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Jul 15 2024

SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**CERTIORARI - COA - GENERAL SESSIONS
APPEAL FROM SPARTANBURG COUNTY**

Honorable Grace Knie, Circuit Court Judge

**Appellant Case No 2024-000761
Lower Case Nos. 2020GS4200001, 00002, 00003, 2019GS4201035**

The State Respondent,

vs.

Mark Anthony Gilbert Petitioner.

PETITIONER’S REPLY TO RETURN

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ARGUMENT

Question I

Did the trial court err in failing to dismiss the four indictments because they were multiplicitous and unduly prejudiced Mark Gilbert by leading the jury to believe Mr. Gilbert was charged with four different crimes when they were actually just one crime?

As the State has not argued against the position of Mr. Gilbert in his Petition that an innovative prosecutor, under the analysis used by the Court of Appeals, could have broken this case into 12 separate charges, they apparently accept this premise. This is the abuse that is possible under the holding of the Court of Appeals. This court should not sanction such a method of prosecuting cases.

The basic problem not recognized by the State is exactly what is the crime alleged? The indictment, as worded, alleges a continuous course of conduct. As mentioned in the opening Petition, this principle was brought to the attention of the trial judge. Rec. on App. at 110, 13. A Connecticut, discussing this issue has said:

It is well established that a criminal information is duplicitous when it charges the defendant in a single count with two or more distinct and separate criminal offenses, thereby implicating the defendant's constitutional right to jury unanimity. What is not clear, and what we must decide in this certified appeal, is whether a defendant charged in a single count with a single statutory violation faces a duplicitous information when the evidence at trial supports multiple, separate incidents of conduct, each of which could independently establish a violation of the charged statute. We conclude as a matter of federal law that such a count is duplicitous and, if not cured by a bill of particulars or a specific unanimity instruction, violates the defendant's constitutional right to jury unanimity, thereby requiring reversal of the defendant's conviction if this duplicity creates the risk that the conviction will result from different jurors concluding that the defendant committed different criminal acts.

State v. Douglas C., 345 Conn. 421, 425–26, 285 A.3d 1067, 1074 (2022)

If the State intended for each act of penile penetration to be a separate crime, then the state has erred in charging Mr. Gilbert with each separate act of penile penetration and not requiring the jury to be unanimous as to each act. When an indictment alleges separate crimes in one indictment, it is duplicitous. Just as each act of penetration by the dildo or other object would be multiple crimes set forth in the same indictment. The state did not try this case based upon each similar act being a separate crime, but as one continuous crime of the times set forth in the indictment.

When the fact is recognized that the State has alleged one continuous crime, whether South Carolina recognizes it or not, then the indictments are in error as they are multiplicitous as discussed in the opening Petition. As the crime is a continuing crime, what the State has alleged in the four indictments become one crime set forth in four indictments. Granted the State could have alleged on a certain date or a very narrow range, that Mr. Gilbert penetrated the witness with a dildo and then on a separate date, or separate very narrow range, alleged Mr. Gilbert penetrated the witness with his penis. Those would be two separate crimes. This would have been consistent with *State v. Smith*, 276 S.C. 484, 280 S.E.2d 56 (1981).

As the State has alleged one continuous crime, the principles set forth in *State v. Adams*, 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020) apply to this case. In *Adams*, the court of appeals held that the various means listed for committing criminal sexual conduct are the means for committing the crime and not elements. As the court said, “Our review of the statutory text, structure, and purpose of § 16-3-655, as well as history, tradition, and fairness, convinces us that within the element of a sexual battery, the jury is not required to agree on the factual means by

which the sexual battery occurred as long as the jury agrees on the fact that ‘a’ sexual battery occurred.” *Id.* at 437, 845 S.E.2d at 226. If the different means of committing the crime were elements, then the jury would need to be unanimous on each element. As the difference in the four indictments is simply using the means of committing the crime to make the difference, the indictments, as a continuous course of conduct, simply alleged one crime.

Smith does not aid the State. In *Smith* the court noted that the two acts of criminal sexual conduct occurred several minutes apart. While a more complete statement of facts would have been helpful, the indication from the facts was that the two acts of sexual assault were separated by time. In this case, if an act of sexual assault with a dildo occurred and as part of the same act, with no intervention of several minutes, a sexual assault with another object or a finger occurred, then that would be a single act of sexual assault accomplished by separate means. Under *Adams*, the jury would not have to unanimously agree on which act occurred as long they unanimously found at least one of the means was used.

In *State v. Weber*, 297 Kan. 805, 304 P.3d 1262 (2013) the Kansas Supreme Court was faced with the case where the jury convicted the defendant of attempted rape and rape. The rape consisted of Mr. Weber penetrating the victim with his finger. The attempted rape arose when Mr. Weber attempted to penetrate the victim with his penis both before and after penetrating her with his finger. In holding this was only one crime, the court held:

The inference that Weber utilized the digital penetration to assist him in accomplishing his ultimate goal of penile penetration is corroborated by the fact that he attempted penile penetration both before and after the use of his fingers. In that context, the State's argument that Weber's inability to accomplish penile penetration constituted an intervening event is nonsensical.
Id. at 810, 304 P.3d at 1267.

