STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2012-212340

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KEEON BUTLER,

APPELLANT.

AMENDED
INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 11

AUTHORITIES CITED

Cases

In re Jeremiah W., 361 S.C. 620, 606 S.E.2d 766 (2004) 10

In re Richard D., 388 S.C. 95, 693 S.E.2d 447 (Ct. App. 2010) 3

McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980) 9, 10

Percival v. Bailey et al., 70 S.C. 72, 49 S.E. 7 (1904) 8

Vandiver v. Endicott, 215 Ga. 250, 109 S.E.2d 775 (1959) 8-9

Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943) 9, 10

State ex rel. Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625 (1936) 8

State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997) 3-10

State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App.1996) 5, 10

State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980) 10

State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970) 3

State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) 3

State v. Prater, 59 S.C. 271, 37 S.E. 933 (1901) 4

State v. Sweat, 221 S.C. 270, 70 S.E.2d 234 (1952) 4

State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) 10

Statutes:

S.C. Code § 16-3-1040 .... 3, 5, 6

S.C. Code § 17-19-20 4

S.C. Code § 17-11-60 9

S.C. Code § 24-1-30 9

S.C. Code § 24-1-110 9

S.C. Code § 24-3-20 8

Other Authorities

THE AMERICAN HERITAGE DICTIONARY 63 (1980) 8

S.C. Op. Atty. Gen. No. 84-74, 1984 WL 159881 10

Opinion of April 28, 1999, 1999 WL 387049 10

Opinion of March 12, 2010, 2010 WL 1370081 10

STATEMENT OF ISSUE ON APPEAL

The issue raised on appeal is not properly before this Court because it was not properly raised below. In any event, the trial judge correctly determined that the corporal-ranked correctional officer was a "public official" under the threatening the life of a public official statute.

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in August 2011 for threatening the life of a public official. On June 14, 2012, Appellant proceeded to trial before the Honorable G. Edward Welmaker and a jury. The jury found Appellant guilty as indicted, and Judge Welmaker sentenced Appellant to five years, suspended upon service of thirteen months and thirty months of probation. A timely notice of appeal was served and filed.

ARGUMENT

The issue raised on appeal is not properly before this Court because it was not properly raised below. In any event, the trial judge correctly determined that the corporal-ranked correctional officer was a "public official" under the threatening the life of a public official statute.

Issue Preservation

Appellant asserts that the trial judge erred in determining that Woods-Tisdale was a "public official" under S.C. Code § 16-3-1040(A) because the State failed to present sufficient evidence that Woods-Tisdale met the criteria set forth in State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997). (See Brief of Appellant, p. 9). The State submits that this issue is not properly before the Court because Appellant did not properly raise the issue below. The issue regarding whether or not Woods-Tisdale was a "public official" was raised prior to trial by the prosecutor, who was apparently anticipating that Appellant would later raise the issue at the directed verdict stage. (See R. p. 5, lines 10-11; see R. p. 5-14). The trial judge made an *in limine* pre-trial ruling - before any evidence was presented - based upon the information before him. (R. p. 14, lines 8-15). However, Appellant subsequently failed to challenge the sufficiency of the evidence establishing the "public official" element in any fashion at the directed verdict stage. (R. p. 88, line 22 – p. 89, line 12). Therefore, no issue regarding the sufficiency of the evidence on this point is preserved for appellate review. See State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (directed verdict argument was not preserved where the defendant raised different arguments below); In re Richard D., 388 S.C. 95, 100-101, 693 S.E.2d 447, 450 (Ct. App. 2010) (particular argument in support of directed verdict was not preserved for appellate review where defendant raised different argument below); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

