

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
Hon. Donald B. Hocker, Cir. Court Judge

Unpublished Opinion No. 2017-UP-064
Submitted November 1, 2016 - Filed February 1, 2017

Mr. Tamarquis Antwain Wingate,

Petitioner,

v.

The State,

Respondent.

Appellate Case No: 2014-002717

PETITION FOR
A
WRIT OF CERTIORARI

RECEIVED
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SC Court of Appeals

Mr. Tamarquis Antwain Wingate
SCDC # 315016 (B.R.C.I.)
4460 Broad River Road
Columbia, South Carolina 29210
[Petitioner/Self-Represented]

OTHER COUNSEL OF RECORD:

Robert Michael Dudek, Appellate Defender, of Columbia for Petitioner.

Attorney General Mr. Alan McCrory Wilson, and Senior Assistant Deputy Attorney General John Benjamin Aplin, (former) Sally Elliott, all of Columbia for Respondent.

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QUESTIONS PRESENTED

- 1.) Whether as an initial issue of concern, the erroneous jury instruction conveyed by the Lower Court warrants per-se reversal without having to consider the remaining issues on appeal?
- 2.) Whether Appellate Counsel provided "ineffective assistance" when filing a Anders v. Cal., brief eluding to "No Merit" in light of the above issue and argument supporting such, which presented several Fundamental Errors for review by the Court of Appeals?
- 3.) Whether the Trial Court's "jury instruction" in regards to "stipulation to establish an element of the offense"; clearly erroneous? [Appellants Pro-se Brief]

STATEMENT OF THE CASE

Appellant was indicted, tried and convicted, out of the (12th) Circuit, originally for (CSC) criminal sexual conduct with a minor, third degree and criminal sexual conduct with minor, or Attempt-victim 11 to 14 years of age inclusive--second (2nd) deg. (See R. (4)(e)). This case was improperly tried by submitting a new Direct Indictment for Two Counts of First Degree criminal sexual conduct with a minor. (See R. (3)).

On December 10, 2014, the jury found Appellant guilty on both Counts and the judge sentenced Appellant to concurrent twenty-two year prison terms and upon release, committed to the Sexual Violent Predator Proceedings. The trial attorney, upon Appellant's request, appealed the conviction. Upon the Notice of Appeal, trial counsel omitted Appellant's sentences imposed were for "the wrong" two counts of the criminal sexual conduct with minor. Which exposes First, rather than "Third Degree", according to the original indictments. [See R. (7. p. 5)].

Chief Appellate Defender, Mr. Robert M. Dudek, was appointed as counsel on appeal to handle Appellant's case, and notified Appellant through legal correspondence dated March 11, 2015. Six months later, Mr. Robert M. Dudek, submitted and filed an Anders Brief (dated October 23, 2015), acknowledging "the improper bolstering of the victims testimony by the prejudicial hearsay", and then asked the court to grant his motion to be relieved as counsel, because Appellant's appeal is without merit.

Deputy Clerk (V. Claire Allen), of the Court of Appeals, no-
tified Appellant in relation to the procedure pursuant to Anders v. California, which allowed Appellant forty-five (45) days to file with the Court, a pro-se brief addressing any arguable issues that Appellant believes the court of appeals should consider on appeal. (filed Feb. 8, 2016).

With Appellant being "thrust" with self-representation for appellate review, for which is risky based on the complexities of the rules and procedures. Coupled with the fact court personnel and judges alike are normally hostile towards prose filings. Appellant remained to focus his undivided attention to the facts, issues and the law, as they pertained to his case. And requested an extension of time (dated March 17, 2016) to comply with the procedures under Anders. The Court granted the motion for extension.

On April 26, 2016, Appellant submitted the initial pro-se brief, claiming several constitutional errors in his trial which amounted to "errors of law".

More importantly, "in light of the Court's decision in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (May 4, 2016)", Appellant amended his pro-se brief to the inclusion of the identical claim found above in Stukes.

This Court determined in Stukes, that the trial court's instructions to the jury was erroneous (a groundbreaking decision from past procedure), "that the victim's testimony do not have be corroborated in a prosecution under section §16-3-655, under

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South Carolina Law. Irrefutably, this Court found such instruction to be erroneous, reversible error, and unconstitutional. And on that basis alone, "reversed Stukes convictions", while overturning the court of appeals affirmance.