In *Smith*, had there had not been an intervening time, there would have been but one crime. Thus, *Smith* does not answer the question of whether there is more than one crime in the present case. Also, while the facts in *Smith* are sketchy, there was apparently no attempt in *Smith* to allege a continuous crime.

This Court should grant the petition for writ of certiorari and rule that when the State alleges a continuous course of conduct in an indictment, the State cannot create separate crimes by alleging the same crime was committed by different means. As the State told the jury, through their indictments, that Mr. Gilbert had committed four crimes and not one, this was prejudicial to Mr. Gilbert. Unless this court grants this Petition for Certiorari and reverses all the charges, the state will not be deterred from using similar tactics in the future.

Question II

Did the trial court err in sentencing Mark Gilbert to a consecutive five year sentence on indictment № 19-GS-42-1035 when the sentence violated the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States of America and Article I, § 12 of the Constitution of the State of South Carolina?

The State has misconstrued the position of Mr. Gilbert when they say, “Much of Gilbert’s appellate argument is premised on his argument he could not be prosecuted for separate charges in his case.” Ret. at 14. As to this issue, Mr. Gilbert assumes the court has ruled against him as to Question I. The issue as to Question II is totally independent of Question I.

To better understand this issue, assume the following facts. 1. Mr. Gilbert is tried on June 5, 2023 for the charges in Indictment 20-GS-42-002 which uses the phrase “penetration of the vagina with an object” without identifying what the object was. 2. After Mr. Gilbert is tried

on that charge, he is tried on August 12, 2023 for any of the other indictments. Whether he is acquitted or convicted of the initial charge, the principle of double jeopardy would prevent the second trial. By using the word “object” in the first indictment, the state has included all the other items alleged in the other indictments as all of them meet the definition of “object.” Had the state defined “object” as “other than a dildo, finger or penis” then the State could have tried him on the separate charges. Under the facts of this case, as the word object, as it was not defined in the indictment, it would include a dildo, finger or penis. Thus, the conviction in Indictment 20-GS-42-002 cannot stand as it violates double jeopardy.

The principles established in *Rutledge v. United States*, 517 U.S. 292 (1996) should control this case. The United States Supreme Court, using the principles established in *Blockburger v. United States*, 284 U.S. 299 (1932), found the second conviction violated double jeopardy. In *Rutledge*, the defendant was charged with the violation of two separate criminal statutes. One was a violation of participating in a conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 and one count of conducting a continuing criminal enterprise (CCE) “in concert” with others in violation of § 848. The court ruled that the conspiracy alleged in the conspiracy to distribute drugs contained the same facts as the acting in concert for a violation of conducting a continuing criminal enterprise. In holding the second conviction violated double jeopardy, the court said, “Because § 846 does not require proof of any fact that is not also a part of the CCE offense, a straightforward application of the Blockburger test leads to the conclusion that conspiracy as defined in § 846 does not define a different offense from the CCE offense defined in § 848.” *Id.* at 300. The same principle applies here. Because the proof of penetration by an object does not contain any facts that would not be included in the

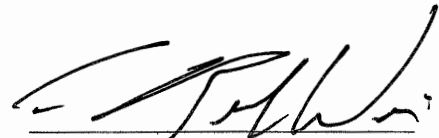
penetration by a dildo, finger or penis, as they are all objects, double jeopardy prevents the consecutive sentences in this case.

This court should grant the Petition for Writ of Certiorari and reverse the consecutive sentences in this case.

CONCLUSION

For the foregoing reasons, and for the reason in the Petition for Writ of Certiorari, this court should grant the petition as to Question I and remand the case for a new trial. In the event the court does not grant the petition as to Question I, the Petition for Writ of Certiorari as to Question I, this court should grant the petition as to Question II and dismiss the consecutive sentence as a violation of the double jeopardy provision of the Fifth Amendment to the Constitution of the United States of America and Article I, § 12 of the Constitution of the State of South Carolina.

July 14, 2024



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Appellant Case No 2024-000761
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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 Petitioner in the above entitled case. That on July 15, 2024, she did deposit via virtual mail a copy of the Petitioner’s Reply of Return in the above case addressed to the following:

- SC Court of Appeals ctappfilings@sccourts.org
- Barry Joe Barnette bbarnette@spartanburgcounty.org;
- Alan McCrory Wilson agwilson@scag.gov
- Mark Reynolds Farthing at mfarthing@scag.gov .

July 15, 2024

/s/ Sandy Traynham
Sandy Traynham
Secretary

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