

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT - 9 2014

Appeal from Sumter County
George C. James, Jr., Circuit Court Judge

S.C. Supreme Court

Lower Court Case No. 2013-CP-43-0370

Appellate Case No. 2014-~~0014566~~

001566

RUSSELL EARLEY, #199848,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO MOTION FOR APPEAL BOND

The State of South Carolina respectfully submits the following in opposition to the Petitioner's motion for appeal bond:

1. Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was true bill indicted at the July 2009 term of the Sumter County Grand Jury for Criminal Solicitation of a Minor. (2009-GS-43-712). Charles T. Brooks, III, Esquire, represented Applicant.

Petitioner proceeded to a jury trial and on July 19, 2012, Petitioner was found guilty. The Honorable Benjamin H. Culberston, sentenced Petitioner to eight years imprisonment.

2. A timely Notice of Appeal was filed on Petitioner's behalf. Petitioner chose to withdraw his appeal. The South Carolina Court of Appeals dismissed his appeal by Order dated September 21, 2012. The remittitur was issued on October 8, 2012
3. Petitioner subsequently filed an application for post-conviction relief on January 7, 2013. An evidentiary hearing was held on February 24, 2014 at the Sumter County Courthouse. Petitioner was present and represented by Tommy A. Thomas, Esquire. Daniel Gourley, Esquire of the Attorney General's Office represented the State. The Honorable George C. James, Jr., granted Petitioner's application by Order dated June 30, 2014.
4. The State filed a timely notice of appeal on July 21, 2014.
5. Petitioner moves this Court to issue an order releasing him on bond pending the State's appeal. In support of his motion for appeal bond, Petitioner asserts: he will likely prevail on appeal, he will be living with his parents, and will be working with his brother. He also asserts his professed good character and reputation through affidavits from family members and others within the community.
6. Initially, the State asserts the Petitioner should be precluded from release on bond pending appeal because his motion for appeal bond was improperly filed. "Where the sentence originally imposed did not exceed imprisonment for ten (10) years, the petition for bail shall be made to the lower court. In all other cases, the petition for bail shall be made to the Supreme Court." Rule 243(k), SCACR. The Petitioner's motion for appeal bond should have been filed in the lower court as the Petitioner's sentence of

imprisonment does not exceed ten years. The Petitioner was sentenced to a term of imprisonment of eight years for Criminal Solicitation of a Minor.

7. However, should this Court consider the request pursuant to Whitener v. State, 225 S.C. 244, 81 S.E.2d 784 (1954), the State asks this Court to exercise its discretion to deny the Petitioner's motion. Rule 243(k), SCACR, provides that Petitioner's release on bond pending appeal from a post-conviction relief order shall be "exercised with caution and only in exceptional circumstances." "In deciding whether to exercise the discretionary authority to admit an applicant to bail, the following factors will be considered: the probability the applicant will prevail on appellate review and the nature of the relief he or she will receive; the seriousness of the criminal offense committed; the danger the applicant may pose to the community if he or she is released; the likelihood that the applicant may flee if released; and the character and circumstances of the applicant." The State submits this case does not present the requisite circumstances to warrant the Petitioner's release on bond pending appeal. For the reasons set forth below, the State strenuously opposes this motion and requests that this Court deny Petitioner's motion for appeal bond pending appeal to the Supreme Court.
8. The State asserts it is unlikely the Petitioner will prevail and the lower court's ruling will be reversed once the Supreme Court has had an opportunity to review the issue on appeal. See Order Granting Post-Conviction Relief.
9. The State submits the Petitioner's request for release on bond pending appeal must be denied based upon the serious nature of the crime committed and the danger the Petitioner poses to the community. The Petitioner was convicted of Criminal Solicitation of a Minor. The victim in this case was a 14-year old boy who went to Wal-Mart with his

grandmother to purchase headphones (Tr t. p. 57 line 12—p. line 18). The Petitioner followed the victim into the bathroom and Petitioner stood 5-10 feet away from victim as he used the bathroom. Victim then left the bathroom because he felt “nervous” and “awkward” while Petitioner stood behind him. (p. 80). Victim then exited the bathroom, sneezed in his hands, and returned a second time to the bathroom to wash his hands. Petitioner was sitting in the bathroom when the victim reentered the bathroom. Victim washed his hands and exited the bathroom. Petitioner followed the victim out of the bathroom, called the victim over to where he was and asked the victim, while pointing to the victim’s genitals, “do you want a blow job.” Victim responded, “hell no, f**k you.” Victim stated he became angry and scared and immediately went to authorities. Victim pointed Petitioner out to Thomas Gales (Wal-Mart supervisor) who followed Petitioner outside, saw Petitioner get into his truck and leave the Wal-Mart parking lot. Thomas Gales called police, gave a description of Petitioner’s vehicle. Shortly thereafter, Petitioner was pulled over by police. Victim was then driven to where Petitioner was pulled over and positively identified Petitioner. Victim again positively identified Petitioner in the court room as the person who propositioned him outside the bathroom. The State submits the serious nature of the crime he committed warrants denial of his request for bond pending appeal and early release into the community. The State also submits the nature of the crime suggests that the Petitioner may prey upon other children in the community.

10. The State submits the Petitioner’s request for release on bond pending appeal must be denied as the Petitioner poses a flight risk. The Petitioner faces up to eight years in prison if the Supreme Court affirms the reversal of the lower court and the Petitioner receives a

new trial. The possibility of forfeiture of bail and escape are great in view of the fact that the Petitioner has little to lose by absconding. The Petitioner has already served two years of his current eight year sentence, so the potential of receiving an eight year sentence when he is retried must factor into his actions if he were to be released on bond. Accordingly, the Petitioner presents a flight risk if released as requested.

11. The State submits this Court should give great weight to Petitioner's prior criminal history. Specifically, Petitioner was convicted of DUS in 1990; in 1993 Petitioner was convicted of two counts of distribution of marijuana, two counts of criminal conspiracy, a DUS third and habitual offender; in 1997 Petitioner was convicted of possession of 28-grams or less marijuana; in 1998 Petitioner was convicted of DUS; in 2000 Petitioner was convicted of DUS; Petitioner was convicted in 1996 in the state of Texas for possession of marijuana less than five pounds but greater than four ounces; and most notably Petitioner was convicted of nine prior bank robberies in 2003 all of which occurred in various states.

12. The State submits this Court allow Respondent to supplement the record with any material submitted by the victim of this case. Respondent has been in contact with the minor victim and his adult family members and they have indicated that they will be writing a letter in support of denying Petitioner's appeal bond. Victims have the right to be notified of, attend, and comment on any post-conviction proceedings, affecting the probation, parole, or release of the offender. S.C. Code § 16-3-1560(A) (1976). Victims also have the right to make recommendations in cases for which bond is being requested. S.C. Code § 16-3-1525(I)(1) (1976).

Additionally, the State prays this Court deny the Petitioner's request for release on bond pending appeal.

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
SC Bar #100934

October 9, 2014


ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas
The Honorable George C. James, Jr., Circuit Court Judge

RUSSELL EARLEY,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Motion for Appeal Bond**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tommy Arthur Thomas, Esquire
PO Box 88
Irmo, SC 29063

This 9th day of October, 2014



CAROLINE KAISER
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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OCT - 9 2014

October 9, 2014

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Russell Earley v. State of South Carolina
Lower Court Case No. 2013-CP-43-0370
Appellate Case No. 2014-0014566**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Motion for Appeal Bond** in the above mentioned case.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar #100934

DG/ck

cc: Tommy Arthur Thomas, Esquire