

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

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SC Court of Appeals

RESPONDENT,

v.

MICHAEL GENTILE,

PETITIONER

APPELLATE CASE NO. 2015-01370

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

Opinion No. 2017-UP-108

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Michael Gentile petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the fact that the State failed to establish what circumstances of the case warranted the expanded time frame alleged in the indictment and failed to show that the time span alleged in the indictment was narrowed as much as possible.

Petitioner was initially indicted for criminal sexual conduct with a minor first degree on or about January 1, 2009, indictment #2012-GS-18-1480. (First CSC w/ Minor indictment, R. p. 203). On June 4, 2015, eleven days before trial, Petitioner was indicted for lewd act upon a child under

sixteen between January 1, 2010, and September 1, 2012, indictment #2015-GS-18-0598. (Lewd Act Indictment, R. p. 199). Additionally on June 4, 2015, eleven days before trial, the State amended the original criminal sexual conduct with a minor first degree indictment to expand the time frame from on or about January 1, 2009, to between January 1, 2010, and September 1, 2012. (Second CSCw/ Minor indictment, R. p. 201).

Prior to trial Petitioner, relying on State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), moved to quash both the lewd act indictment and the criminal sexual conduct with a minor first degree with the expanded time frame as unconstitutionally overbroad and vague in violation of Petitioner's state and federal constitutional right to due process of law. (June 15, 2015, R. pp. 15-20). Petitioner argued, "What I'm saying is that no amount of time is enough to prepare two years and nine months to determine whether he had an alibi defense. Mr. Gentile is a truck driver. He's on the road for long periods of time. If, as in the first indictment, there was a one day or two day or a week or some sort of narrowed framed, it – it might be that he would have an alibi in this case. But due to the length of the timeframe in the indictment itself, he's essentially stripped of that defense, Your Honor." (June 15, 2015, R. p. 17, lines 11-20).

The trial judge denied the motion to quash ruling:

Based upon the case law, it – and certainly the Court does not find that it's an overly broad time period. The indictments in this case do give the defendant sufficient certainty and particularity – it apprises him of the elements of the offense to be charged, and gives him the opportunity to – to review that time period. And, basically, he's called to know what he's called upon to answer and may plead accordingly. And it certainly, based upon the review of the actual indictments, it – the offenses are stated with sufficient particularity to enable the court to know which judgment to pronounce, so the Court is – your motion is denied.

(R. p. 19, lines 10-23). Petitioner additionally argued that the time frame was such that he could not protect himself from further prosecution from other allegations that could later be raised during the same time frame. (R. p. 20, lines 3-14). The judge again denied the motion to quash.

(R. p. 20, lines 21-24). The jury returned a verdict of not guilty for criminal sexual conduct with a minor first degree but guilty of lewd act. The trial judge erred in refusing to quash the new indictments as the expanded, non-specific time frame was unconstitutionally overbroad because it lacked specificity as to when the alleged acts occurred and the State failed to show circumstances warranting the expanded time frame. Additionally, the State failed to demonstrate that the time span in the indictments was narrowed as much as possible.

In Baker the South Carolina Supreme Court relied on language from State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) in addressing the sufficiency of an indictment writing:

If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court is charged with: determining whether (1) *the offense is stated with sufficient certainty and particularity* to enable the court to know what judgment to pronounce, and *the defendant to know what he is called upon to answer and whether he may plead an acquittal* or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500 (emphasis added). “In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances.” State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct.App.2007). In doing so, “one is to look at the ‘surrounding circumstances’ that existed pre-trial, in order to determine whether a given defendant has been ‘prejudiced,’ i.e., taken by surprise and hence unable to combat the charges against him.” State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

State v. Baker, 411 S.C. 583, 589, 769 S.E.2d 860, 863-64 (2015), reh'g denied (Apr. 9, 2015).

In Baker the Court found that prejudice resulted from the unconstitutionally overbroad indictments writing, “Examining the indictments in the instant case in view of all the surrounding circumstances, we find Baker was prejudiced as he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges against him. Simply stated, there was no way for Baker to know “whether he [could] plead an acquittal.” Gentry, 363 S.C. at 103, 610 S.E.2d at 500.” 411 S.C. at 590, 769 S.E.2d at 864. As in Baker, Petitioner in the present case had no way of knowing whether he could plead an acquittal based on the expanded

non-specific time frame alleged in the indictment for lewd act. While counsel for Petitioner was notified that the State intended to seek an expanded time frame, (R. p. 17, lines 5-10), Petitioner was undoubtedly taken by surprise when the expanded time frame was sought over two years after the original indictment providing a specific date.

While the time frame alleged in the indictment in Baker involved an expanded unspecified six year time period and the time frame alleged in the indictment in the present case involved an expanded unspecified over two year time period, the new expanded time frame indictments in both cases were sought very close to the time of trial. In Baker the expanded indictment was sought two weeks prior to trial and in the present case the expanded indictment was sought eleven days prior to trial. The State failed to establish special circumstances to justify the expanded time frame.

In affirming Petitioner's conviction this Court wrote:

Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007) ("The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); id. ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support."); id. at 98-99, 654 S.E.2d at 853-54 (explaining the court uses a two-prong test to determine whether the period alleged in the indictment provides sufficient notice to a defendant: "(1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury."); id. at 101, 654 S.E.2d at 855 ("Time is not a material element of . . . committing a lewd act on a minor."); id. at 101-02, 654 S.E.2d at 855 ("[I]ndictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame."); id. at 102, 654 S.E.2d at 855 ("The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse."); State v. Wade, 306 S.C. 79, 82-83, 409 S.E.2d 780, 781-82 (1991) (refusing to adopt a per se rule that a two year time period in an indictment was unconstitutionally overbroad).

