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Apr 10 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Abbeville County
Hon. Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2019-001902

The State,

Respondent,

v.

Kenneth Earle McGill,

Appellant.

RETURN TO PETITION FOR REHEARING

On March 22, 2023, this Court affirmed Appellant's conviction and sentence. Specifically, this Court found the trial court did not err in refusing to quash the trafficking indictment as duplicitous, give an entrapment jury instruction, and grant a continuance to review cell phone related materials. Appellant has served and filed a Petition for Rehearing in which he challenges this Court's ruling only as to the refusal to quash and the denial of his continuance request. The State submits there are no grounds for granting the Petition for Rehearing.

As to the issue related to quashing the indictment, Appellant's argument to this Court remains the same. He focuses on the same Fourth Circuit Court of Appeals decision as the primary basis for why the indictment should be deemed duplicitous. However, this Court correctly concluded, consistent with South Carolina state precedent, that the indictment was properly considered and was not duplicitous. The Court properly concluded the indictment related to a continued course of conduct amounting to a single crime. The indictment properly tracked the language of the trafficking statute and detailed more than one method of

accomplishing the crime as opposed to separate and distinct crimes. See State v. Pee Dee News Co., Inc., 286 S.C. 562, 565, 336 S.E.2d 8, 9 (1985) (holding “indictments related to one crime only, and the descriptions of more than one method of violation does not create a new crime” and will not be found to be duplicitous); State v. Sheppard, 248 S.C. 464, 466-467, 150 S.E.2d 916, 917 (1966) (finding indictment for DUI not duplicitous because the “indictment charges only one offense which may be established by proof that the defendant operated a motor vehicle while under the influence of intoxicating liquor or of narcotic drugs, either or both.”). As a result, this Court should deny the petition for rehearing as to this issue.

As to the issue related to the denial of the continuance to further examine the cell phone data, this Court properly concluded the trial court did not abuse its very wide discretion. “Reversals of refusal of a continuance are about as rare as the proverbial hens’ teeth.” State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)). As this Court noted, Appellant accomplished the stated goal of the continuance through other means. He sought merely to explore the cell phone data in the hope of finding additional information which could be used to further impeach Ferguson. Appellant already impeached Ferguson by detailing his history, his reduced charges, and the inconsistencies in his testimony. Appellant extensively argued regarding Ferguson’s bias and motive to lie to avoid a significant sentence and help himself out. The fishing expedition in hopes of finding further inconsistencies is not a proper basis to grant the continuance and is not a proper ground for reversing on appeal. As a result, this Court should deny the Petition for Rehearing as to this issue.

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny the petition for rehearing and affirm Appellant's convictions and sentences.

Respectfully submitted,

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition for Rehearing by emailing a copy to Appellant's counsel of record, William Norman Epps, III, at his primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 10th day of April, 2023.



CAROLINE COLLINS
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Caroline Collins

From: Caroline Collins
Sent: Monday, April 10, 2023 4:23 PM
To: 'norman@eppslawfirm.net'
Cc: William Blicht
Subject: The State v. Kenneth Earle McGill (2019-001902)
Attachments: MCGILL Kenneth - Return to Petition for Rehearing - 2019-001902 (03263574xD2C78).PDF

Good Afternoon Mr. Epps,

Attached please find the Return to Petition for Rehearing in The State v. Kenneth Earle McGill (2019-001902). This return will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

CAROLINE COLLINS, Administrative Coordinator
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