ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL GENTILE,

APPELLANT

APPELLATE CASE NO. 2015-001370

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to quash as unconstitutionally overbroad and vague the indictment for lewd act, true billed by the grand jury on June 4, 2015, eleven days before trial, and alleging that the offense took place between January 1, 2010, and September 1, 2012, when, over two years earlier on March 7, 2013, the grand jury indicted Appellant only for criminal sexual conduct with a minor first degree occurring on or about January 1, 2009?

STATEMENT OF THE CASE

On March 7, 2013, the Dorchester County Grand Jury indicted Appellant Gentile for criminal sexual conduct with a minor first degree occurring on or about January 1, 2009, indictment #2012-GS-18-1480. (First CSCw/ Minor indictment, R. p. 203). Over two years later on June 4, 2015, the Dorchester County Grand Jury indicted Appellant for lewd act upon a child under sixteen occurring between January 1, 2010, and September 1, 2012,, indictment #2015-GS-18-0598. (Lewd Act indictment, R. p. 199). It appears that on June 4, 2015, the same day as the Grand Jury indicted Appellant for the lewd act charge, the State re-presented the earlier indictment for criminal sexual conduct with a minor first degree to the Grand Jury with an expanded time frame of between January 1, 2010, and September 1, 2012. (Second CSCw/Minor indictment, R. p. 201). On June 15, 2015, Appellant proceeded to jury trial on both the criminal sexual conduct with a minor indictment with the expanded time frame and the lewd act indictment before the Honorable Maite Murphy. Pierce Wehman and John Loy represented Appellant at trial. Kyle Ward and Sheila Mims prosecuted the case. The jury returned a verdict of not guilty for criminal sexual conduct with a minor first degree but guilty of lewd act. Judge Murphy sentenced Appellant to fifteen (15) years suspended upon the service of fourteen (14) years with four (4) years of probation to follow. A timely notice of intent to appeal was served on June 22, 2015. This appeal follows.

STATEMENT OF FACTS

Appellant began dating the Minor's mother in May of 2010, and in May or June of that same year moved in with the Minor's mother, the Minor and her younger brother. (June 16, 2015, R. p. 63, line 6- p. 64, lines 1-9). The four lived in a two bedroom, one bath apartment. At the time of trial in June of 2015, the Minor was 12 years old.

At trial the mother testified that on August 31, 2012, she discovered some things on the Minor's phone that resulted in the mother calling the police. (June 16, 2015, R. p. 65, line 15 – p. 66, lines 1-25). At the time the police wee notified Appellant was driving a truck for a living, on the road and not at home. (June 16, 2015, R. p. 65, lines 19-20). The mother did not testify about any statements made by the minor limited to time and place by Rule 801(d)(1)(D), SCRE. The police officers who went to the apartment that night did not testify at trial. The minor was later interviewed at the Dorchester Children's Center. (June 16, 2015, R. p. 67, lines 14-25). The video of the interview was admitted in evidence as State's Exhibit #3 and played for the jury without objection. (June 16, 2015, R. p. 92, line 1-11). Appellant was arrested. On March 7, 2013, the Dorchester County Grand Jury indicted Appellant for criminal sexual conduct with a minor first degree, indictment #2012-GS-18-1480. Over two years later in June 4, 2015, eleven days before trial, the Dorchester County Grand Jury indicted Appellant for lewd act upon a child under sixteen, indictment #2015-GS-18-0598. Additionally, on June 4, 2015, the State expanded the time frame in the original criminal sexual conduct with a minor first degree indictment from on or about January 1, 2009, to between January 1, 2010, and September 1, 2012. On June 15, 2015, Appellant proceeded to jury trial, on both indictments. The jury found Appellant not guilty of criminal sexual conduct with a minor first degree. This appeal involves the conviction for lewd act.

ARGUMENT

The trial judge erred in refusing to quash as unconstitutionally overbroad and vague the indictment for lewd act, true billed by the grand jury on June 4, 2015, eleven days before trial, and alleging that the offense took place between January 1, 2010, and September 1, 2012, when, over two years earlier on March 7, 2013, the grand jury indicted Appellant only for criminal sexual conduct with a minor first degree occurring on or about January 1, 2009.

