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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Barnwell County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2014-UP-444 (S. C. App. filed December 10, 2014)

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

v.

Eric VanCleave ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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 PETITIONER

INDEX

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals Err by affirming the Trial Court's denial of the Petitioner's motion to dismiss the February 2013 indictments on both the issues of violation of the Petitioner's right to speedy trial and on the grounds that pre-indictment delay violated his due process rights?

2. Did the Court of Appeals Err by affirming the Trial Court's improper admission of testimony of prior or other bad acts in accordance with Rule 404(b)?

3. Did the Court of Appeals Err by affirming the Trial Court's denial of the Petitioner's motion for directed verdict in accordance with Rule 19(a) where the evidence raised merely a suspicion of guilt?

STATEMENT OF THE CASE

On April 1, 2010 Eric VanCleave was arrested on eight (8) charges emanating from Barnwell County: K-338461 Criminal Sexual Conduct with a Minor 11-14 YOA 2nd Degree; K-338462 Criminal Sexual Conduct with a Minor 11-14 YOA 2nd Degree; K-338463 Criminal Sexual Conduct with a Minor 11-14 YOA 2nd Degree; K-338464 Criminal Sexual Conduct with a Minor Under 16 YOA 2nd Degree; K-338465 Committing/Attempting Lewd Act on Minor; K-338466 Committing/Attempting Lewd Act On Minor; K-338467 Committing/Attempting Lewd Act on Minor; and, K-338468 Committing/Attempting Lewd Act on Minor. (Warrants)

On September 30, 2010 the Grand Jury for Barnwell County returned True Billed indictments for four (4) of the charges: 2010-GS-06-272 for warrant K-338462 Criminal Sexual Conduct with Minor 2nd Degree; 2010-GS-06-273 for warrant K-338464 Criminal Sexual Conduct with a Minor 2nd Degree; 2010-GS-06-274 for warrant K-338466 Lewd Act Upon Minor; and 2010-GS-06-275 for warrant K-338468 Lewd Act Upon a Minor.

On June 26, 2012 Attorney Robert T. Williams, Sr., attorney for Petitioner filed and served on the State Motions for Discovery. On July 25, 2012 Attorney for Petitioner filed and served a Notice of Motion and Motion for Speedy Trial. On January 16, 2013 Attorney for Petitioner filed and served an additional Notice of Motion and Motion for Speedy Trial.

On February 25, 2013 Petitioner appeared in Barnwell General Sessions Court, prepared for trial on the September 2010 indictments. On February 25, 2013, four (4) new indictments were true billed by the Barnwell County Grand Jury, Indictment Numbers 2013-GS-06-76, 2013-GS-06-77, 2013-GS-06-78, and 2013-GS-06-79.

The Trial Judge continued the trial of Petitioner until April 1, 2013 as a result of the

newly indicted charges.

Petitioner was tried over a two (2) day period of April 1, 2013 and April 2, 2013 with a guilty verdict being rendered as to all four (4) February 2013 indictments. The 2010 indictments were never tried. Petitioner was sentenced to a term of twenty (20) years on Indictment No. 2013-GS-06-76 for Criminal Sexual Conduct with a Minor - 2nd Degree; fifteen (15) years on Indictment No. 2013-GS-06-77 for Lewd Act Upon a Child Under 16; ten (10) years on Indictment No. 2013-GA-06-78 for Assault and Battery of High and Aggravated Nature; and ten (10) years on Indictment No. 2013-GS-06-79 for Criminal Sexual Conduct - 3rd Degree. All sentences were ordered to run concurrent.

Petitioner timely served and filed his Notice of Intent to Appeal on April 10, 2013. Following briefing by both parties, the case was brought for oral argument on October 9, 2014 before the Court of Appeals. On December 10, 2014, the Court of Appeals State v. VanCleave, Unpub Op. No. 201-UP-444 (S.C. Ct. App. December 10, 2014) affirmed the Trial Court's rulings. On December 18, 2014, the Petitioner respectfully filed a petition for rehearing. The Petitioner's petition for rehearing was denied by the Court of Appeals on January 27, 2015. The Petitioner respectfully files this Petition for Certiorari to the South Carolina Supreme Court.

