

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Spartanburg County
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case Tracking No. 2016-001965

The State, Respondent,

vs.

Daniel William Spade Petitioner

REPLY TO RETURN TO PETITION
FOR WRIT OF CERTIORARI

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Questions Presented

Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the State to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question III: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question IV: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the State had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the State did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

Argument

Question I

Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the State to prove Mr. Spade had abused his daughter?

When the State uses a panic attack to prove that the crime of criminal sexual conduct with a minor has occurred, then to properly reply to such a fact, any defendant should be permitted to introduce any panic attack that did not occur in the presence of the defendant. As stated in *State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012) “When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.” The other panic attacks would rebut the allegation of the state that the panic attacks only occurred in the presence of the accused and therefore the panic attacks are evidence of the alleged sexual abuse. Contrary to the argument of the State and the ruling of the trial judge, Mr. Spade never intended to use the panic attacks as evidence of third party guilt. The use of the panic attacks was to simply show they occurred around individuals other than Mr. Spade. For this purpose, they were admissible.

Mrs. Smith discussed observing panic attacks when Mr. Spade was not present both before and after October of 2012. App. at (227), 11 to (228) 117. Her testimony establishes there were panic attacks at times when Mr. Spade was not present. Neither the court below nor the State in its brief ever explained how a panic attack is evidence of third party guilt. Mr. Spade sought to introduce such evidence to simply establish that panic attacks occurred at other times

around other people.

The State contends that after the trial judge's ruling, defense counsel had no complaint about the trial judge's ruling. Return of Resp. at 6. The trial judge only gave him permission to call an expert or cross examine Ms. Loftis, but the trial judge stated he was going to look at that as a back door attempt to bring in third party guilt. App. at (229) , ll 3-6. At no time during the discussion did trial counsel agree to the ruling of the trial judge. After being ruled against, he simply asked about the limits to which he would be able to cross-examine Mrs. Smith and the extent to which he could ask Ms. Loftis questions. App. at (232, ll 2 to (234), l 9. This is not agreeing with the ruling.

The State then engages in a discussion of third party guilt citing *Holmes v. South Carolina*, 547 U.S. 319, 328 (2006) and *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). In his Briefs before the Court of Appeals and at the trial below, Mr. Spade never asserted that he was using a third party guilt defense. He simply wanted to show that the minor child had panic attacks around several other people, including the adoptive father. The evidence was admissible, probative and helpful in the defense of Mr. Spade. Rule 401, South Carolina Rules of Evidence.

Question II

Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

The State has argued "There has been no contention, either at trial or on appeal, that Mr. Brannon actually possessed pertinent information that was required to be turned over to the defense." Return of Resp. at 12. To a point the State is correct. What the State has failed to recognize is that to determine if there is pertinent information, Mr. Spade would be required to

depose either Mr. Brannon or his client and have the client waive the attorney client privilege. If the privilege is not waived then Mr. Spade would never know if such information exists. As noted in the opening Petition for Writ of Certiorari, “Moreover, given the public interest in reserving confidentiality, the court may exercise its inherent power and disqualify the district attorney even if the former client waives his confidentiality.” Eli Wald, *Disqualifying a District Attorney When a Government Witness Was Once the District Attorney’s Client: The Law Between the Courts and the State*, 85 DENV. U. L. REV. 369, 383 (2007). See, also *Young v. United States*, 481 U.S. 787 (1987). The potential for a conflict is so great that having a private attorney who represented the complainant in a related family court matter, is prejudicial as a matter of law. The State further argues “Further, there has been no contention at trial or on appeal that Mr. Brannon, as special prosecutor, failed to actually comply with Brady or Rule 5 obligations.” Return by Resp. At 12. As noted in the Petition for Writ of Certiorari in footnote 4, Mr. Brannon did not understand the wording of the simple order of Judge Hayes and stated to the Court the records requested by defense counsel were not under his control. App. at (269), ll 2-5. This Statement illustrates that Mr. Brannon did not understand the order required him as a special prosecutor to turn over all records of Ms. Loftis, even if they were not under his control. App. at (2).

As noted previously, this Court has been critical of the use of Special Prosecutors in criminal cases. This case affords this Court the opportunity to make a definitive statement prohibiting the use of special prosecutors. If this Court decides that a special prosecutor is proper under some circumstances, then this Court can use this case as an opportunity to establish such parameters. In the event the State elects to use a special prosecutor, this Court should require

that the client of the special prosecutor waive all attorney client privileges on the record before the trial.

Question III

Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

The State first contends, as did the Court of Appeals, that this issue is not preserved. As noted in the Petition for Certiorari, the trial judge specifically ruled on this issue when he began his discussion of the conflict issue by stating “And the other - -“ App. at 122, l 14. Any common sense reading of the English language would lead one to conclude the trial court had in fact ruled upon the first issue.

