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Mar 27 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mark Anthony Gilbert, Appellant.

Appellate Case № 2021-000599

Appeal from Spartanburg County
Grace Gilchrist Knie, Circuit Court Judge

Unpublished Opinion № 2024-UP-072
Submitted February 1, 2024 - Filed March 13, 2024

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Mark Anthony Gilbert respectfully requests that this Court rehear this matter to correct the following errors and omissions:

1. This Court erred in failing to hold that South Carolina Code § 16-3-655(B)(1) does not list different crimes, but simply the means of committing the same crime by different means. As such, the opinion of this Court in this matter is contrary to the holding in *State v. Sheppard*, 248 S.C. 464, 150 S.E.2d 916 (1966). In that case, the South Carolina Supreme Court held that when a statute gives different means of committing the crime of driving under the influence, only

one crime has been alleged when the different means are alleged in one indictment. In the unpublished opinion, this Court failed to follow *Sheppard*. This Court further failed to follow the holding of the South Carolina Supreme Court when the court stated, “The statute prohibits obscenity; the indictments relate to one crime only, and the description of more than one method of violation does not create a new crime.” *State v. Pee Dee News Co.*, 286 S.C. 562, 565, 336 S.E.2d 8, 9 (1985). This Court improperly held method of violating the statute created a different crime.

Under the analysis used by the Court in this case, the prosecutor could have divided up the 27 months into three segments of nine months each. He then could have obtained four indictments in each of the three segments and had 12 charges against Mr. Gilbert. Nothing in the opinion of this court would prevent such a practice.

2. This Court erred in finding, “the State presented evidence that Gilbert engaged in one form of sexual batter for a period of time before eventually engaging in another form of sexual battery.” *State v. Gilbert*, Op. № 2024-UP-072 (S.C.Ct.App. filed March 13, 2024) at 2. The Court failed to recognize that the indictments in this case did not include a certain means of committing the crime of a certain period of time and then allege a different means over a different period of time. The record in this case does not demonstrate that one means of the sexual assault occurred during one period of time and another means started at a different time. If the state knew such dates, they would have put the different dates in the different indictments. They did not. The dates in the indictments are the same regardless of the means used to commit the acts. Furthermore, the theory adopted by this court is not supported by the evidence. This Court failed to name which means of committing the crime was over which period of time that

from and to the exclusion of the other means of committing the crime.

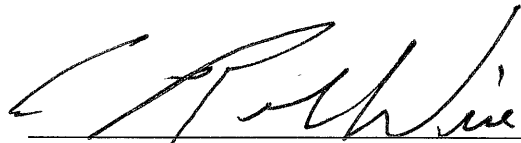
3. This Court erred in relying upon *State v. Smith*, 276 S.C. 484, 280 S.E.2d 56 (1981) to support the conclusion in this case. The State in *Smith* indicted the defendant for two specific sexual acts that occurred on a specific day and were separated as to time. Under the *Smith* case, the defendant was indicted for two separate acts. Whether the means of accomplishing the act was the same means or different means was of no importance as the state specifically put the defendant on notice of two separate acts that violated the law. In the present case, the state has alleged the same crime over the same time period. The state has elected to prosecute as a single crime a continuous course of conduct. In *Smith*, the state did not elect to indict for a continuous course of conduct. Whether the statute in South Carolina permits the state to indict a defendant for a continuous course of conduct has not been decided. This Court should take the opportunity presented in this case and determine if the law in South Carolina permits the indictment for a continuous course of conduct.

4. This court erred in failing to recognize that indictment № 20-GS-42-002 alleges the crime of penetrating the vagina with an object. As such, the penetration of the vagina with dildo, finger, or penis would also be penetrating the vagina with an object. The jury in this case was never instructed to differentiate among the various means of committing the act. As such, the consecutive sentencing on indictment № 19-GS-4201035 would violate the double jeopardy clause of the federal and state constitutions. This Court failed to consider that the five year consecutive sentence in indictment № 19-GS-42-1035, for actual sexual intercourse, would be included under indictment № 20-GS-42-002, which alleges Mr. Gilbert used an object. Criminal sexual conduct with an object would include criminal sexual conduct using a penis. Thus, Mr.

Gilbert has been punished twice for what is legally the same act. No reading of the statute would exclude a penis from being an object. In the jury instructions in this case, the jury was never told that “an object” means something different the other means of committing the crime.

For the foregoing reason, this Court should grant the Petition for Rehearing and reverse the conviction of Mark Anthony Gilbert on the ground that the indictments in this case allege the same crime and therefore were multiplicitous. Furthermore, the consecutive sentence violated the double jeopardy provisions of Article I, § 12 of the Constitution of the State of South Carolina and the Fifth Amendment to the Constitution of the United States of America.

March 26, 2024



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STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY

General Sessions Court
Honorable Grace Knie, Circuit Court Judge

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The State Respondent,

vs.

Mark Anthony Gilbert. Appellant

CERTIFICATE OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on March 27, 2024, she did deposit via virtual mail a copy of the Petition for Rehearing in the above case addressed to the following:

Barry Joe Barnette bbarnette@spartanburgcounty.org;
Alan McCrory Wilson agwilson@scag.gov
Mark Reynolds Farthing at mfarthing@scag.gov ; and
Honorable Grace Gilchrist Knie
S.C. Circuit Court
180 Magnolia Street
Spartanburg, SC 29306

March 27, 2024

/s/ Sandy Traynham
Sandy Traynham
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The State vs. Mark Anthony gilbert, Appellate Case No. 2021-000599

From: sandy traynham (straynham2@yahoo.com)

To: bbarnette@spartanburgcounty.org; mfarthing@scag.gov; awilson@scag.gov

Cc: rauchwise@gmail.com

Date: Wednesday, March 27, 2024 at 11:39 AM EDT

Counsel,

I am attaching herewith a Petition for Rehearing which will be filed with the court today. Please confirm you have received this email.

Sandy Traynham
Secretary

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