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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Angela R. Taylor, Family Court Judge

IN THE INTEREST OF: STEPHEN W.,
A JUVENILE UNDER THE AGE
OF SEVENTEEN,

APPELLANT

APPELLATE CASE NO. 2012-213481

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Argersinger v. Hamilton, 407 U.S. 25 (1972) 8

Chambers v. Florida, 309 U.S. 227 (1940) 7

Doe v. South Carolina, Op. No. 27159 6

Duncan v. Lousianna, 391 U.S. 145 (1968) 6, 9, 10

In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967) 7

In re L.M., 286 Kan. 460, 472 (Kan. 2008) 4

In Re Oliver, 333 U.S. 257 (1948) 7

McKeiver v.Pennsylvania, 403 U.S. 528 (1971) ..... passim

Scott v. Illinois, 440 U.S. 367 (1979) 8

Shelton v. Alabama, 535 U.S. 654 (2002) 8

State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) 3

Statutes

S. C. Code Ann. § 63-19-1820 3

S.C. Code Ann. § 61-1-40 3

S.C. Code Ann. § 63-19-1410 ..... 3, 7

S.C. Code Ann. § 63-19-1420 3

S.C. Code Ann. § 63-19-1440 ..... 3, 5

S.C. Code Ann. § 63-19-810 ..... 3, 5

S.C. Code Ann. § 63-19-820 ..... 3, 5

S.C. Code Ann. § 63-19-1440(D) 5

S.C. Code Ann. § 63-19-1440(E) 5

S.C. Code Ann. § 63-3-590 7

Rules

Rule 37, SCRCimP 6

Rule 609(d), SCRE 6

Rule 9(a), SCRFC 3

Constitutional Provisions

S.C. Const. art I, § 14 .... 3, 4

U.S. Const. amend. VI 4, 6, 8, 9

U.S. Const. amend. XIV .... passim

STATEMENT OF ISSUES ON APPEAL

Whether the family court erred in denying appellant's motion for a jury trial?

STATEMENT OF THE CASE

Appellant was charged on a juvenile petition from Richland County for possession of marijuana. He proceeded to trial on November 13, 2012, before the Honorable Angela R. Taylor. Appellant was adjudicated a delinquent and was ordered to continue on probation until his eighteenth birthday. Joanna K. Delaney, Esquire, represented appellant and Kendall Corley, Esquire, represented respondent.

This appeal follows.

ARGUMENT

The family court erred in denying appellant's motion for a jury trial because juveniles are entitled to a jury trial under State and Federal constitutions.

Defense counsel made a pretrial motion on jury trial for the juvenile she was representing on a charge of possession of marijuana. She stated both the State and Federal constitutions guaranteed a jury trial. She also submitted a brief on her motion that was made an exhibit. The family court denied the motion. (R. 4, line 10 – R. 9, line 17). That ruling was in error.

Article I, Section 14 of the South Carolina Constitution provides:

> Trial by jury; witnesses; defense. The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. (1970 (56) 2684; 1971 (57) 315).

It should be noted from the above that "any person" charged with an "offense" is entitled to a jury trial. The constitution does not distinguish between a child and an adult. In addition, S.C. Code § 61-1-40 states that a "[c]hild means a person under the age of eighteen." Our Supreme Court has held that a viable fetus is a person in both civil and criminal contexts. State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984).

The constitution also says an "offense" not just a crime. Thus, any person charged with an offense is entitled to a jury trial. The South Carolina Children's Code consistently uses the word "offense" when referring to juvenile charges. See S.C. Code Sections 63-19-810, 63-19-820, 63-19-1410, 63-19-1420, 63-19-1440, 63-19-1820. While S.C. Code § 63-3-590, states that children are to be dealt at a hearing and without a jury and Family Court Rule 9(a) states that all hearings in family court are to be conducted without a jury, these

provisions are in conflict with Article I, Section 14 of the South Carolina Constitution. Those provisions, therefore, should fail since they are repugnant to the Constitution.

While there is no case law in South Carolina on whether juveniles are entitled to a jury trial, the State of Kansas has found that their state constitution does extend the right of a jury trial to juvenile proceedings. Their court found that their Bill of Rights extended the right to a jury trial to "all prosecutions." In re L.M., 286 Kan. 460, 472 (Kan. 2008). The court found that "all prosecutions" applied to juvenile proceedings because their juvenile justice code repeatedly referred to their proceedings as prosecutions. This is similar to our Constitution which refers to "an offense" and our juvenile justice code that repeatedly refers to crimes involving juveniles as offenses.