STATEMENT OF FACTS

This case concerns numerous issues raised by the Petitioner both before and during the trial of his case.

Eric VanCleave was arrested on April 1, 2010 and charged with eight (8) counts of sexual misconduct: (1) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338461); (2) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338462); (3) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338463); (4) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338464); (5) Committing or Attempting a Lewd Act Upon a Minor (Warrant No. K-338465); (6) Committing or Attempting a Lewd Act Upon a Minor (Warrant No. K-338466); (7) Committing or Attempting a Lewd Act on a Minor (Warrant No. K-338467); and, (8) Committing or Attempting a Lewd Act Upon a Minor (Warrant No. K-338468).

Four (4) of the above stated warrants , K-338462, K-338464, K-338466, and K-338468, were subsequently submitted to the Barnwell Grand Jury on September 30, 2010 resulting in True Billed Indictments. Those indictments incorporated the allegations contained in those warrants specific to dates, times, and places. All four (4) warrants and the resulting indictments alleged sexual crimes allegedly committed by Petitioner on Victim 1 on the dates of April 20, 2003 and March 27, 2005 in Barnwell County, South Carolina. Those indictments were for the offenses of Criminal Sexual Conduct with a Minor Second Degree, Criminal Sexual Conduct with a Minor Second Degree, Lewd Act Upon a Minor, and Lewd Act Upon a Minor, respectively.

On July 24, 2012 Petitioner's attorney filed and served a Notice of Motion and Motion for Speedy Trial. When no hearing was granted, nor order addressing the trial date was issued,

Petitioner's attorney filed and served a second Notice of Motion and Motion for Speedy Trial on January 14, 2013.

Petitioner 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, Petitioner timely notified the Prosecutor of his intention to offer alibi evidence that would conclusively prove that Petitioner could not have been in the County of Barnwell on the two (2) dates alleged in the indictments. This alibi, therefore, would have resulted in an acquittal of all charges that were pending for trial, on the 2010 Grand Jury Indictments in Barnwell County.

On February 25, 2013, the first day of the trial week selected for Petitioner, the State presented to the Barnwell Grand Jury four (4) new indictments for warrants K-338463, K-338467, K-338465, and K-338461. These indictments were listed as 2013-GS-06-76 Criminal Sexual Conduct with Minor, 2013-GS-06-77 Lewd Act Upon a Child, 2013-GS-06-78 Assault and Battery of a High and Aggravated Nature and 2013-GS-06-79 Criminal Sexual Conduct Third Degree .

The new indictments, presented almost thirty-five (35) months after Petitioner's arrest, now alleged a different and more expanded time frame for the offenses occurring between April 1, 2005 and May 17, 2006 (R. pp. 302-304), for indictment 2013-GS-06-76 and 2013-GS-06-77; and between May 27, 2006 and May 29, 2006 (R. p. 304, l. 22; p. 307, l. 1); for Indictment 2013-GS-06-78 and 2013-GS-06-79.

The new indictments reflected the warrant numbers of those arrest warrants that had previously not been presented before by the Grand Jury, K-338461, K-338463, K-338465, and K-338467. The allegations contained on those warrants were for offenses that allegedly occurred either on April 11, 2004 or March 30, 2002.

The allegations contained in the new indictments expanded the time period Petitioner was forced to defend from April 11, 2004, on the Criminal Sexual Conduct with a Minor 2nd Degree, and Lewd Act Upon a Minor to the time period of April 1, 2005 until May 17, 2006. Additionally, the Assault and Battery of a High and Aggravated Nature and Criminal Sexual Conduct in the 3rd Degree Indictments expanded the time period the Petitioner had to defend from March 30, 2002 to between May 27, 2006 and May 29, 2006.

