

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

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FEB 22 2016

SC Court of Appeals

Opinion No. 2015-UP-524 (S.C. Ct. App. filed 11/18/2015)

13-GS-23-000700 & 10-GS-23-008831

THE STATE,

RESPONDENT,

V.

GARY REECE THOMPSON, JR.,

PETITIONER

APPELLATE CASE NO. 2014-000164

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/21/2016.

QUESTIONS PRESENTED

1. In this trial for criminal sexual conduct with a minor first degree, did the judge err in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Petitioner had a prior conviction for criminal sexual conduct with a minor first degree was highly prejudicial?

2. Did the South Carolina Court of Appeals err in finding that the objection to the jury learning about Petitioner's prior conviction for criminal sexual conduct with a minor first degree was waived when counsel failed to object at the time a stipulation about the prior conviction was read to the jury when the judge had already made a final ruling about the jury learning of the prior conviction and the stipulation was less harmful than a live witness testifying about the prior conviction, as initially proposed by the State?

STATEMENT OF THE CASE

In November of 2013, amended indictments for criminal sexual conduct with a minor first degree and disseminating obscenity to a minor against Appellant Gary Reece Thompson, Jr. were presented to the Greenville County Grand Jury. The criminal sexual conduct with a minor indictment was a direct presentment. The Grand Jury indicted Thompson on both charges, indictments #2013-GS-23-000700A, 2010-GS-23-008831. On January 13, 2014, Thompson proceeded to jury trial before the Honorable D. Garrison Hill. Randall L. Chambers represented Thompson at trial. Christy K. Sustakovitch prosecuted the case. The jury returned verdicts of guilty and Judge Hill sentenced Thompson to life imprisonment. A timely notice of intent to appeal was filed on January 22, 2014. The direct appeal was perfected and on November 18, 2015, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Thompson, 2015-UP-524 (S.C.Ct.App. filed November 18, 2015). A timely petition for rehearing was filed on December 3, 2015. The petition for rehearing was denied on January 21, 2016. This petition for writ of certiorari follows.

ARGUMENTS

1. In this trial for criminal sexual conduct with a minor first degree, the judge erred in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Petitioner had a prior conviction for criminal sexual conduct with a minor first degree was more prejudicial than probative.

Prior to trial Petitioner moved to quash the amended indictment for criminal sexual conduct with a minor first degree pursuant to S.C. Code §16-3-655(A)(2), based on a prior conviction, and require the State to proceed on the original indictment for criminal sexual conduct with a minor first degree pursuant to S.C. Code §16-3-655(A)(1), based on the age of the minor. (R. p. 7, line 8 – p. 8, lines 1-25). In the alternative to quashing the indictment, Petitioner moved to require the State to accept a stipulation that Petitioner had a prior conviction as required by section (A)(2) of the statute. (R. p. 13, lines 4-6; p. 17, line 23 – p. 18, lines 1-2). Petitioner argued that the prior conviction for criminal sexual conduct was more prejudicial than probative pursuant Rule to 403, SCRE.

The State objected to the suggested stipulation but proposed an alternative stipulation in which, rather than calling a witness to testify about the prior conviction, the judge would inform the jury that Petitioner had been convicted of criminal sexual conduct with a minor which is an offense listed in S.C. Code §23-3-430(C) as required by the statute. (R. p. 19, line 20 – p. 20, lines 1-14). The trial judge found that the case was distinguished from Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) finding that the prior conviction in the present case was probative. (R. p. 23, line 3- p. 24, 25, lines 1-3). The trial judge stated, “Here, the probative value is essential. Because the legislature didn’t just say any prior conviction, it said in Section 16-3-655(A)(2) that it had to be a certain type of offense, which is the offense the State is conceding it will be willing to stipulate to, unlike the prosecutor in the Old Chief case. And,

unlike that case, the specific type of offense did have probative value for a 403 analysis.” The trial judge erred.

During the trial the State introduced a written copy of the stipulation, (R. p. 150, lines 22-24; State’s Exhibit #7, R. p. 366) and the judge told the jury, “So the stipulation is that the Defendant, Gary Reece Thompson, has been convicted of criminal sexual conduct with a minor first degree, an offense listed pursuant to South Carolina Code Section 23-3-430(C), and is currently on the South Carolina Sex Offender Registry.” (R. p. 152, lines 17-22). Petitioner did not renew his objection as the State’s stipulation was less harmful than a live witness testifying about the prior conviction, as the State initially proposed. Informing the jury that Petitioner had a prior conviction for criminal sexual conduct with a minor, rather than simply informing the jury that he had a conviction for an offense listed in S.C. Code §23-3-430(C), was far more prejudicial than probative. The judge erred in not requiring the State to accept the stipulation that Petitioner had a conviction for an offense listed in S.C. Code §23-3-430(C).

