STATE OF SOUTH CAROLINA

COURT OF APPEALS

APPEAL FROM BARNWELL COUNTY

RECEIVED

DEC 18 2014

SC Court of Appeals

The Honorable Doyet A. Early, III, Circuit Court Judge

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

v.

Eric VanCleave ..... Appellant.

Unpublished Opinion 2014-UP-444, filed December 10, 2014

PETITION OF REHEARING

On December 10, 2014, this Court issued an opinion which affirmed the decision of the Trial Court on a multitude of rulings made during the Appellant's trial, State v. VanCleave, Unpub Op. No. 201-UP-444 (S.C. Ct. App. December 10, 2014). The Appellant respectfully petitions for rehearing.

The Court ultimately affirmed the rulings and convictions of the Appellant, by citing Rule 220(b), SCACR, and issued rulings as it related to four elements involved in the Appellant's appeal; (1) As to whether the circuit court erred in denying Appellant's motion to dismiss the February 2013 indictment on the grounds that his right to a speedy trial had been violated; (2) As to whether the circuit court erred in denying the Appellant's motion to dismiss the February 2013 indictment on the grounds that pre-indictment delay violated his due process rights; (3) As to whether the circuit court erred in refusing to exclude testimony on prior and other bad acts

allegedly committed by Appellant; (4) As to whether the circuit court erred in denying the Appellant's directed verdict motion. However, the Appellant would respectfully submit that in this Court's ruling, the Court did not fully and adequately consider the essential elements of this case. In addressing the matters in this Petition the Appellant considers the first two matters interconnected. The Court overlooked that the error made by the trial court was the fact the February 2013 indictments were only sought after the Appellant provided alibi notice as required by Rule 5(e), thus making the delay improper, overly prejudicial, and further making it impossible to secure potential witnesses for trial. It is imperative to examine the two issues together, in that together they collectively illustrate the violation of the Appellant's due process right.

1. In this matter, the Court overlooked and did not fully consider the Trial Court's denial of the Appellant's motion to dismiss the February 2013 indictments on both the issues of violation of the Appellant's right to speedy trial and on the grounds that pre-indictment delay violated his due process rights.

On July 24, 2012, Appellant's attorney filed and served a Notice of Motion and Motion for Speedy Trial. When no hearing was granted, nor order issued addressing this matter, Appellant's attorney filed and served a second Notice of Motion and Motion for Speedy Trial on January 14, 2013. Finally, Appellant was notified that his case would be tried February 25, 2013. In compliance with Rule 5(e) of the South Carolina Rules of Criminal Procedure, Appellant timely notified the Prosecutor of his intention to offer alibi evidence that would conclusively prove that Appellant could not have been in the County of Barnwell on the two (2) dates alleged in the indictments. The Appellant's alibi as presented completely exonerated the Appellant during the time frame listed in the indictments that had been pending for more than two years.

(App. Br. pp 4-6)

The right of an accused to a fair, speedy, and impartial trial was first set forth by the VI Amendment of the United States Constitution and by Article I, Section 14 of the South Carolina Constitution. The South Carolina Legislature took steps in furtherance of this important protection of the rights of an accused when it enacted Rule 3(c)(d) of the South Carolina Rules of Criminal Procedure and placed a frame work which states that within ninety (90) days upon receiving an arrest warrant the Solicitor shall seek indictment before the Grand Jury, and if some extenuating circumstance were to arise they should petition the Circuit Court for an extension of an additional ninety (90) days. Rule 3(c)(d), SCRCrimP. (App. Br. p 7)

The Court overlooked the onus on the State to demonstrate sufficiently what good cause exists to justify the delay in the prosecution of a case. State v. Lee, 375 S.C. 394, 653 S.E.2d 259 (2007) Where the Defendant can make a good showing that his ability to prepare and offer a defense to the charges against him (i.e. alibi witnesses no longer available to the Defendant, as in the current matter), the Court must place a higher degree of scrutiny on the State's actions or inaction. Situations like the present matter have precipitated rulings in accordance with State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) examining the ultimate unconstitutionality of the Solicitor's control over trial dockets and the delays causing undue prejudice to a Defendant's right to a speedy and fair trial. (App. Br. pp 8-10)

It was improper to allow the State to utilize the initial underlying arrest warrants to seek new indictments thirty-five (35) months after initial arrest. The actions of the State should have been barred by the Court, where there was no additional investigation nor new evidence obtained and the State's actions were solely precipitated upon notice that the Defendant intended to offer

an alibi encompassing the dates in the initial indictments. The State's undertaking was clearly an attempt to circumvent justice and deny the Appellant his right to a fair trial.

