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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Fairfield County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY JAMES THOMPSON,

PETITIONER.

APPELLATE CASE NO 2026-000109

REPLY BRIEF OF PETITIONER

GARY H JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ARGUMENTS IN REPLY

I. The convenience of witness Bell in testifying remotely as a violation of Petitioner's confrontation rights was argued and ruled upon at the trial court and by the Court of Appeals and is preserved for this Court's review.

Respondent asserts that the ability of Bell to attend trial due to the change in circumstance regarding his move from Pennsylvania back to Fairfield County is not preserved since it was not sufficiently articulated to the trial court.

At trial, however, Petitioner never took issue with the sufficiency of the evidence or—more specifically—he never argued Bell's statements about his medical conditions needed to be supported by medical evidence, leaving that argument unpreserved. Likewise, although he noted Bell was in the same county as the courthouse on the day of trial, after Bell testified his back hurt too much that day to travel to court, Petitioner did not argue that Bell's prior move indicated he could attend or that the distance between Bell and the courthouse was too close for any exception to the Confrontation Clause to apply.

Brief of Respondent p. 9.

To the contrary, in the initial hearing on Bell's remote testimony, counsel for petitioner objected to the use of video and the trial court granted the State's request to allow Bell to testify remotely over video, on the basis of Bell's self-reported medical problems and limitations. R. 3, ll. 21-24; 5, ll. 16 – 23. The trial court's order was at the specific request of the State to allow Bell to testify because he was under medical orders not to fly due his age and complications from his back. R. 2, ll. 14 – 22. As the State admitted, by the time trial actually began, Bell had relocated from Pennsylvania to Fairfield County, eliminating the alleged barrier associated with flying from Pennsylvania to South Carolina. At trial, petitioner's counsel renewed the objection, noting that Bell's presence so close to the courthouse negated the prior travel concerns:

MR. FRICK: Your Honor, I'd renew my objection to having the virtual testimony of Mr. Bell. I believe he is now in Fairfield County. He is down the road. I would ask that we get him

transported here so I could have live testimony. My chief concern is, if I need to ask him about his previous statement, I think this is going to be problematic and very difficult. I'm not exactly sure how we're going to execute that.

R. 148, ll. 15 – 22. The trial court then questioned Bell and others about his physical ability to be transported to the courthouse and, as in his prior ruling, allowed Bell to testify remotely over counsel's objection that it deprived petitioner of his "full confrontation" right and impacted the ability to cross-examine Bell. R. 5, ll. 16-20; 148, ll. 15 – 22; 149, l. 10 – 150, l. 9. The trial court noted counsel for Petitioner was protected on the Record on this point. R. 150, l. 9.

The issue of the sufficiency of the need to allow Bell to avoid face to face testimony in court based upon his age and health was fully argued and addressed below. The trial court initially ruled that Bell's presence in Pennsylvania and inability to fly made remote testimony appropriate. Since Bell was in the same county as the courthouse by the time trial started, the issue was revisited on the same grounds as when he was in Pennsylvania since the barrier to flying was no longer an issue and his physical condition had allowed a move to South Carolina since the original order granting remote testimony.

These same basic uncontested facts were presented to the Court of Appeals in petitioner's Final Brief:

Defense counsel Frick then renewed his objection to allowing Tommy Bell to testify virtually. "I believe he is now in Fairfield County. He is down the road. I would ask that we get him transported here so I can have live testimony ... " R. 148, II. 12-22. Defense counsel Frick also said a chief concern, in addition, was apparently impeaching Bell about a previous statement which "I think this is going to be problematic and very difficult. I'm not exactly sure how we're going to execute that. I've got him queued up and ready to go to attempt it though." R. 148, II. 19-24.

Appellant's Final Brief p. 8. Petitioner's Final Brief argued that the exception to face to face testimony authorized by Maryland v. Craig, 497 U.S. 836 (1990) was narrow and generally

limited to testimony of minors. Appellant's Final Brief p. 19. However, Petitioner's Final Brief also acknowledged the Craig exception had been applied in other settings but that allowing Bell to testify under the facts of this case violated Petitioner's confrontation rights by denying face to face confrontation before the jury and impacting his ability to cross-examine Bell. Appellant's Final Brief p. 20-22.

