THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent

v.

Daniel William Spade, Appellant.

Appellate Case № 2014-000448

Appeal from Spartanburg County
R. Keith Kelly, Circuit Court Judge

Unpublished Opinion № 2015-UP-352
Heard February 11, 2016 - Filed July 6, 2016

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Daniel William Spade, the Appellant above named, hereby Petitions this Court to Rehear this matter based upon the following grounds:

1. The Court, in holding the exclusion of the defense evidence of panic attacks was not error, erred in concluding "[T]here was no indication of whether the panic attacks did or did not occur around the time of Appellant's visits with Victim." *State v. Spade,* P. № 2016-UP-352 (S.C. Ct.App. filed July 6, 2016) at 4. This Court failed to consider the picture introduced as State's Exhibit № 2 was specific as being right after the minor child had a visit with Mr. Spade. This discussion is found on page 162 of the Record on Appeal. Defense counsel had initially

objected to the introduction of the picture because it was not specific as to time. At that point the state introduced evidence that the picture was taken right after the September visit. The picture purported to be of the minor child having a panic attack right after that visit.

The testimony proffered by Mr. Spade would have informed the jury the minor child had panic attacks when she was around other males. Without this testimony proffered by Mr. Spade, the jury was left with the compelling evidence that the minor child had panic attacks right after visiting with Mr. Spade. Such a conclusion was not only extremely misleading, it was not factually accurate. As the proffered testimony was to contradict a very specific incident of a panic attack after a visit with Mr. Spade the testimony did not have the "potential to confuse or mislead the jury." *State v. Spade,* P. № 2016-UP-352 (S.C.Ct.App. filed July 6, 2016) at 4. In fact, by excluding the testimony the jury was mislead. The evidence was even more prejudicial when, as this Court correctly noted, the prosecution in their "closing argument emphasized the connection between Victim's visits with Appellant and the panic attack." " *State v. Spade,* P. № 2016-UP-352 (S.C.Ct.App. filed July 6, 2016) at 3. Mr. Spade, because of the the lower court's ruling, had no counter argument to that of the State.

This Court held in *Reeves v. State*, 415 S.C. 366, 368, 782 S.E.2d 747, 748 (Ct. App. 2015), reh'g denied (Mar. 24, 2016) held that defense counsel was ineffective when he failed to offer to the jury other reasonable explanations for the injuries to the minor child other than sexual abuse. This Court should apply the same principles here. The evidence of another source for the panic attacks is as relevant as another source of the injuries in *Reeves.* Both tend to prove the particular defendant did not commit the crime as charged.

This Court further suggested that Mr. Spade could call an expert witness as to panic

attacks and could have cross-examined the Grandmother about "what was going on" but could not ask her about specific individuals who were present. " *State v. Spade,* P. № 2016-UP-352 (S.C.Ct.App. filed July 6, 2016) at n. 4. Such a limitation would actually be more harmful than helpful to Mr. Spade. An expert could be expected to testify that panic attacks could be caused by sexual abuse among other causes. When the only cause admitted at the trial was the visits with Mr. Spade, such an expert would seal the case against Mr. Spade. The expert would have stated sex abuse can cause panic attacks and no other reason for a panic attack would have been given. Likewise, if cross-examination of the Grandmother is limited to "what was going on" but no individuals are permitted to be named, the testimony would not only be inaccurate but very misleading to the jury as to the true facts. Who was present is the key to completely understanding the panic attacks. Again, excluding who was present would not only have made the testimony factually inaccurate, but would again have mislead the jury.

This Court should rehear this matter and issue a new opinion in which the Court rules that the exclusion of the evidence of other panic attacks was prejudicial to Daniel Spade and reverse his conviction.

2. This Court erred in finding "no evidence Private Counsel either used his authority as a special prosecutor to gain an advantage for a civil client or otherwise compromised his neutrality."" *State v. Spade,* P. № 2016-UP-352 (S.C.Ct.App. filed July 6, 2016) at 7. Because of the rule of attorney client privilege, such a requirement is virtually impossible to prove and is not necessary. As the United States Supreme Court has said "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). When a prosecuting attorney has an obligation of confidentiality to either a witness or potential witness, there is an

appearance of impropriety that calls into question the fairness of the proceeding. Surely the State has not contended that a prosecuting attorney may have such an obligation to a witness or potential witness. In any case where a private prosecutor is used, a defendant will never be able to establish actual prejudice unless a client is willing to waive the right to attorney client privilege. *See,* John D. Bessler, Confidence that a prosecutor will exercise judgment responsibly is not possible when there is the presence of a private party's interest in addition to that of doing justice. John D. Bessler, *THE PUBLIC INTEREST AND THE UNCONSTITUTIONALITY OF PRIVATE PROSECUTORS*, 47 ARK. L. REV. 511 (1994). No such waiver was ever given in this case.

In denying the right of private counsel to prosecute the case, a New York court said "In the case of the prosecutor, all of these obligations flow not to the complainant, but to the public, which is the client." *Sedore v. Epstein*, 864 N.Y.S.2d 543, 548 (2008). To add to the equation an ethical obligation of the prosecuting attorney to a client other than the state, is to require the attorney to serve two masters. In a fair judicial system, this is not possible.

This Court should rehear this matter and issue a ruling that the permitting private counsel who had represented the mother and step father at the termination of parental rights hearing deprived Daniel Spade of due process of law in violation of the State and Federal Constitutions and reverse his conviction.

