

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2011-GS-10-05232
Case No.: 2011-GS-19-04844

The State of South Carolina.....Respondent,

v.

Robert Harvey Payne Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. Evidence did not exist to meet each element of the charge of Indecent Exposure because Payne's behavior was constitutionally protected expressive speech.

South Carolina law makes it a crime to "willfully, maliciously, and indecently expose" oneself in a public place, on the property of others, or to the view of any person on a street or highway. S.C. Code Ann. § 16-15-130(A)(1).

Payne's conduct did not meet the elements of this crime because there is no evidence of that his actions were malicious. The State and the trial court were in agreement that Payne's behavior was not intended – or received – in any sexual way, nor did it have any kind of sexual or prurient connotation. It was not intended to gratify or arouse. (Trial Transcript p. 480). Therefore, the State bore the burden of proving Payne acted solely out of malice, in violation of the statute. The evidence does not support this position.

Payne testified that on May 29, 2011, the toilet on his houseboat was not functional. He also testified that he suffers from prostate cancer, which causes him to have to urinate frequently. While he most often used gallon jugs and/or a bucket to collect waste, he would sometimes be caught short. He further testified that he did not believe that the general public could see him from the vantage point of his boat, and that he did take care to be sure the general public did not see him, and that if anyone did, it would be Stone. (Trial Transcript pp. 416, 435, 446, 460-461).

Moreover, any behavior exhibited toward Stone qualified as constitutionally protected expressive behavior, and therefore was not subject to punishment.

Payne's behavior is expressive speech, not punishable by the Indecent Exposure statute. The South Carolina and United States Constitutions expressly protect freedom of speech, and no law – including a law governing indecent exposure - shall abridge such freedom.

Expressive conduct is protected by the First Amendment. United States v. O'Brien, 391 U.S. 367, 376 (1968). Such symbolic conduct is protected even if the idea being communicated by the conduct is offensive to society. State v. Ramsey, 311 S.C. 555, 559, 430 S.E.2d 511, 514 (1993), citing Texas v. Johnson, 491 U.S. 397, 414 (1989). Public nudity, without more, is not a violation of the Indecent Exposure statute. See, e.g., Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718, 719-20 (1997). When public nudity is employed as expressive speech to convey a particularized message, it is protected from punishment by law.

Payne's action was a statement of disdain and/or disrespect that was intended as expressive behavior, and was understood that way. Payne testified in great detail concerning the expressive message of his conduct – that of political contempt. For two years, he had been subjected to a deliberate pattern of "harassing and stalking and the cops coming down." He felt that Stone had manipulated his relationship with law enforcement to harass him and force him to move. He was expressing his "contempt and frustration" as a result of this treatment. He testified that was sending "a clear message." Stone was included in the direction of this expression, even if he may not have been the

only target of the expression. Stone was included because he had connections with the law enforcement and public officials whose harassment Payne endured, and he used those connections to help move Payne from the place that he believed he had a legal right to live. Specifically, he took issue with the city ordinance governing abandoned boats, which was attempting to be enforced against him, even though he lived on his boat. He further testified that Stone's constant complaints cause him to be the unfounded target of investigations and/or inquiries by the Army Corps of Engineers, OCR, DNA, DNR, DHEC, Charleston County, and the Town of Mount Pleasant. (Trial Transcript pp. 417-420, 430, 447, 450).

The record reflects that Payne intended to convey a message of political contempt, and that the message was in part directed at Stone because of his misuse and corruption of law enforcement procedures and agencies. Stone received the message. The State did not prove that anyone else received the message. The trial court therefore erred as a matter of law in failing to direct a verdict that Payne's expression was constitutionally protected.

II. The trial court erred in failing to direct a verdict of not guilty on the charge of Pointing and Presenting a Firearm because the evidence is insufficient to support a verdict.

Respondent argues that the trial court did not err by failing to direct a verdict of not guilty on the charge of pointing and presenting a firearm "where two different victims testified that defendant pointed a shotgun at them and defendant fired it."

