

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
ADMINISTRATIVE LAW COURT

The Honorable J. Derham Cole

Appellate Case No.: 2016-001633
Case No.: 14-GS-11-01085 and 15-GS-11-00938

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NOV 28 2016
SC Court of Appeals

Dossie Faison, Jr.,

Appellant,

Versus

State of South Carolina,

Appellee.

INITIAL BRIEF



Fletcher N. Smith, Jr.
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Greenville, South Carolina
November 22, 2016

TABLE OF CASES

State v. Williams, 108 S.C. 295, 93 S.E. 1006 (1917)

State v. Sanders, 37 N.C. App. 53, 245 S.E. 2d 397 (N.C. App. 1978)

STATEMENT OF ISSUES

Argument 1

Whether the Court erred in ordering the Appellant to register as a sex offender where the Court failed to make specific findings on the record as to why the Appellant should be given such a status and/or sentence.

Argument 2

The lower court judge erred in not granting a new trial on the basis that there was insufficient corroboration of the alleged victim's assertion to warrant a conviction by the jury of the appellant for the offense of indecent exposure.

Argument 3

Whether the Court Erred in not quashing the indictment on the basis that the statute is void for vagueness and the November 20, 2014 Indictment had been dismissed with prejudice and thus the Defendant was subjected to Double Jeopardy

STATEMENT OF THE CASE

Appellant was indicted on November 14, 2014 by a Cherokee County grand jury for the offense of indecent exposure. Exh, _____. Then on October 1, 2015, the Appellant was again Indicted by a Cherokee County Grand Jury for the same offense and same alleged facts. Exh. _____

Appellants legal counsel filed a Motion to Quash the indictment and also argued that S.C. Code Sec. 16-15-130 is unconstitutionally vague. Tr. p. _____

This case was called to trial on August 2, 2016 and concluded on August 3, 2016 before the Honorable J. Derham Cole. Fletcher Smith, Jr. represented the appellant. Kimberly Laskanic assistant solicitor represented the state.

On August 3, 2016 the appellant was found guilty of the criminal offense of indecent exposure under Indictment 2015-GS-11-938. Trial Trs. 47. Judge Cole sentenced the appellant to 3 years in prison and a payment of a fine of \$3,000.00 provided, however that the sentence would be suspended upon the service of 18 months and a payment of a fine of \$100.00 plus costs and assessments. Trial Trs. 50-51. The balance was to be suspended during the period of probation for 5 years. P. 51 The Court also ordered the defendant to register as a sex offender pursuant to South Carolina Code § 23-3-430. Trial Trs. _____

The appellant's legal counsel requested that the Court not order the appellant to register as a sex offender. Trial Trs. 50

STATEMENT OF FACTS

The appellant Fazon came to be charged with a criminal offense of indecent exposure by Barbara Humphries who stated that Fazon exposed his penis to her at a convenience store. Trial Trs.

The incident occurred around 10:00 p.m. on September 1, 2014 at the Quick Quack convenience store where the alleged victim went to the store to pick up a pack of cigarettes and then go to work. Trial Trs. 52 The alleged victim states that she got out of her car and that the defendant was there and he was talking with another man. Trial Trs. 54 The alleged victim says she walked by the appellant, goes into the store, and makes a purchase. Trial Trs. 50 She states that as she was leaving the store walking back to her car the defendant gets her attention and asks her for a cigarette. Trial Trs. 55 The alleged victim gives the defendant a cigarette but then claims that the defendant exposed his penis to her. Trial Trs. 56 There was a video camera recording the incident but there is no evidence on the video camera showing the defendant exposing his penis to the alleged victim. Trial Trs. 74-89 Nor does the other two men who was supposed to have been talking to the defendant corroborate the alleged victim's statement that she saw the defendant exposing his penis to her. Humphries testimony was completely different than what she told police officers at the time of the incident and the video tape did not corroborate her statements to police. Tr. Trs. 74-89.

Nevertheless the jury found the defendant guilty of indecent exposure. The Court sentenced the defendant to 3 years in prison and a \$3,000.00 fine provided that the defendant serve 18 months and pay \$100.00 fine and that the rest of the sentence would be suspended and that the defendant be placed on probation for 5 years. Trial Trs. 50-51 The Court also did not make any specific finding that the circumstances of the case should warrant that the defendant or appellant in this case should be placed on the sexual registry. Trial Trs. 51 The Court did however repeat the statute but did not make specific findings from the record to indicate as to why the appellant should be on the sexual registry. Trial Trs. 51

After the jury verdict, the Appellant's legal counsel made a motion for a new trial. Tr.