Juveniles should also be entitled to a jury trial under the United States Constitution. The brief defense counsel submitted on this issue is as follows:

JUVENILES ARE ENTITLED TO A TRIAL BY JURY UNDER THE UNITED STATES CONSTITUTION

In McKeiver v.Pennsylvania, 403 U.S. 528 (1971) a plurality of the Court held that juveniles are not entitled to a jury trial under the Sixth and Fourteenth Amendments to the Constitution. The defendant notes that due to the nature of the plurality opinion this case is not binding on him, and asserts such a right does not exist under federal law.

Four of the justices based their decision on the same policy considerations (Mr. Justice Blackmun, Chief Justice Burger, Mr. Justice Stewart, and Mr. Justice White). They reasoned that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution' within the meaning and reach of the Sixth Amendment." McKeiver at 540. The defendant notes that more than forty years have passed since

the McKiever plurality opinion. He would further note particular aspects of the South Carolina juvenile justice system for the Court's consideration, which he believes illustrate the juvenile court proceedings have become "criminal prosecutions" in this state. A juvenile initially incarcerated at the Department of Juvenile Justice after being adjudicated delinquent in family court is later housed at the state Department of Corrections, along with adult offenders who are incarcerated for adult offenses. Such incarceration at the Department of Corrections is mandatory, at age seventeen or nineteen, by statute. For all offenses: "[a] juvenile who has not been paroled or otherwise released from the custody of the department by the juvenile's nineteenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections." S.C. Code Ann. §63-19-1440(D). For certain offenses: "[a] juvenile committed to the Department of Juvenile Justice following an adjudication for a violent offense contained in Section 16-1-60 or for the offense of assault and battery of a high and aggravated nature, who has not been paroled or released from the custody of the department by his seventeenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections." S.C. Code Ann. §63-19-1440(E). While such juvenile offenses may be called offenses, they are still criminal prosecutions for the purpose of this right. The juvenile defendant is subject to pretrial detention (S.C. Code Ann. §63-19-810 & 820), trial (S.C. Code Ann. §63-19-1410), a finding of guilty or not guilty by a trier of fact, and incarceration (S.C. Code Ann. §63-19-1440). The issue is whether they have violated a state criminal law. The burden of proof is beyond a reasonable

doubt. There must be probable cause for arrest. Rules of discovery apply. See, South Carolina Rules of Criminal Procedure, Rule 37. In fact, a juvenile adjudication can be used for impeachment in a later adult case. (See, South Carolina Rules of Evidence, Rule 609(d), which would not be allowed if the offense were not considered a crime. The South Carolina Supreme Court recently held "a juvenile 'adjudication' is the equivalent of a 'conviction'..." for purposes of seeking a pardon. Doe v. South Carolina, Op. No. 27159. Other collateral consequences may flow from a juvenile adjudication that are identical to an adult conviction. For example: requirements for D.N.A. sampling and inclusion in law enforcement databases; mandatory public sex offender registry requirements and mandatory lifetime G.P.S. monitoring for sex offenses; deportation; et. cetera.

Two concurring justices based their decisions on other reasoning. Justice Harlan, concurring, agreed with the result, because he did not believe the Sixth or Fourteenth Amendments required the states to provide jury trials to anyone. However, he stated that "[i]f I felt myself constrained to follow *Duncan v. Lousianna,* 391 U.S. 145 (1968), which extended the Sixth Amendment right of jury trial to the States, I would have great difficulty, upon the premise seemingly accepted in my Brother BLACKMUN'S opinion, in holding that the jury trial right does not extend to state juvenile proceedings." McKeiver, at 557. Justice Brennan concurred with the result in that particular case, but stated that the due process question could not be decided on the basis of the general characteristics of juvenile proceedings, rather, only in terms of the adequacy of a particular state's procedures to protect the juveniles from oppression by the government or against a compliant or

biased judge. McKeiver at 554. Brennan reasoned that the Pennsylvania system was adequate, as it allowed the admission of the public to juvenile trials, thereby "focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation". McKeiver at 555. Justice Brennan's reasoning is supported by a reading of In Re Oliver, where the Court declared that "[t]he knowledge that every criminal trial is subject to a contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power". 333 U.S. 257 (1948). The Chambers Court had already avowed that no man's liberty shall be forfeited for a violation of law without a charge fairly made and fairly tried in a public tribunal. Chambers v. Florida, 309 U.S. 227 (1940). Notably, South Carolina's procedure for juvenile trials does not allow for public scrutiny. S.C. Code Ann. §63-3-590 provides that "[t]he general public must be excluded and only persons the judge finds to have a direct interest in the case or in the work of the court may be admitted." The defendant additionally submits that he is being deprived of due process as a result of this statute.