S.C. Code §16-3-655 provides:

(A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

(1) the actor engages in sexual battery with a victim who is less than eleven years of age; or

(2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

In order to prove the elements of S.C. Code §16-3-655(A)(2) the State must prove a sexual battery with a minor less than sixteen years of age by someone who has a prior conviction for an offense listed in Section 23-3-430(C) or who has been ordered to be included in the sex offender

registry pursuant to Section 23-3-430(D). The name and nature of the offense are not necessary in order for the State to prove the elements of the offense. The State simply has to prove either a prior offense listed in Section 23-3-430(C) or a prior order to be included in the sex offender registry pursuant to Section 23-3-430(D), not both. In this case the jury was informed that Petitioner had a prior conviction for criminal sexual conduct with a minor; one of the charges for which he stood trial, **and** that he is currently on the sex offender registry.

In State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), this Court wrote:

In Old Chief the defendant was charged with three crimes: (1) assault with a dangerous weapon, (2) using a firearm in relation to a crime of violence, and (3) violation of 18 U.S.C. § 922(g)(1) (possession of a firearm by anyone with a prior felony conviction). Id. In Old Chief, the prosecution relied on the defendant's prior indictment for "assault causing serious bodily injury" to establish a violation of 18 U.S.C. § 922(g)(1), and introduced the order of judgment and commitment for the defendant's prior assault conviction. Id. The Supreme Court found that, although *relevant* under Rule 402, FRE, the evidence of the name and nature of the crime was unnecessary to prove the gun charge, and was highly prejudicial to the defendant as it was similar to the current assault charges pending against the defendant. Id. Weighing the probative value of the name and nature of the crime against its prejudicial impact, the Court held that introducing these details was unduly prejudicial under Rule 403, FRE. Id. The Court found that the defendant's admission that he committed a qualifying crime to be sufficient for purposes of proving a violation of 18 U.S.C. § 922(g)(1) under these circumstances. Id. (footnote omitted).

The James case involved the South Carolina burglary first degree statute, S.C. Code §16-11-311, which provides:

(A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(a) is armed with a deadly weapon or explosive; or

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of *two or more* convictions for burglary or housebreaking or a combination of both.
(emphasis added).

In order to prove burglary first degree in James, the State introduced certified copies of seven prior convictions for burglary. In reversing the conviction in James the Court wrote, “We believe the probative value of all seven prior convictions was outweighed by the very great potential for prejudice to James, and crossed the line established in Old Chief, regardless of the judge's limiting instructions to the contrary.”

355 S.C. at 35, 583 S.E.2d at 750.

While the stipulation in the present case only referenced one prior conviction, the statute at issue, S.C. Code §16-3-655(A)(2), provides for enhancement based on a prior conviction for any of the 23 separate offenses listed in S.C. Code §23-3-430(C). The burglary statute, on the other hand, provides for enhancement based only on a prior conviction for burglary or housebreaking. The challenge in the present case is analogous to the challenge in Old Chief to 18 U.S.C. § 922(g)(1), which is triggered by a prior conviction for many different crimes. As noted by the Court in footnote eight of the James opinion, “Violation of 18 U.S.C. § 922(g)(1) is triggered by prior convictions for many different crimes. S.C.Code Ann. § 16-11-311(A)(2) requires proof of prior convictions for only two specific crimes: burglary and housebreaking.” 355 S.C. at 31, 583 S.E.2d at 748.

As in Old Chief, evidence of the name and nature of the prior conviction for criminal sexual conduct with a minor was unnecessary to prove the crimes charged, and was highly prejudicial as Appellant was charged with criminal sexual conduct with a minor first degree. As the United States Supreme Court wrote in Old Chief:

The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

Pursuant to Rule 403, SCRE, the probative value of the name and nature of the prior conviction is substantially outweighed by the danger of unfair prejudice in the jury hearing that Petitioner had been convicted of the same crime for which he was on trial. The prejudice was enhanced in the present case by the fact that the jury was informed that Petitioner has a prior conviction for criminal sexual conduct with a minor first degree as well as the fact that he is currently on the sex offender registry.

