6-30-2012

Brief of Amici Curiae The Defender Initiative and ACLU of South Carolina

The Defender Initiative

ACLU of South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	Case # 2012-
	)	
STATE OF SOUTH CAROLINA	)	
RESPONDENT,	)	
	)	
vs.	)	BRIEF OF AMICI CURIAE
	)	THE DEFENDER INITIATIVE AND
	)	ACLU OF SOUTH CAROLINA
	)	
APPELLANT.	)	
	)	
	)	
	)	

Statement of the Case

was charged with harassment in Municipal Court of the Town of Hilton Head Island under what the arresting officer cited as 17-3-1700 for an alleged offense of harassment occurring on July 3, 2011. At trial the judge told the jury that he was charged with violation of 16-3-1710. [1] Recording of Trial 1:35:55. He was arrested and jailed on July 3, 2011. The ticket he was given summoned him to appear in court on August 4, 2011. [Copy of the ticket is attached.]

Mr was released from jail and filed a written motion for appointment of a public defender on July 18, 2011. was unemployed. Recording of Trial 1:49:09. As far as can be determined from the record, the motion was not ruled on, and Mr.

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[1] § 16-3-1710 states: Penalties for conviction of harassment in the second degree.

(A) Except as provided in subsection (B), a person who engages in harassment in the second degree is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars, imprisoned not more than thirty days, or both

was tried before a jury on the afternoon of February 13, 2012, without counsel. [Case Information Sheet is attached.] A variety of evidentiary issues arose during the trial, including objections to relevance, which Mr. . was not able to negotiate. The court cautioned Mr. , hat his redirect questions must be limited to the direct of the witness, but when the prosecutor on redirect went far beyond what had been raised in cross examination, the judge said nothing. Recording 1:11:27.

When the judge instructed the jury, she told them, after saying that the burden of proof is on the state, "The law always presumes the defendant is guilty of the crime." Recording 1:34:44. Undoubtedly she misspoke but she did say it. She then said that the defendant begins the trial with a clean slate. Id.

The judge told the jury that harassment is defined in part as a "pattern of substantial, intentional, and unreasonable intrusion". Recording 1:36:30. There was some confusion in front of the jury about what degree of harassment was charged. The judge initially read the statute defining harassment in the first degree. [2] Recording 1:36:08. Mr. ,said he was

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[2] § 16-3-1700. Definitions states:

As used in this article:

(A) "Harassment in the first degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the first degree may include, but is not limited to:

(1) following the targeted person as he moves from location to location;

(2) visual or physical contact that is initiated, maintained, or repeated after a person has been provided oral or written notice that the contact is unwanted or after the victim has filed an incident report with a law enforcement agency;

(3) surveillance of or the maintenance of a presence near the targeted person's:

(a) residence;

charged with harassment in the second degree, and the judge eventually agreed. The prosecutor said that second degree was the greater offense and told Mr. he did not want the greater offense. Recording 1:37:33-1:38. The judge then said Mr. was charged in the second degree and then read the jury the definition of harassment in the second degree. Recording 1:39. [3]

Mr. was convicted. The judge sentenced him to 30 days but held the sentence "in abeyance" for Mr. to complete 30 hours of counseling. Recording 1:45:05. The prosecutor summarized the sentence, saying in part that if Mr. did not do the 30 hours within nine months, he would go to jail for 30 days. Recording 1:49:50. Mr. filed an appeal February 22, 2012.

Issues on Appeal

Mr. was denied his Sixth Amendment right to counsel when the court failed to rule on his motion for a public defender and to provide him appointed counsel. He need not

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(b) place of work;

(c) school; or

(d) another place regularly occupied or visited by the targeted person; and

(4) vandalism and property damage.

[3]S.C. Code Ann. § 16-3-1700 states: B) "Harassment in the second degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

show prejudice to obtain a reversal because he suffered a complete denial of counsel. The conviction is invalid and should be reversed.

Argument

A person accused of a misdemeanor is entitled to the appointment of counsel if he or she is unable to pay for counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). This was reaffirmed in *Alabama v. Shelton*, 535 U.S. 654 (2002). The South Carolina Supreme Court acknowledged this constitutional requirement in *Talley, v. State of South Carolina*, 371 S.C. 535; 640 S.E.2d 878 (2007). [4]

South Carolina law provides:

> Any person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto (SECTION 17-3-10.)

Mr. [redacted] clearly did not waive his right to counsel as he filed a written motion for appointment of a public defender.

South Carolina Constitution Article I Section 14 provides that "Any person charged with an offense shall enjoy the right ...to be fully heard in his defense by himself or by his counsel or by both."

