

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

RECEIVED
DEC 30 2014
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD, SR.,

APPELLANT

APPELLATE CASE NO. 2012-212269

Unpublished Opinion No. 2014-UP-470

PETITION FOR REHEARING

Petitioner Jon Wynn Jarrard, Sr., requests rehearing pursuant to Rule 221(a), SCARCR, because this Court may have overlooked, and thereby only addressed, the real issues in this case in passing: "Did the trial court err when it allowed the State to proceed under §16-3655(A)(2)...to use the Defendants prior conviction, as propensity evidence in violation of due process?" Additionally, Petitioner also raised the issue of whether the trial court erred in failing to conduct an on the record Rule 403 balancing test in relation to the introduction of the prior bad act evidence.

In *State v. Benton* the South Carolina Supreme Court held that in order for a law that allowed the admission of a prior conviction as an element of the crime to survive an attack on due process grounds, the law needed to be tied to a legitimate state purpose and reasonably designed to accomplish that purpose. *State v. Benton* 338 S.C. 151, 156, 526 S.E.2d 228, 230. In the context of the burglary first statute, the state purpose is to deter repeat offenders and the reasonable design is the allowance of the introduction of two prior bad acts that are the very same act the defendant is on trial for. The deterrent effect exists as an enhanced sentence, fifteen years to life imprisonment. That is not the case with 16-3-655(A)(2).

Under subsection (A)(2) criminal sexual conduct with a minor statute law, 16-3-655, the state is allowed to introduce one of twenty-three prior bad acts listed in Section 23-3-430(C) as part of the element of the crime. The prior bad acts that are allowed to be introduced as evidence in these cases are as varied as (12) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470); or (15) kidnapping (Section 16-3-910) (of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense). In this case, the trial court allowed a remote fifteen year old conviction under section 23-3-430(C)(13). Subsection (C)(13) allows any violations of Article 3, Chapter 15, Title 16 involving a minor to become an element of the crime. Even if the Court considers a legitimate state purpose the protection of children, due process prohibits the legislature to paint with such a broad brush. *Benton* allows for the introduction of the same crime as an element of burglary first degree, not the introduction of all crimes against people or personal property. There is no legitimate state purpose in allowing a prior murder, lynching, hazing, assault, etc. involving a minor to be allowed to be introduced as an element of criminal sexual conduct with a minor. The defendant is already accused of a

grievous crime and allowing the introduction irrelevant prior crimes goes against our traditional notices of due process and the rules of evidence.

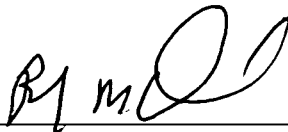
Additionally, this law is not reasonably designed to accomplish a purpose. The law does not accomplish the deterrent effect of a greater sentence. The way the statute is constructed 16-3-655, a conviction under subsection (A)(2) imposes a lesser sentence than a conviction under subsection (A)(1). The only difference between the two subsections is allowance of the prior bad act evidence in. The only reasonable inference is that the introduction of this prior bad act waters down the state's burden of proof and the legislature has acknowledged this by creating a lesser sentence for the crime. The only deterrent factor is that if you are accused of criminal sexual conduct with a minor and the defendant has been a prior bad actor in another unrelated sexual case or a case involving a minor, that evidence will be used against you. This is not a legitimate state purpose and is a thin disguise for the introduction of such prior bad acts that the Rules of Evidence under Rules 403 and 404 were designed to exclude.

The trial court also erred by not conducting an on the record balancing test of the prior conviction under Rule 403. Even if propensity evidence is otherwise admissible, the evidence is still subject to the traditional rules of evidence. *See Benton* at 156, *State v. James*, 335 S.C. 25, 34, 583 SE2d 745, 748 (2003). Neither the trial judge's traditional role in weighing the probative value of evidence versus its prejudicial effect under Rule 403, nor Rule 401, is displaced by the operation of a statute where an element of an offense is a prior conviction. *Id.* Particularly with sex crimes, where the danger for prejudice is so great, the court should not be allowed to shirk its responsibility as gatekeeper. Additionally, this Court in *State v. Spears*, held that failure to conduct an on the record balancing test was sufficient enough to remand the case back to the trial court. *State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (S.C. App., 2013) In

Spears, the trial court allowed for the introduction of evidence that the defendant engaged in shooting the victim a month prior to the incident he was on trial for, murder and three counts of assault and battery with intent to kill (ABWIK) with the same victim. *Id.* In remanding back the trial court, this Court declined to perform a de novo Rule 403 balancing test likening the requirement for the trial court to conduct a prior conviction balancing test under Rule 609(b). *Id.*; *State v. Colf*, 525 S.E.2d 246, 337 S.C. 622 (S.C., 2000). With no physical evidence of the alleged crime introduced at trial and with some questions of credibility relating to the accuser, the introduction of a prior conviction for lewd act on a minor was fundamentally prejudicial. The introduction of Appellant's prior conviction was fundamentally unfair and stripped him of any of the protections provided by SCRE 403, SCRE 404(b), and the South Carolina Constitution.

In designing 16-3-655(A)(2) the legislature created a giant exception to our state's history against the introduction of propensity evidence. The act effectively allows for the introduction any prior conviction that has some connection toward minors or sexual depravity in general, even if not directed towards children. If the General Assembly is allowed to create this exception what is stopping them from allowing the exception to swallow the rule? If this court allows the exception to continue, why wouldn't the legislature create a crime called "aggravated DUI" and define it as one having one or more DUI within the past 10 years. What about "aggravated drug sales" by defining it as having one or more drug sales within the past 10 years. What about "aggravated shoplifting" by the same type law? The General Assembly simply cannot take away the fundamental right to a fair trial by such tactics. The Constitution prohibits it and only the courts can enforce the constitution. Petitioner requests rehearing.

Respectfully submitted,

By:  _____

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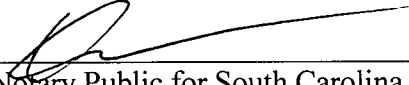
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of December, 2014.



ROBERT M. DUDEK
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 30th day of December, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.