Appellant was initially indicted for criminal sexual conduct with a minor first degree on or about January 1, 2009, indictment #2012-GS-18-1480. (First CSC w/ Minor indictment, R. p. 203). On June 4, 2015, eleven days before trial, Appellant was indicted for lewd act upon a child under sixteen between January 1, 2010, and September 1, 2012, indictment #2015-GS-18-0598. (Lewd Act Indictment, R. p. 199). Additionally on June 4, 2015, eleven days before trial, the State expanded the time frame in the original criminal sexual conduct with a minor first degree indictment from on or about January 1, 2009, to between January 1, 2010, and September 1, 2012. (Second CSCw/ Minor indictment, R. p. 201).

Prior to trial Appellant, relying on State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), moved to quash both the lewd act indictment and the criminal sexual conduct with a minor first degree with the expanded time frame as unconstitutionally overbroad and vague in violation of Appellant's state and federal constitutional right to due process of law. (June 15, 2015, R. pp. 15-20). Appellant argued, "What I'm saying is that no amount of time is enough to prepare two years and nine months to determine whether he had an alibi defense. Mr. Gentile is a truck driver. He's on the road for long periods of time. If, as in the first indictment, there was a one day or two day or a week or some sort of narrowed framed, it – it might be that he would have an alibi in this case. But due to the length of the timeframe in the indictment itself, he's essentially stripped of that defense, Your Honor." (June 15, 2015, R. p. 17, lines 11-20).

The trial judge denied the motion to quash ruling:

> Based upon the case law, it – and certainly the Court does not find that it's an overly broad time period. The indictments in this case do give the defendant sufficient certainty and particularity – it apprises him of the elements of the offense to be charged, and gives him the opportunity to – to review that time period. And, basically, he's called to know what he's called upon to answer and may plead accordingly. And it certainly, based upon the review of the actual indictments, it – the offenses are stated with sufficient particularity to enable the court to know which judgment to pronounce, so the Court is – your motion is denied.

(June 15, 2015, R p. 19, lines 10-23). Appellant additionally argued that the time frame was such that he could not protect himself from further prosecution from other allegations that could later be raised during the same time frame. (June 15, 2015, R. p. 20, lines 3-14). The judge again denied the motion to quash. (June 15, 2015, R. p. 20, lines 21-24). The jury returned a verdict of not guilty for criminal sexual conduct with a minor first degree but guilty of lewd act. The trial judge erred in refusing to quash the new indictment as the expanded, non-specific time frame was unconstitutionally overbroad because it lacked specificity as to when the alleged acts occurred.

In State v. Baker, 411 S.C. 583, 592, 769 S.E.2d 860, 865 (2015), the South Carolina Supreme Court wrote:

> Accordingly, we hold the trial judge erred in refusing to quash the indictments as the non-specific, six-year period covered in the indictments was unconstitutionally overbroad because it lacked specificity as to when the alleged acts occurred. It is axiomatic that an indictment must include more than the elements of the charged offense. Therefore, we reverse Baker's convictions.

In footnote #5 the Court stated, "We emphasize that our decision does not preclude the State from re-indicting Baker for the four counts of committing a lewd act upon a minor that he was convicted by using appropriate time limitations for the charged offenses. Had the indictments alleged that the conduct occurred during the summer months of the years 1998 through 2004, i.e., June 1 until September 1, we believe the indictments would have been sufficient." Id.

The indictment in the present case alleges, "That in Dorchester County, South Carolina, on or about January 1, 2010 to September 1, 2012, the defendant, Michael Edward Gentile, being over the age of 14 years old, did willfully and lewdly commit or attempt to commit a lewd or lascivious act upon the body or its parts of [Minor], a child under the age of sixteen (16) years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of himself or the child. This offense in violation of Section 16-15-140, of the South Carolina Code of Laws, as amended." (R. p. 199, Lewd Act indictment). The original indictment for criminal sexual conduct with a minor alleged that the offense took place on or about January 1, 2009. (First CSCw/ Minor indictment, R. p. 203).

