STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Brooks P. Goldsmith, Circuit Court Judge

WAYNE WELLS, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000887

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when, during jury deliberations in this trial for criminal sexual conduct with a minor second degree, the jury asked if it mattered if the defendant truly believed the victim was eighteen years of age and is ignorance of her age an excuse and the judge answered that it did not matter if the defendant truly believed the victim was over eighteen years of age and ignorance of her age is no excuse?

STATEMENT

In October of 2010, the Sumter County Grand Jury indicted Petitioner Wells for criminal sexual conduct with a minor second degree, indictment #2010-GS-43-0337. On November 8, 2010, Petitioner proceeded to jury trial before the Honorable William J. Young. Calvin Hastie represented Petitioner at trial. Marvin Spratlin prosecuted the case. The jury returned a verdict of guilty and Judge Young sentenced petitioner to twenty (20) years in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the direct appeal after review pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). State v. Wells, Op. No. 2012-UP-621 (Ct. App. filed November 21, 2012).

On April 18, 2013, Petitioner filed an application for post-conviction relief [PCR]. 2013-CP-43-675. The State filed a return on June 13, 2013. On May 29, 2014, an evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. Casey Cornwell represented Petitioner at the hearing. Daniel F. Gourley represented the State. In a written order signed July 7, 2014, Judge Cothran denied relief and dismissed the application. Petitioner filed a timely *pro se* notice of intent to appeal. This Court dismissed the appeal on October 29, 2014, for failure to order the transcript of the evidentiary hearing.

On April 21, 2015, Petitioner filed a second application for post-conviction relief. 2015-CP-43-1008. The State filed a return and motion to dismiss on February 2, 2016. On March 18, 2016, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Timothy L. Griffith represented Petitioner at the hearing. Daniel F. Gourley represented the State. In an order signed March 30, 2016, Judge Goldsmith granted a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 91991). On April 26, 2016, petitioner served a timely notice

of intent to appeal. This petition for writ of certiorari pursuant to Austin and a separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object when, during jury deliberations in this trial for criminal sexual conduct with a minor second degree, the jury asked if it mattered if the defendant truly believed the victim was eighteen years of age and is ignorance of her age an excuse and the judge answered that it did not matter if the defendant truly believed the victim was over eighteen years of age and ignorance is no excuse.

The jury found Petitioner guilty of criminal sexual conduct with a fifteen year old girl. Petitioner was twenty-five years old. (App. p. 47, lines 2-7). Petitioner testified that the girl told him that she was eighteen years of age. (App. p. 145, lines 1-14). The girl admitted that she initially told Petitioner that she was eighteen years of age. (App. p. 39, lines 6-9). Petitioner denied having sexual intercourse with the girl but admitted to digital penetration. (App. p. 162, lines 1-18). The girl admitted that she called Petitioner and invited him to come to her house. (App. p. 58, lines 7-24). In closing argument the prosecutor conceded that the girl was a willing participant. (App. p. 189, lines 3-4). The responding officer noted the relationship beween Petitioner and the girl as boyfriend/girlfriend. (App. p. 120, line 13 – p. 121, lines 1-5; p. 123, line 15 – p. 124, lines 1-6).

During jury deliberations the judge read aloud the following questions from the jury: "Have two questions. If, if the defendant truly believed the victim was 18, does that matter and/or is ignorance of her age no excuse?" (App. p. 198, lines 11-13). The judge responded, "The correct answer that I'm going to write on here is if the defendant truly believed the defendant[1] was over 18 does that matter, the answer is no, and ignorance is no excuse." (App. p. 198, lines 14-17). When asked if there were any objections, counsel for Petitioner responded, "None." (App. p. 198, lines 20-21).

[1] It appears this should be victim.

During the PCR hearing trial counsel testified that Petitioner wanted to assert the defense of mistaken age. (App. p. 267, lines 6-8). Trial counsel testified that he advised Petitioner that mistaken age was not a defense. (App. p. 267, lines 9-13). According to trial counsel, Petitioner wanted "to tell his side of the story." (App. p. 268, lines 1-4). Trial counsel admitted that he did not object to the judge's answer to the jury's question and explained, "No, I had no objection to it because the judge was stating what the law was." (App. p. 270, lines 4-9).

