

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Sumter County
Hon. Howard P. King, Circuit Court Judge
Appellate Case Tracking No. 2010-172951

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FEB 26 2015

S.C. Supreme Court

The State,

Respondent,

v.

Mark Baker,

Petitioner.

PETITION FOR REHEARING

On February 11, 2015, this Court reversed Petitioner's conviction and sentence in an opinion in which the Plurality found the indictment unconstitutionally broad in failing to provide Petitioner sufficient notice of the charges he faced, a single judge concurred in result, and two judges dissented finding Petitioner's convictions and sentences should be affirmed. The Plurality overlooked relevant case law as well as facts and findings appearing in the record. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the trial court properly refused to quash the indictment, hold any error in qualifying the forensic interviewer as an expert was harmless, and affirm Petitioner's convictions and sentences.

The Plurality opinion improperly focuses on Petitioner's ability to create and prepare for a specific defense—in this case alibi—in its determination the indictment failed to meet the requisite standards of notice as required in State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). This error caused the Plurality to overlook or

misapprehend years of prior opinions by this Court indicating the indictments in this case provided sufficient notice and were not unconstitutionally lacking.

The Plurality calls Gentry the seminal case in analyzing the sufficiency of an indictment. In Gentry, this Court said:

If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Id. at 102-103; 610 S.E.2d at 500 (citing S.C. Code Ann. § 17-19-20 (2003); State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003)).

The Gentry Court specifically found an indictment “is a notice document.” Id. at 102, 610 S.E.2d at 500. The Court in Gentry continued and the Plurality acknowledged: “In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances.” The Plurality, however, overlooked language in Gentry directly applicable to the instant case: “Further, whether the indictment could be more definite or certain is irrelevant.” Id. at 103, 610 S.E.2d at 500. This or similar language has been used by this Court in many cases. See e.g., State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972); State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952) (“The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet.”) Nonetheless,

making the language more definite or certain is the exact expectation announced by the Plurality.

Further, section 17-19-20 of the South Carolina Code provides:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

The indictments in the instant case are substantially in the language of the lewd act statute, provide the name of the person Petitioner committed the lewd act upon and their birthdate to show compliance with the statutory elements, indicate what county the offense took place, and provide a time frame for the offense though one is not a required element under the law. The indictments the Plurality found insufficient meet the requirements of this section and should have been deemed and judged sufficient pursuant to this statute.

The Plurality focuses on Gentry's requirement for a sufficient indictment of "whether Petitioner know[s] what he is called upon to answer and whether he may plead an acquittal or conviction thereon."¹ The Plurality then ignores the fact Petitioner clearly knows what he must answer because he is seeking information from employers and others to create a defense to the charges he knows he must answer. Instead, the Plurality utilizes the difficulties he has in creating a defense to say the indictment failed to provide the requisite notice.

¹ There is absolutely no doubt the indictments noticed him of the elements of the offense and included all material and essential elements of the crime of lewd act.

Actual notice has been defined by this Court: “Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him.” Strother v. Lexington County Recreation Com'n, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998). Clearly, Petitioner had knowledge of whether or not he “did wilfully and lewdly commit or attempt to commit a lewd and lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen (16) years, to wit: [Older Niece] (Date of Birth: . . . /89), with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or of the said child” as alleged by the indictment. Whether the date the alleged lewd act was to have been committed occurred within the last 6 weeks or 6 years should not change his level of knowledge of his actions against this child. He either did an act or he didn’t and he knew whether he was guilty and should seek a plea or whether he was innocent and seek an acquittal. Nothing in the date range would change this knowledge or provide any additional notice regarding whether Petitioner committed the act.

Instead, the Plurality of this Court focuses on his ability to create an alibi or other defense. The State submits whether the indictment conveys notice is a completely separate and distinct question from whether Petitioner or any defendant has had sufficient time to prepare a defense. If an inability to properly prepare arises, the defendant may seek a continuance or other remedy to preserve his ability to present a full defense. Petitioner sought a continuance in this case for this exact reason, and the denial of this continuance has not been raised before this Court. He knew the charges and allegations he faced, he received discovery which included the video recording and other allegations

from the children, he knew exactly when they were present with him, and as stated above, he knew whether he had ever inappropriately committed a lewd act or CSC with the children. As a result, he was attempting to establish a defense to these charges because he had proper notice. The fact the change in time frame was made a month before trial, and the fact he was having difficulty establishing a defense, do not impact whether he received the requisite notice necessary through an indictment.

One circuit court judge reviewed his need for further time to prepare and granted a one week continuance. The trial judge subsequently reviewed his need to further prepare and denied his motion for a continuance specifically finding he had ample time. However, whether he should have been granted a continuance to give him proper time to prepare is a separate question of whether he had notice of the charges sufficient so he knew what to prepare.

