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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

SC Court of Appeals No. 2014-000448

The State, ... Respondent,

vs.

Daniel William Spade ..... Appellant

INITIAL REPLY BRIEF OF APPELLANT

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Argument

Question I

Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade was present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

The Respondent argues that Mr. Spade received the relief he requested. Br of Resp. at 9 This is simply not a correct reading of the relief Mr. Spade requested below or of the ruling of the trial court In an effort to determine what the position of the trial judge would be on the admissibility of the evidence, trial court sought a ruling from the trial judge on a cross examination of Dale Smith as to the presence of David Jolley when the minor child suffered panic attacks The precise question was:

> Q Was he [David Jolley] present for every panic attack that you saw prior to October of 2012?
> A. Yes
> Rec. on App. at 224, ll 15-17

The solicitor then argued that mentioning the presence of David Jolley would be bringing up third party guilt which the trial court had excluded in a pre-trial conference. He said "I mean, this is third party guilt They are trying to shift to show that the panic attacks occurred with a certain individual And even in the best light I don't think you could say that it's just Daivd Jolley. It could be any male person, or whatever, that could cause these panic attacks from there, but there were other people available." Rec on App at 225, ll 21-25 to 226, ll 1-2

The trial judge then very specifically ruled such testimony would not be admissible. He said "But at this point in time - - you could, but this court looks at this as sort of

a back door to third party guilt, and I have already ruled on that yesterday in pretrial motions And the defendant has failed to show that the proper evidence is inconsistent with his guilt, so I'm - - I'm not going to allow that in " Rec. on App. at 229, ll 3-8. The solicitor then stated·

> Your honor, I think he has to be very careful. I think the court has cautioned him on that. Obviously he can ask questions concerning that, her evaluation and talking to the witness, but to bring up the reasons for these panic attacks, he has to be very careful to point our a certain individual.
> Rec on App at 230, ll 2-8

The trial court then responded "I agree with that. Don't point to any particular individual." Rec. on App. at 230, ll 8-9. How from this limitation can one argue that defense counsel got the relief he requested? He asked to bring out that David Jolley was around the minor child when the panic attacks occurred. Defense counsel was informed that he could bring out the panic attacks but he could not point out that David Jolley or any other individual was around when they occurred At best defense counsel obtained half of what he requested and without the two halves, the one half was not only not helpful but would actually hurt the case of Mr Spade. Why would defense counsel have any desire to bring out more testimony about panic attacks if he could not ague that Mr Jolley was present when they occurred This was not about third party guilt, but about an explanation for the panic attacks that tended to exonerate Mr. Spade The panic attacks could easily have been caused by the minor child's fear of Mr. Jolley for a variety of reasons that had nothing to do with any sexual abuse. But the jury was forbidden to hear this testimony Defense counsel simply cannot fully explore the alternative explanation for the panic attacks if he is not able to show they occurred when Mr. Jolley was present.

Under Rule 401 of the South Carolina Rules of Evidence, evidence that the child

had panic attacks while Mr. Jolley was present is relevant evidence as defined As this Court has said "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy " *State v Preslar*, 364 S.C 466, 475, 613 S E.2d 381, 386 (Ct App 2005) The evidence made less probable the fact that Mr Spade caused the panic attacks.

Defense counsel did not argue below, and did not suggest, that the panic attacks only occurred in the presence of the adoptive father He did seek to introduce evidence that they occurred in the presence of the adoptive father and therefore the probative value of the panic attacks being caused by any alleged sexual abuse by Mr Spade was greatly lessened.

The Respondent is correct that Mr Spade's attorney was free to argue that the minor child did not have panic attacks or that the panic attacks were not caused by any alleged sexual abuse by Mr Spade. Such an argument would have fallen on deaf ears as he was not permitted to offer evidence that panic attacks occurred when Mr. Jolley was present. The only testimony the jury heard was that panic attacks occurred when the child visited with Mr Spade.

Question II

Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the juror was struck for her age and being retired?