In the order of dismissal the PCR judge wrote, "This Court finds Applicant's allegation that Counsel was ineffective for failing to object to the trial judge's answer to the jury's question to be without merit." (App. p. 284). The PCR judge wrote, "Counsel stated he did not object to the judge's answer to the jury's question because the judges [sic] answer was not objectionable. Trial counsel concluded that the judge properly answered the question that ignorance is no excuse in regards to Victim's age." (App. p. 284). The PCR judge erred.

Consent is not a defense to a charge of criminal sexual conduct with a minor. State v. Whitener, 228 S.C. 244, 274, 89 S.E.2d 701, 716 (1955). A minor, as a matter of law, is incapable of consent. Id. While the prosecution does not have to prove a lack of consent in a criminal sexual conduct with a minor second degree case, the prosecution must still prove the mental element of the offense. A mistake of fact in regard to age negates the mental element required for criminal sexual conduct with a minor second degree. Contrary to trial counsel's assertion, criminal sexual conduct with a minor second degree requires a mental element or mens rea and is **not** a strict liability offense.

In State v. Kelsey, 331 S.C. 50, 77–78, 502 S.E.2d 63, 77 (1998) the South Carolina Supreme Court wrote:

> A mistake of fact which negates the existence of the mental element of the offense, will preclude conviction. 21 Am.Jur.2d *Criminal Law,* § 141 at 276

(1981); William Shepard McAninch, Criminal Law of South Carolina, 542 (1996). If the particular offense is a general intent crime, the mistake of fact must be reasonable. See State v. Dizon, 47 Haw. 444, 390 P.2d 759 (1964) (the mistake must not be due to the negligence or carelessness of the defendant). Moreover, a trial court is not required to give an instruction on mistake of fact unless and until the defendant introduces some evidence, direct or circumstantial, of a reasonable basis for having made the mistake. United States v. Norquay, 987 F.2d 475 (8th Cir.1993).

S.C. Code §16-3-655(B)(2) provides:

A person is guilty of criminal sexual conduct with a minor in the second degree if:

the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

The statute does not provide the mens rea required for criminal sexual conduct with a minor second degree. In State v. Jefferies, 316 S.C. 13, 17–18, 446 S.E.2d 427, 429–30 (1994) the South Carolina Supreme Court wrote:

"Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." United States v. Bailey, 444 U.S. 394, 403, 100 S.Ct. 624, 631, 62 L.Ed.2d 575, 586 (1980). "Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and] an evil doing hand,' " *Id.* at 402, 100 S.Ct. at 631, 62 L.Ed.2d at 586; although this Court has recognized that the legislature may declare an act criminal regardless of the mental state of the actor. State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990); State v. Manos, 179 S.C. 45, 183 S.E. 582 (1936). Thus, we must determine what, if any, *mens rea* is required for the crime of kidnapping.

The required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence. Bailey, 444 U.S. at 404, 100 S.Ct. at 631, 62 L.Ed.2d at 586–87. "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion." *Id.* at 403, 100 S.Ct. at 631, 62 L.Ed.2d at 586. Thus, the commentators and Model Penal Code have

rejected the traditional dichotomy in favor of the hierarchical approach. See W. LaFave & A. Scott, *Handbook on Criminal Law* § 28 (1972).

Criminal statutes are presumed to require a mens rea. In Staples v. United States, 511 U.S. 600, 605–06, 114 S. Ct. 1793, 1797, 128 L. Ed. 2d 608 (1994) the United States Supreme Court wrote:

> Indeed, we have noted that the common-law rule requiring *mens rea* has been "followed in regard to statutory crimes even where the statutory definition did not in terms include it." Balint, supra, at 251–252, 42 S.Ct., at 302. Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored, Liparota, *supra,* at 426, 105 S.Ct., at 2088, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime. Cf. United States Gypsum, supra, at 438, 98 S.Ct., at 2874; Morissette, supra, at 263, 72 S.Ct., at 249–250.