The State also concludes that the appointment by the governor can be done after the fact. This case is now more than three years old and no such appointment has been made. While Petitioner does agree the appointment by the governor could appoint Mr. Brannon after the solicitor appointed him, logic would dictate such appointment would still have to be done before Mr. Brannon began his duties. This did not happen in this case.

The State also argues that the statute is not applicable because the statute only applies to actual paid assistant solicitors. Nothing in the statute limits its application to paid solicitors. In addition, the salaries of assistant solicitors is covered under S. C. Code § 1-7-406. Thus, the S. C. Code § 1-7-470 also applies to unpaid special prosecutors.

The State further argues that Mr. Spade cannot show prejudice. First this issue is adequately covered in the discussion on Issue II. Second, Mr. Spade would point out that no court should have no problem reversing a conviction if a defendant were prosecuted by a person

who claimed to be a licensed practicing attorney but in fact was not. While obviously that is not the facts in this case, the illustration is applicable on the issue of showing prejudice. An improperly appointed attorney on the issue of prejudice is the equivalent of the unlicensed prosecutor.

Question IV

Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the State had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the State did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

The State argues as an additional sustaining grounds that the notes of Meredith Thompson-Loftis are not discoverable under Rule 5 and therefore as defense counsel was not entitled to the records there can be no error in failing to turn over the records. In the proceeding below defense counsel knew that the records could not be obtained under Rule 5 of the South Carolina Rules of Criminal Procedures. For this precise reason, defense counsel took the extra step of filing a motion to disclose those records in the event the State elected to use Ms. Loftis as a witness. The State did not appeal that pre-trial order. The order of Judge J. Mark Hayes is now the law of the case and the State was required to comply with the order. “[T]he finding below that sub-section (h) does not bar recovery for lack of causal connection, right or wrong, is the law of this case and requires affirmance.” *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970). The fact that the records were not in the possession of the state, as argued in its Return, is simply not relevant to this discussion. Return of Resp. at 23-24. The Order of Judge Hayes required the State to turn over the records regardless of who has

possession of them.¹

The State has argued the order of Judge Hayes did not provide for a remedy. In that respect the State is correct. But few orders ever provide for a specific remedy. Judges have the right to assume the parties will comply with order even without a specific remedy. The State cites *State v. Salisbury*, 330 S.C. 250, 267, 498 S.E.2d 655, 664 (Ct. App. 1998), aff'd as modified, 343 S.C. 520, 541 S.E.2d 247 (2001) for the proposition "Even if the State failed to comply with Salisbury's Rule 5 request, the trial court had discretion to provide a proper remedy." Mr. Spade agrees with this proposition. In this case, the trial court in essence provided no remedy for the late disclosure of the medical records. He only excluded those records disclosed during the testimony of Ms. Loftis.

The State has further argued that Mr. Spade cannot show prejudice. Return of Resp. at 24. There are two types of information that can arise from this type of late disclosure. The first is if the records contain obvious material that can readily be used for impeachment on cross-examination. If the impeachment value is obvious, then any defendant would not be prejudiced by the information as it can be used. In the vast majority of cases, however, a defendant would need to consult an expert to determine the value of the information contained in the reports. In the petition for Writ of Certiorari Mr. Spade points to several comments in the reports that would be something that any prudent lawyer would want to consult with an expert to determine its value. Mr. Spade should not be required to wait until his Post Conviction Relief petition to

¹ Under the same order the State was also required to turn over the computer forensic results. This was not turned over. While the computer records are not involved in this appeal, it was illustrate the attitude the state had toward the compliance with the order of Judge Hayes. App. at 39, 11121 to 43, 19.

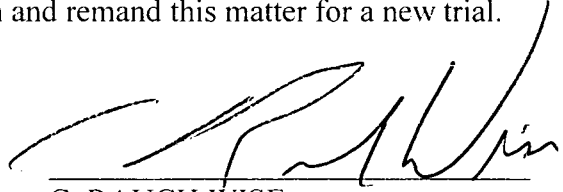
establish prejudice.

As with many cases involving an appeal, the ruling of the trial judge is subject to an abuse of discretion standard. This Court should encourage, and not discourage, trial judges to impose a sanction of the State for violation of Rule 5 and specific discovery orders. To affirm a trial judge who imposed no sanction, simply does not encourage a trial judge to impose sanctions. Judicial economy would dictate that a defendant should have the full opportunity to present his best case at the trial level. To force any defendant to wait until a Post Conviction Relief hearing to establish his prejudice because the trial judge did not abuse his discretion, simply is not efficient. This Court should review this matter and reverse the conviction of Mr. Spade based upon the failure of the State to properly comply with the Order of Judge Haynes. To do otherwise simply sanctions the failure of the State to obey an order.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for writ of Certiorari, correct the legal errors in the Court of Appeals decision and remand this matter for a new trial.

November 11, 2016



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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynam 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 November 11, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Reply Brief in the above case addressed to William M. Blicht, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Traynam

before me this 11 day

of November, 2016.

Mary Jane Harter (L.S.)

Notary Public for South Carolina

My Commission expires: 11/30/22