

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAR 02 2016

SC Court of Appeals

Appeal from Pickens County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VERNON GLEN EVANS,

APPELLANT

APPELLATE CASE NO. 2014-002747

BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases

<u>Anders v. California</u> , 386 U.S. 738 (1967).....	4
<u>State v. Baker</u> , 411 S.C. 583, 769 S.E.2d 860 (2015)	7,8

Statutes

SC Ann16-3-655(A)(1).....	5
---------------------------	---

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by refusing to quash the indictment because it was overbroad?

STATEMENT OF THE CASE

Appellant was convicted of criminal sexual conduct with a minor in the first degree after a jury trial held before the Honorable Clifton Newman in Pickens County on December 16-18, 2014. A thirty (30) year sentence was imposed. Teal Johnson, Esquire was trial counsel. Sam Tooker, Esquire was the assistant solicitor.

On June 4, 2015, a brief was submitted pursuant to Anders v. California, 386 U.S. 738 (1967). On February 16, 2016, this court issued an order directing the parties to brief the following issue:

Whether the trial court erred by refusing to quash the indictment because it was overbroad.

This brief follows.

ARGUMENT

The trial court erred by refusing to quash the indictment because it was overbroad.

The indictment charging appellant with criminal sexual conduct with a minor in the first degree reads as follows:

That VERNON GLEN EVANS did in Pickens County, between the dates of August 4th, 2007 and August 4th, 2011, while entrusted by the Victim's parents to babysit the Victim, commit a sexual battery on S.B., a minor child, who was less than eleven years of age at the time. This is in violation of §16-3-655(A)(1) [formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended.

The indictment was true billed on November 12, 2014. Trial began on December 16, 2014.

Prior to the swearing of the jury defense counsel moved to quash the indictment based on the over-broad four year time frame set forth in the indictment which gave appellant no opportunity to present any kind of alibi defense or any kind of defense for that matter. (Tr. p.65, l.18 – p.66, l. 3).

The following discussion occurred between the court, defense counsel, and the solicitor:

THE COURT: Assuming that you were successful in this motion to quash the indictment prior to the jury being sworn in a case, what would be the effect of that?

MS. JOHNSON: I guess they would re-indict my client, Your Honor. But instead of dealing with this nebulous time frame, I would have a more specific date with which to contend. And you know, my client is just - - I feel like he's being deprived of a due process violation in order to properly defend against these allegations and to prepare a defense.

THE COURT: All right. Solicitor, what do you say?

MR. TOOKER: Yes, sir, Your Honor. And Ms. Johnson stole the words right out of my mouth. Time is not an essential element in the offense. I can appreciate her argument and actually anticipated that. I don't know if Your Honor has a copy of the indictment in front of him.

THE COURT: Looking at it. Yes, sir.

MR. TOOKER: So the language that I included in the indictment because - - as I say, the reason for the broad time frame is the victim has a difficult time testifying to exactly when this stuff happened. She has a hard time remembering. They move around a lot. She's in a lot of different schools. And so because of that, I went with a very broad time frame. The thing that she was certain about was that she was always at his house when he would babysit her. That's where it always happened. So I put it during this time frame. And while entrusted by the victim's parents to babysit the victim so that we could afford the defendant that information in anticipation and preparation of his defense. I can certainly appreciate the argument. And again, that's the reason for the language that I utilized.

But ultimately, in a case like this, I mean it's very seldom that there are allegations that on January 21st, 2010, this thing happened to this person at this place. By and large, it's when I was seven, eight or nine these things were happening to me.

And so because of the issues regarding memory and regarding the victim's ability to recount the kind of things that have happened to her in a case like this, the state chose to indict with a broad time frame with more specific factual circumstances, thinking that that kind of killed two birds with one stone. So that's sort of my underlying reasoning for the indictment language. I think ultimately the defendant has not been prejudiced anymore than if I had done between August 4th, 2007 - - and these dates, August 4th, that's her birthday; so August 4th, 2007 to August 4th, 2011, between seven and eleven, she often - - well, there are just some inconsistencies with the ages that she gives. And so because of those inconsistencies, I went with that broad a time frame so as to include the different times she talked about.

Ultimately I think that's something that probably benefits the defense because those inconsistencies are things the defense can argue are reasons to doubt. However, I don't think they are reasons to quash an indictment.

So for those reasons I would respectfully oppose Ms. Johnson's request.

THE COURT: With regard to an allegation regarding the sufficiency of an indictment, 17-19-20 of the code says, every indictment shall be deemed and judged sufficient and

good in law which in addition to allegations as to time and place as required by law, charges the crime substantially in the language of the common law of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. And if the offense be a statutory offense, that the offense be alleged to be contrary to the statute as such case may have provided.

And this indictment, with regard to referring to the question as to time and place and the objection as to the time, the indictment is clear as to the place and in violation of 16-3-655 (a) (1) and it is plainly written to inform the defendant of the nature of the offense charged such that he can present any defense that he might have to it.

State v. Wilkes says that indictment should be deemed sufficient if it charges the crime substantially in the nature of the common law or the statute prohibiting it and the nature of the offense can be easily understood. And where you have an offense involving allegations of criminal sexual conduct with a minor, it's not at all unusual that the - - and you have an incidence of delayed reporting, it's not at all unusual to have the time alleged to be within a time frame of offenses or four year time frame is just too wide a scope of time. It's bracketed by birthdays on the 4th, did you say?

MR. TOOKER: August 4th is her birthday, yes, sir.

THE COURT: August 4th, 2007 and a four-year period. I think given the nature of the allegations where it certainly would be better for the time period to be more limited, I don't think it runs afoul with the statutory requirements for the indictment. And I respectfully deny your motion.

(Tr. p. 66, l. 4 – p. 70, l. 1).

The trial court erred in refusing to quash the indictment. In State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015) the Supreme Court of South Carolina held that new indictments notifying a defendant of charges of lewd act upon a minor and criminal sexual conduct with a minor which occurred at an unspecified time over six years in time were unconstitutionally overbroad and vague. The indictments violated the defendant's due process rights because they lacked specificity as to when the charged acts occurred and the defendant was taken by surprise and strictly limited to his

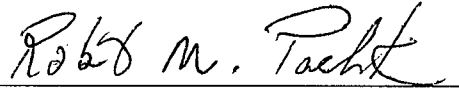
ability to fight the charges against him. The State's belated presentation of the new indictments only gave the defendant two weeks to research what was alleged to have occurred over a six-year period.

Appellant in this case was faced with the same obstacles as the defendant in State v. Baker. The alleged charge against him covered a four-year time period. How could appellant provide a decent alibi or any defense when four years were involved and no specific day is alleged? In addition, he was not indicted until a month before his trial giving him just that short period to research four years of his life.

CONCLUSION

The indictment should have been quashed and appellant's conviction should be reversed.

Respectfully submitted,

A handwritten signature in black ink, reading "Robert M. Pachak". The signature is written in a cursive style with a horizontal line underneath it.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Clifton Newman, Circuit Court Judge

RECEIVED

MAR 02 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

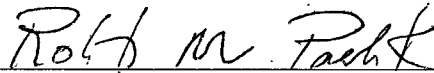
VERNON GLEN EVANS,

APPELLANT

APPELLATE CASE NO. 2014-002747

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant and Designation of Matter in the above referenced case has been served upon Benjamin J. Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of March, 2016.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.