In Dean v. United States, 556 U.S. 568, 580, 129 S. Ct. 1849, 1858, 173 L. Ed. 2d 785 (2009) the Court wrote:

> Consistent with the common-law tradition, the requirement of *mens rea* has long been the rule of our criminal jurisprudence. See United States v. United States Gypsum Co., 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). The concept of crime as a "concurrence of an evil-meaning mind with an evil-doing hand ... took deep and early root in American soil." Morissette v. United States, 342 U.S. 246, 251–252, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Legislating against that backdrop, States often omitted intent elements when codifying the criminal law, and "courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." Id., at 252, 72 S.Ct. 240. Similarly, absent a clear statement by Congress that it intended to create a strict-liability offense, a *mens rea* requirement has generally been presumed in federal statutes. See id., at 273, 72 S.Ct. 240; Staples v. United States, 511 U.S. 600, 605–606, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). With only a few narrowly delineated exceptions for such crimes as statutory rape and public welfare offenses, the presumption remains the rule today. See Morissette, 342 U.S., at 251–254, and n. 8, 72 S.Ct. 240; see also Staples, 511 U.S., at 606–607, 114 S.Ct. 1793 (discussing United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922)).

While the Court in Dean noted that the offense of statutory rape is a narrowly delineated exception to the presumption of a mens rea requirement, the Model Penal Code § 213.6 creates

strict liability only in cases involving a child of ten years of age or younger providing, "Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age."

In the present case, the legislature has not made a clear statement that it intended for criminal sexual conduct with a minor second degree pursuant to S.C. Code §16-3-655(B)(2) involving a fifteen year old to be a strict liability offense. As provided by the Model penal Code, offenses involving a fifteen year old should not be strict liability offenses. The jury in the present case, as finders of fact, should have been allowed to decide if Petitioner proved, by a preponderance of the evidence, that he reasonably believed that the girl was eighteen years of age, as she told him. The trial judge's instruction to the jury that that it did not matter if the defendant truly believed the victim was over eighteen years of age and ignorance is no excuse was error. Trial counsel was ineffective in failing to object to the prejudicial instruction.

In People v. Hernandez, 61 Cal. 2d 529, 530, 393 P.2d 673, 674 (1964) the jury found the defendant guilty of statutory rape. The defendant appealed arguing that the trial court erred in refusing to permit the defendant to present evidence showing that he had a good faith reasonable belief that the prosecutrix was eighteen years of age or more. The court in Hernandez addressed knowledge of age as it applies to the question of intent and reversed finding that the offer of proof of the defendant's reasonable belief that the prosecutrix had reached the age of consent demonstrated a sufficient basis upon which the jury, as the trier of fact, could find in defendant's favor.

In Jenkins v. State, 110 Nev. 865, 873, 877 P.2d 1063, 1068 (1994), dissenting Justice Springer joined by Justice Rose, wrote:

> The California Supreme Court recognized the defense of reasonable mistake for this kind of offense in People v. Hernandez, 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673 (1964). The Majority is correct, however, in saying that the weight of authority is against allowing a reasonable mistake defense; and I must admit that many state supreme courts chant ritualistic platitudes about protecting young females and about these kinds of defendants' acting at their peril. Many other courts, however, have refused to retain this archaic rationale. State v. Guest, 583 P.2d 836 (Alaska 1978); People v. Plewka, 27 Ill.App.3d 553, 327 N.E.2d 457 (1975); Powe v. State, 389 N.W.2d 215 (Minn.Ct.App.1986); Perez v. State, 111 N.M. 160, 803 P.2d 249 (1990); State v. Elton, 680 P.2d 727 (Utah 1984)[2]; *see also* Model Penal Code § 213.6, cmt. 2 (noting that at least sixteen states allow the defense by statute); Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape,* 64 Mich.L.Rev. 105 (1965).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Trial counsel was ineffective in failing to object to the judge's erroneous instruction to the jury that it did not matter if the defendant truly believed the victim was over eighteen years of age and ignorance is no excuse. There is a reasonable probability that, but for counsel's error,

---

[2] Perez and Elton have been superseded by statute.

the results of the proceedings would have been different. In opening statement trial counsel told the jury that the prosecuting witness told Petitioner that she was eighteen years of age. (App. p. 32, lines 5-10). Trial counsel again discussed the mistake of age issue in closing argument. (App. p. 178, lines 2-8). The prosecutor admitted in closing argument that the sex was consensual. (App. p. 179, lines 17-18). The defense was based on mistake of age. The jury, however, was given erroneous instruction in regard to mistake of age.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of February, 2017.

RECEIVED

FEB 13 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Brooks P. Goldsmith, Circuit Court Judge

WAYNE WELLS, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Wayne Wells, Jr., #314139, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 13th day of February, 2017.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 13th day of February, 2017.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026