STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Greenwood County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CARRIER,

APPELLANT

APPELLATE CASE NO. 2012-212777

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

1. The trial judge erred in refusing to quash a subsequent defective indictment for lewd act, true-billed by the Greenwood County Grand Jury on June 8, 2012, when the State failed to establish the identity of the witness testifying before the Grand Jury in 2012.

On June 8, 2012, the State obtained a second indictment for lewd act expanding the time frame from the initial indictment, true billed on October 2, 2009, from on or about January 1, 2003, to between the 1st of January 1999, and the 31st day of December 2003. (2009 and 2012 indictments, R. p. 410-413). The witness listed on both indictments was Chris Haden. Appellant argued that the 2012 indictment was defective because the witness listed on the 2012 indictment, Chris Haden, formerly of the Greenwood County Sheriff's Department, was no longer with the Sheriff's Department, was not in the State of South Carolina on June 8, 2012, when the indictment was presented to the Grand Jury and could not have been the witness who testified before the Grand Jury. (July 17, 2012, R. p. 206, lines 2-12; p. 210, lines 18-25). The State never argued that Haden testified before the Grand Jury on June 8, 2012.

In the brief the State now argues that the challenge to the subsequent indictment must fail because Appellant failed to prove that Haden did not testify before the Grand Jury on June 8, 2012. At trial there was no dispute that Haden did not appear before the Grand Jury in 2012. Appellant argued, "They haven't said the Mr. Haden was here. They tired to get Mr. Haden back from West Virginia last month to try this case. This indictment was done on the eve of that trial. I was jumping up and down and complaining about how that indictment, you know, was late and then and then [sic]. I mean, I am not speculating and they are not saying he was there. They are just saying it doesn't matter. (July 17, 2012, R.

p. 210, lines 18-25). The State continued to argue that the indictment was not deficient while never stating that Haden, the witness listed on the indictment, testified before the 2012 Grand Jury and without ever informing the trial court who did testify before the 2012 Grand Jury.

Contrary to the State's assertion argued on appeal, Appellant presented evidence through trial counsel, as an officer of the Court, that Officer Haden did not testify before the 2012 Grand Jury. Trial counsel's assertion was not challenged by the State. The State acquiesced in the assertion that Haden was not present by failing to challenge and argue that he was present. The State should not be allowed to now argue that Appellant failed to prove that Haden was not present when that issue was not in dispute at trial. The dispute, as argued by the State at trial, was that the name appearing on the indictment does not matter.

Additionally, the trial judge did not find that Appellant failed to prove that Haden did not testify before the Grand Jury on June 8, 2012. Instead, the trial judge found that in order to quash the indictment he needed more than just an inaccurate name on the indictment. The trial judge wrote:

> Mr. Grose, I share with you your concerns about the current status of the Grand Jury practice in our State. However, I don't know any authority that would require me to quash the indictment based on the identity of the witness. The indictment itself sets forth the allegations for listing of a witness on the form, on the back of the indictment. **If that is inaccurate, without any further showing would not be sufficient to render the indictment defective.** Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe does that and I know the Federal Courts do it. And there have been many assaults on the Grand jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it. (emphasis added).

July 17, 2012, R. p. 211, line 20 – p. 212, lines 1-13). The trial judge ruled that he was without authority to quash the indictment based on the identity of the witness even when the witness listed as appearing before the Grand Jury is inaccurate. The trial judge erred. The inaccurate name appearing on the indictment, without any other information about who testified before the 2012 Grand Jury, renders the indictment defective and constitutes an error of law requiring reversal.

The issue before this Court and the question that was before the trial court is not whether Appellant failed to prove that Haden did not testify before the Grand Jury on June 8, 2012. The issue of whether Haden testified at the 2012 Grand Jury was not in dispute. At trial the State did not argue that Haden testified before the 2012 Grand Jury. As the Solicitor's Office, pursuant to Rule 3(c), SCRCrimP, is responsible for preparing indictments for presentment to the Grand Jury, it is presumed that the State knew that Haden did not testify before the 2012 Grand Jury and as a result did not argue that he testified before the 2012 Grand Jury. Instead, the State questioned if there was any requirement that the person's name who testified before the Grand Jury be listed on the indictment. The State asked, "Is there case law that says that the person who testified in front of the Grand Jury has to be listed on the indictment?[1] (July 17, 2012, R. p. 206, lines 13-15). The State then argues that the fact that the witness listed on the indictment as

