

6

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY LAMONTE GIVENS,

APPELLANT

APPELLATE CASE NO 2018-001920

ANDERS BRIEF OF APPELLANT

RECEIVED
JUL 29 2019
SC Court of Appeals

VICTOR R SEEGER
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

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE2

STANDARD OF REVIEW3

ARGUMENT

The court erred when it denied trial counsel’s request for a
continuance to formulate a defense to the recently amended
indictment that added a violation of a protection order as an
aggravator to the charge of domestic violence of a high and
aggravated nature..... 4

Relevant Facts.....4

Discussion.....6

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL.....9

TABLE OF AUTHORITIES

Cases

<u>Evans v. State</u> , 363 S.C. 495, 611 S.E.2d 510, (2005).....	6
<u>State v. Fonseca</u> , 383 S.C. 640, 681 S.E.2d 1, (Ct. App. 2009)	6
<u>State v. Geer</u> , 391 S.C. 179, 705 S.E.2d 441, (Ct. App. 2010).....	3
<u>State v. Irick</u> , 344 S.C. 460, 545 S.E.2d 282, (2001).....	3
<u>State v. McMillian</u> , 349 S.C. 17, 561 S.E.2d 602 (2002)	7
<u>State v. Myers</u> , 313 S.C. 391, 438 S.E.2d 236, (1993).....	6
<u>State v. Yarborough</u> , 363 S.C. 260, 609 S.E.2d 592, (Ct. App. 2005)	3

STATEMENT OF ISSUE ON APPEAL

Whether the court erred when it denied trial counsel's request for a continuance to formulate a defense to the recently amended indictment that added a violation of a protection order as an aggravator to the charge of domestic violence of a high and aggravated nature?

STATEMENT OF THE CASE

During the August 2017 term the Richland County Grand Jury indicted Appellant for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime. R. 639. During the April 2018 term the Richland County Grand Jury indicted Appellant for domestic violence of a high and aggravated nature (DVHAN). R. 648. The DVHAN indictment was amended and true billed again on July 18, 2018. R. 646.

Appellant proceeded to trial on October 16 – 18, 2018 before the Honorable Clifton Newman, and a jury. R. 1. William Hodge represented Appellant. Id. Kathryn Cavanaugh and Richard Cathcart represented the state. Id.

After the three-day trial, Appellant was found guilty of robbery, as the lesser included offense of armed robbery and DVHAN. R. 599, l. 20 – 601, l. 7. Appellant was found not guilty of kidnapping or possession of a weapon during the commission of a violent crime. Id.

Judge Newman sentenced Appellant to fifteen years' imprisonment for DVHAN and ten years' imprisonment for robbery. R. 636, ll. 19 – 22.

STANDARD OF REVIEW

“The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” Id. (quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)).

ARGUMENT

The court erred when it denied trial counsel's request for a continuance to formulate a defense to the recently amended indictment that added a violation of a protection order as an aggravator to the charge of domestic violence of a high and aggravated nature.

Relevant Facts

The state alleged the facts as follows: On October 18, 2018, on the morning of the incident, Green drove Appellant from Orangeburg to Columbia for a disability hearing. R. 468, l. 8 – 469, l. 10. Green clocked in for her shift at Murphy's at 5:30 a.m. and Appellant waited for her shift to end to get a ride to his disability hearing later that day. R. 470, l. 9 – 472, l. 11.

Green finished her shift at Murphy's and drove to a nearby bank to make the bank deposit with the money from the register from her shift. R. 269, l. 23 – 270, l. 2; R. 473, ll. 6 – 15. She drove to the bank with Appellant in the car, against Murphy's policy prohibiting making deposits with a third party in the car. R. 406, ll. 7 – 11.

Tiffany Green, the complaining witness, and Appellant had a "rocky" relationship and Green wanted Appellant to reconcile with her. R. 466, ll. 2 – 24. Green insisted on Appellant reconciling with her, but Appellant steadfastly refused. R. 474, l. 2 – 475, l. 2.

Due to Appellant rebuffing her advances, Appellant and Green got into an altercation while Green drove to the bank. R. 20, ll. 2 – 15. Green began driving "erratically" at a high rate of speed, between fifty and sixty miles an hour. R. 476, l. 14 – 478, l. 15. She told him that if he was not going to be with her that she would kill them both and drove towards a nearby restaurant, "Ryan's Steakhouse," to crash into it on purpose. Id.

Appellant pulled the keys from the ignition to stop the car from crashing into the restaurant, and he attempted to flee the car. Id. Green grabbed Appellant to keep him in the car which tore his

shirt and, “popped his chain [necklace].” R. 479, ll. 3 – 22. Green struck Appellant multiple times, so hit her back in self-defense. R. 479, l. 23 – 480, l. 18.

A few nearby witnesses saw the incident and the police were called. R. 206, l. 19 – 212, l. 5; R. 214, l. 1 – 229, l. 13. Appellant, still frightened from Green nearly killing them both, hurried away from the scene. R. 481, ll. 2 – 18. Allegedly the deposit bag was ripped during the altercation and money was scattered around the vicinity of the crime scene. R. 221, ll. 14 – 18.

