

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

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SEP 10 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

GARY R. THOMPSON,

APPELLANT

APPELLATE CASE # 2014-000164

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this trial for criminal sexual conduct with a minor first degree, did the judge err in refusing to require the State to accept the stipulation that Appellant had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Appellant had a prior conviction for criminal sexual conduct with a minor first degree was highly prejudicial?

STATEMENT OF THE CASE

In November of 2013, amended indictments for criminal sexual conduct with a minor first degree and disseminating obscenity to a minor against Appellant Gary Reece Thompson, Jr. were presented to the Greenville County Grand Jury. The criminal sexual conduct with a minor indictment was a direct presentment. The Grand Jury indicted Thompson on both charges, indictments #2013-GS-23-000700A, 2010-GS-23-008831. On January 13, 2014, Thompson proceeded to jury trial before the Honorable D. Garrison Hill. Randall L. Chambers represented Thompson at trial. Christy K. Sustakovitch prosecuted the case. The jury returned verdicts of guilty and Judge Hill sentenced Thompson to life imprisonment. A timely notice of intent to appeal was filed on January 22, 2014. This appeal follows.

ARGUMENT

In this trial for criminal sexual conduct with a minor first degree, the judge erred in refusing to require the State to accept the stipulation that Appellant had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Appellant had a prior conviction for criminal sexual conduct with a minor first degree was more prejudicial than probative.

Prior to trial Appellant moved to quash the amended indictment for criminal sexual conduct with a minor first degree pursuant to S.C. Code §16-3-655(A)(2), based on a prior conviction, and require the State to proceed on the original indictment for criminal sexual conduct with a minor first degree pursuant to S.C. Code §16-3-655(A)(1), based on the age of the minor. (Tr. p. 7, line 8 – p. 8, lines 1-25). In the alternative to quashing the indictment, Appellant moved to require the State to accept a stipulation that Appellant had a prior conviction as required by section (A)(2) of the statute. (Tr. p. 13, lines 4-6; p. 17, line 23 – p. 18, lines 1-2). Appellant argued that the prior conviction for criminal sexual conduct was more prejudicial than probative pursuant Rule to 403, SCRE.

The State objected to the suggested stipulation but proposed an alternative stipulation in which, rather than calling a witness to testify about the prior conviction, the judge would inform the jury that Appellant had been convicted of criminal sexual conduct with a minor which is an offense listed in S.C. Code §23-3-430(C) as required by the statute. (Tr. p. 19, line 20 – p. 20, lines 1-14). The trial judge found that the case was distinguished from Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) finding that the prior conviction in the present case was probative. (Tr. p. 23, line 3- p. 24, 25, lines 1-3). The trial judge stated, “Here, the probative value is essential. Because the legislature didn’t just say any prior conviction, it said in Section 16-3-655(A)(2) that it had to be a certain type of offense, which is the offense the State is

conceding it will be willing to stipulate to, unlike the prosecutor in the Old Chief case. And, unlike that case, the specific type of offense did have probative value for a 403 analysis.” The trial judge erred.

During the trial the State introduced a written copy of the stipulation, (Tr. p. 165, lines 22-24; State’s Exhibit #7, R. p. **) and the judge told the jury, “So the stipulation is that the Defendant, Gary Reece Thompson, has been convicted of criminal sexual conduct with a minor first degree, an offense listed pursuant to South Carolina Code Section 23-3-430(C), and is currently on the South Carolina Sex Offender Registry.” (Tr. p. 167, lines 17-22). Appellant did not renew his objection as the State’s stipulation was less harmful than a live witness testifying about the prior conviction, as the State initially proposed. Informing the jury that Appellant had a prior conviction for criminal sexual conduct with a minor, rather than simply informing the jury that he had a conviction for an offense listed in S.C. Code §23-3-430(C), was far more prejudicial than probative. The judge erred in not requiring the State to accept the stipulation that Appellant had a conviction for an offense listed in S.C. Code §23-3-430(C).

