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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM SHANE FORDHAM BROWN,

APPELLANT

APPELLATE CASE NO 2019-001456

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this trial where a co-defendant pled guilty earlier but when called as witness by the State at Appellant's trial asserted his Fifth Amendment right to remain silent, did the trial judge err in allowing the State to call the co-defendant's attorney as a witness and admitting a letter in evidence the attorney received from his client during the course of representation before the co-defendant pled guilty, when the attorney for the co-defendant asserted that the letter was privileged communication with his client?

STATEMENT OF THE CASE

In September of 2018,¹ the Greenville County Grand jury indicted Appellant, William Shane Fordham Brown, for murder, burglary first degree, attempted armed robbery, possession of a weapon during the commission of a violent crime and conspiracy, indictment #2017-GS-23-6747. (R. p. 825). On August 12, 2019, Appellant, with co-defendant, Curtis Allen Babb Jr, proceeded to jury trial before the Honorable Robin B. Stillwell. Scott D. Robinson represented Appellant at trial. Sarah M. Henry represented the co-defendant. Katryna B. Owens and Elizabeth Gary prosecuted the case. The jury returned verdicts of guilty as charged. Judge Stillwell sentenced Appellant to an aggregate sentence of forty-five (45) years. Judge Stillwell sentenced the co-defendant to life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was served on August 26, 2019. This appeal follows.

¹ It is unclear when the Grand Jury met. The number on the face of the indictment shows the year 2017, but at another place on the face of the indictment the year 2017 is crossed out and replaced with 2018. The date listed below the witness name is January 25, 2017. (R. p. 825). The body of the indictment, however, lists September 25, 2018.

STANDARD OF REVIEW

“The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances.” Tobaccoville USA v. McMaster, 387 S.C. 287, 292, 692 S.E.2d 526, 529 (2010). “The trial judge’s decision will not be overturned absent an abuse of discretion.” Id. The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (“quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

In this trial where a co-defendant pled guilty earlier but when called as witness by the State at Appellant's trial asserted his Fifth Amendment right to remain silent, the trial judge erred in allowing the State to call the co-defendant's attorney as a witness and admitting a letter in evidence the attorney received from his client during the course of representation before the co-defendant pled guilty, when the attorney for the co-defendant asserted that the letter was privileged communication with his client.

A jury found Appellant and co-defendant, Curtis Babb, guilty of the fatal shooting of Clinton Pearson during a burglary and attempted armed robbery on December 8, 2016. Another co-defendant, Connell Wells, pled guilty to murder on March 4, 2019, prior to Appellant's August 2019, trial. (R. p. 224, lines 6-18). Wells received a sentence of thirty (30) years. (R. p. 224, lines 15-18). When called as a witness by the State at Appellant's trial, Wells asserted his Fifth Amendment right to remain silent. (R. pp. 223-227).

Nakia Sims, a family friend of Appellant, testified that in December of 2016, Appellant was living in a spare bedroom of the townhouse where Sims lived with her children. (R. p. 660, line 22 – p. 661, lines 1-22). Sims knew Appellant by the nickname "Deuce."² (R. p. 678, lines 18-20). Sims testified that on the evening of December 8, 2016, she and her children and Appellant ate dinner and then went to bed as usual. (R. p. 662, line 18 – p. 663, lines 1-21). Sims testified that sometime after midnight she heard a banging on the door. (R. p. 665, line 20 – p. 666, lines 1-9). She testified that Appellant also heard the banging and they both went to the door. (R. p. 666, line 10 – p. 667, lines 1-16). Sims testified that when Appellant opened the door, they saw Connell Wells bleeding profusely from his leg. (R. p. 667, line 17 – p. 668, 669, lines 1-25). Wells told them he had been shot. (R. p. 668, lines 1-3). Wells did not want them

² Counsel for Appellant stipulated that Appellant's nickname was "Deuce." (R. p. 528, lines 3-22). Counsel for Appellant also stipulated that Appellant was represented by attorney John Abdalla at one point in time. (R. p. 607, lines 1-15).

to call an ambulance. (R. p. 669, lines 8-23). Sims testified that she tried to stop the bleeding but knew that Wells needed medical attention. (R. p. 668, line 15 – p. 669, lines 1-13). Appellant called 911. (R. p. 669, line 19 – p. 670, lines 1-2). Wells was transported for medical attention and was interviewed by the police. Witness Damean Wideman testified that he knew Wells as “Butta.” (R. p. 361, lines 15-25). Wideman told an investigator that Appellant told him that, “. . . they sent Butta to go search the house and when he returned to the living room, Curt shot him in the knee with a shotgun.” (R. p. 370, line 25 – p. 371, lines 1-3).

