

RECORDED ORIGINAL

DEC 19 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL MAURICE FRASIER,

APPELLANT

APPELLATE CASE NO. 2016-000607

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

Donnelly v. DeChrisoforo, 416 U.S. 637 (1974)..... 5

Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) 6

Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007) 5

State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001)..... 6

State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) 4, 5

State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) 6

Statutes

S.C. Code Ann § 23-3-430 (Supp. 2000)..... 3

S.C. Code Ann. § 23-3-470 (Supp. 2010)..... 3

S.C. Code Ann. § 23-30-400 (Supp 2000)..... 5

Rules

Rule 404(a) SCRE 6

Constitutional Provisions

U.S. Const. art. 1 § 3..... 6

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to rule properly on appellant's objection to the solicitor's mischaracterization of him and the conscience of the community remarks made during closing arguments.

STATEMENT OF THE CASE

Appellant Daniel Maurice Frasier was convicted of failure to register as a sex offender per jury trial held during the March 2016 term of the Charleston County General Sessions Court before Judge William P. Keesley. Appellant was sentenced to imprisonment for a period of 366 days. William Ted Smith represented appellant at trial, and Assistant Solicitors Lauren Frierson and Edward R. Corvey appeared on behalf of the state.

Appellant appealed. This brief follows.

ARGUMENT

The trial judge erred in failing to rule properly on appellant's objection to the solicitor's mischaracterization of him and the conscience of the community remarks made during closing arguments.

Appellant pled guilty to lewd act on a child under fourteen on October 17, 1985. R. 62, l. 1 – 8. Therefore, appellant was required to register on the sex offender registry four times a year as a tier III offender. See. S.C. Code Ann § 23-3-430 (Supp. 2000). R. 64, l. 7 – 18. Appellant's last date of registration was on January 7, 2015, and his next date to register was scheduled to occur in April 2015. R. 39, l. 14 – R. 41, l. 16. Appellant did not register as required in April 2015 and as a result, a warrant for his arrest was issued in May 2015 for violating S.C. Code Ann. § 23-3-470 (Supp. 2010). R. 49, l. 19 – R. 50, l. 9.

During closing arguments, the solicitor made the following remarks:

Solicitor: Thank you [jurors] for bearing with us...I appreciate it, [the assistant solicitor] appreciated it and your community appreciates it. R. 82, l. 1 – 5.

Solicitor: We talk about community because that's exactly what the sex offender registry is designed for. The legislature did that the protection of the community...It's designed to ensure that we're keeping tabs on a subsection of people who have been shown and deemed by the legislature to be a high risk degree offender. R. 82, l. 10 – 18.

Defense Counsel: Objection Your Honor.

Trial Judge: Yes, sir.

Defense Counsel: Facts not in evidence.

Trial Judge: Disregard the last statement, ladies and gentlemen. R. 82, lines 19 – 23.

Solicitor: And so as I was saying, the registry acts as a protection for our community. R. 82, lines 24 – 25.

The solicitor's argument addressing the sex offender registry as a community protection vehicle sanctioned by the legislature was clear a plea for the jury to enlist themselves along with the legislators as community protectors who must as jurors assist in safeguarding the community by convicting appellant of failing to register as a sex offender. This meant that the jury verdict of guilty as charged leaned more on legislative/community values rather than on the evidence presented at trial. Hence, the prejudice against appellant's defense.

A prosecutor may not urge jurors to convict a defendant in order to protect community values, preserve order, or deter future law breaking. State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999). As a rule, a prosecutor may appeal to the jury to do their full duty, but may not appeal to the personal biases or passions or prejudices of the jury. State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999). For example, in the drug case of Liberte, the solicitor in effect equated the reasonable doubt instruction as a trick to acquit the defendant of drug charges and an attack on police who were trying to "keep drugs off our streets." The Liberte court reversed and held that:

In our view, the argument was calculated to appeal to the jury's passions and prejudices by playing on the jury's fear of the impact of drugs on our society. The argument invited the jury to convict the Defendants, even if the evidence did not prove their guilt beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs. Such an appeal is clearly improper.

Although the argument in appellant's case was not calculated to appeal to the jury's passions and prejudices regarding drugs as in Liberte; nonetheless, the prejudice arose in reference to another fearful topic via the solicitor's comments designed to raise the passions of the jury by igniting

people's prejudices against sex offenders who harm children. The closing argument in the present case was so improper that a new trial was warranted. A new trial will be granted if the prosecutor's comments so infected the trial with enough unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChrisoforo, 416 U.S. 637 (1974). Here, as in Liberte, the conscience of the community comments suggested that the jurors disregard their duty to find whether the state established proof of appellant's guilt beyond a reasonable doubt and convict him based on community values.

Also, the solicitor's mischaracterization of petitioner as a high risk degree sex offender was factually incorrect and not based on any evidentiary basis presented at trial, and thus prejudicial as well. Although the language of the sex offender registry act under S.C. Code Ann. §23-30-400 (Supp 2000) is stated as "promot[ing] the state's fundamental right to provide for the public health, welfare, and safety of its citizens [as] sex offenders often pose a high risk of reoffending;" here, there was no proof offered showing that appellant displayed characteristics or behaviors indicating that he was a high risk degree sex offender. As a rule, a solicitor's closing argument must be confined to the evidence or testimony in the record and its reasonable inferences. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007). Thus, there was no evidentiary basis in support of the solicitor's assertion at closing that appellant was a high risk degree sex offender. The only issue before the jury was whether appellant failed to register as a sex offender during the time period that he was required to do so.

Not only was there no evidence or testimony to support the solicitor's portrayal of appellant as a "high risk degree [sex] offender," but in addition, these comments constituted error because the same amounted to an improper mischaracterization of appellant. As a rule, the state cannot attack the character of the defendant unless he first places his character in issue. Mitchell v. State, 298 S.C.

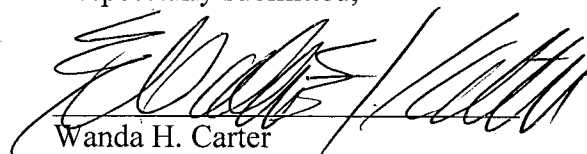
186, 379 S.,E.2d 123 (1989). Appellant did not testify at trial. The high risk sex offender label assigned to appellant by the solicitor at closing was a bad character designation that prejudiced appellant's defense. Character evidence is not admissible to prove the accused possesses a criminal character or has the propensity to commit the crime with which he is charged. State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998); State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). See also Rule 404(a) SCRE.

The solicitor's closing comments at issue did not constitute harmless error because the impact was not minimal (see State v. Brown, supra), and the same certainly contributed to the jury verdict in the case. The trial judge denied counsel's renewed objections to these matters at the close of the state's case and at the close of the case. R. 64, lines 1 – 6; R. 68, lines 10 – 17; TR. 105, l. 9 – 15. The solicitor's comments denied appellant of his right to a fair trial trial in violation of the Fourteenth Amendment to the United States Constitution and article 1, section 3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, counsel for appellant requests that appellant's conviction be reversed and his case remanded to the lower court for a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

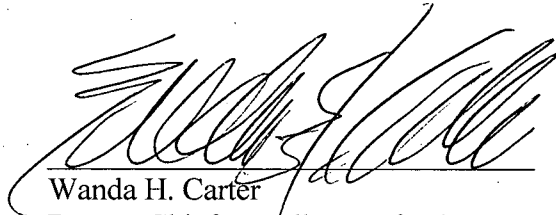
ATTORNEY FOR APPELLANT

This 19th day of December, 2016.

CERTIFICATE OF COUNSELPRIVATE

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

December 19, 2016



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