S.C. Code §16-3-655 provides:

(A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

(1) the actor engages in sexual battery with a victim who is less than eleven years of age; or

(2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

In order to prove the elements of S.C. Code §16-3-655(A)(2) the State must prove a sexual battery with a minor less than sixteen years of age by someone who has a prior conviction for an offense listed in Section 23-3-430(C) **or** who has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D). The name and nature of the offense are not necessary in order for the State to prove the elements of the offense. The simply has to prove either a prior offense listed in Section 23-3-430(C) **or** a prior order to be included in the sex offender registry pursuant to Section 23-3-430(D), not both. In this case the jury was informed that Appellant had a prior conviction for criminal sexual conduct with a minor, one of the charges for which he stood trial, **and** that he is currently on the sex offender registry.

In State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), the South Carolina Supreme Court wrote:

In Old Chief, the defendant was charged with three crimes: (1) assault with a dangerous weapon, (2) using a firearm in relation to a crime of violence, and (3) violation of 18 U.S.C. § 922(g)(1) (possession of a firearm by anyone with a prior felony conviction). Id. In Old Chief, the prosecution relied on the defendant's prior indictment for "assault causing serious bodily injury" to establish a violation of 18 U.S.C. § 922(g)(1), and introduced the order of judgment and commitment for the defendant's prior assault conviction. Id. The Supreme Court found that, although *relevant* under Rule 402, FRE, the evidence of the name and nature of the crime was unnecessary to prove the gun charge, and was highly prejudicial to the defendant as it was similar to the current assault charges pending against the defendant. Id. Weighing the probative value of the name and nature of the crime against its prejudicial impact, the Court held that introducing these details was unduly prejudicial under Rule 403, FRE. Id. The Court found that the defendant's admission that he committed a qualifying crime to be sufficient for purposes of proving a violation of 18 U.S.C. § 922(g)(1) under these circumstances. Id. (footnote omitted).

The James case involved the South Carolina burglary first degree statute, S.C. Code §16-11-311, which provides:

(A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(a) is armed with a deadly weapon or explosive; or

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of *two or more* convictions for burglary or housebreaking or a combination of both. (emphasis added).

In order to prove burglary first degree in James, the State introduced certified copies of seven prior convictions for burglary. In reversing the conviction in James the Court wrote, “We believe the probative value of all seven prior convictions was outweighed by the very great potential for prejudice to James, and crossed the line established in Old Chief, regardless of the judge's limiting instructions to the contrary.” 355 S.C. at 35, 583 S.E.2d at 750.

While the stipulation in the present case only referenced one prior conviction, the statute at issue, S.C. Code §16-3-655(A)(2), provides for enhancement based on a prior conviction for any of the 23 separate offenses listed in S.C. Code §23-3-430(C). The burglary statute, on the other hand, provides for enhancement based only on a prior conviction for burglary or housebreaking. The challenge in the present case is analogous to the challenge in Old Chief to 18 U.S.C. § 922(g)(1), which is triggered by a prior conviction for many different crimes. As noted by the Court in footnote eight of the

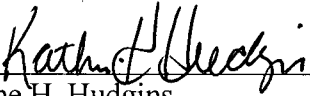
James opinion, “Violation of 18 U.S.C. § 922(g)(1) is triggered by prior convictions for many different crimes. S.C.Code Ann. § 16–11–311(A)(2) requires proof of prior convictions for only two specific crimes: burglary and housebreaking.” 355 S.C. at 31, 583 S.E.2d at 748.

As in Old Chief, evidence of the name and nature of the prior conviction for criminal sexual conduct with a minor was unnecessary to prove the crimes charged, and was highly prejudicial as Appellant was charged with criminal sexual conduct with a minor first degree. Pursuant to Rule 403, SCRE, the probative value of the name and nature of the prior conviction is substantially outweighed by the danger of unfair prejudice in the jury hearing that Appellant had been convicted of the same crime for which he was on trial.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2014.

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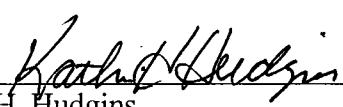
GARY R. THOMPSON,

APPELLANT

APPELLATE CASE # 2014-000164

CERTIFICATE OF SERVICE

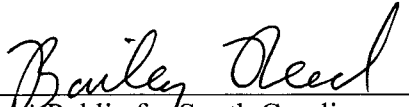
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of September, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021 .