APPELLANT'S ISSUES ON APPEAL

Within Appellant's pro-se appeal brief, Appellant raised the following argument/issues for consideration:

- a. Whether the court erred by denying the Appellant's Direct Verdict, based on the State's proof of establishing Every Element, beyond a Reasonable Doubt Standard to the charge of Criminal Sexual Conduct (CSC) with a minor (§16-3-655)?
- b. Whether the court erred by Denying Appellant's trial Counsel's Motion to Suppress Evidence", when clearly the verbal evidence that was submitted SHOULD HAVE BEEN "EXCLUDED" because its Probative Value is Substantially outweighed by the DANGER of UNFAIR PREJUDICE?
- c. Whether Appellant Counsel was "ineffective" for failing to advocate for an "initial review" when Appellant sought effective assistance of counsel as guaranteed by the Sixth Amendment and Anders v. California.

As beforementioned, Appellant sought leave to make several amendments. These amendments include the following:

1. Whether the trial court erred "on its own", prejudicing Appellant, by instructing the jury "Without Stipulation from the Defense", to establish an element of the charged offense against Appellant (for the jury). U.S. Const 5th and 14th; S.C. Const. art. V, §XXI. (Amended 4/26/2016)

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- ~~2. Whether the trial court's instruction was erroneous, war-
ranting reversal, where it instructed jurors; "the victim's
trial testimony need not be corroborated in a prosecution
under Section §16-3-655, of S.C. Code of Law"
(Amended 5/16/2016)~~

JURISDICTIONAL STATEMENT FOR REVIEW

This Court retains Jurisdiction to review final orders and decisions of the Court of Appeals pursuant to SCACR, Rule 242(a). Whereas, a writ of certiorari is not a matter of right, but of sound judicial discretion, and will only be granted where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reason which will be considered:

- (1). Where there is a novel question of law
- (2). Where there is a dissent in the decision of the Court of Appeals
- (3). Where the decision of the Court of Appeals in in conflict with a prior decision of the Supreme Court
- (4). Where substantial constitutional issues are directly involved
- (5). Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

In addition to the Court's jurisdiction, Appellant also

claims "that although a decision now relied on was decided post trial". He has standing to rely on the subsequent decision pursuant to the United States Supreme Court, in Giffin v. Kentucky, 479 U.S. 314 (S. Ct 1987), and as the Court of Appeals for this State has recognized in State v. Parker, (No. 2015-UP-574, Dec. 30, 2015)("A new rule for the conduct of criminal prosecutions is to be applied retroactively to "all cases, state or federal, pending on direct review or not yet final").

Appellant case was pending on direct review when this Court decided State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (May 4, 2016). For which applies in this appeal, and should have been ruled on in the Court of Appeals, but was withheld for review by this Honorable Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. Appellant begins in the instant order due to the "special and important reason" establishing grounds to grant this writ of certiorari. Such stems from the Court of Appeals refusal to address Appellant's issue here, which called into question "the trial courts' instruction to petit jurors expressing the following":

The Trial Court: "In addition, the testimony of the alleged victim need not be corroborated in a prosecution under Section 16-3-655, Code of Laws for South Carolina". (Tr. tr. p. 232, 1-2).

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The above issues was properly before the Court of Appeals

(2014-002717), pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), within Appellant's pro-se appeal brief. (Amended 5/16/2016) The pro-se appeal brief clearly cited State v. Stukes, 787 S.E.2d 480 (S.C. S. Ct. 2016), in support of this ground for appeal. And without requalifying the argument here. Melvin P. Stukes appealed his conviction for criminal sexual conduct (CSC) and first degree burglary, "arguing the Court of Appeals erred in affirming the trial court's jury instruction that Victim's testimony need not be corroborated by additional evidence or testimony pursuant to §16-3-657 of the South Carolina Code (2003)".

This Court held: "We reverse and hold indtructing the jury on this statute is an impermissible charge on the facts and therefore unconstitutional". "We further overrule our precedent condoning this instruction".

There is two important arguments to support the granting of this writ, in which could be made. One, that at the time Appellant amended his pro-se appeal brief (5/16/2016), Stukes had been decided. Second, because of the holding in Griffin v. Kentucky, 479 U.S. 314 (1987), "because Appellant's case was not yet final (i. e. pending on direct review), the decision by this Court irrefutably applies".

Moreover, the Court of appeals denied Appellant's initial appeal on February 1, 2017. And a subsequent petition for rehearing on April 21, 2017. And how such a constituionally ground-breaking

~~decision was not applied in Appellant's appeal, no logical answer~~
exist. Except not to have reviewed the contents of the pro-se appeal brief, and on the basis, it was simply denied.