Prior to trial co-defendant Curtis Babb moved to sever his trial from Appellant’s trial based on a letter that the State asserted was written by Appellant and sent to co-defendant Wells. (R. pp. 10-27). The letter implicated co-defendants, Wells and Babb in the shooting. The original letter was later admitted as State’s Exhibit #46. (R. p. 606, lines 22-23; R. p. 838). The original letter, State’s Exhibit #46, was written on the back of paperwork with Appellant’s name on it. (R. p. 838). The State advised the judge that an expert would testify that the handwriting in the letter matched the handwriting of Appellant. (R. p. 12, lines 18-20). The judge then asked the prosecutor, “So, Ms. Owens, tell me please, through whom do you intent to introduce the letter and for what purpose do you intend to introduce the letter?” (R. p. 15, lines 6-8). The prosecutor answered:

Well, a variety of witnesses could ultimately introduce the letter. I certainly intend to ask Mr. Connell Wells about the letter, as it is my understanding that Mr. Wells delivered that letter to his attorney at the time. His attorney then forwarded that letter to me. And you’ll note that his attorney, Mr. Shipman, is also on the State’s witness list. I asked him to bring the original of that letter that he’s retained since having received it from his client.

If, of course, Mr. Wells is unwilling to acknowledge or otherwise authenticate the letter, I would certainly make the argument at that time that the rules on authentication, including the very recent Court of Appeals opinion that specifically discuss writings, that the content of this letter and its discussion of

extremely specific details of the case not to mention repeated pronouns I, me, my, our refer to the fact that this letter is written by someone involved in the case.

So, in that respect, we would suggest that a base level authentication foundation has been laid and we would have our SLED employee testify about the examination. The employee at the question document division at SLED.

(R. p. 15, line 9 – p. 16, lines 1-8).

The judge denied the severance motion but ordered redactions to the letter to remove reference to co-defendant Curtis Babb. (R. p. 27, lines 5-21). The redacted copy of the letter was later admitted as State's Exhibit #23. (R. p. 582, line 21 – p. 583, lines 1-10; R. p. 836). Co-defendant Babb also moved to suppress the letter because of threats in the letter aimed at Wells that constituted a prior bad act. (R. p. 39, line 15 – p. 40, lines 1-23). Appellant joined in the motion. (R. p. 40, line 24 – p. 41, lines 1-2). The State argued that if the jury believed the State's hand-writing expert, the letter was functionally a confession by Appellant. (R. p. 41, lines 5-23). The judge overruled the motion to suppress and indicated he would allow its admission as long as it met the threshold of authentication. (R. p. 43, line 23 – p. 44, lines 1-15).

When called as a witness by the State at Appellant's trial, Wells testified that he pled guilty to his participation in a murder that took place on December 8, 2016. (R. p. 224, lines 12-18). He testified that he received a thirty (30) year sentence. (R. p. 224, lines 15-17). When asked who was with him when he committed the crime, Wells asserted his Fifth Amendment right to remain silent and the judge allowed him to invoke the privilege. (R. pp. 224, lines 19-24). The State asked Wells if he told the Court who was with him when he pled guilty and if he met with an investigator at the hospital and gave a statement. (R. p. 225, lines 1-17). Wells asserted his right to remain silent to both of these questions. The State asked if Wells was shot on December 8, 2016. (R. p. 225, line 20). The judge required Wells to answer and he confirmed that he was shot on December 8, 2016. (R. p. 225, lines 20-25). Wells asserted his right to

remain silent when asked about conversations with an investigator and when asked about State's Exhibits #20, #21 and #22. (R. p. 226, line 11 – p. 227, lines 1-7). The State, however, did not try to question Wells about the letter, State's Exhibit #23. (R. p. 836). Wells denied that his nickname was "Butta." (R. p. 227, lines 8-12).

After Wells asserted his Fifth Amendment right to remain silent, the State called his attorney, Chris Shipman, as a witness. (R. p. 530, lines 8-13). Mr. Shipman advised the judge that he had a matter that needed to be addressed outside the presence of the jury. (R. p. 530, lines 14-16). Mr. Shipman advised the judge that under Rule 4.9 of the Rules of Professional Conduct and the fact that his client asserted Fifth Amendment protection, he could not take any action adverse to the interest of his client. (R. p. 531, lines 7-22). Mr. Shipman testified:

Your Honor, a copy was turned over to the State for purposes of plea bargaining and also to prevent a threat. I believe had we gone to trial for him, it would have been inadmissible for those purposes, but pursuant to plea negotiations, involving attorney and prosecutor. But now, I think It's more broadly covered by the confidentiality restrictions and I think I would have to breach my duty to my client to honor the subpoena here today, Your Honor.

(R. p. 534, lines 12-21). Counsel for Appellant and co-defendant agreed that the letter should not be admitted. (R. p. 533, lines 2-6).