The Respondent attempts to characterize a term used to describe a juror as being a strike because of the person's gender. When asked about Juror 199 the attorney for Mr. Spade simply said "The same thing your honor." Rec on App at 83, l 19. The State then assumed that the reason was Juror 199 was a grandmother. They said "She's a retired grandmother?" Rec. on

App at 83, ll 20-21 The explanation then given by defense counsel was gender neutral. Defense counsel stated he used his strike because of her age, having three children, and being divorced. Rec on App at 83, ll 23-25 When defense counsel later refered to Juror 199 as being a retired grandmother that term was used as a description and not as a reason for striking her. In an attempt to prove the strike was used based upon her gender, the State argued "[L]et's look at some of the men that are in the jury box. They are at least as old as number 199 " Rec on App. at 85, ll 22-24

Pointing out that jurors who are seated bear the same characteristics as a juror who was struck, can be persuasive in proving an improper motive in striking a juror. But the burden remains with the party seeking to prove an improper basis for striking the juror As the South Carolina Supreme Court has said:

> Finally, in regard to the second part of Johnson's argument, the Solicitor does not have a duty to indicate whether these standards were applied to white jurors who were seated. The burden is on the defense counsel to prove that the Solicitor's allegedly neutral reasons were pretextual because they were not applied in a neutral manner. No evidence was presented that a white juror was seated who had the same disqualification as the black jurors who were struck.
> *State v Johnson,* 302 S.C 243, 246, 395 S E.2d 167, 169 (1990)

As noted in the opening brief, the failure of the State to identify those jurors who were of the same approximate age and retired prevented defense counsel from stating why they were permitted to sit on the juror assuming they were the same. Defense counsel is not required to identify similar jurors and explain why they were seated The State has the burden of establishing the fact that similar jurors were not struck by defense counsel The failure of defense counsel to object to a vague and general statement that does not comply with the

requirements of the law can not be interpreted as an admission the state has met its burden of proof.

In *Payton v Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998) the term "redneck" was not used as a general description to help identify the juror who is being discussed. Counsel in that case from the comments made in stating why he struck the juror, used the term to apply to a certain group of people. He actually meant, as the term was defined by the court, "a member of the white rural laboring class ... offensive slang" *Id* at 56, 495 S.E 2d at 208, n. 1 As defense counsel here used the term to generally describe the person who was not present in the courtroom, the state still have the burden of showing that similar jurors who were male were in fact seated. The state failed in this burden

As this Court has said "The State's reasons for striking jurors do not have to be reasonably specific or legitimate." *State v Garris,* 394 S.C. 336, 354, 714 S C 888, 898 (Ct App 2011) [1] Defense counsel gave a gender neutral basis for the strike and the state never refuted this reason by establishing that similarly situated male jurors were in fact seated. The trial court erred in finding the strike of Juror 199 was based upon gender.

Question III

Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Issue Preservation

[1] Arguably if counsel gave an illegitimate reason for a strike, that could be evidence of a strike based upon race or gender The state has never argued the reasons given in this case were not legitimate

The Respondent has argued that this issue is not preserved because defense counsel was not specific enough in his objection. Defense counsel objected saying "Mr. Brannon served as counsel for the mother and now father of the victim in the Family Court trial that took place in October of 2012 We believe that creates an inherent conflict of interest and would ask the he not be allowed to serve as a special prosecutor." Rec on App. at 8, ll 20-25 Counsel could not have been clearer that the dual representation created a conflict in this case. The trial court had the opportunity to rule upon the conflict and the trial judge improperly ruled there was no conflict

Merits

The Respondent contends that Mr Spade's conflict of interest claim "is based upon rank speculation that Mr Brannon *might* have learned something during his representation of the victim's mother and adoptive father in the past that *might* have been helpful in this case and assumes that Mr. Brannon failed to turn such information over to the defense " Br. of Resp. at 20(emphasis in the original) The Respondent then engages in the speculative assumption that had the mother and adoptive father been asked, they would have waived the lawyer-client confidentiality *Id* The issue of conflict of interest was raised to the trial court below. No waiver of attorney client privilege was ever placed on the record. During the entire discussion concerning the conflict of interest Mr Brannon remained mute and never represented to the court that he had no actual conflict Rec on App. at 8-10