Prior to trial, defense counsel Hodge made a motion to quash the indictment for DVHAN, “that was just served,” on Appellant. R. 35, ll. 10 – 19. The state responded that the indictment for DVHAN was presented to the Grand Jury in April 2018, then it was amended and presented for a second time to the July 2018 Grand Jury. R. 77, l. 13 – 78, l. 2. The state explained that both the April indictment and the July indictment were for DVHAN, and the amendment was to add language regarding the aggravation factor of violating an order of protection as a basis for the DVHAN charge against Appellant. Id. The solicitor stated that Investigator Gonzales presented probable cause to both grand juries. R. 79, l. 23 – 80, l. 3.

The court ruled that the amended indictment did not, “change the substantive facts,” of the charges such that Appellant was aware of the charges against him. R. 45, ll. 7 – 18; R. 83, ll. 7 – 10. The court further stated the “real question” was whether the addition of the order of protection language to the amended indictment justified a continuance. R. 80, l. 22 – 81, l. 4.

Hodge argued that he needed a continuance for more time to review the amended July indictment and discuss the charges with Appellant. R. 83, l. 14 – 85, l. 8. Hodge explained that he was only given notice of the trial date a month prior. Id. Hodge argued at trial, there was evidence he had yet to review. Id. Hodge also only recently discovered that there were newly amended reports

of the 911 calls he needed to investigate. Id. Hodge implored the court for a continuance stating he wanted, “there to be no doubt in his mind that he [was] ready.” Id.

The solicitor argued that Appellant was given adequate notice of the charges for trial and that the trial should proceed. R. 85, l. 12 – 86, l. 4.

The court denied Hodge’s motion for a continuance and ruled that the trial would start the next morning. R. 86, ll. 5 – 8. Appellant proceeded to trial and was found guilty of DVHAN and robbery, but not guilty of possession of a weapon during the commission of a violent crime. R. 599, l. 22 – 600, l. 7.

Discussion

The trial court erred in denying Appellant’s motion for a continuance since Appellant was entitled to adequate time to formulate a defense to the newly amended July indictment.

An indictment is a notice document, “The primary purpose[] of an indictment [is] to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted.” State v. Fonseca, 383 S.C. 640, 646, 681 S.E.2d 1, 4 (Ct. App. 2009), *aff’d*, 393 S.C. 229, 711 S.E.2d 906 (2011) (citing Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005)).

“An indictment may be amended if: (1) it does not change the nature of the offense; (2) the amended charge is a lesser included offense of the original crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty.” Id. (citing State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993)). An amended indictment can still provide notice to a defendant of the charges against him if the amendment did not alter the, “substance and nature,” of the charges against him. Fonseca, at 646–47, 681 S.E.2d at 4.

Here the state altered the “substance and nature” of the charges against Appellant when they amended the indictment to include language that Appellant violated an order of protection as a basis for his DVHAN charge against him. R. 83, l. 14 – 85, l. 8. Due to that new line of attack from the state, trial counsel Hodge needed more time to formulate a defense. Id.

In State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002), our Supreme Court held the trial court abused its discretion in denying McMillian’s motion for a continuance so he could obtain a transcript of his first trial “where the lack of such a transcript prejudiced his ability to effectively cross-examine the witnesses against him.” Id. at 24, 561 S.E.2d 605-606.

This Court should likewise find that the trial court abused its discretion in this case by denying Appellant’s motion for a continuance. R. 86, ll. 5 – 8. The lower court’s error resulted in Appellant being convicted because he was unable to properly defend himself against the newly amended indictment that added an additional aggravating factor to enhance his charge to a DVHAN.

CONCLUSION

By reason of the foregoing arguments Appellant respectfully requests that this Court vacate Appellant's convictions and remand his case to the Richland County Court of General Sessions for a new trial.

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

WESLEY LAMONTE GIVENS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

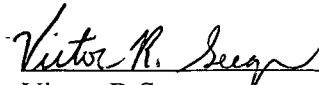
RECEIVED
JUL 29 2019
SC Court of Appeals

Counsel for Wesley Lamonte Givens 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 Clifton Newman, which was held on October 16-18, 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 Wesley Lamonte Givens.

Respectfully Submitted,



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of July, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY LAMONTE GIVENS,

APPELLANT

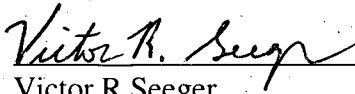
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) Sentence Sheets: and
- (3) Trial Transcript Dated Oct. 16-18-2018

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

July 29, 2019


Victor R Seeger
Appellate Defender

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

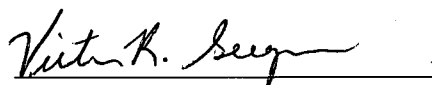
ATTORNEY FOR APPELLANT

RECEIVED
JUL 29 2019
SC Court of Appeals

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."

July 29, 2019.



Victor R Seeger
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

RECEIVED
JUL 29 2019
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

RECEIVED
JUL 29 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

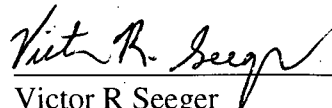
V.

WESLEY LAMONTE GIVENS,

APPELLANT


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 William M. Blicht, Jr., 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 Wesley Lamonte Givens, 294844, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 29th day of July, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of July, 2019.



Notary Public for South Carolina
My Commission Expires: October 26, 2019