

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**RECEIVED**

APPEAL FROM OCONEE COUNTY  
Court of General Sessions

MAR 03 2014

R. Lawton McIntosh, Circuit Court Judge

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**S.C. SUPREME COURT**

Appellate No.: 2012-206186

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The State.....Respondent,

v.

Anthony Clark Odom.....Appellant,

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**SUPPLEMENTAL RECORD ON APPEAL**

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State's Memorandum of Law in Opposition to Def's Motion to Quash Indict..... 0001

STATE OF SOUTH CAROLINA )  
COUNTY OF OCONEE )

IN THE COURT OF GENERAL SESSIONS  
TENTH JUDICIAL CIRCUIT

2011 JUN 27 P 11:55  
CLERK OF COURT

STATE OF SOUTH CAROLINA,  
vs.  
ANTHONY C. ODOM,  
Defendant

MEMORANDUM OF LAW IN  
OPPOSITION OF THE DEFENDANT'S  
MOTION TO QUASH INDICTMENT

2010-GS-37-363  
2010-GS-37-364

NOW COMES the State of South Carolina by an through the undersigned Assistant Attorney General opposing the Motion by the defendant to Quash the Indictments in this case for prosecutorial vindictiveness and in support thereof states as follows.

FACTUAL BACKGROUND

In February 2010, the defendant was tried for Criminal Solicitation of a Minor in Spartanburg County (Indictment number 2006-GS-42-2006-2289), for communications the defendant had with an undercover Detective of the Spartanburg County Sheriff's Office between March and May 2006, which resulted in a mis-trial.

Prior to calling the case for trial in Spartanburg, the State intended to introduce communications the defendant had with an undercover investigator of the Westminster Police Department between the dates of May 4 and 6, 2006 as evidence of prior bad acts (hereinafter "Oconee Chats").

The week before trial began in Spartanburg County, Counsel for the State advised Defense Counsel during a telephone conference that rather than attempting to admit the Oconee Chats as prior bad acts evidence, pursuant to SCRE Rule 404(B), in the Spartanburg trial, charges would be submitted to the Oconee County Grand Jury for True Bill as a separate case.

EX-125  
COMPUTER

Classified by \_\_\_\_\_  
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Supplemental ROA 0001

Just prior to presentment of the charges to the Grand Jury, the State was notified by a phone call from the Federal District Court that the defendant had filed an action against the Attorney General and all Circuit Solicitors in the United States District Court for the District of South Carolina seeking temporary and permanent declaratory and injunctive relief to prevent the State from submitting said indictments to the Oconee County Grand Jury. The Honorable Margaret B. Seymour denied the temporary injunction and by Order dated August 6, 2010, granted the State's Motion to Dismiss.

The Defendant was indicted by the Oconee County Grand Jury on April 12, 2010 for two (2) counts of Criminal Solicitation of a Minor. The Oconee Chats were not included in the Spartanburg County indictments, nor were any Spartanburg communications included in the Oconee County indictments.

### LEGAL ARGUMENT

The State anticipates the defendant will move to quash the indictments in this case for prosecutorial vindictiveness based upon the following:

- Prosecution in Oconee County is retaliation for the defendant exercising his constitutional right to trial and to defend himself in Spartanburg County;
- The defendant was told the Oconee Chats would not be prosecuted;
- Four years between the conduct and indictment of the Oconee Chats is vindictive; and
- Two (2) indictments (one for each of the Oconee Chats) is vindictive when compared to a single indictment in Spartanburg County for multiple communications.

The State asserts these arguments are without merit and the indictments must stand.

South Carolina recognizes “[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” State v. Fletcher 322 S.C. 256, 261-2, 471 S.E.2d 702, 705 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978)).

In State v. Dawkins, our Supreme Court states

an initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution. The mere fact that a defendant refused to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent charging decisions are unjustified.