[1] The Grand Jury charges found on the South Carolina Judicial Department website provide "On the back of the indictments, the names of the witnesses for the State will be listed. You may call the witnesses before you for questioning. You do not have to examine all of them in every case, since in some cases the testimony of one witness may convince you that the accused should to trial. If so, you do not have to examine the other witnesses. However, do not find a 'no bill' without examining all of the witnesses because the last witness may know facts which the others did not."

testifying before the Grand Jury did not in fact testify before the Grand Jury does not render the indictment deficient because, "Your Honor, the indictment has been true billed, it was sent to the Grand Jury. Somebody had to present testimony that convinced the Grand Jury that there was probable cause in this case. I don't see where, I just don't see where it is deficient." (July 17, 2012, R. p. 211 lines 1-5).

The right to indictment by a Grand Jury is an important right under both our State and Federal Constitutions. "No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed." S.C. Const. Art. I, §11. *See also* S.C. Code §17-19-10. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. Const. Amend. V.

The trial judge in the present case properly called into question the current status of Grand Jury practice in South Carolina, specifically the practice of failing to record the proceedings of the Grand Jury. (July 17, 2012, R. p. 211, lines 20 – p. 212, lines 1-13). The trial judge said, "Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe does that and I know the Federal Courts do it. And there have been many assaults on the Grand jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it." The judge, however, did not need an amendment to the Code to quash the indictment in the present case. Because Investigator Haden did not testify before the Grand Jury, the 2012 indictment is irregular on its face, revealing

"*actual* abuse" of the Grand Jury process. Thompson, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis original). The judge had the authority and duty to quash the irregular 2012 indictment. The State could then seek a new indictment or proceed on the 2009 indictment. The failure to quash the indictment requires a new trial.

"A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." State v. Capps, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981). In State v. Thompson, 305 S.C. 496, 501-502, 409 S.E.2d 420, 424 (Ct. App. 1991) (internal citations omitted) (emphasis original), the South Carolina Court of Appeals wrote:

> Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary. Speculation about "potential" abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. In saying this, we yield to no one in our zeal to insure that the grand jury continues to perform its historic function as a shield between the accused and abuse of the prosecutorial power of the State. The courts of South Carolina stand guard to see that the grand jury is not reduced to a "mere plaything of prosecutors."

Appellant does not merely speculate about the irregularity of the Grand Jury proceeding in the present case. It is undisputed that Haden, the witness listed as appearing before the 2012 Grand Jury, did not appear before the Grand Jury. The State presented no evidence that this was merely a scrivener's error, instead arguing that it simply did not matter. The 2012 indictment was sought in haste on the eve of trial. The error in the indictment constitutes grounds for quashing the indictment as an actual abuse of the Grand Jury proceeding. The failure to quash the indictment requires a new trial.

2. The trial judge erred in refusing to find the requirement of lifetime GPS monitoring unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

After the jury was excused the Appellant specifically moved, pursuant to Rule 29 SCRCrimP, to take the ten days allowed to file post trial motions. The State did not object to the filing of post trial motions. Appellant then moved for a pre-sentence report to assist the trial judge in imposing sentence. (July 17, 2012, R. p. 338 – 340). The judge denied the motion for a pre-sentence report. . (July 17, 2012, R. p. 340, lines 2-4). At sentencing the State noted that S.C. Code §23-3-540 requires mandatory lifetime GPS monitoring. (July 17, 2012, R. p. 340, lines 5-18). Appellant objected to imposing this condition. (July 17, 2012, R. p. 343-344). Appellant challenged the mandatory GPS monitoring without some kind of specific determination or hearing. (July 17, 2012, R. p. 344, lines 2-17). Counsel referenced the challenge in the Greenville case (State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)) as a "sort of due process issue." (July 17, 2012, R. p. 343, lines 13-24).

In a written motion filed July 30, 2012, Appellant moved for a new trial or in the alternative moved for reconsideration of the sentence. (Motion for New Trial, R. p. 377). Appellant specifically argued that the lifetime GPS monitoring requirement found in S.C. Code §23-3-540 was unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment. (Motion for New Trial, p. 22-30; R. p. 398-406). In a written order signed August 9, 2012, the trial judge denied the motion.

The State, relying on State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012) argues that the Eighth Amendment challenge to mandatory GPS monitoring is not preserved for review by this Court. The State's reliance on Taylor is misplaced. In Taylor this Court wrote, "We find the issue of whether the crimes should have been considered one serious offense due to their close temporal proximity and inextricable connection is unpreserved because our review of the record reveals Taylor never raised it during trial." 399 S.C. at 63, 731 S.E.2d 603. At trial, Taylor moved to quash the State's notice of its intent to seek a sentence of life without parole not because the crime should be considered one offense but rather because the 1998 rape did not support a sentence of life without parole because it occurred prior to his predicate most serious offense, the 1999 rape.