The trial judge's pre-trial ruling was essentially a ruling on a premature directed verdict motion. Notably, Appellant made no motion to quash, and in any event, a motion to quash would not have been an appropriate vehicle to challenge the State's proof on an element of the offense. (See R. p. 5-14). See State v. Sweat, 221 S.C. 270, 272, 70 S.E.2d 234, 235 (1952) (where defendant moved to quash the indictment before trial on the ground that the proof would not meet the allegations in the indictment, the trial judge properly denied the motion because the indictment was not facially defective); cf. State v. Prater, 59 S.C. 271, 276, 37 S.E. 933, 934 (1901) ("There was no error in refusing to quash the indictment, as here alleged; for, if we assume that the motion to quash for defects not apparent on the face of the indictment may be made after plea to the merits and evidence thereon, still, to have granted the motion, the court would have been compelled to determine whether joint sales had been proven or not, and thus invade the province of the jury. Defendants' proper course at that stage was to have made request of the court to instruct the jury in accordance with the contention, if they desired to test its correctness; preferring their request in writing as required by the rules of the court. This was not done."); see also S.C. Code § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). If defendants were permitted to raise pre-trial motions to "quash" on the ground that they did not believe the State's evidence would prove the allegations in the indictment, it would

obviate the need for the grand jury.[1] Based on the foregoing, the State submits that this Court should dismiss the appeal on error preservation grounds.

Discussion

Appellant was indicted under S.C. Code § 16-3-1040(A) for threatening the life of a "public official." This statute states as follows:

> It is unlawful for a person knowingly and wilfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official, teacher, or principal, or members of his immediate family if the threat is directly related to the public official's, teacher's, or principal's professional responsibilities.

The statute defines "public official" in subsection (E)(1) as "an elected or appointed official of the United States or of this State or of a county, municipality, or other political subdivision of this State."[2]

In State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997), the South Carolina Supreme Court most recently addressed the scope of the term "public official" under S.C. Code § 16-3-1040 (A). In Bridgers, the defendant was indicted for threatening to kill a corporal with the South Carolina Highway Patrol who came to the defendant's home to investigate a traffic accident. Bridgers at 12-13, 495 S.E.2d at 197. The trial judge denied the defendant's motion to quash the indictment on the ground that the corporal was not a "public official" within the meaning of the statute. Id. The South Carolina

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[1] The State submits that State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997), does not stand for the proposition that motions to quash are appropriate under these circumstances. The State would point out that the propriety of raising the motion to quash was not raised or addressed in Bridgers. See Bridgers at 12-15, 495 S.E.2d at 197-99; cf. State v. Carter, 324 S.C. 383, 385, 478 S.E.2d 86, 87 (Ct. App. 1996) (where the "public official" issue was addressed in the context of a directed verdict motion).

[2] The statute defines "public employee" as "a person employed by the State, a county, a municipality, a school district, or a political subdivision of this State, except that for purposes of this section, a 'public employee' does not include a teacher or principal of an elementary or secondary school." S.C. Code § 16-3-1040 (E)(2).

Court of Appeals disagreed with the trial judge and concluded that, although Highway Patrol officers would clearly be considered public officials under the common law because they owed a duty to the public and the duties pertained to the public interest, the common law test had no application because the statute itself defined the term "public official" as someone who is "elected or appointed," which Highway Patrol officers were not. State v. Bridgers, 323 S.C. 185, 473 S.E.2d 829 (Ct. App. 1996).

The South Carolina Supreme Court reversed, holding that Highway patrol officers are "public officials" within the meaning of S.C. Code § 16-3-1040(A). The Supreme Court reasoned that the fact that Highway Patrol officers and troopers are commissioned by the Governor upon recommendation by the Director of the Department of Public Safety was evidence that they are "appointed" as required by the statute. Bridgers at 13-14, 495 S.E.2d at 197. The Supreme Court also found that the common law provided guidance on the issue since the Legislature is presumed to be aware of the common law when it enacts statutes. Id. at 14, 495 S.E.2d at 197-98. The Court pointed out that a "public officer" has been held to be a person "'who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, not occasional or intermittent.'" Id. at 14, 495 S.E.2d at 198 (citation omitted). The Court stated that "the greater the duty to the public at large, the more likely it is that the individual will be a public official.'" Id. at 15, 495 S.E.2d at 198. The Court noted that lower-level Highway Department officials, deputy sheriffs, and police officers have all been held to be "public officials." Id.

