appeal or minimizing the impact damaging evidence would be fundamentally unfair. Therefore, we conclude that, if a party has obtained a final ruling on the admissibility of impeachment evidence, that party does not lose his right to challenge on appeal the admissibility of the evidence by eliciting the evidence during direct examination."

State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (S.C. App. 1995); State v. Smalls, 260 S.C. 44, 194 S.E. 2d 188 (1973)

(B) In its Brief, page 20, Respondent argues:

The primary concern of the trial judge at this in limine hearing was whether there was any evidence that Appellant was not insane at the time of the jail stabbing.

In its Brief, page 28, Respondent argues:

Second, Appellant attempts to overcome the obvious admissibility of the jailhouse stabbing by arguing that this evidence should have been prohibited because Appellant was criminally insane at the time of the stabbing. This argument must fail. Appellant places great emphasis on the fact that three doctors gave opinions that Appellant was insane at the time of the prison stabbing. The doctors' opinions, however, are not dispositive of this issue.

In its Brief, page 31, Respondent argues:

This evidence and testimony clearly supports the trial court's decision to let the jury determine whether Appellant was criminally responsible for the stabbing of inmates Williamson and Gorth.

The trial court found:

THE COURT: All right, I find that evidence regarding the character of the defendant is relevant in a penalty phase of a capital trial as such evidence is relevant to sentencing of the defendant and is appropriately admissible for the consideration of the jury. (ROA p 2978, lines 4-8)....I find that character is not a medical diagnosis. (ROA p 2979, lines 2-3).

The flaw in the States argument is that the State is presupposing that to prove that character has been altered the Appellant must prove that he is not guilty by reason of insanity. The Appellant contends that his psychosis is not indicative of his character. Whether or not the Appellant's psychosis reaches the level of not guilty by reason of insanity is irrelevant to the admissibility of evidence in the sentencing phase of a capital case. The level of admissibility was whether the

aggravating circumstance was indicative of "character" evidence.

South Carolina Rules of Evidence 404, Character Evidence Not Admissible to Prove Conduct; Exception; Other Crimes,

(a) **Character Evidence Generally.** Evidence of a person's character or trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

(b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person...It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923); State v. Garner, 304 S.C. 220, 403 S.E. 2d 631 (1991).

The State presupposes that Appellant was seeking a determination of not guilty by reason of insanity. This is an incorrect position and proposition. The Appellant presented expert testimony that the presence of psychosis is not indicative of character as the psychosis alters ones' character thereby rendering the character evidence as unreliable. It is the Appellant's position that the existence of psychosis or mental illness is a medical determination that can not be contradicted by a lay witness such as Broadus Strain, a detention officer whose observations were untrained and limited. The psychosis which altered the character of Mar-Reece Hughes and precipitated the jail house slaying is not indicative of Mar-Reece Hughes' character and therefore was improperly admitted.

The State is correct in its position that whether or not the Appellant is not guilty by reason of insanity is for a jury to determine. The Judge is also correct

in his position that character, standing alone, is not a medical diagnosis. Here, those applications are misplaced. The Appellant was not seeking a judicial finding of not guilty by reason of insanity as he was on trial for the death of officer McCants and not the death of Mr. Williamson.

Mr. Hughes presented expert medical testimony as to his state of mind, his diagnosis and his mental illness at the time of the jail house slaying to prove that those acts were not indicative of his character. The three medical experts who testified verified that Appellant's character was altered by the presence of a severe mental illness. They further opined that due to the Appellant's mental illness he did not comprehend the criminality of his conduct and therefore the mental illness rose to a level of not guilty by reason of insanity. This diagnosis is only secondarily germane to the issue at hand. The point the Appellant is making is that there is a difference between a medical finding and a judicial finding of insanity.

The judge is the trier of law. The admissibility of evidence is a matter of law. The trial court is the gate keeper to ensure that only reliable and relevant evidence is admitted. Here, the trial court erred. The trial court's admission of the second unrelated unadjudicated post-McCant's murder was in violation of his Eighth Amendment Right as the Appellant's psychosis is not indicative of his character and therefore improperly submitted to the jury for consideration of his death sentence. "The Constitution requires a jury to make an individualized determination as to whether the defendant should be executed based on the

'character of the individual and the circumstance of the crime.'" Payne v. Tennessee, 501 U.S. 808, 115 L. Ed. 2d 702, 111 S.Ct. 2597, reh den. 501 U.S. 1277, 115 L. Ed. 2d 1110, 112 S.Ct. 28 () quoting Zant v. Stephens, 462 U.S. 862, 897, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983).

II.

The Trial Judge erred in failing to instruct the Jury as to the life sentence of the Appellant's Co-Defendant, Eric Dwayne Forney, as a mitigating factor. (Respondent's Argument IV).