Petitioner argued that the State should not be allowed to prosecute the new indictments presented on February 25, 2013, the very week Petitioner was to be tried. (R. pp. 058-072)

The Trial Judge refused to dismiss the indictments (R. p. 067, l. 3-18) requiring Petitioner's attorney to acquiesce in a continuance. (R. p. 066, l. 18; p. 67, l. 18)

The Trial was rescheduled for April 1, 2013. Petitioner reiterated his contention that the State should not be allowed to move forward with these four (4) new indictments for the identical reasons stated at the prior hearing. The Trial Judge again allowed the State to go forward. (R. pp. 106-110)

During the trial, the Trial Court, over the Petitioner's objection allowed into evidence testimony under Rule 404(b) of the South Carolina Rules of Evidence.(R. pp. 77-104, 189-216)

At the conclusion of the State's case, the Petitioner made a motion for directed verdict which was denied by the Trial Court. (R. pp. 222-225). Again, at the conclusion of all testimony in the matter, the Petitioner made a motion for directed verdict which was also denied by the Trial Court. (R.p. 291)

ARGUMENT

1. The Court of Appeals Erred by affirming the Trial Court's denial of the Petitioner's motion to dismiss the February 2013 indictments on both the issues of violation of the Petitioner's right to speedy trial and on the grounds that pre-indictment delay violated his due process rights.

The Court of Appeals ultimately affirmed the Trial Court's rulings in denying the Petitioner's motions to dismiss the indictments due to a number of due process violations. However, it is respectfully submitted that the determinations of the Court of Appeals were in err.

In considering this Petition, the Petitioner requests that this Court consider a recent relevant case that was decided on February 11, 2015 which speaks directly to the Petitioner's issue: State v. Baker, Appellate Case No. 2010-172951, Filed by this Court on February 11, 2015. The Baker case was not previously cited by the Petitioner, because the Court's holding in Baker was not previously available to the Petitioner at either the Trial Court level or when the Court of Appeals made their decisions. In Baker, this Court in a strikingly analogous fact pattern ruled that a similar last minute extension of indictment period, without sufficient notice, and without specific times and details created an overly prejudicial burden on the Petitioner and thereby required that his convictions be overturned.

In considering a Baker analysis, the Petitioner has suffered irreparable harm stemming from the pretrial delay in the disposition of his case. On July 24, 2012, Petitioner'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, Petitioner's attorney filed and served a second Notice of Motion and Motion for Speedy Trial on January 14, 2013. Finally, Petitioner 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, Petitioner timely notified the Prosecutor of his intention to offer

alibi evidence that would conclusively prove that Petitioner could not have been in the County of Barnwell on the two (2) dates alleged in the indictments. The Petitioner's alibi as presented completely exonerated the Petitioner during the time frame listed in the indictments that had been pending for more than two years.

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.

The Petitioner asserts that the Court of Appeals overlooked the requirement on the State to demonstrate what good cause existed that would justify the delay in the prosecution of this case. State v. Lee, 375 S.C. 394, 653 S.E.2d 259 (2007) stands for the proposition that there will be a higher degree of scrutiny placed on the States action or inaction where the Petitioner can demonstrate that his ability to prepare and offer a defense have been compromised by that delay. Here, the possible alibi witnesses to any other times were no longer available as they were deceased.

State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) represents another delay case by the State, this case actually touching upon the ultimate unconstitutionality of the Solicitor's control over trial dockets.

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 Petitioner his right to a fair trial.

The extraordinary delay in bringing indictments that related to the newly altered time frame, put the Petitioner in a position where any potential alibi witnesses would be impossible to secure, created 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 Petitioner 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 failure to dismiss the newly sought indictments, including an overly expansive and broad time frame, 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 is in err. The State's actions were improper and deliberately designed to abuse the due process and fair trial rights of the Petitioner.

2. The Court of Appeals Erred by affirming the Trial Court's improper admission of testimony of prior or other bad acts in accordance with Rule 404(b).

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) Obviously the lack of detail offered by both brothers as to the events, failing to testify exactly when it occurred, as well as failing to testify to a time span elapsed, demonstrates a failure of proof shown to be clear and convincing evidence.

