

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Thomas L. Hughston, Jr., Circuit Court Judge

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SEP 21 2016

SC Court of Appeals

Unpublished Opinion No. 2016-UP-245
Submitted April 1, 2016 – Filed June 1, 2016

The State Respondent

v.

Rodney Lee Rogers, Sr. Petitioner.

PETITION FOR WRIT OF CERTIORARI

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2. THE COURT OF APPEALS ERRED IN HOLDING THAT BECAUSE THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION TO TRY LEWD ACT ON A MINOR CHARGES THE TRIAL COURT COULD SENTENCE THE PETITIONER EVEN THOUGH THE PETITIONER WAS NEVER INDICTED ON THAT CHARGE AND NEVER WAIVED INDICTMENT IN THE PRESCRIBED MANNER BUT INSTEAD DID NOT OBJECT TO THE TRIAL COURT'S JURY CHARGE WHICH THUS ACTED AS AN INDICTMENT AND WAIVER.	
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CERTIFICATE OF COUNSEL

Counsel for Petitioner certified that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2016.



O. W. Bannister
Attorney for Petitioner

QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TRIAL COURT'S ERRONEOUS CHARGE OF A CRIME FOR WHICH THE PETITIONER WAS NEVER INDICTED, NEVER SIGNED A WAIVER OF INDICTMENT, AND WAS NEVER QUESTIONED ABOUT HIS WAIVER, WAS A WAIVER OF THE INDICTMENT AND WAIVER REQUIREMENTS BECAUSE HE DID NOT OBJECT TO THE CHARGE?
2. DID THE COURT OF APPEALS ERR IN HOLDING THAT BECAUSE THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION TO TRY LEWD ACT ON A MINOR CHARGES THE TRIAL COURT COULD SENTENCE THE PETITIONER EVEN THOUGH THE PETITIONER WAS NEVER INDICTED ON THAT CHARGE AND NEVER WAIVED INDICTMENT IN THE PRESCRIBED MANNER BUT INSTEAD DID NOT OBJECT TO THE TRIAL COURT'S JURY CHARGE WHICH THUS ACTED AS AN INDICTMENT AND WAIVER?

STATEMENT OF THE CASE

Petitioner was indicted for Criminal Sexual Conduct with a Minor, First Degree. After the close of all evidence, the prosecution requested the trial court charge that Lewd Act on a Minor was a lesser included offense of Criminal Sexual Conduct with a Minor, First Degree. The trial court agreed with the prosecution and charged the jury on both crimes. The Petitioner did not object to the erroneous charge. The jury convicted the Petitioner of Lewd Act on a Minor but acquitted him of Criminal Sexual Conduct with a Minor, First Degree.

ARGUMENT

The Court of Appeals cited two opinions in support of its decision upholding the conviction. The first was State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985). Stone is distinguishable because it held the trial court did not commit error for failure to charge self-defense which was not requested.

Charging the Petitioner with a new unindicted crime after the trial is over runs afoul of the South Carolina Const., art. I, §11 which requires an indictment. In pertinent part art. I, §11 states, “No person may be held to answer for any crime the jurisdiction over which is not within the magistrate’s court, unless on a presentment or indictment of a grand jury....”

Art. I, §11 goes on to say, “The General Assembly may provide for the waiver of an indictment by the accused....” In S.C. Code Ann. §17-23-130, the legislature provided for a defendant to waive presentment of an indictment. Note that the waiver is required to be signed by the defendant.

In the instant case, the Petitioner was never indicted for Lewd Act on a Minor and never signed a waiver of indictment. Yet the Court of Appeals held that the Petitioner’s failure to object to the trial court’s erroneous conclusion that Lewd Act on a Minor was a lesser included offense of Criminal Sexual Conduct, First Degree acted to waive presentation of an indictment or to sign a waiver.

The second case the Court of Appeals cited is State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Gentry is distinguishable on its facts. The question in Gentry was the sufficiency of an indictment to confer subject matter jurisdiction on the court to try the matter. Gentry made indictments notice documents which must be challenged for sufficiency before the jury is sworn.

In this case there was no indictment for Lewd Act on a Minor to challenge before the jury was sworn. Only after all the testimony and evidence was heard did the charge of Lewd Act come into play. There is no signed waiver or questioning of the Petitioner if his waiver was knowingly or voluntarily made.

Without question the trial court had subject matter jurisdiction to try Petitioner for Lewd Act on a Minor if the Petitioner was indicted for that crime or waived such indictment. The question here is can the trial court try an unindicted defendant on an erroneous conclusion that Lewd Act on a Minor is a lesser included offense of Criminal Sexual Conduct even if the defendant does not object to the charge.

A trial court's charge to the jury is a statement of law and even if correct it is not a vehicle to charge the Petitioner with an entirely separate crime from the one he was on notice to defend. Here, the trial court's charge of Lewd Act on a Minor had two components. The first was a statement of law which was correct as far as the elements of Lewd Act on a Minor were concerned. The second component was to tell the jury it could convict the Petitioner of a crime for which he was never indicted nor did the Petitioner waive indictment in the only manner allowed by statute.

In Gentry, Judge Pleicones dissented and pointed out the requirements of an indictment or waiver as set forth in State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1997). Judge Pleicones pointed out that one reason to require an indictment is for the benefit of the court and cannot be waived by the defendant.

Allowing the Petitioner's conviction for Lewd Act on a minor to stand adds a new dimension to what is permissible in criminal trials and turns all norms upside down. A trial court's erroneous charge on what is permissible for the jury to convict a defendant of, if not objected to, allows a defendant to be convicted in spite of never being on notice

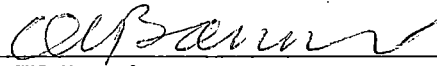
to defend against that charge until the trial is over and never be personally questioned as to his intelligent waiver.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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September 19, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

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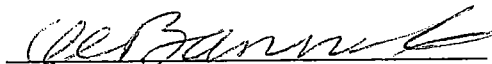
The undersigned certifies that a true copy of the Petition for Writ of Certiorari was this day mailed, postage prepaid, to:

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SC Court of Appeals

Re: **The State vs. Rodney Lee Rogers, Sr.**
Unpublished Opinion No.: 2016-UP-245

Dear Mr. Shearhouse:

Enclosed please find the following:

1. Original and seven (7) copies of the Petition for Writ of Certiorari;
2. Original (unbound) and two copies of the Appendix;
3. Original and one copy of the Proof of Service.

Please return a stamped copy of these documents in the self-addressed, stamped envelope provided.

By copy of this letter and the Proof of Service, I am serving a copy of the Petition for Writ of Certiorari upon the Clerk of the Court of Appeals and counsel of record.

Yours truly,

BANNISTER, WYATT & STALVEY, LLC


O. W. Bannister

OWB/tjc
Enclosures

cc: The Hon. Jenny Abbott Kitchens ✓
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