The judge asked Mr. Shipman, "Does your client not waive that privilege when he asked you to turn it over to the State?" (R. p. 534, lines 22-24). Mr. Shipman answered, "Well, Your Honor, perhaps, the contents of the letter, which they already have. If they're asking me under what conditions I received it, under what conditions I turned it over, I think that's all confidential." (R. p. 534, line 25 – p. 535, lines 1-4). The judge overruled the objections. (R. p. 536, lines 18-25). Mr. Shipman then testified that he received a letter from his client, Connell Wells, during the course of his representation, and the original letter was marked for identification as State's exhibit #46. (R. p. 538, line 18 – p. 539, line 1; R. p. 838). Mr. Shipman

could not testify who gave his client the letter, or when or how it was received. (R. p. 539, line 18 – p. 540, lines 1-7).

The original unredacted letter, provided at trial by Mr. Shipman, was later admitted as State's Exhibit #46. (R. p. 606, lines 22-23; R. p. 838). The letter admitted as State's Exhibit #46 was written on the back of paperwork with Appellant's name on it. (R. p. 838). It does not appear that the redacted copy of the letter that had been provided to the prosecutor prior to trial, State's Exhibit #23, included the back with Appellant's name. Although the unredacted letter, State's Exhibit #46, was admitted in evidence, it was not sent back to the jury. (R. p. 585, line 12 – p. 586, 587, lines 1-13; R. p. 836; R. p. 838). The State, however, referred to the letter with Appellant's name on the back in closing argument. (R. p. 748, lines 4-9).

Jack Jamieson, a questioned document examiner from the South Carolina Law Enforcement Division, was qualified, over objection, as an expert witness in questioned document analysis. (R. pp. 569-575). Agent Jamieson compared State's Exhibit #23, the copy of the letter provided to the prosecutor by Mr. Shipman, to known writing samples of Appellant. (R. pp. 578-582; R. p. 836). The agent concluded that Appellant wrote the letter, State's Exhibit #23. (R. p. 580, lines 17-23; R. p. 836). State's Exhibit #23, the redacted copy was admitted in evidence subject to the previous objections made by counsel for co-defendant Babb. (R. p. 582, line 21 – p. 583, lines 1-10; R. p. 836). Counsel for Appellant did not object.³

The trial judge erred in admitting both State's Exhibit #23 and State's Exhibit #46 because both constituted privileged communication between co-defendant Wells and his attorney, Mr. Shipman. (R. p. 836; R. p. 838). The back of the letter showing paperwork with Appellant's name on it included in State's Exhibit #46 is not included in State's Exhibit #23

³ The failure to object may need to be addressed in post-conviction relief.

because the back was not turned over to the State by Mr. Shipman and not waived. (R. p. 836; R. p. 838). As to the content of the letter, once the judge allowed Wells to assert his right to remain silent at Appellant’s trial, the State should not have been able to circumvent that ruling by calling the attorney to testify about privileged communications.

In State v. Love, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980), the South Carolina Supreme Court wrote:

We have long recognized the attorney-client privilege against disclosure of confidential communications by a client to his attorney. In the case of South Carolina State Highway Department v. Booker, 260 S.C. 245, 195 S.E.2d 615, in discussing the privilege, we stated:

This privilege is based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence should not be abused by permitting disclosure of such communications. This privilege belongs to the client and not the attorney, and may be waived by the client. 81 Am. Jur. 2d, Witnesses, Section 223; South Carolina State Highway Department v. Booker, *supra*.

In State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 219–20 (1981), the South Carolina Supreme Court listed the elements giving rise to the attorney-client privilege as follows:

“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961).

The Court in Doster noted that not every communication within the attorney-client relationship is privileged writing, “This is exemplified by the widely recognized rule that the privilege does not extend to communications in furtherance of criminal, tortious or fraudulent conduct. United States v. United Shoe Machinery Corporation, 89 F.Supp. 357 (D.Mass.1950); 125 A.L.R. 508; 16 A.L.R.2d 1029.” 276 S.C. at 651, 284 S.E.2d at 220.

The letter was protected by the attorney-client privilege and should not have been disclosed at trial by the attorney. The letter was given to the attorney by the client during the course of his representation. The circumstances surrounding how the letter was received were discussed with the attorney in confidence. The communication was not in furtherance of criminal, tortious or fraudulent conduct. It was appropriate for the attorney to assert the privilege as the client was allowed to assert his right to remain silent. By analogy, in Doster the Court recognized the appropriateness of the attorney asserting the privilege when the client was deceased. The error in admitting the letter is not harmless. The original unredacted letter, State's #46, that included the back of the letter with paperwork containing Appellant's name was not seen by the jury but the State referred to the letter in closing argument. (R. p. 746, lines 4-9; R. p. 838). The State's reference in closing further linked Appellant to the letter. The content of the letter admitted as State's Exhibit #23 and seen by the jury was highly prejudicial, containing threats to Wells and his family. (R. p. 836).

CONCLUSION

Based on the above argument, this Court should reverse Appellant's convictions and remand the case for a new trial.

s/ Kathrine H. Hudgins
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2021.

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CERTIFICATE OF COUNSEL FOR APPELLANT

SC Court of Appeals

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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.”

Respectfully Submitted,

s/ Kathrine H. Hudgins
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This 29th day of March, 2021.