To properly address a 404(b) admissibility question, the Court must undertake a complete examination of the factors laid out in State v. Wallace, to include: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the alleged perpetrator; (3) the location where the alleged abuses occurred; (4) the use of coersion or threats; and (5) the manner of the occurrence. State v. Wallace. 384 S.C. 428, 683 S.E.2d275 (2009)

When reviewing the similarities of the testimony of the three (3) victims and comparing the dissimilarities and in an attempt to analyze the evidence in accordance with State v. Wallace,

the following must be noted: (1) that the age of the victims differed; (2) locations of the alleged assaults differed; (3) there was no alleged coercion or threats linked with any of the allegations; and, (4) the time spans are different.

Additionally, the Court overlooked 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.

3. The Court of Appeals Erred by affirming the Trial Court's denial of the Petitioner's motion for directed verdict in accordance with Rule 19(a) where the evidence raised merely a suspicion of guilt.

In order to withstand directed verdict, "competent evidence tending to prove the charge in the indictment" must exist. 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 (Petitioner'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 Petitioner's guilt, instead it relied solely on conflicting testimonial evidence, some of which was improperly admitted as stated before.

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.

The testimony and evidence presented by the State in this matter fell far short of the necessary threshold to withstand Directed verdict. The absolute inconsistences in witness testimony combined with the directly contradictory evidence provided did no more than raise a mere suspicion of guilt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant certiorari, reverse the decision of the Court of Appeals affirming rulings of the Trial Court as it relates to: the denial of the Petitioner's motion to dismiss the February 2013 indictments on both the issues of violation of the Petitioner's right to speedy trial and on the grounds that pre-indictment delay, including an improper broadening of the indictment time frame violated his due process rights; the admission of testimony of prior or other bad acts in accordance with Rule 404(b); and denial of the Petitioner's motion for directed verdict in accordance with Rule 19(a) where the evidence raised merely a suspicion of guilt.

The Petitioner respectfully requests the Court overturn the convictions and order the dismissal of the improperly obtained indictments, or at a minimum remand the matter for consideration by the Trial Court with the exclusion of improperly admitted evidence.

Respectfully submitted,

Robert T. Williams, Sr. #6149
Benjamin A. Stitely, #75339
Williams, Hendrix, Steigner, & Brink
Post Office Box 849
Lexington, S.C. 29071

ATTORNEYS FOR PETITIONER

February 20, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Barnwell County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2014-UP-444 (S. C. App. filed December 10, 2014)

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

v.

Eric VanCleave ..... Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that a petition for rehearing was made to and finally ruled upon by the Court of Appeals.

Robert T. Williams, Sr. #6149
Benjamin A. Stitely, #75339
Williams, Hendrix, Steigner, & Brink
Post Office Box 849
Lexington, S.C. 29071

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

v.

Eric VanCleave ..... Petitioner.

PROOF OF SERVICE

I certify that I have served the **Petition for Certiorari and Appendix** on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on February 20, 2015, addressed to Alan M. Wilson, Attorney General, William M. Blitch, Jr., Assistant Attorney General, Office of the Attorney General, Post Office Box 11549 Columbia, South Carolina 29211-1549; and a copy of the **Petition for Certiorari** was served on Jenny Abbott Kitchings, Clerk of Court, S.C. Court of Appeals, Post Office Box 11629, Columbia, South Carolina, 29211, postage prepaid and deposited in the United States Mail on February 20, 2015.

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

Dated: February 20, 2015

Robert T. Williams, Sr. #5149
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 PETITIONER

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
Michelle L. Boykin

Via Hand Delivery

February 20, 2015

Daniel E. Shearouse,
Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

Re: State v. Eric VanCleave
Appellate Case No. 2013-000748

Dear Mr. Shearouse:

Please find enclosed for filing an original and six (6) copies of the Petitioner's Petition for Writ of Certiorari, two (2) copies of the Record on Appeal, two (2) copies of the Respondent's Final Brief, two (2) copies of the Appellant's Final Brief, and two (2) copies of the Appendix in the above referenced case.

If you have any questions, please call.

With kindest regards, I am

Very truly yours,

Robert T. Williams, Sr.

RTW/as

cc: Alan M. Wilson
William M. Blitch
Jenny Abbott Kitchings