2. The South Carolina Court of Appeals erred in finding that the objection to the jury learning about Petitioner's prior conviction for criminal sexual conduct with a minor first degree was waived when counsel failed to object at the time a stipulation about the prior conviction was read to the jury when the judge had already made a final ruling about the jury learning of the prior conviction and the stipulation was less harmful than a live witness testifying about the prior conviction, as initially proposed by the State.

The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence finding the issue was not preserved for appellate review, citing State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct.App. 2007) (finding defense counsel's statement that he had "no objection" to the introduction of evidence at trial constituted a waiver of any issue he previously has with the same evidence), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009). State v. Thompson, 2015-UP-524 (S.C.Ct.App. filed November 18, 2015). The Court of Appeals erred. Petitioner objected to the jury learning that Petitioner had a prior conviction for criminal sexual conduct with a minor first degree, pursuant to S.C. Code §16-3-655(A)(2), by asking the State to stipulate to the prior conviction. (R. p. 13, lines 4-6; p. 17, line 23 – p. 18, lines 1-2). The State objected to the suggested stipulation but proposed an alternative stipulation in which, **rather than calling a live witness to testify about the prior conviction**, the judge would inform the jury that Petitioner had been convicted of criminal sexual conduct with a minor which is an offense listed in S.C. Code §23-3-430(C) as required by the statute. (R. p. 19, line 20 – p. 20, lines 1-14).

The trial judge understood Petitioner's objection to the jury learning that Petitioner had a prior conviction for criminal sexual conduct with a minor but distinguished the present case from Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) finding the State was not required to stipulate to the prior offense. (R. p. 23, line 3- p. 24, 25, lines 1-3).

The judge stated, "I don't know how any court could require the State to elect under these circumstances here, or to find Rule 403 barred the jury from hearing about a stipulation such as has been proposed by the solicitor." (R. p. 24, lines 20-24). The judge then stated that he would instruct the jury on the limited purpose for which the prior crime can be considered. Finally the judge stated, "So that's my ruling on that issue." (R. p. 25, line 3). The objection to the jury hearing that Petitioner had a prior conviction for criminal sexual conduct with a minor was properly raised to the trial judge, ruled upon by the trial judge and preserved for appellate review.

During the trial the State introduced a written copy of the stipulation, (R. p. 150, lines 22-24; State's Exhibit #7, R. p. 366) and the judge told the jury, "So the stipulation is that the Defendant, Gary Reece Thompson, has been convicted of criminal sexual conduct with a minor first degree, an offense listed pursuant to South Carolina Code Section 23-3-430(C), and is currently on the South Carolina Sex Offender Registry." (R. p. 152, lines 17-22). Petitioner did not renew his objection because the State's stipulation was less harmful than a live witness testifying about the prior conviction, as the State initially proposed.

The Court of Appeals found that that Petitioner waived any objection to the jury learning about the prior offense by failing to object when the stipulation was read to the jury. The judge, however, had already made a final ruling about the jury learning of the prior offense and no further objection was necessary. See State v. Wiles, 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009); Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review."). Petitioner did not object because the judge had already ruled that the jury would learn about the prior conviction and defense counsel acknowledged that the judge reading the

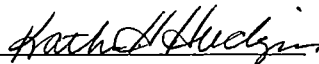
stipulation to the jury was less harmful than a live witness testifying about the prior conviction, as the State initially proposed. (R. p. 20, lines 15-17). Accepting the stipulation that the judge rather than a live person inform the jury of the prior offense did not waive the initial objection to the jury learning of the prior offense.

The Court of Appeals' reliance on State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct.App. 2007) is misplaced because in Dicapua the sole pretrial objection to the videotape was that it lacked audio. The videotape lacking audio that was introduced in evidence at trial in the Dicapua case was not the lesser of two evils like the stipulation in the present case. While trial counsel waived the objection in Dicapua by stating he had no objection, in the present case counsel stated he had no objection in order to prevent the State from bringing in the live witness to testify about the prior conviction. Counsel did not waive his initial objection to the jury learning that Petitioner had a prior conviction for criminal sexual conduct with a minor first degree pursuant to S.C. Code §16-3-655(A)(2). This Court should find the issue preserved for appellate review and address the merits of the argument.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of February, 2016

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SC Court of Appeals

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D. Garrison Hill, Circuit Court Judge

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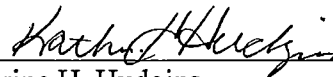
GARY REECE THOMPSON, JR.,

PETITIONER

APPELLATE CASE NO. 2014-000164

CERTIFICATE OF SERVICE

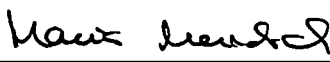
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals this 22nd day of February, 2016.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of February, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.