In the present case Appellant challenged the mandatory GPS monitoring without some kind of specific determination or hearing. (July 17, 2012, R. p. 344, lines 2-17). Appellant then followed up with the unopposed post trial motion and specifically argued that the lifetime GPS monitoring requirement found in S.C. Code §23-3-540 was unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.. (Motion for New Trial pp. 22-30; R. p. 398-406). The post trial motion requested a specific hearing, as requested at sentencing, to determine if electronic monitoring was appropriate. (Motion for new trial p. 30, R. p. 406). The issue is preserved for review by this Court.

As discussed in Appellant's initial brief, the fact that the statute mandates electronic monitoring without an individualized determination is part if the argument challenging the statute as a violation of the Eighth Amendment. The electronic

monitoring requirement, as applied in South Carolina without discretion, is traditionally viewed as punishment, constitutes an affirmative disability or restraint by requiring the individual being to plug himself into an electrical outlet for at least three hours everyday and promotes the traditional aims of punishment of retribution and deterrence. The rational connection of the electronic monitoring requirement to the non-punitive purpose of public safety is tenuous because the requirement is mandatory and the judge has no discretion to determine if there is a need for electronic monitoring. The electronic monitoring requirement is excessive with respect to the non-punitive goal of public safety in light of the additional registration requirements. The non-discretionary lifetime electronic monitoring requirement is unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

3. The trial judge erred in refusing to grant a mistrial when the State asked a witness if the minor approached the witness "pertaining to the incidents with Mr. Carrier" in violation of the limitation to time and place exception to the hearsay rule found in Rule 801(d)(1)(D), S.C.R.E.?

During the direct examination by the State of Carolyn Travis, the minor's youth director, the State asked, "Did [minor] approach you pertaining to the incidents with Mr. Carrier?" (July 17, 2012, R. p. 296, lines 22-23). Appellant objected and moved for a mistrial. (July 17, 2012, R. p. 296, line 24 – p. 297, line 1). The judge denied the motion. The judge erred.

The State argues, "In any event, to the extent this Court considers the question itself rather than the testimony offered in response to that question, the State submits the question could not constitute improper corroboration because, though it identified

Appellant, it did not reference a sexual assault, a time or place, or even whether the victim made a statement about the unspecified 'incidents.'" (Initial Brief of Respondent p. 34).

The State, immediately prior to asking the youth director if the minor approached her pertaining to the incidents with Mr. Carrier, asked the youth director, "Now, Ms. Travis, did [minor], in 2009 did [minor] approach you pertaining to the abuse she suffered?" (July 17, 2012, R. p. 296, lines 15-16). The youth director responded, "Yes." Trial counsel objected and the trial judge instructed the State to rephrase the question. (July 17, 2012, R. p. 296, lines 17-21). The State then asked the improper question, "Did [minor] approach you pertaining to the incidents with Mr. Carrier?" (July 17, 2012, R. p. 296, lines 22-23).

Viewing the testimony in context, rather than in isolation, the testimony is improper corroboration testimony referencing "the incidents with Mr. Carrier" as alleged abuse suffered by the minor. The testimony is in direct violation of Rule 801(d)(1)(D) SCRE. The testimony warranted the granting of the mistrial motion.

Appellant was prejudiced by the improper question. Credibility of the minor witness was a critical determination to be made by the jury. *E.g.* State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J., dissenting) ("As in many CSC cases, this case turned primarily on the veracity of the victim. In the instant case, while physical evidence indicated that the victim had been abused, no physical evidence other than the testimony of the victim connected Petitioner to the crime."). In Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) the South Carolina Supreme Court wrote, "As to the prejudice prong of Strickland v. Washington, supra, Sanchez was prejudiced

by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. As stated in Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 569, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" The improper question by the State constituted prejudicial corroboration testimony warranting a mistrial.

CONCLUSION

Based on the argument presented in issue one, Appellant's conviction should be reversed and the case remanded for trial on the 2009 indictment. Based on the argument presented in issue two, this Court should find the mandatory electronic monitoring requirement of S.C. Code §23-3-540 unconstitutional as a violation of the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution. Based on the argument presented in issue three, Appellant's conviction and sentence should be reversed.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 27th day of May, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 27th, 2014

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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of May, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 27th day of May, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.