This same testimony forms the basis of Payne's argument that the trial court was required to direct a verdict. The record reflects that the two witnesses are referring to the

same single shot fired by Payne. This is the sole basis for the Pointing and Presenting charge. The witnesses, however, describe the shot as coming from a different direction, and happening at a different time. It was not reasonable for the jury to believe this evidence, which defies the laws of physics and cannot form the basis of Payne's guilt. Further, the jurors were allowed, essentially, to substitute their subjective opinion of whether Payne's behavior could have caused bodily harm.

S.C. Code Ann. § 16-23-410 provides that it is unlawful for a person to present or point at another person a loaded or unloaded firearm. The State was required to prove each element of this crime. "Presentment" means "to show in a threatening manner." In re: Spencer R., 387 S.C. 517, 692 S.E.2d 569, 572-73 (Ct. App. 2010). The State must also prove that Payne specifically intended to present a firearm. Id. at 573. Last, the State must show that a weapon be pointed or presented "at" someone. Spencer, 692 S.E.2d at 573.

The State did not offer evidence sufficient to support a verdict that Payne pointed or presented a firearm at a person, and that Payne intended to do so. The record shows that Payne not only did not intend to point or present a firearm, he took great pains to hide what he was doing. Further, Payne testified, and the State did not contradict, that he cannot even discern whether people are present at a distance of 170 yards. (Trial Transcript p. 429). There is no way, based on the evidence of record, that the State established intent on Payne's part to point or present a firearm at either Stone or Anderson.

Stone testified that he heard a boom that he thought was a backfire. This was the shot that Payne fired from inside his boat. (Trial Transcript p. 169). Stone testified that he then observed what he believed to be "a stick or maybe a baseball bat" in Payne's hands when he was leaving his boat. (Trial Transcript p. 157). According to Stone, Payne fired the second shot from the island within one minute of the first shot. (Trial Transcript p. 169). In the 911 call that followed, Stone did not mention anything about Payne aiming or firing in his direction or at his person, even though this became his narrative at trial. (Trial Transcript p. 162).

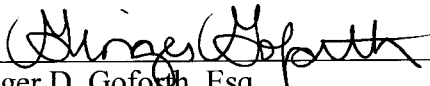
Anderson also could not perceive any danger from Payne's presence on the island. He testified that he had to pick up a firearm scope in order to determine what Payne might have been holding while emerging from the woods 270 yards away. Like Stone, Anderson's 911 call did not mention in any way that Payne had fired at him. (Trial Transcript pp. 266-268).

In short, no reasonable juror could find evidence of pointing and presenting "at" anyone because the the gun was between 179 yards and 270 yards from Stone and Anderson, respectively. Appellant thus submits that the State did not meet its burden of proving that Payne presented a firearm at either Stone or Anderson.

CONCLUSION

For the reasons set forth herein, this Court should reverse the convictions of Robert Harvey Payne and direct that a judgment of not guilty be entered in this matter on the charges of Indecent Exposure and Pointing and Presenting a Firearm.

November 5, 2014



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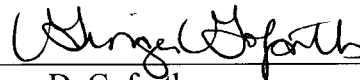
The State of South Carolina.....Respondent,

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PROOF OF SERVICE

I, the undersigned, hereby certify the Initial Reply Brief of Appellant and Amended Designation of Matter to be included in Record on Appeal in the above referenced matter was mailed, postage prepaid, to Respondent’s Attorney, Salley W. Elliott, Assistant Attorney General, at SC Attorney General’s Office, PO Box 11549, Columbia, SC 29211 on November 5, 2014.



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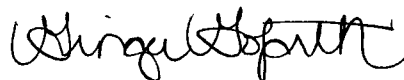
The Honorable Jenny Abbott Kitchings
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Re: State of South Carolina v. Robert Harvey Payne
In the Court of Common Pleas for Charleston County
C.A. No: 2011-GS-10-05232 & 2011-GS-19-04844

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of the Initial Reply Brief of Appellant and Amended Designation of Matter to be Included in Record on Appeal in the above case. I also include a Proof of Service certifying service of these documents upon Respondent's Attorney, Salley W. Elliott. Please file the original and send a clocked copy back to me in the envelope I have enclosed for your convenience. I appreciate your assistance in this regard.

Sincerely,



Ginger D. Goforth
Robert M. Dudek

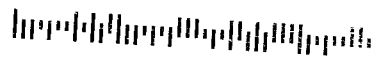
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