297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989)(referencing United States v. Godwin, 457 U.S. 368, 102 S. Ct.2485, 73 L.Ed.2d. 74 (1982) (There is no presumption of prosecutorial vindictiveness when a prosecutor brings additional charges after a defendant refuses a plea bargain.), see United States v. Wilson 262 F.3d 305, 315 (4<sup>TH</sup> Cir 1981)(citations omitted) (stating “[a]n initial decision should not freeze future conduct.”).

“A prosecutor should remain free before trial to exercise that broad discretion entrusted to him to determine the extent of the societal interest in prosecution.”<sup>1</sup> Wilson 262 F.3d at 315(citations omitted). While decisions to prosecute must not be made in retaliation against defendants for exercising their legal rights, “courts must nonetheless be cautious not to intrude unduly in the broad discretion given to prosecutors in making charging decisions. A prosecutor’s charging decision is presumptively lawful.” Id. (citing United States v Armstrong 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996)).

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<sup>1</sup> “[A] change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than a pre-trial decision.” Id. at 316 (quoting Godwin at 381, 102 S. Ct. 2485).

In Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), the Supreme Court recognized that certain limited circumstances pose a “realistic likelihood of vindictiveness” by a prosecutor, and warrant the application of a “presumption of vindictiveness.” “The inquiry, however, is not focused solely on the presence or absence of actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses such a “reasonable likelihood of vindictiveness” as to require a presumption of vindictiveness.” State v. Fletcher, 322 S.C. 256, 260, 471 S.E.2d 702, 704 (Ct. App. 1996). “Where there is no such reasonable likelihood, the burden is on the defendant to prove actual vindictiveness.” Fletcher, 322 S.C. at 261, 471 S.E.2d at 705 (citing Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).)

In a case such as this one when a prosecutor merely exercises his or her discretion in charging and when to bring those charges, no such presumption should arise. As a result, the defendant is required to prove actual vindictiveness and “any inference of vindictiveness which can be derived from the timing of the direct indictment is insufficient to prove an improper motivation . . . , where, as here, the evidence established probable cause to believe the crime had occurred.” Fletcher, 322 S.C. at 262-63, 471 S.E.2d at 706.

The Fourth Circuit in Wilson enumerates a two-prong test, which must be clearly met to establish prosecutorial vindictiveness. The defendant must show that (1) the prosecutor acted with genuine animus toward the defendant, and (2) but for that animus, the defendant would not have been prosecuted. See Wilson, 262 F.3d at 314 (citing Godwin, 457 U.S. at 380 n. 12, 102 S. Ct. 2485; United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000). In other words, the defendant must prove the prosecutor harbored vindictive animus and pursues prosecution *solely* to punish the defendant. See id.

If actual vindictiveness is not established, the circumstances of the case may support a presumption of vindictiveness. However, any such presumption, must be evaluated against “the background presumption that charging decisions of prosecutors are made in the exercise of broad discretion and are presumed to be regular and proper.” *Id.* at 318 (citing Armstrong 517 U.S. at 464, 116 S.Ct. 1480).<sup>2</sup>

Quite simply, the defendant cannot overcome the presumption that counsel’s decision, in exercise of her broad discretion, to present these charges to the Oconee County Grand Jury is presumed proper. See Wilson 262 F.3d at 315. In the case at bar, the State has probable cause to believe the defendant committed the crime charged, and, the decision to prosecute is discretionary. See Fletcher 322 S.C. at 261, 471 S.E.2d at 705.

Further, the defendant cannot show actual or genuine animus by counsel and but for that animus he would not have been prosecuted. See Wilson, 262 F.3d at 315. Nor does a presumption of vindictiveness arise from the facts of this case, as nothing suggests counsel for the State harbored vindictive animus and pursued prosecution *solely* to punish the defendant. See id. at 316 (citation omitted); Wilson, 262 F.3d at 315-16 (citation omitted).