At trial the Minor testified that that, "He touched me in my places and did a lot of things" in the locked bedroom of the apartment where the Minor, her brother, her mother and Appellant lived. (June 16, 2015, R. p. 73, lines 8-10). The Minor's mother described the apartment as a two bedroom, one bath apartment. (June 16, 2015, R. p. 64, lines 4-14). The mother testified that she worked during the day and Appellant worked at night so Appellant was in charge of watching the minor and her brother while the mother was at work during the day. (June 16, 2015, R. p. 64, line 18 – p. 65, lines 1-11). The mother testified that Appellant worked for a security company and then later drove a truck for a living. (June 16, 2015, R. p. 65, lines 6-20).

In Baker the South Carolina Supreme Court relied on language from State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) in addressing the sufficiency of an indictment writing:

> If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court is charged with: 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. Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500 (emphasis added). "In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct.App.2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

State v. Baker, 411 S.C. 583, 589, 769 S.E.2d 860, 863-64 (2015), reh'g denied (Apr. 9, 2015). While the time frame alleged in the indictment in Baker involved an expanded unspecified six year time period and the time frame alleged in the indictment in the present case involved an expanded unspecified over two year time period, the new expanded time frame indictments in both cases were sought very close to the time of trial. In Baker the expanded indictment was sought two weeks prior to trial and in the present case the expanded indictment was sought eleven days prior to trial.

In Baker the Court found that prejudice resulted from the unconstitutionally overbroad indictments writing, "Examining the indictments in the instant case in view of all the surrounding circumstances, we find Baker was prejudiced as he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges against him. Simply stated, there was no way for Baker to know "whether he [could] plead an acquittal." Gentry, 363 S.C. at 103, 610 S.E.2d at 500." 411 S.C. at 590, 769 S.E.2d at 864. As in Baker, Appellant in the present case had no way of knowing whether he could plead an acquittal based on the expanded non-specific time frame alleged in the indictment for lewd act. While counsel for Appellant was notified that the State intended to seek an expanded time frame, (June 15, 2015, R. p. 17, lines 5-10), Appellant was undoubtedly taken by surprise when the expanded time frame was sought over two years after the original indictment providing a specific date.

At trial the State relied on State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007) in support of the time frame alleged in the indictment. (June 15, 2015, R. p. 17, lines 22 – p. 18, 19, lines 1-6). The Court in Tumbleston noted that the indictment does not have to specify the precise time of each offense charged and the circumstances of some cases warrant an extended time frame. "Indeed, indictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame. Nicholson, 366 S.C. at 574, 623 S.E.2d at 103; see also State v. Alexander, 140 S.C. 325, 138 S.E. 835, 839 (1927) (noting "surplusage will not vitiate an indictment which, without regard to the surplusage, is sufficient to charge the offense for which the defendant is being indicted")." Tumbleston, 376 S.C. at 101-02, 654 S.E.2d at 855. The Court in Tumbleston found the circumstances of the case warranted the extended time frame writing, "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. B.J. verified the abuse began while she was in kindergarten, and she ensured the end of the abuse when she disclosed the offenses to her mother." Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855. In the present case the State failed to present and the trial judge failed to find circumstances warranting the expanded time frame.

In State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991), decided prior to Gentry, the Court rejected a *per se* rule of insufficiency based on a two year time period. The Court in Wade noted, "In this case, the indictment time span was narrowed as much as possible under the circumstances." 306 S.C. at 84, 409 S.E.2d at 783 (1991). There is nothing in the present record to indicate that the time span was narrowed a much as possible. While the forensic interviewer asks multiple questions about the details of the alleged abuse, very few questions are asked in

regard to time frame. (State's Exhibit #3). Expanded time frames should be the exception instead of the norm and should be justified by special circumstances. The State failed to demonstrate special circumstances to justify the expanded time frame in the present case.

In Baker, 411 S.C. 583, 592, 769 S.E.2d 860, 865 (2015), reh'g denied (Apr. 9, 2015), the Court wrote:

> Given the expansive time frame and lack of specificity as to this time frame, we can only conclude Baker was prejudiced by the defects in the indictments. Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles.

Appellant in the present case was prejudiced by the unspecified two year expanded time frame alleged in the lewd act indictment. The State failed to show special circumstances warranting the expanded time frame. The defect requires reversal. As in Baker, the State may seek a more time specific indictment alleging lewd act.

CONCLUSION

Based on the above argument, the conviction for lewd act should be reversed.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 24th, 2016

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of May, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of May, 2016.

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