In Tumbleston this Court noted that an indictment for a sex crime during a specified time period is sufficient **when the circumstances of the case warrant considering an extended time frame**. The Court in Wade noted, “In this case, **the indictment time span was narrowed as much as possible under the circumstances.**” 306 S.C. at 84, 409 S.E.2d at 783 (1991)(emphasis added). In the present case the State failed to present circumstances warranting the expanded time frame as were presented in Tumbleston. In the present case the State failed to narrow the time span as much as possible as in Wade. Expanded time frames should be the exception instead of the norm and should be justified by special circumstances. The State failed to demonstrate special circumstances to justify the expanded time frame in the present case.

As persuasive authority, in Georgia a defendant can file a special demurrer and ask that the indictment be quashed as imperfect when the indictment fails to allege a specific date. State v. Layman, 279 Ga. 340, 341, 613 S.E.2d 639 (2005). The Georgia Appellate Courts recognize an exception to this rule when the State can demonstrate that it is unable to identify a specific date. In Watkins v. State, 336 Ga. App. 145, 147–48, 784 S.E.2d 11, 14–15 (2016), the Georgia Court of Appeals wrote:

Generally, an indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer. However, where the State can show that the evidence does not permit it to allege a specific date on which the offense occurred, the State is permitted to allege that the crime occurred between two particular dates. O'Rourke v. State, 327 Ga.App. 628, 631–632(2), 760 S.E.2d 636 (2014) (citing Layman, 279 Ga. at 340–341, 613 S.E.2d 639); Blanton v. State, 324 Ga.App. 610, 614(2), 751 S.E.2d 431 (2013) (same). To that end, “[i]n meeting its burden of showing that it is unable either to identify a specific date on which an offense occurred or to narrow the range of possible dates, the State is required to present some evidence and may not rely solely upon argument by counsel or mere speculation.” Blanton, 324 Ga.App. at 615(2), 751 S.E.2d 431.

The law in Georgia is consistent with Tumbleston requiring the State to show circumstances to warrant an extended timeframe and Wade requiring the State to show that the time span in the indictment was narrowed as much as possible.

In New York the indictment must state the date and time of the offense to the best of the People's knowledge. In People v. Garcia, 141 A.D.3d 861, 863, 34 N.Y.S.3d 766, 769–70 (N.Y. App. Div.), leave to appeal denied, 28 N.Y.3d 929, 63 N.E.3d 78 (2016), the Court wrote:

“When time is not an essential element of an offense, the indictment, as supplemented by a bill of particulars, may allege the time in approximate terms[, so long as it] set[s] forth a time interval which reasonably serves the function of protecting [the] defendant's constitutional right to be informed of the nature and cause of the accusation” (People v. Watt, 81 N.Y.2d 772, 774, 593 N.Y.S.2d 782, 609 N.E.2d 135 [1993] [internal quotation marks and citations omitted]; accord People v. Porlier, 55 A.D.3d 1059, 1060, 865 N.Y.S.2d 732 [2008]). “Reasonableness and fairness demand that the indictment state the date and time of the offense to the best of the People's knowledge, after a reasonably thorough investigation has been undertaken to ascertain such information” (People v. Morris, 61 N.Y.2d 290, 296, 473 N.Y.S.2d 769, 461 N.E.2d 1256 [1984]; see People v. Jabot, 93 A.D.3d 1079, 1080, 941 N.Y.S.2d 311 [2012]). In assessing whether a more precise date could have been ascertained through diligent efforts, we may consider the age and intelligence of the victim, the relevant circumstances and “the nature of the offense, including whether it is likely to occur at a specific time or is likely to be discovered immediately” (People v. Morris, 61 N.Y.2d at 296, 473 N.Y.S.2d 769, 461 N.E.2d 1256; see People v. Watt, 81 N.Y.2d at 774–775, 593 N.Y.S.2d 782, 609 N.E.2d 135). If we conclude that the People made diligent efforts, we then determine whether the time period alleged was reasonable by considering, among other factors, the ability of the victim to particularize the date of the offense and the passage of time between the alleged offense and the defendant's arrest and/or the date of the indictment (see People v. Morris, 61 N.Y.2d at 296, 473 N.Y.S.2d 769, 461 N.E.2d 1256).


In Baker, 411 S.C. 583, 592, 769 S.E.2d 860, 865 (2015), reh'g denied (Apr. 9, 2015), the

Court wrote:

Given the expansive time frame and lack of specificity as to this time frame, we can only conclude Baker was prejudiced by the defects in the indictments. Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles.

Appellant in the present case was prejudiced by the unspecified two year expanded time frame alleged in the lewd act indictment. The State failed to show special circumstances warranting the expanded time frame. The defect requires reversal. As in Baker, the State may seek a more time specific indictment alleging lewd act. Counsel respectfully seeks rehearing to address the State's failure to show circumstances to warrant an extended timeframe and the State's failure to show that the time span in the indictment was narrowed as much as possible.

Respectfully Submitted,


KATHRINE H. HUDGINS
Appellate Defender

This 21st day of March, 2017.

STATE OF SOUTH CAROLINA

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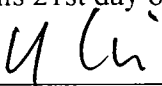
PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Gentile, #364416, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 21st day of March, 2017.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of March, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.