The Honorable Margaret B. Seymour in granting the State’s Motion to Dismiss the defendant’s request for injunctive relief from indictment in Federal District Court, stated:

[d]uring the pendency of the Spartanburg trial, the position of Chief Prosecutor for the South Carolina Internet Crimes Against Children Task Force changed from David Stumbo to Megan Wines. Because prosecutors have discretion to decide which crimes to prosecute, this personnel change lends support to [the Attorney General’s] strategy explanation. The court finds that [Odom] has failed to prove bad faith.

Order and Opinion August 6, 2010 (granting the State’s Motion to Dismiss).

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<sup>2</sup> A presumption of vindictiveness typically arises when, at the time the prosecutor initially tried the defendant, the decision was made not to try the defendant on an additional available charges later brought only after a defendant has had a successful appeal. *Id.* at 319.

(A) Prosecution in Oconee County is not retaliation for the defendant exercising his constitutional right to trial and to defend himself in Spartanburg County

Indictments for the Oconee Chats are not a *change* in charging after an initial trial is complete *nor a continuation* of prosecution because (1) the defendant is charged with criminal acts separate from those in Spartanburg, which rest on separate and sufficient evidence; (2) counsel for the defendant was advised prior to calling the Spartanburg case for trial that indictments would be submitted to the Oconee Grand Jury; and (3) the Spartanburg indictment is still pending further prosecution.

It is of no consequence the State's strategy of introducing the Oconee chats in the Spartanburg trial changed. See Godwin at 381, 102 S. Ct. 2485). As above-noted, "[a]n initial decision should not freeze future conduct." Wilson at 315 (citations omitted). The State has a societal interest in protecting minors and pursuing prosecution of the defendant for his acts. See Wilson at 315 (citations omitted).

Further, the defendant not pleading guilty and requiring the State to try him in Spartanburg does not refute that subsequent indictments are justified and proper. See State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989)(citations omitted). The United States Supreme Court has stated "there is no presumption of prosecutorial vindictiveness when a prosecutor files additional charges after a defendant refuses a plea bargain." Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), see State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (quoting Goodwin).

(B) The defendant was not told by counsel for the State that the Oconee Chats would not be prosecuted, and even if he were, it is of no consequence.

The defendant cannot establish he was actually advised the Oconee communications would not be prosecuted. Present Counsel for the State did not advise as such, and were a

statement of the kind made it would have been by prior Counsel for the State and most probably in the course of plea negotiations. In fact, at pre-trial hearings held in Spartanburg County on July 9, 2007, David Stumbo, on behalf of the State, when asked about the Oconee chats said “we never intended to charge... *at that time* in Oconee County.” Hearing Transcript page 13.

As previously mentioned, the defendant not entering a guilty plea does not merit any presumption of vindictiveness. See id. Assuming arguendo a statement had been made not to indict the Oconee Chats, it is clear the defendant did not rely on it and the State is not bound by discussions.

(C) Four years between the conduct and indictment of the Oconee Chats is not vindictive.

Indictment of the Oconee chats after the trial in Spartanburg and four (4) years after the conduct is not significant. Again, the defendant’s counsel was advised prior to the State calling the trial in Spartanburg. Moreover, timing of indictment does not establish improper motive if probable cause exists to believe a crime occurred. See Fletcher 322 S.C. at 263, 471 S.E.2d at 706.

In this case, the State has probable cause to believe the defendant committed the crimes charged in both Oconee and Spartanburg separately. Prosecution in Oconee County is not the continuation of a currently existing charge, but rather, the defendant is being prosecuted for crimes separate and additional to those charged in Spartanburg County, as a result the State may elect to submit these charges to an Oconee County Grand Jury at anytime.

(D) Two (2) indictments (one for each of the Oconee Chats) is not vindictive.

The State submits how the Oconee chats are indicted is wholly discretionary and accordingly, is proper. Current Counsel for the State inherited the sole Spartanburg indictment and determined it in the State’s interest to proceed under a “per chat” basis in Oconee County.

CONCLUSION

Wherefore the State respectfully prays a Motion by the Defendant to Dismiss based on prosecutorial vindictiveness be denied as such argument lacks merit.

Respectfully submitted,

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April 11, 2011