The sufficiency of the trial court allowing Bell to testify remotely due to physical inability to attend trial was argued below and is preserved for review by this Court.

II. S.C. Code Ann. § 16-3-1550, and this Court's interpretation of that statute, would not justify allowing witnesses to skip the rigors of in person testimony on the inadequate assertions by Bell in this case.

The State would look towards S.C. Code Ann. § 16-3-1550 (2015) to provide guidance on the Legislature's intent to accommodate elderly and infirm witnesses through use of remote testimony. Brief of Respondent p. 11. Certainly, S.C. Code Ann. § 16-3-1550(E) provides a mechanism to accommodate those with special needs by the use "closed or taped sessions when appropriate." The true impact of S.C. Code Ann. 16-3-1550(E) is in the procedure mandated by this Court for when such accommodation may be ordered.

Together, *State v. Cooper*¹ and *State v. Rogers*² established the following procedure to be followed by the trial judge in this factual situation. First, the trial judge must make a case-specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and hear the child, should have

¹ *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).

² *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987), overruled on other grounds by *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).

counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

State v. Murrell, 302 S.C. 77, 80–81, 393 S.E.2d 919, 921 (1990).

In any case in which video has replaced in court testimony, this Court has required more than "generalized testimony" concerning the reasons for overcoming the confrontation rights of the accused. State v. Bray, 342 S.C. 23, 30–31, 535 S.E.2d 636, 640 (2000). Here, the generalized testimony that Bell was in physical pain from his back and could not travel to the courthouse would not survive the guidelines this Court has provided in Murrell and Bray. If, for a minor victim of sexual assault, more is required before allowing video testimony, then certainly for an adult, non-victim witness like Bell the present showing was insufficient.

The State has cited S.C. Code Ann. 16-3-1550(E) as evidence of the State's "public policy" and, by extension, the "important public policy" requirement outlined in Craig. Id., 497 U.S. at 850. To the extent one can read S.C. Code Ann. 16-3-1550(E) as establishing such "public policy," Petitioner would cite the Legislature's codification of the requirement of face to face confrontation as a more fundamental acknowledgement of public policy. "Every person accused shall, at his trial, be allowed to be heard by counsel, may defend himself and shall have a right to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face." S.C. Code Ann. § 17-23-60 (1976 as amended). By its wording, S.C. Code Ann. § 17-23-60 is a codification of fundamental due process rights such as access to counsel and confrontation of witnesses.

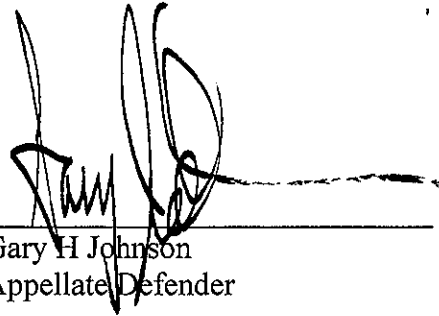
To the extent S.C. Code Ann. 16-3-1550(E) and S.C. Code Ann. § 17-23-60 provide different public policy statements, this Court has provided the lower courts guidance on the balancing required between these competing interests in the context of minor victim witnesses.

We hold the use of videotaped testimony did not violate Cooper's right of confrontation. His counsel was permitted to cross-examine without limitation. Cooper was enabled to view the proceedings and assist counsel in the cross-examination. The presence of the trial judge created a courtroom atmosphere. Moreover, the procedure did not lessen the reliability of the victim's testimony. The jury, through the videotape, was able to observe the victim's appearance and demeanor throughout her testimony.

State v. Cooper, 291 S.C. 351, 359, 353 S.E.2d 451, 456 (1987). As noted in State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), this effort to avoid traumatizing a minor victim requires more than mere generalized claims of discomfort. The lower court here erred in allowing Bell to testify remotely over Petitioner's objection based upon his generalized claims of back pain that made his transport to the courthouse more difficult.

CONCLUSION

For the reasons set forth in his Briefs before this Court, Petitioner requests that this Court reverse the decision of the Court of Appeals and remand this matter to the Court of General Sessions in Fairfield County for a new trial.

A handwritten signature in black ink, appearing to read "Gary H. Johnson", is written over a horizontal line. The signature is stylized with large, sweeping loops and a long horizontal stroke extending to the right.

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of August, 2026.