The Respondent attempts to distinguish this case from the ones cited by Mr Spade in his opening brief by saying here Mr Brannon was working with the solicitor and not prosecuting the case on his own This is a distinction without a difference Once private counsel

undertakes to represent his client in a criminal prosecution, the same conflict exists whether he is the sole prosecutor or part of a team The fact that the adoption proceeding was completed some 16 months before this trial does not eliminate the conflict inherent in Mr Brannon prosecuting this case His obligation to respect the confidentially of his clients remained sacrosanct *See*, Rule 1 6, *Confidentially of Information*, and Rule 1 9(c)(2), *Duties to Former Clients,* Rule 407, S C Rules of Professional Conduct

The Respondent also cites *Person v Miller*, 854 F.2d 656 (4th Cir 1988) for the proposition that a private attorney may assist in prosecuting a case. *Person* does not even discuss the issue raised by Mr. Spade - is there a conflict when private counsel can be forced to reveal privileged matter in his prosecution of the criminal case

Nor is this case controlled by *State v Smart*, 278 S.C 515, 299 S.E.2d 686 (1982) *Smart* did not discuss or rule upon the issue of the obligation of confidentiality to one client being in conflict with the obligation of a prosecutor to give to the defense counsel any exculpatory material or information in the possession of the private attorney acting as a prosecutor

As noted in the opening brief our Supreme Court has been critical of the use of private prosecutors. *State v Mattoon,* 287 S C. 493, 339 S.E.2d 867 (1986). While they have been critical no decision discusses the inherent conflict between a private lawyer who had represented a litigant prosecuting the same issue in criminal court Respondent acknowledges this inherent conflict when it argues that had the trial court asked, Mr Brannon's client would have waived any conflict and Mr Brannon never stated there was no conflict The facts are they did not waive any such conflict. In the event Mr. Spade is required to file a post conviction relief

action, could Mr Brannon refuse to testify on the ground that he has an attorney-client confidential relationship with the mother and adoptive father? This Court should take the lead from our Supreme Court and hold private counsel being involved in the prosecution of a criminal case is in fact an inherent conflict and that such an action can be undertaken only after an intelligent and knowing waiver of that confidentiality by the client

Question IV

Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Issue preservation

Respondent's argument that the issue concerning S C Code § 1-7-470 is not preserved ignores the plain meaning of the dialogue between defense counsel and the trial judge. In making his objection defense counsel said

> Understanding that the solicitor does have the right to appoint a special prosecutor, first of all, I don't have any evidence under Section 1-7-470 of the South Carolina Code that his appointment as special prosecutor has been in any way, shape or form commissioned by the governor's office
> Rec. on App. at 8, ll 11-16.

This statement cannot be construed to mean that defense counsel conceded that the solicitor has the right to appoint a special prosecutor without complying with the terms of the statute. The statement is a simple statement that while the solicitor has the right to appoint a special prosecutor, such appointment must comply with the statute.

The Respondent's position that the trial judge did not rule on the issue is also

misplaced Defense counsel made two objections to the use of Mr Brannon as a special prosecutor. The first was based on the statute and the second was based upon the conflict of interest When the trial court ruled on the issue, here is the full content of the ruling·

> THE COURT· Well I don't see a conflict, though Mr. Shabel I really don't. Mr Barnette, as the solicitor of this circuit, can appoint any licensed attorney to act as a special prosecutor That's my understanfing In fact, I have had it happen to me before Mr Barnette was the prosecutor in a case.
>
> MR. SHABEL We understand, thank you.
>
> THE COURT: *And the other* - - as far as the conflict, I don't see the conflict. Certainly there would be a conflict had he represented your client - -
>
> MR. SHABEL Yes, sir.
>
> THE COURT - - but he didn't So its denied, but you are protected on the record.
> Rec on App at 10, ll 10, ll 7-19 (emphasis added).