2. The Trial Judge erred in failing to instruct the Jury as to the life sentence of the Appellant's Co-Defendant, Eric Dwayne Forney, as a mitigating factor.

In its Brief, page 66, the Respondent argues:

Appellant's fourth issue on appeal must be rejected because evidence that another jury could not reach a unanimous decision regarding the sentence to impose upon Forney simply is not a relevant mitigating circumstance in Appellant's sentencing proceeding.

The trial judge in deciding which statutory mitigating circumstances may be supported, the trial judge is to be concerned only with the existence of evidence, not its weight. State v. Bellamy, 293 S.C. 103, 359 S.E. 2d 63 (1987). The trial judge erred in not allowing the sentence of the co-defendant to be introduced as a mitigating factor. The evidence presented during the guilt phase was that Mar-Reece Hughes was not the triggerman.

Mar-Reece Hughes testified:

MR. SCHUSTERMAN: What happened next?

MAR-REECE HUGHES: Eric Forney started firing out of the vehicle.

MR. SCHUSTERMAN: When you say Eric Forney started firing out of the vehicle, where was Eric Forney when he fired the first shot?

MAR-REECE HUGHES: He was in the passenger seat.

(ROA 1654, lines 2-7).

MR. SCHUSTERMAN: Mr. Hughes, after the first shot was fired, what do you recall?

MAR-REECE HUGHES: I had panicked and I didn't know what to do.

MR. SCHUSTERMAN: Did Mr. Forney shoot any more that night?

MAR-REECE HUGHES: Well, he shot Officer Brent McCants some more that night.

MR. SCHUSTERMAN: What did he do after he fired that first shot?

MAR-REECE HUGHES: After he fired the first shot, he leaned a little further out of the car and eventually got out of the vehicle and stood over Officer Brent McCants as he fired into his body.

(ROA p 1658, line 13-17).

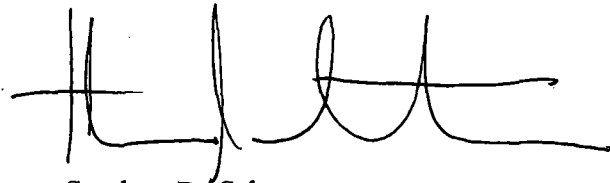
As stated in the Respondent's brief:

The sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death. State v. Cooper, 291 S.C. 332, 353 S.E. 2d 441 (1986); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982).

In neither Mr. Forney's trial nor Mr. Hughes' trial did the State prove that either defendant was the "triggerman." As such, the State was purporting the theory of equal culpability of each defendant. If this is the case, then the fact that Mr. Forney, of equal culpability of Mr. Hughes, was given a life sentence prior

to Mr. Hughes' trial is a mitigating circumstance to the imposition of death upon Mr. Hughes. Therefore, Mr. Forney's life sentence is a mitigating factor. Mr. Forney's sentence arises out of the identical set of facts and circumstances of the crime. Mr. Forney's sentence was a basis that a sentence of less than death could have been imposed upon Mr. Forney. "The sentence imposed upon a codefendant for the same offense and upon others for similar offenses are among a wide variety of factors which may be properly considered in determining a proper punishment." State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (S.C. 1976) citing U.S v. Williams, 499 F.Ed 52 (1st Cir.). The trial judge erred in excluding this mitigating evidence. The jury should have been given the opportunity to consider Mr. Forney's sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. D. Schusterman', written in a cursive style with a horizontal line extending to the right.

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Attorney for Appellant.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

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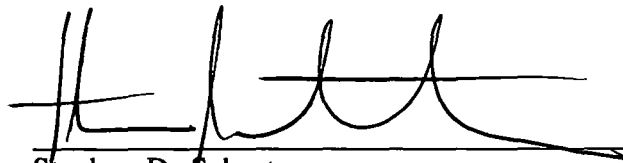
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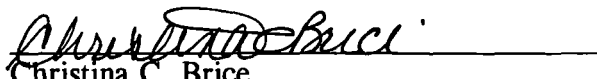
CERTIFICATE OF COUNSEL

The undersigned certify that this Final Reply Brief complies with Rule 207 (b), South Carolina Appellate Court Rules.

March 31, 1998



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In the Supreme Court

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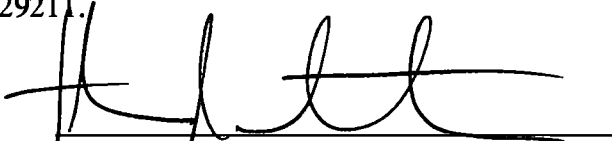
v.

Mar-Reece Aldean Hughes, Appellant.

CERTIFICATE OF SERVICE

The undersigned certify, they have served the Final Reply Brief of the Appellant on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 6, 1998 addressed to the attorney of record, Robert F. Daley, Jr., Post Office Box 11549, Columbia, South Carolina 29211.

April 6, 1998



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