The extraordinary delay in indictment relating to the newly altered time frame, put the Appellant in a position where any potential alibi witnesses would be impossible to secure, creating prejudice sufficient to satisfy an analysis under Barker v. Wingo 407 U.S. 514, 92 S.Ct. 2182 (1972). It is impossible to foresee the need to elicit testimony from witnesses for use at trial, or even preserve, by way of proffer, potential alibi witness testimony where the Appellant was not on notice he would need to do so before an unreasonable thirty-five (35) month delay. It is never upon a Defendant to prove his innocense, and it is a burden shifting to compel a Defendant to prepare a defense for a time period which he is not on notice he would be required to do so. (App. Br. pp 7-10)

The Court overlooked the Trial Court's failure to dismiss the newly sought indictments where the actions of the State were clearly taken to abuse Rule 5(e) of the South Carolina Rules of Criminal Procedure which mandates the Defendant provide notice of alibi. The State's actions were deliberately designed to abuse the due process and fair trial rights of the Appellant.(App. Br. pp 4-7)

2. The Court overlooked essential elements of the Appellant's appeal by affirming the Trial Court's improper admission of testimony of prior or other bad acts in accordance with Rule 404(b), in doing so the Court failed to ensure the Defendant's right to a fair trial.

Before it can be admitted and presented at trial, 404(b) prior bad act evidence that did not result in a conviction must be demonstrated to the Court to be "clear and convincing." State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000);

State v. Weaverling, 337 S.C. 460, 523 S.E.2d. 787 (Ct. App. 1999) Before the Court allows into evidence testimony that indicates unindicted, prejudicial, and highly inflammatory acts the Court must first ensure that the evidence is clear and convincing and that said evidence must only be used to resolve issues of motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

The Court overlooked the stunning variance and discrepancy of the alleged prior bad acts in this matter. A complete examination of the testimony of the non-victim witnesses does not satisfy the long standing standard for admissibility of alleged prior bad acts. Where the State fails to establish its burden the alleged evidence and testimony should be barred. State v. Tutton, 354 S.C. 319, 580 S.E. 2d. 186 (Ct. App. 2003) (App. Br. pp 10-14)

In its ruling, the Court overlooks the actual purpose of 404(b) evidence. The allowance of prior bad acts should be limited in its use for situations were there is an actual question as to the motive, identity, common scheme or plan, mistake of accident, or intent of a Defendant. In this matter, the 404(b) evidence was offered to simply add additional inflammatory and prejudicial allegations which were never previously founded. The expansive allowance of the admission of alleged bad acts which did not result in convictions, or in this matter even charges (following a thorough previous investigation), creates an absolute bar to a Defendant's right to a fair trial on the charges which are indicted.

The Court cannot allow the State to label a set of facts a common scheme or plan or Rule 404(b) evidence and make it so. Likewise, establishing potential 404(b) evidence, in and of itself, does not render otherwise inadmissible evidence admissible. A Defendant must be tried and ultimately convicted or acquitted on the individual merits of the indicted case, it is improper

to create an inference of guilt and bolster otherwise insufficient evidence through the use of improperly admitted 404(b) evidence. (App. Br. pp 10-14)

3. The Court overlooked essential elements of the Appellant's appeal by affirming the Trial Court's denial of the Appellant's motion for directed verdict in accordance with Rule 19(a) where the evidence raised merely a suspicion of guilt.