When the trial court made the statement "and on the other" he obviously knew he was ruling on two issues and intended to rule on the two issues He first ruled on the appointment issue and then ruled on the conflict issue Defense counsel asked for two rulings and he received two rulings The issue is obviously preserved

Merits

A now retired circuit court judge of our state once advised a lawyer "Read the code. You will be surprised what you find " Defense counsel read the code and found there is a process by which special prosecutors are appointed in the Seventh Judicial Circuit The solicitor failed to comply with the statute.

The Respondent argues that Mr. Brannon was a "volunteer special prosecutor for the duration of one trial rather than as a paid 'assistant solicitor' as discussed by the statute Br of Resp. at 28. The Respondent fails to point out in the record where this fact was proven below. The Respondent also fails to explain how this court is to determine the difference between a "special prosecutor" and an "assistant solicitor " The statute in question applies to the Seventh Judicial Circuit and the solicitor of that circuit must comply with its mandates

If the solicitor did not comply with the statute, then Mr Brannon is not authorized to is participate in the trial. If he is not authorized then his participation is a nullity Using the logic of the Respondent, if a person who is not a lawyer prosecuted a case, then the conviction could not be reversed unless the defendant could show prejudice When the error is so fundamental as to go to the right of a person to participate in the trial, then reversal should be required If not, then there is no incentive for the solicitor to comply with the statue. A law has to have purpose and meaning

Question V

Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

The Respondent has argued that "Appellant cannot predicate reversible error upon his failure to timely receive something he was never actually entitled to receive " Br. of Resp at 34. This statement is not a correct statement under the facts of this case In preparing for trial defense counsel specifically requested an order requiring the state to turn over the counseling records of Meredith Thompson Loftis. Whether without the order Mr. Spade was entitled to those records under any theory is a moot question The solicitor had every opportunity to argue that position before Judge Mark Hayes at the time of the hearing If the solicitor asserted the position that Mr Spade was not entitled to those records, the solicitor lost that issue. Mr. Spade's entitlement to the records at the time of trial was the law of the case. This Court cannot look behind the order of Judge Hayes As Mr Spade was in fact entitled to the records pursuant to a court order, Mr Spade can predicate reversible error on the failure to provide the records.

Mr. Spade acknowledges that the order from Judge Hayes does not provide for a remedy. In fact most pre-trial orders do not provide for a specific remedy The lack of a remedy does not mean the order is not enforceable. The fact that the records had not been in the possession of the state is not relevant The wording of the order states that the records were to be given to defense counsel only if the state elected to use Ms Lofis as a witness Obviously everyone assumed the state did not have the records and they were in the possession of Ms. Loftis. Once the State decided to use her as a witness they were

required under the order to then obtain all the records and give them to the defense counsel. They failed to do this.

When records are supplied at the last minute, prejudice will virtually always be difficult if not impossible to prove The problem with proving prejudice arises not from the lack of diligence on the part of defense counsel but due to the tardiness of the State in providing the records The State should not be rewarded for their violation of the court order by the inability of defense counsel to immediately point to prejudice when he has had little time to evaluate the records. The State elected to make defense counsel's job more difficult. Under these circumstances the State should bear the consequences of the delay in providing the records This matter should be reversed for the failure of the State to comply with Judge Hayes order.

CONCLUSION

For the foregoing reasons, the conviction of Daniel William Spade should be reversed and the matter remanded for a new trial.

April 28, 2014

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case That on April 29, 2015, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Initial Reply Brief in the above case addressed to Christian Catoe Bigelow, Office of the Attorney General, P O Box 11549, Columbia, SC, 29211

SWORN to and Subscribed Sandy Trayhnam

before me this 29 day

of April, 2015.

Mary Jane Harlow (L S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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April 29, 2015

Jenny Abbott Kitchings, Clerk
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Re State vs Daniel William Spade

Dear Ms Kitchings.

Enclosed herewith is the original Initial Reply Brief and Affidavit of Service concerning the above referenced matter.

With kindest regards, I am

Very truly yours,

C Rauch Wise

CRW/mjh

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