3. The Court erred in holding "we find unpreserved Appellant's contention that Private Counsel was unqualified to serve as a special prosecutor because the solicitor failed to produce a governor' commission pursuant to section 1-7-470 of the South Carolina Code (2005). The trial court did not rule on this section 1-7-470 argument. Nor did Appellant request a ruling on the

specific point." " *State v. Spade,* P. № 2016-UP-352 (S.C.Ct.App. filed July 6, 2016) at 7. The error in this holding is that the record reflects the trial judge issued a ruling on this issue.

Beginning on page 18 of the Record on Appeal, a discussion of the issue involving Douglas Brannon being a special prosecutor begins. The issue involving the statute is raised at line 11of the page. The issue involving the conflict of interest is found beginning at line 17. At that point, the trial judge had two issues before him. His ruling begins on page 20 at line 7, In ruling against the statute issue, the trial judge states "Mr. Barnette, as the solicitor of this circuit, can appoint any licensed attorney to act as a special prosecutor. That's my understanding. In fact, I have had it happen to me before Mr. Barnette was the prosecutor in a case." Rec. on App. at20, ll 8-12.[1] Defense counsel then acknowledges the ruling saying "we understand. Thank you." Rec. on App. at 20, l 13. In that ruling the trial judge only mentions the appointment of special prosecutor. The statute only relates to the appointment of a special prosecutor.

After this acknowledgment by defense counsel, the trial judge then rules on the conflict issue. He then begins by saying "And the other - - as far as the conflict, I don't see the conflict." Rec. on App. 20, ll 14-15. When he begins his ruling by saying "And on the other" he obviously had concluded ruling on the issue involving the statute. His ruling on that issue had even been acknowledged by defense counsel. The record shows that everyone understood the first ruling had been on the statute issue. The issue was preserved.

This Court should rehear this matter and issue a ruling that the solicitor failed to comply

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[1] Trial counsel's acknowledgment that the solicitor has the right to appoint a special prosecutor is nothing more than an acknowledgment that the solicitor may do so if the solicitor goes through the proper procedure. The trial judge obviously understood that or the trial judge would have used the trial counsel's words against him.

with South Carolina Code § 1-7-470 and reverse the conviction of Daniel Spade.

4. This Court erred in holding that the trial judge did not commit error in excluding the testimony of Meredith Thompson-Loftis. First this Court failed to consider the full background on this issue. On January 2, 2013, over a year before this trial, trial counsel filed a motion to compel the discovery which resulted in an Order issued by Judge J. Mark Hayes dated February 22, 2013. Rec. on App. at 3. This order required the State to turn over the records in the possession of Thompson-Loftis, if the State elected to use her as a witness. Rec. on App. at 3. On October 31, 2013 the state, apparently having decided to use her as a witness, turned over to trial counsel records for the period of May 17, 2011 until February 20, 2012. Rec. on App. at 341-430. Defense counsel, sensing that there might be more records, filed a motion on February 11, 2014 to prohibit the use of Thompson-Loftis at trial as they believe they had not received all the records.

Four days before trial, and in apparent response to the Motion filed on February 11, 2014, the state then gives defense counsel 42 pages of notes from Thompson-Loftis, the majority of which actually pre-dated the October 31, 2013 disclosure. No reason was ever offered for not disclosing the all available documents when the previous disclosure was made. Assuming that at least 30 days prior to trial was a reasonable time to make the disclosure, the State had over 270 days, excluding week-ends, to make the disclosure ordered by Judge Hayes. They apparently made a decision not to make the full disclosure.

If a discovery order is to have any meaning, there must be sanctions for the failure to comply with the Order. As the United States Supreme Court said in applying an exclusion sanction against a defendant for a discovery violation , "It may well be true that alternative

sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Taylor v. Illinois*, 484 U.S. 400, 413 (1988). If exclusion is an appropriate sanction when a defendant fails to comply with discovery obligations, how much more is the same sanction appropriate when the State violates the discovery obligations. In the context of a violation of the civil discovery rules this Court has held "Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes should serve to protect the rights of discovery provided by the Rules. Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 217 (Ct. App. 1997)(internal citations omitted) *See also Duke v. Westvaco Dev. Corp.*, 279 S.C. 464, 467, 309 S.E.2d 293, 295 (Ct. App. 1983). In this case no sanction was imposed.[2] If more severe sanctions are imposed for discovery violations when only money is involved, then at least a similar sanction should be imposed when a citizen's freedom is at issue.

This Court should rehear this matter and rule that the trial court erred in failing to impose any sanctions upon the State per the discovery violation and reverse the conviction of Daniel Spade.

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[2] The fact that the trial judge did exclude any testimony from January, 2014 until February of 2014 (Rec. on App. at 268-269) only serves to point out the State had not seriously taken their obligations under the order of Judge Hayes. Ms. Thompson-Loftis had seen the child into 2014 and this issue should have been brought to the trial court's attention at the pre-trial Motion. A defense used by Mr. Brannon that the records were not under the "control" of the State flies in the face of the plain wording of the Order. Rec. on App. at 269, ll 2-4.

CONCLUSION

For the foregoing reasons this Court should rehear this matter and issue an order reversing the conviction of Daniel William Spade and remanding the case for a new trial.

July 20, 2016

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IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

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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 July 20, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing in the above case addressed to William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed Sandy Trayhnam

before me this 20 day

of July, 2016.

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

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July 20, 2016

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
1220 Senate St.
Columbia, SC 29211

Re: The State vs Daniel William Spade (2014-000448)

Dear Ms. Kitchings:

Enclosed herewith is the original Petition for Rehearing concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,

C Rauch Wise

C. Rauch Wise

CRW/mjh
cc William M. Blitch, Jr.