The remaining three justices (Mr. Justice Douglas, Mr. Justice Black, and Mr. Justice Marshall) concurred in their dissent, reasoning that "the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial." McKeiver at 558. They noted that conviction of the crimes in that case: would subject a person, whether adult or juvenile, to incarceration in a state institution; the issue was whether they had violated a state criminal law; and that In re Gault had held "that 'neither the Fourteenth Amendment nor the Bill of

Rights is for adults alone.'" McKeiver at 559. They further noted that the Fourteenth Amendment, which makes the Sixth Amendment right to a trial by jury applicable to the states speaks of the denial of the rights to "any person," not "any adult person." Id at 560.

Additionally, the defendant finds the Shelton, Argersinger, and Scott line of cases instructive here as to the application of the Sixth Amendment. In Scott, the Court stated that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment...", and found the application of the Sixth Amendment is necessary. Scott v. Illinois, 440 U.S. 367 (1979). Argersinger held that the classification of an offense as misdemeanor or petty does not govern the application of the Sixth Amendment. Argersinger v. Hamilton, 407 U.S. 25 (1972). Although the Court was specifically addressing right to counsel, the defendant asserts that the situation is analogous. When there is a substantial deprivation of liberty which may take place upon conviction, the defendant should be availed of both the guarantees of jury and counsel to safeguard his liberty. Classification of an offense as juvenile does not take the imprisonment of the juvenile defendant (here potentially for a period not to exceed his twenty-first birthday) out of the reach of the Sixth Amendment. Indeed, more recently the Shelton Court has found the Sixth Amendment to apply even where the defendant is not actually incarcerated, if there is at least the possibility of incarceration by way of a suspended sentence. Shelton v. Alabama, 535 U.S. 654 (2002).

The defendant believes that McKeiver is not controlling law, and that he is entitled to a trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution.

THE IMPORTANCE OF A TRIAL BY JURY IN THE CASE AT HAND

Justice Douglas's dissent in McKiever notes some of the benefits of a public trial: public trials come to the attention of key witnesses which may voluntarily come forward and give important testimony; spectators learn about their government; and the "knowledge that every criminal trial is subject to contemporaneous review in the [forum] of public opinion is an effective restraint on possible abuse of judicial power." McKeiver at 567. In Duncan v. Lousiana, the Court recognized that "[a] right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government." 391 U.S. 145, 155 (1968). "Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." Id at 156. The Court further stated that "[e]ven where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." Id at 158.

In the defendant's case, the importance of having twelve fact-finders as opposed to one is particularly crucial. The defendant is charged with Simple Possession of Marijuana. He is facing incarceration in a state facility for a period not to exceed his twenty-first birthday. The defendant is currently sixteen years old. A determination of guilt in this case would be based solely on the jury's evaluation of

the credibility of the testimony of law enforcement agents. The defendant is entitled to have this testimony evaluated by a jury. Further, the defendant feels that the focus of public attention on his trial would be very meaningful under his particular circumstances, given that the investigating law enforcement body did very little by way of investigation or documentation. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

CONCLUSION

On the basis of the above arguments, appellant should be entitled to a jury trial.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

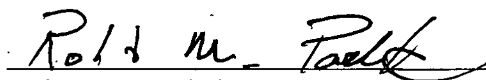
ATTORNEY FOR APPELLANT

April 22, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 18, 2013



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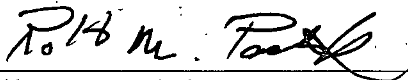
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of November, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

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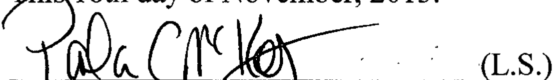
This 18th day of November, 2013.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