The Court overlooked that at the conclusion of the State's case there existed insufficient "competent evidence tending to prove the charge in the indictment." Rule 19, South Carolina Rules of Criminal Procedure. A proper examination of State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) states that a trial court must not hesitate to grant a Defendant's (Appellant's) motion where the evidence presented merely raises a suspicion of guilt. In the present matter, the State did not offer any physical or tangible evidence supporting the Appellant's guilt, instead it relied solely on conflicting testimonial evidence, some of which was improperly admitted as stated before. (App. Br. pp 14-19)

The prerequisite requirement for the State to present evidence above that which only rises to a mere suspicion of guilt exists to protect a Defendant's rights in a case such as this where the nature of the allegation contained within the indictment would naturally generate prejudice in the minds of a jury. It is the duty of the Court to act as a gate keeper and to ensure that at the conclusion of a case the evidence presented is legally sufficient to seek a verdict of guilt. It is the absolute province of a Jury to act as fact finders in a case, however where there is only evidence arising to mere suspicion the Court must act. (App. Br. pp 14-19)

In light of the foregoing, the Appellant would respectfully request the Court grant this Petition, withdraw its previous opinion, and reverse the rulings of the Trial Court.

December 18, 2014

Robert T. Williams, Sr., #6149
Benjamin A. Stitely, #75339
Williams, Hendrix, Steigner & Brink, P.A.
206 East Main Street
Post Office Box 849
Lexington, South Carolina 29071
(803) 359-1550

Attorneys for Appellant

STATE OF SOUTH CAROLINA

COURT OF APPEALS

APPEAL FROM BARNWELL COUNTY

COURT OF GENERAL SESSIONS

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SC Court of Appeals

The Honorable Doyet A. Early, III, Circuit Court Judge

Indictments Nos. 2013-GS-06-76, 2013-GS-06-77, 2013-GS-06-78, 2013-GS-06-79

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

v.

Eric VanCleave ..... Appellant.

PROOF OF SERVICE

I certify that one (1) copy of the **Appellant's Petition of Rehearing** was served on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on December 18, 2014, and addressed to William M. Blitch, Jr., Assistant Attorney General, Office of the Attorney General, P.O. Box 11549 Columbia, South Carolina 29211-1549, with an additional copy being served on Susanna Ringler, Assistant Solicitor and Jack W. Hammack, Jr., Assistant Solicitor, Second Judicial Circuit, P.O. Box 723 Barnwell, South Carolina 29812; and Alan Wilson, Attorney General, John W. McIntosh, Chief Deputy Attorney General, and Sally W. Elliott, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549 Columbia, South Carolina 29211-1549.

I further certify that all parties required to be served have been served.

Dated: December 18, 2014

Robert T. Williams, Sr.

Robert T. Williams, Sr. #6149
Benjamin A. Stitely, #75339
Williams, Hendrix, Steigner & Brink, P.A.
200 East Main Street
Post Office Box 849
Lexington, South Carolina 29071
(803) 359-1550
Attorneys for Appellant

WILLIAMS, HENDRIX, STEIGNER & BRINK, P.A.

ATTORNEYS AT LAW

POST OFFICE BOX 849
LEXINGTON, SOUTH CAROLINA 29071-0849
(803) 359-1550
Fax: (803) 359-4543 (803) 359-7460
1-800-922-6293

Robert T. Williams, Sr.
Jonathan R. Hendrix, Sr.
Carolyn B. Steigner
W. Lisa Brink

Daun C. Steigner
Benjamin A. Stitely
David K. Allen
Michelle L. Boykin

December 18, 2014

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State of South Carolina v. Eric VanCleave
Appellate Case No. 2013-000748

Dear Ms. Kitchings:

Please find enclosed for filing one (1) original and seven (7) copies of the Appellant's Petition of Rehearing in the case noted above. After filing, please return a clocked copy to this office in the envelope provided for your convenience.

If you have any questions, please give me a call.

With kindest regards, I am

Very truly yours,

Robert T. Williams, Sr.

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SC Court of Appeals

RTW/as

Enclosures

cc: Alan Wilson, Attorney General
William M. Blitch, Jr., Assistant Attorney General
John W. McIntosh, Chief Deputy Attorney General
Sally W. Elliott, Assistant Attorney General
Susanna M. Ringler, Assistant Solicitor
Jack W. Hammack, Jr., Assistant Solicitor
Eric VanCleave