The Court also noted that the following criteria may be considered when distinguishing between public officers and public employees: (1) whether the position

was created by the Legislature; (2) whether the qualifications for appointment are established; (3) whether the duties, tenure, salary, bond, and oath are prescribed; and (4) whether the one occupying the position is a representative of the sovereign. Id. at 14, 495 S.E.2d at 198. However, the Court was careful to point out that "no single criterion is dispositive and not all the criteria are necessary to find that an individual is a public officer." Id. Finally, the Supreme Court found that public policy favored treating Highway Patrol officers as public officials because city police officers have been held to be public officials and it would be nonsensical to treat Highway Patrol officers differently. Id. at 15-16, 495 S.E.2d at 198-99.

In Appellant's case, the trial judge properly concluded that Woods-Tisdale is a "public official" under the statute. At the time of the incident, Woods-Tisdale held the rank of corporal and was a correctional officer at Perry Correctional Institution. (R. p. 31-35). Woods-Tisdale wore a uniform. (R. p. 60, lines 22-23). Her duties at the time included supervising security in the inmate building and delivering legal materials to inmates in the lock-up facility. (R. p. 60, lines 17-21). According to the undisputed information presented to the judge in the pre-trial hearing, Woods-Tisdale was "commissioned as a corrections officer." (R. p. 12, lines 11-17). Additionally, pursuant to SCDC policy, the warden or a designee specifically selects corporals for service, and because of this, corporals and others engaged in security-related positions are distinguished from prison "staff" who can be selected by a board.[3] (R. p. 8, lines 9-15).

As in Bridgers, the fact that Woods-Tisdale was commissioned served as evidence that she was an appointed official. The fact that the warden or his designee had to specifically select Woods-Tisdale to be a corporal confirmed the fact of her

[3] Prison "staff" includes "food service, canteen, commissary, health services, operational review, grievances." (R. p. 8, lines 13-15).

appointment.[4] See State ex rel. Coleman v. Lewis, 181 S.C. 10, 103, 186 S.E. 625, 635-36 (1936) ("'On general principles, the choice of a person to fill an office constitutes the essence of his appointment.'") (citation omitted). Further, correctional officers are charged with duties involving an exercise of the sovereign power; that is, enforcement of the laws of this State by ensuring that people who have been convicted and sentenced under our law satisfy their imposed punishments. In doing so, correctional officers also preserve law and order within the prison, enforce the law within the correctional facility, and ensure that prisoners' sentences are carried out in accordance with the laws governing the treatment of prisoners. See, e.g., S.C. Code § 24-3-20, *et seq*. The duties of a correctional officer are "continuing, and not occasional or intermittent.'" Bridgers at 14, 495 S.E.2d at 198 (citation omitted). More importantly, correctional officers' duties are of great concern to the public at large since public safety is at stake. (See R. p. 8-9; p. 11, lines 15-19).

Further illustrating the delegation of a portion of the State's sovereign power to correctional officers is the fact that the Legislature grants an employee of the South Carolina Department of Corrections whose assigned work location is one of the correctional facilities the status of a "peace officer" anywhere in the State while in the performance of his officially assigned duties relating to the custody, control, transportation, or recapture of an inmate. S.C. Code § 24-1-280; see Percival v. Bailey et al., 70 S.C. 72, 49 S.E. 7 (1904) ("Peace officers have at common law the right to arrest upon view, without warrant, all persons who are guilty of a breach of the peace or other violation of the criminal laws.") (citations omitted); see also Vandiver v. Endicott, 215

[4] Importantly, the statute does not define "appointed official" or provide restrictions on who may appoint. See S.C. Code § 16-3-1040. "Appoint" generally means "to select or designate to fill an office or position." See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 63 (1980).

Ga. 250, 251, 109 S.E.2d 775, 777 (1959) (a peace officer is an individual vested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public, such powers enduring at the pleasure of the creating power, whose tenure is not transient, occasional, or incidental).

Although the position of "correctional officer" was not specifically created by the Legislature, the Department of Corrections was created under S.C. Code § 24-1-30, and the Director of the Department of Corrections was granted the authority to employ and discharge such persons as may be necessary for the efficient conduct of the prison system. See S.C. Code § 24-1-110 (A). The qualifications for appointment, duties, and tenure have been established pursuant to Department of Corrections policy under the authority of S.C. Code § 24-1-30 and § 24-1-110 (A).