Trs. 52

Appellant appeals.

Argument 1

The Court erred in ordering the Appellant to register as a sex offender where the Court failed to make specific findings on the record as to why the Appellant should be given such a status and/or sentence.

Defense counsel objected to Fazon being placed on the sexual registry. The state on the other hand saw it that the defendant be ordered to be placed on the sexual registry.

The Court after considering argument of counsel stated "I find based upon the circumstances of the case that defendant should be required to register pursuant to 23-3-430 on the sex offender registry."

The appellant asserts that this pronouncement by the Court is not sufficient finding to warrant Fazon being placed on the sexual registry. It is unclear whether the Court actually ordered the defendant to be on the sexual registry after making this pronouncement except to say

Argument 2

The lower court judge erred in not granting a new trial on the basis that there was insufficient corroboration of the alleged victim's assertion to warrant a conviction by the jury of the appellant for the offense of indecent exposure.

In the case before the bar, neither the video camera nor the man who was at the scene corroborated the alleged victim's statement that Fazon actually exposed his penis to her. Fazon did not testify and corroborate this lady's statement. The video of the parking lot also is devoid of any indication that Fazon committed such an act.

The state relied on the video that the video does not corroborate Ms. Humphrey's position nor the state's argument.74-86.88

Since there is a lack of corroboration for the victim's statement, the Court should order a new trial and/or reverse the conviction of the defendant.

Argument

3

The Court Erred in not quashing the indictment on the basis that the statute is void for vagueness and the November 20, 2014 Indictment had been dismissed with prejudice and thus the Defendant was subjected to Double Jeopardy

It is clear, that the State indicted the Appellant twice for the same offense with only difference being that the state claims that the criminal offense occurred on different dates.

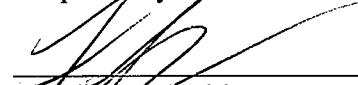
If the state dismissed the first indictment of November 20, 2014, then it could not prosecute the defendant on the second indictment alleging the same facts. The Motion to Quash the Indictment was made before the Jury was sworn and thus it was preserved for review. **State v. Howell**, 220 S.C. 178 (1951). Consequently, the indictment should have been quashed and the case dismissed.

Additionally, the indictment should have been quashed because the statute does not define what a private part is nor does it seem to indicate that the courts can second guess the legislature on this issue. The legislature having failed to adequately define a principal part of the statute renders the court without authority to second guess the legislature. Since private parts in not adequately defined in the statute the indictment should have been quashed as being void for vagueness. **State v. Sanders**, 37 N.C. 53, 245 S.E. 2d 397 (N.C. App. 1978).

CONCLUSION

For the foregoing reason this criminal case should be reversed.

Respectfully Submitted



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APPEAL FROM CHEROKEE COUNTY
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CERTIFICATE OF SERVICE

I, Fletcher N. Smith, Jr., hereby certify that I have this 22 day of November, 2016, served a copy of the herein below listed document(s) to the addressees listed below by via facsimile and by depositing a copy of same in the United States Postal System postage prepaid, and mailing same to:

Initial Brief
Designation of Matter

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Dear Ms. Abbott Kitchings:

Please find enclosed one original and two (2) copies of Initial Brief of Appellant and Designation of Matter in the above referenced case.

Feel free to contact me with any questions regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Fletcher N. Smith, Jr.".

Fletcher N. Smith, Jr.
FNS/lm

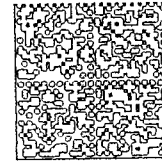
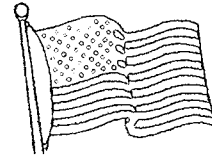
Enclosure(s)

cc: J. Benjamin Aplin, Esquire
Senior Assistant Deputy Attorney General

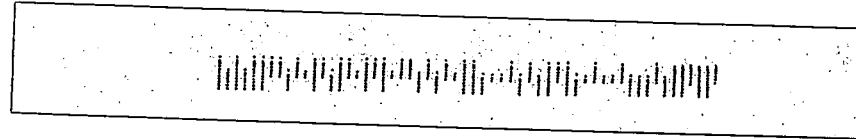
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