The Plurality focuses exclusively on Petitioner's inability and difficulty establishing an alibi defense to find the new indictments overbroad. Petitioner has all along asserted a general denial of guilt. Even when the indictments alleged only a specific summer of 2002-2004, Petitioner never alleged he had an alibi. This fact alone belies the Plurality's focus on his ability to establish an alibi. As the Plurality itself points out, an alibi must be for the entire time period he is alleged to have committed the offense, State v. Robbins, 275 S.C.373, 271 S.E.2d 319 (1980), and because he could not establish one for the summers of 2002-2004 he can suffer no prejudice or surprise at his inability to establish an alibi for 1998-2004. As a result, even if preparation is amalgamated with the concept of notice, he has prepared all he could prepare for his alibi

defense and this should not be a basis for finding the indictment failed to present sufficient notice of what Petitioner had to be prepared to answer.

Further, even if the proper analysis includes looking at all surrounding circumstances, including Petitioner's ability to prepare a defense, he had more than adequate time to prepare. As stated above, he knew whether or not he had committed a lewd act on this child at any point, much less within the six year time frame. Further, he had from October 3 until November 13 to prepare his defense to the new indictments.² During this time, he further exemplified the fact he had notice of what he had to defend as he sought out records of employment and other records which would establish his whereabouts during the time frame in which the Older Niece was present with Petitioner. During this time, he learned the records did not exist. At the time of trial, there was clearly nothing more he could do in preparing a defense. The trial court specifically found he had sufficient time to prepare his defense, found he has not indicated an alibi defense³, and delay would prejudice the State and not Petitioner.

The Plurality indicates "we are unable to discern how any defendant could effectively defend himself against a six-year time frame." This argument can be raised just as effectively for a one-week time frame or two-month time frame as it can for the six-year time frame depending on the circumstances of the case. If the one-week time frame occurred six years prior to the indictment is true-billed, as could likely be the case after a delayed disclosure of sexual abuse by a child, or almost twenty years prior as the repressed memories come out as in Moriarty v. Garden Sanctuary Church of God, 341

² The Plurality indicates he had two weeks, however the Record establishes this is incorrect. Counsel for Petitioner acknowledges he received notice of the new indictments and copies of the indictments on October 3. (R.29). The indictments were not true-billed until October 26, however, he had notice of the expanded time frame for over three weeks prior to the true-bill.

³ This is a finding Petitioner did not and has not taken issue with on appeal.

S.C. 320, 534 S.E.2d 672 (2000), it would be just difficult to defend as the current six-year time frame. The end result is that the defendant would likely have a defense of denial and the resulting trial would depend on the credibility findings and other factual findings by the jury—just as they did in this case in which Petitioner alleged denial and challenged the credibility of the witnesses and his defense was ultimately rejected by the jury. See e.g., State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 783 (1991) (“We do not agree with the defendant that he was unable to prepare a defense to the charge of the indictment because of the time span involved. On the contrary, the defendant proceeded with a defense of denial, and presented evidence of factual impossibility. The jury simply rejected these defenses.”). Additionally, it is clear credibility of the witnesses and their claims played a significant factor in this case and were definitely considered by the jury because Petitioner was convicted of some charges related to the Older Niece, but acquitted of the charge related to the Younger Niece and the CSC.

The Plurality’s focus on the inability to establish an alibi and, specifically, the lack of records from 1998-2002 as a “concrete example of prejudice” is belied by its own recommendation for how the indictment could have been written to be valid. This internal inconsistency exemplifies why the indictment in this case should be considered sufficient to provide the requisite notice. The Plurality finds an indictment that spans 1998-2004 to be overbroad. However, according to the Plurality, the State could bring the same indictment covering the same years and just restrict the time frame of each year to the summer months and the indictment would be proper and not overbroad, or presumably bring 6 indictments covering the same time frames just listing the separate summer months in each indictment. The difficulties in preparing a defense of alibi would

be exactly the same for the defendant. His notice of the charges and what he would be called upon to answer would be exactly the same. As former Chief Judge Sanders of the Court of Appeals said in McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) and this Court has adopted: “whatever doesn’t make a difference doesn’t matter.” McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011). The ruling by the Plurality is the epitome of placing form over substance as the substance of Petitioner’s notice and ability to prepare a defense would not change. See e.g., State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983) (finding the Court should not elevate form over substance, especially when the appellant is not denied a fair trial); see also, Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (recognizing “the drift of the law away from the rules of technical and formalized pleading which had characterized an earlier era.”).

Finally, the Plurality overlooks well established law that the time is not of the essence in a case such as lewd act and CSC with a minor and as a result, the State has no obligation to prove a specific time or date or even a range of dates. It is well established time is not of the essence in most sexual offenses, including lewd act and CSC. See State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007); see also, State v. Reynolds, 48 S.C. 384, 26 S.E. 679 (1897) (finding time not of the essence in a case of incest).

“Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred. In such a case, however, the indictment must show the offense was committed prior to the finding of the indictment.” State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) (internal citations omitted); see also, State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939) (finding when time is not of the essence to an offense, the State has the right to prove the

offense occurred any time prior to the issuance of the indictment). When time is not of the essence, the State need not prove any specific date upon which the alleged offense occurred. Importantly, the State need not even prove the offense occurred within the time frame established in the indictment.

Two cases demonstrate the fact the Plurality overlooked relevant case law directly on point with this case. First, in Reynolds, the indictment charged the defendant with “having carnal intercourse with his own daughter on the 15th day of March, 1894, and on **divers other days both before and since** that date up to the day of the finding of the indictment, first Monday in June, 1896.” Reynolds, 26 S.E. at 679 (emphasis added). The indictment not found invalid and his conviction not reversed even though the proof at trial indicated the offense occurred seven years prior to the dates included in the indictment. This Court specifically found “It is well settled that it is not necessary to prove the precise day, or even year, laid in the indictment, except where time enters into the nature of the offense, or is made part of the description of it. There is no statute of limitation in this case, and it is clear that time is not of the essence of the offense charged.” Id. (internal citations omitted); see also, State v. Rush, 129 S.C. 43, 123 S.E. 765 (1924) (finding an indictment for manufacturing whiskey “on August 23, 1923, and divers other days” was sufficient because time was not of the essence).

A second case, considering a significant time frame in an indictment is State v. Sweat, 276 S.C. 448, 279 S.E.2d 375 (1981). In Sweat, the indictment charged the defendant with conspiracy to defraud the government “beginning on a date or dates unknown at this time to the Grand Jury but including the 15th day of July 1973, through the 31st day of December, 1978, and ending on a date or dates unknown at this time to

the Grand Jury.” Id. at 450, 279 S.E.2d at 376. At a minimum the indictment alleged a five and a half year time frame, but in actuality alleged an indefinite one because it merely indicated the offense began some time before July 15, 1973. This Court found:

Time is not of the essence in conspiracy offenses. That the conspiracy allegedly extended over the period in question does not of itself render the indictment overbroad. This in combination with the unlawful acts, stated with particularity to be the use of county personnel, equipment, goods and chattels plus inmate labor at Westoe Plantation in Dorchester County for the benefit of private parties, sufficiently advises the court and respondents of the specific charge against them.

Id. at 451, 279 S.E.2d at 376-377. This case provides similar notice, as discussed above, because Petitioner clearly knew the charge against him and knew whether at any time during 1998-2004 he committed a lewd act against the minor named in the indictment. Just as the conspiracy continued throughout the time frame alleged in the indictment, the abuse of the minor child in this case took place throughout the time frame alleged in the indictment.

Requiring the State to be more specific, especially when the child victim cannot be more specific, or to have to elect only specific times to include in the indictment, provides no more notice to the defendant and is not likely to be accomplished given the inability of children to adequately recall dates and chronology of events. See e.g., Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 (“The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse.”). In examining the circumstances surrounding the indictment in the instant case, it provided Petitioner with adequate notice to be able to know whether he committed the

offense and even provided him notice to prepare a defense. The fact he was unsuccessful in preparing a defense, or even had difficulty in preparing the defense, should be addressed by other means such as a grant of a continuance and not the quashing of the indictments.

As the State submits this Court should grant the Petition for Rehearing and find the indictments sufficient and the trial court properly denied Petitioner's motion to quash, this Court should then address the remaining issue of whether it was error to qualify the forensic interviewer as an expert and whether that error was harmless. This Court should find any error in qualifying the forensic interviewer as an expert completely harmless in light of State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), and all arguments raised in the State's Brief of Respondent which are incorporated herein by reference.

This Court should therefore grant the petition for rehearing, affirm the Court of Appeals holding on the forensic interviewer as well as the holding on the indictment, and affirm Petitioner's convictions and sentences.

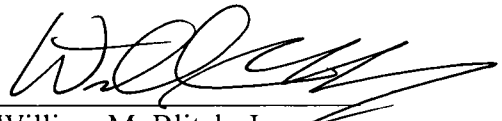
CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court properly refused to quash the indictments, hold any error in qualifying the forensic interviewer as an expert was entirely harmless, and affirm Petitioner's convictions and sentences.

Respectfully submitted,

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February 26, 2015

STATE OF SOUTH CAROLINA

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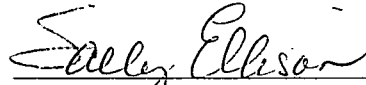
Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 26th day of February, 2015.



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ALAN WILSON
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FEB 26 2015

S.C. Supreme Court

February 26, 2015

VIA HAND DELIVERY

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

Re: State v. Mark Baker,
Appellate Case No. 2010-172951

Dear Mr. Shearouse:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies enclosed)
Victim's Services (enclosure)