ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE, RESPONDENT,

V.

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ZINAH DAMARIS JENNINGS, APPELLANT FEB 10 2016

SC Court of Appeals

APPELLATE CASE NO. 2012-212947

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2016-UP-047

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing on both issues. Respectfully, the Court's opinion overlooks key points that necessitate reversal of appellant's conviction.

Issue 1

The Court's opinion cites State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) for the proposition that "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." State v. Jennings, No. 2016-

UP-047, at page 2 (Ct. App. Jan. 27, 2016). This citation indicates that the Court believes appellant's first issue is not preserved for appeal.

Appellant complied with the Gentry rule requiring that objections to indictments be made before the jury is sworn. On May 31, 2012, appellant filed a motion to quash the indictment. R.1624. A pre-trial hearing was held before the Honorable G. Thomas Cooper, Jr. on June 7, 2012, at which he took the motion under advisement and ordered further briefing. R. 1595. On June 11, 2012, the State filed a response to appellant's motion to quash the indictment. R.1642. On June 14, 2012, appellant filed a reply to the State's response. R.1647. On July 3, 2012, Judge Cooper issued an order denying the defendant's motion to quash the indictment. R.1652.

The hearing during which appellant received Judge Cooper's order was held before Judge McMahon. R. 1. Mr. Pride began his argument by telling Judge McMahon that Judge Cooper had not ruled on his motion to quash. R. 72, l. 21 – 73, l. 2. Before this hearing, the State sought and received a superseding indictment on July 19, 2012. R. 1779. Trial counsel again argued that the indictment contained no description of illegal conduct. R. 80, ll. 7 – 10.

Before trial, appellant filed a motion to quash the superseding indictment. R. 1656. R. 265, ll. 15 – 19. Judge McMahon heard this motion after jury selection, but before the jury was sworn. R. 286, l. 11 (swearing of the jury). In the motion, appellant complained that the date range had been expanded, but no additional facts were given. R. 1656. Appellant specifically argued that she had no notice of "any of the circumstances or the specific misconduct she must prepare to defend. R. 1656.

After hearing argument from the parties Judge McMahon essentially repeated his prior ruling and held the indictment was sufficient. R. 281, l. 10 – 284, l. 17. Because appellant filed two motions and argued the indictment issue and obtained rulings from two judges, she complied with

Gentry. Appellant continued to raise concerns regarding the indictment and notice throughout the trial, all of which flowed from the court's initial error in refusing to quash the indictment. Respectfully, this Court erred in holding this issue unpreserved and should grant rehearing and reverse.

Issue 2

This Court's opinion overlooks that the issue on appeal is not the admissibility of appellant's statements, but the refusal to charge the jury that appellant had no duty to tell the police the location of her child. The Fifth Amendment to the United States Constitution provides in relevant part that, "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda v. Arizona, 384 U.S. 436, 467 (1966). "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-74. "Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, **the subjects discussed**, and the duration of the interrogation." Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) (emphasis added). The jury instruction sought by appellant was based on these bedrock principles of Fifth Amendment jurisprudence.

Appellant cited Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990) for this charge. R. 1665. The reasoning in Bouknight supports appellant's argument, but, at first glance, the outcome does not. The mother in Bouknight had her child removed by Maryland social services. Bouknight, 493 U.S. at 552. The child was later returned to the mother, but only under the auspices of a court order requiring certain things of the mother. Id. Social services

became again concerned for the child and petitioned the state juvenile court to require the mother to produce the child. Id. at 552-53. The mother refused. Id. at 553. The juvenile court held her in contempt. Id.

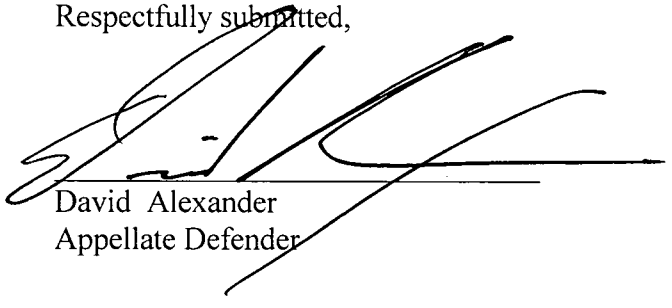
The United States Supreme Court upheld the contempt finding against a Fifth Amendment challenge. Id. at 561. The Court based its decision on very narrow reasoning. Id. at 554-61. Since the mother only had custody of the child pursuant to a court order subjecting her to social services' oversight, the Court found that the mother "submitted to the routine operation of the regulatory system and agreed to hold [the child] in a manner consonant with the State's regulatory interests and subject to inspection by [social services]." Id. at 559. The Court cited a line of cases holding "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purpose **unrelated to the enforcement of its criminal laws.**" Id. at 556.

In this case, appellant was the subject of a criminal investigation. She was not subject to any court orders or DSS involvement. No regulatory exception to the Fifth Amendment applies because the State was attempting to enforce its criminal laws when it interrogated appellant and when it prosecuted her. Bouknight makes this distinction very clear and specifically stated that it was not addressing the Fifth Amendment's application to a criminal case involving the same facts. "We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings." Id. at 561. "But we note that imposition of such limitations is not foreclosed." Id. "In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled." Id. at 562. The Bouknight Court quoted Adams v. Maryland, 347 U.S. 179, 181 (1954): "'[A] witness does not need any statute to protect him from the use of

self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.'" Bouknight at 562. The reasoning of Bouknight that the Fifth Amendment would apply in a criminal context supports the giving of appellant's requested charge.

The trial court's failure to give such a charge prejudiced appellant because the jury could have convicted her for refusing to tell the police the child's location. The solicitor, by telling the jury in closing argument that "you have to tell the police where your child is," compounded this prejudice. R. 1541, ll. 7 – 10. The Court should grant rehearing on this issue and reverse appellant's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

This 10th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Zinah Jennings, #352262, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 10th day of February, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 10th day
of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.