

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM GREENWOOD COUNTY SC Court of Appeals
Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge
2009-GS-24-1246

APPELLATE CASE NO.: 2014-000980

The StateRespondent

v.

Rodney Lee Rogers, Sr.Appellant.

Final Reply Brief of Appellant

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STATEMENT OF ISSUE ON APPEAL

The trial court erred in charging the jury they could convict the Appellant for a lewd act on a minor under S.C. Code §16-15-140 because the Appellant was not indicted under that section or §16-3-655(c) and neither section is a lesser included offense under §16-3-655(a) under which the Appellant was indicted and therefore the trial court lacked subject matter jurisdiction for the conviction.

STATEMENT OF THE CASE

Appellant Rodney Lee Rogers, Sr. (hereinafter "Rogers") was arrested on April 29, 2009 on a warrant charging violation of S.C. Code §16-3-655(A), Criminal Sexual Conduct with a minor in the first degree. He was subsequently indicted for the same charge.

On April 15, 2014 Rogers went to trial and was convicted by a jury on the unindicted charge of violating S.C. Code §16-15-140, lewd act on a minor.

Rogers was sentenced by the Honorable T. L. Hughston to fifteen (15) years provided on the service of ten (10) years the balance suspended with probation for five (5) years.

On April 25, 2014, Rogers filed his notice of appeal with the Clerk of Court for Greenwood County. The South Carolina Court of Appeals received the Notice of Appeal on April 30, 2014.

ARGUMENT I

THE TRIAL COURT ERRED IN CHARGING THE JURY THEY COULD CONVICT THE APPELLANT FOR A LEWD ACT ON A MINOR UNDER S.C. CODE §16-15-140 BECAUSE THE APPELLANT WAS NOT INDICTED UNDER THAT SECTION OR §16-3-655(C) AND NEITHER SECTION IS A LESSER INCLUDED OFFENSE UNDER §16-3-655(A) UNDER WHICH THE APPELLANT WAS INDICTED AND THEREFORE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION FOR THE CONVICTION.

The State argues: (1) the trial court had subject matter jurisdiction to try Rogers for a crime for which he was never indicted, never waived indictment, and was not a lesser included offense of the crime for which Rogers was tried; (2) Rogers waived his right to challenge his conviction because he did not object to the trial court charging the jury with the lesser included offense; and (3) Rogers did not preserve the issue by his failure to object at trial. Rogers will reply to each argument in turn.

The State reads State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) to clothe the trial court with subject matter jurisdiction over all crimes to include lewd act on a minor. That is correct as far as it goes. Gentry does not grant the trial court jurisdiction to try a defendant on related crimes for which the defendant has not been indicted or the prosecution has agreed to a waiver of indictment even if the defendant requests such additional charges. In State v. Dickerson, 395 S.C. 101, 716 S.E. 2d 895 (2011) the defendant requested the trial court charge the jury with an unindicted related crime. In refusing to do so, the Court held that Gentry establishes the concepts of subject matter jurisdiction and sufficiency of an indictment are distinct. Thus, the trial court has subject matter jurisdiction under flawed indictments unless the defendant raises the issue before the jury is sworn.

In Rogers' case, there was no indictment, no waiver, and no lesser included offense. Unless one of these elements is present, the trial court does not have subject matter jurisdiction. State vs. Green, 343 S.C. 207, 539 S.E.2d 419 (Ct. App. 2000) is on all fours with Rogers. In Green, the court held a defendant cannot be convicted for a crime for which he was not indicted if it is not a lesser included offense to that charged in the indictment.

The Green court noted, “[The] circuit court does not have subject matter jurisdiction to convict a defendant “unless there has been an indictment, a waiver of indictment, or unless the charge is a lesser included offense of the crime charged in the indictment.”) (quoting Murdoch

v. State, 308 S.C. 143, 144, 417 S.E.2d 543, 544 (1992)).

Neither Green nor Murdoch was overruled by Gentry.

Rogers submits that the trial court lacked subject matter jurisdiction to try him on an unindicted charge without a waiver and the unindicted charge was not a lesser included offense. This conclusion is in accord with the South Carolina Constitution, Art. I § 11, which requires an indictment before a citizen can be tried by the trial court.

ARGUMENT II

THE TRIAL COURT ERRED IN CHARGING LEWD ACT ON A MINOR BECAUSE APPELLANT DID NOT WAIVE INDICTMENT.

Waiver of indictment is provided for in §§17-23-120 and 130, S.C. Code Ann. A waiver must be signed by Rogers to waive indictment. Rogers never signed a waiver of indictment or orally waived an indictment.

Whether the court says Rogers did not have notice of the crime for which he was convicted or never waived indictment pursuant to statutory law the result is the same. Rogers' conviction must be set aside.

ARGUMENT III

APPELLANT DID NOT WAIVE HIS RIGHT TO APPEAL HIS CONVICTION FOR AN UNINDICTED OFFENSE BECAUSE HE DID NOT OBJECT AT TRIAL.

Article I, §11 of the South Carolina Constitution requires an indictment. Without an indictment or a waiver of indictment the trial court is without subject matter jurisdiction to try Rogers on lewd act on a minor. State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002).

In Watson the Court stated, "In a criminal case the trial court's subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses." Id. at p. 375. This statement was approved in State v. Burton, 356 S.C. 259, 589 S.E.2d 6 (2003).

Neither Watson nor Burton was expressly overruled by Gentry.

Subject matter jurisdiction can be raised at any time. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

CONCLUSION

The conviction of the Appellant should be vacated.



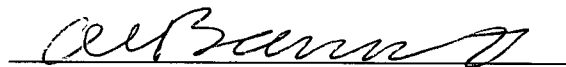
O. W. Bannister, Attorney for Appellant

June 8, 2015

Certificate Of Counsel

The undersigned certifies that this Initial Reply Brief complies with Rule 208, *SCACR* and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information.

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PROOF OF SERVICE

The undersigned certifies that a true copy of the foregoing:

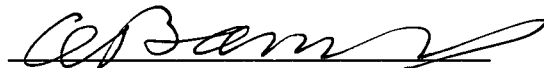
1. Final Reply Brief of Appellant;
2. Final Brief of Appellant; and
3. Motion to File Out of Time.

was this day mailed, postage prepaid, to:

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SC Court of Appeals

Re: **The State vs. Rodney Lee Rogers, Sr.**
Appellate Case No.: 2014-000980

Dear Ms. Kitchings:

Enclosed please find the following documents regarding the above referenced matter:

1. Motion To File Final Brief of Appellant and Final Reply Brief of Appellant Out of Time and six (6) copies;
2. Final Reply Brief of Appellant and fifteen (15) copies;
3. Final Brief of Appellant and fifteen (15) copies;
4. Proof of Service;
5. Our firm's Operating Account Check Number 2116 in the amount of \$25.00;

By copy of this letter, I am providing a copy of the aforementioned to opposing counsel. Please return a clocked-in copy of the Final Reply Brief of Appellant and Final Brief of Appellant back to me in the self-addressed, stamped envelope provided.

Please let me know if you need anything further from our office.

Yours truly,

BANNISTER, WYATT & STALVEY, LLC

O. W. Bannister /cpa

O. W. Bannister

OWB:cpa
Enclosures

cc: David Spencer, Esq.
David M. Stumbo, Esq.

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