Finally, correctional officers act as representatives of the warden - and thus of the sovereign - inasmuch as they are appointed by the warden or his designee and are involved in the custody and control of state prisoners.[5] See Willis et al. v. Aiken County, 203 S.C. 96, 103, 26 S.E.2d 313, 315-16 (1943) ("It is generally held that 'the fact that the position is a subordinate one, and that its holder may be accountable to a superior does not prevent it from being an office, or the incumbent an officer as distinguished from a mere employee. A subordinate or inferior officer is none the less an officer.'") (citations omitted); McClain v. Arnold, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980) (the status of a public official does not depend upon "the government employee's place

[5] The Legislature has demonstrated its intent that the warden of a state correctional facility be considered a "public official." See S.C. Code § 17-11-60 ("It shall be lawful and mandatory upon the ***warden or other official*** in charge of a penal or correctional institution in this State to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers.") (emphasis added). Appellant did not dispute this below. (See R. p. 8, lines 16-23; see p. 5-14).

on the totem pole," but is measured by "the public interest in a government employee's activity in a particular context.") (citations omitted). In sum, contrary to Appellant's assertions, Woods-Tisdale met the criteria for a public official as set forth in Bridgers.

Significantly, the South Carolina Supreme Court has already concluded that law enforcement officers are public officials.[6] See Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943) (deputy sheriff); McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980) (police officer); State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980) (police officer); State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct.App.1996) (police officer); In re Jeremiah W., 361 S.C. 620, 606 S.E.2d 766 (2004) (police officer); State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997) (Highway Patrol officer); see also State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) (lower-level Highway Department employees). Correctional officers, who are similarly engaged in duties of great concern to the public, should be afforded the same treatment, especially where the Legislature has specifically granted them the status of peace officers.

The statute's purpose was to make it a serious offense to convey threats to people in positions of authority who are representatives of the State. In the State's view, a prisoner who makes a threat against a correctional officer in charge of the prisoner's care and custody has clearly violated the provisions of § 16-3-1040(A). Therefore, the State submits that the trial judge's determination that Woods-Tisdale was a "public official" was correct.

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[6] The State would note that there is an Attorney General's Opinion from 1984 indicating that a corrections officer would be considered a "public official" for purposes of the prohibition on dual office holding. See S.C. Op. Atty. Gen. No. 84-74, 1984 WL 159881; see also Opinion of April 28, 1999, 1999 WL 387049; Opinion of March 12, 2010, 2010 WL 1370081.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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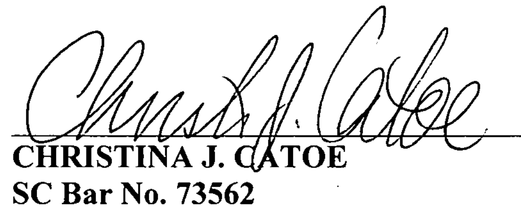

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ATTORNEYS FOR RESPONDENT

October 28, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2012-212340

THE STATE OF SOUTH CAROLINA,

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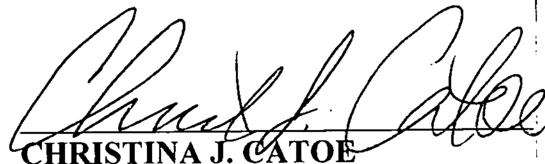
DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

The Respondent submits that the following should be included in the Record on Appeal:

(1) True-billed indictment;
(2) Trial Transcript p. 1-128.

ALL DOCUMENTS DESIGNATED SHOULD BE REDACTED IN ACCORDANCE WITH THE SOUTH CAROLINA SUPREME COURT ORDER ON PERSONAL DATA IDENTIFIERS.

The undersigned hereby certifies this Designation contains no matter that is irrelevant to this appeal.



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October 28, 2013

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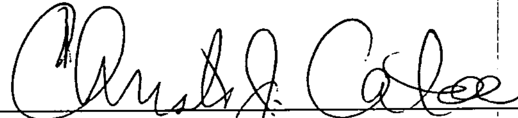
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Amended Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **LaNelle C. DuRant**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **28th** day of **October, 2013.**



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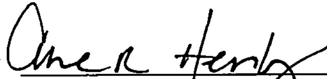

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