South Carolina Rule 602 Defense of Indigents also requires the court to advise the defendant of the right to counsel and to take steps to implement the appointment of counsel for eligible persons. [The relevant text of Rule 602 is attached.]

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[4] The *Talley* court vacated the portion of the petitioner's sentence that included a condition of good behavior, saying that a magistrate could not impose probation and that the condition was effectively probation. The case was a post-conviction relief case and the court declined to apply *Shelton* to petitioner to reverse the conviction altogether. The court found that a sentence that resulted only in a fine and a suspended sentence did not violate the federal constitutional right to counsel. The court did not address a situation such as Mr. MacDermant's direct appeal from a case in which he already had been incarcerated prior to the time of trial, nor did it address state statutory and court rule requirements.

The Greenville Court of General Sessions has recognized the requirements of *Argersinger* and *Shelton*, and has issued a Standing Order that magistrates should ask in-custody defendants whether they want counsel and if they do, the magistrate must refer the matter to the Office of Indigent Defense which shall appoint counsel to eligible persons. [Copy of Standing Order attached.]

After Mr. [redacted] said he should have had a lawyer and cited *Shelton*, the trial judge in this case said, "If incarceration is on the table then every defendant should have a right to counsel." Recording 1:51:39. She added, "I personally think the defendant should be represented by counsel, if they're indigent. I think every defendant's entitled to counsel." After a comment from the prosecutor, she added, "If the offense warrants incarceration and they're indigent." Recording at 1:52:09.

The trial judge misunderstood the holding of *Shelton*, as she thought that it applied to sentences of one year or longer. Recording 1:50:40. Mr. Shelton in fact was sentenced to 30 days, suspended. *Shelton, supra.*

The South Carolina Summary Court Judges Bench book states: "...the imposition of a sentence, in whole or in part, may be postponed (suspended) while a court waits to see if the defendant will perform certain terms or conditions." Bench book available at http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/CriminalH.htm. The trial judge in this case put the 30 day jail sentence "in abeyance" on condition of completion of 30 hours of counseling. She then said she was suspending it on condition of Mr. [redacted] completing the 30 hours. Recording 1:47:56. [redacted] therefore faced the possibility of incarceration and was entitled to counsel.

There is No Need to Establish Prejudice When Counsel is denied

The law is clear that when counsel is denied, the defendant does not need to establish that other prejudice occurred at the trial in order to obtain a reversal. The South Carolina Supreme Court has written: "First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *Nance v. Ozmint*, 367 S.C. 547, 552 (2006) [citation omitted].

Mr. need not show prejudice from the denial of counsel in this case. But amici would note that there were numerous instances in the trial that counsel could have prevented or remedied. The jury was erroneously instructed because the judge first instructed the jury on first degree harassment, which was not charged. Recording 1:36:10. In addition, the prosecutor was able to offer testimony by the arresting officer on redirect examination that went far beyond the cross questions asked by Mr. When Mr made a relevance and unfair prejudice objection, the court did not rule on it. Recording 1:12:06 et seq. After Mr. asked the complaining witness on direct in the defense case whether the witness had seen Mr. at a party and the witness said he did not recall, and Mr. asked no further questions, the prosecutor asked a series of questions about a burglary that had occurred at the witness' house months earlier than the incident involving Mr. again far beyond the scope of the direct examination. Recording 1:15 et seq. The judge overruled Mr. relevance objection, and the witness proceeded to testify about bullet casings found in his yard and the fear that his children had because of that. The witness testified that the perpetrators had been arrested before the alleged incident in July. The prosecutor asked additional leading questions about the witness' rage that day, with no intervention from the court. Id.

If Mr. _____ had had counsel, counsel could have sought a mistrial because of the erroneous jury instructions, could have prevented the questions that were beyond the scope of cross-examination, and could have kept out of evidence the information about bullets left at the scene by other people. Amici note that the judge at sentencing took steps to calm a dispute that arose between Mr. _____ and the prosecutor and took pains to explain procedures to Mr. _____.

Conclusion

The law is clear that a defendant facing possible incarceration is entitled to appointed counsel when he cannot afford to hire a lawyer. Mr _____ requested counsel almost seven months before his trial and the court did not provide counsel. There was no question of his eligibility as he was unemployed. The trial judge mistakenly thought that *Shelton* required appointment of counsel only for someone sentenced to a year or longer in jail.

The amici curiae, therefore, support the appeal of the appellant and request that his conviction be reversed. The amici further argue that should the city seek to try Mr. _____ again, the court must appoint counsel for him.

Respectfully submitted,

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