

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge
2009-GS-24-1246

APPELLATE CASE NO.: 2014-000980

The StateRespondent

v.

Rodney Lee Rogers, Sr.Appellant.

Initial Brief of Appellant

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THE TRIAL COURT ERRED IN CHARGING THE JURY THEY COULD
CONVICT THE DEFENDANT FOR A LEWD ACT ON A MINOR UNDER
S.C. CODE §16-15-140 BECAUSE THE DEFENDANT WAS NOT INDICTED
UNDER THAT SECTION OR §16-3-655(C) AND NEITHER SECTION IS A
LESSER INCLUDED OFFENSE UNDER §16-3-655(A) UNDER WHICH THE
DEFENDANT WAS INDICTED AND THEREFORE THE TRIAL COURT
LACKED SUBJECT MATTER JURISDICTION FOR THE CONVICTION.

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TABLE OF AUTHORITIES

Cases:

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S.C. Code Ann. § 16-3-655(A) and (C) (Supp. 2012)1

S.C. Code Ann. § 16-15-140 (Repealed 2012 Act No. 255 eff. Jun 16, 2012)1

STATEMENT OF ISSUE ON APPEAL

THE TRIAL COURT ERRED IN CHARGING THE JURY THEY COULD CONVICT THE DEFENDANT FOR A LEWD ACT ON A MINOR UNDER S.C. CODE §16-15-140 BECAUSE THE DEFENDANT WAS NOT INDICTED UNDER THAT SECTION OR §16-3-655(C) AND NEITHER SECTION IS A LESSER INCLUDED OFFENSE UNDER §16-3-655(A) UNDER WHICH THE DEFENDANT WAS INDICTED AND THEREFORE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION FOR THE CONVICTION.

STATEMENT OF THE CASE

Rodney Lee Rogers, Sr. was arrested on April 29, 2009 on a warrant charging violation of S.C. Code § 16-3-655(A), Criminal Sexual Conduct with a minor in the first degree. He was subsequently indicted for the same charge.

On April 15, 2014 Rogers went to trial and was convicted by a jury on the unindicted charge of violating S.C. Code § 16-15-140, lewd act on a minor.

Rogers was sentenced by the Honorable T. L. Hughston to fifteen (15) years provided on the service of ten (10) years the balance suspended with probation for five (5) years.

On April 25, 2014, Rogers filed his notice of appeal with the Clerk of Court for Greenwood County. The South Carolina Court of Appeals received the Notice of Appeal on April 30, 2014.

ARGUMENT

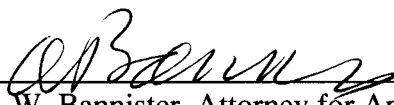
After the close of the evidentiary portion of the trial, the trial court held a charging conference with the prosecution and defense attorney. The prosecutor requested a charge to the jury on the lesser included offense of lewd act on a minor, §16-15-140. (Transcript pp. 16-21) The judge agreed to charge that section and did. The Appellant was convicted under that section.

Section 16-15-140 was repealed on June 18, 2012. The saving clause does not apply to the Appellant because he was never indicted for violating §16-15-140.

Section 16-3-655(C), which replaced §16-15-140, is not a lesser included offense of §16-3-655(A) for which the Appellant was indicted. State v. Green, 343 S.C. 207, 539 S.E.2d 419 (Ct. App. 2000). Therefore the trial court lacked subject matter jurisdiction which can be raised at any time, *ibid*.

CONCLUSION

The conviction of the Appellant should be vacated.



O. W. Bannister, Attorney for Appellant

August _____, 2014

Certificate Of Counsel

The undersigned certifies that this Initial Brief complies with Rule 208, *SCACR* and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information.

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PROOF OF SERVICE

The undersigned certifies that a true copy of the foregoing:

Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal

was this day mailed, postage prepaid, to:

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August 11, 2014

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**Re: State vs. Rodney Lee Rogers, Sr.
Appellate Case No.: 2014-000980**

Dear Ms. Elliott:

Enclosed please find a copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal, along with my Proof of Service.

By copy of this letter I am forwarding the original and one copy of the enclosed documents to the Clerk of Court of Appeals.

Yours truly,

BANNISTER, WYATT & STALVEY, LLC


O. W. Bannister

OWB/tjc
Enclosures

cc: Jenny Abbott Kitchings, Clerk
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