Nevertheless, what the appeals Court decision does do, "it sets in conflict with a prior decision of this Supreme Court". As the date of the appeals denial in this case is subsequent to the Supreme Court's Stukes decision. In which this Court may exercise its supervisory discretion. Especially where the holding in Stukes, represents "a clear break from the past procedure of a court's jury instruction in regards to Victim's testimonies".

Based on the evidence and argument on this issues, Appellant is entitled to have the case reversed and remanded for a new trial in light of this Court's Stukes decision.

ISSUE II.

2. WHETHER APPELLATE COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL, WHEN FILING THE ANDERS BRIEF, SUGGESTING THAT APPELLANT'S CASE WAS WITHOUT MERIT, WHEN BEING CONFRONTED WITH THE VARIOUS FUNDAMENTAL ERRORS AT TRIAL?

Appellant recognizes the amount of indigent clients that the South Carolina Commission on Indigent Defense (SCCID), receives on a yearly basis. Appellant also recognizes that Appellate Counsels are quite busy, but that doesn't excuse the rights and laws that operate under the Sixth Amendment, which entitles a criminal

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defendant to effective assistance of counsel on direct appeal".

See Hudson v. Hunt, 235 F.3d 892 (4th Cir. 2000).

Here, Appellant conveys for this Court's consideration; "he has never seen, talked verbally to, or was 'ever' effectively assisted by SCCID Chief Appellate Defender, Mr. Robert M. Dudek. Even when asked openly before the Court of Appeals. (Filed Sept. 8, 2016). Appellant sent many legal correspondence to Mr. Dudek, in fear of Liberty or Life, left messages with his office to speak with him personally, so that Appellant and Appellate Defender may establish a meaningful Lawyer/Client Relationship. All to no avail in this case.

When Appellant presented the fundamental errors to counsel in order to get effective assistance, counsel failed to respond, no lawyer conference calls, nor any lawyer visitation with regards to effective assistance. When the "error" were printed and forwarded to the Appellate Defender in black and white. Due to the significance of a case traveling through the Appeals Court (i.e. **Stukes**), Appellate Counsel should have at least notified Appellant and moved to "supplement the record". Which would have provided a legitimate basis for the inclusion of that issue.

In U.S. v. Huggins, 191 F.3d 532 (4th Cir. 1999), "a defendant has a right to a meaningful appeal based on a complete record of trial (i.e. transcript). As such, a defendant may base an appeal on errors that occurred during the plea bargaining process, at trial or sentencing". And if a defendant fails to raise these 'Record Based Errors' on appeal, he risk those issues being

(8/15/16)

~~legally forfeited. Or, he would have to raise them later in a~~
post-conviction proceeding.

Appellant explained to counsel concerning Trial Counsel's ineffectiveness and if the Appellate Defender can assure Appellant of his appeal right would be protected. Defendant's right to effective assistance of counsel applies not just at trial but also on direct appeal. See Bear Steps v. U.S., 339 F.3d 777 (8th Cir. 20-03); Harris v. Day, 226 F.3d 361 (5th Cir. 2000); and Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985).

Here, the writ of certiorari should be granted on this ground where "the record on appeal", clearly exposes counsel's refusal to place a prevailing issue in the record on appeal, which clearly prejudiced the Appellant from the "merits brief" he was entitled to. In light of Stukes, supra, no attorney acting competently, should not have been aware of such a "ground-breaking decision", which constituted "a clear break from past procedure".

However, Appellant is not unmindful that a claim of ineffective assistance of counsel is normally not cognizable on direct appeal. Unless the record clearly shows his performance fell below an objective standard of reasonableness, in the realm of the appeal. Strickland, supra.

Appellant in conclusion on this issue, argues for relief on this ground because this is such a case clearly demonstrating counsel's deficient performance, and the remedy for such is to reverse the conviction and sentence, and remand for a new trial.

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ISSUE III.

3. WHETHER THE TRIAL COURT'S JURY INSTRUCTION IN REGARDS TO "STIPULATION TO ESTABLISH AN ELEMENT OF THE OFFENSE", CLEARLY ERRONEOUS? [Appellant's Pro-Se Brief].

Appellant argues here that "the trial court erred when it instructed jurors on the essential elements of the crime for which he was charged and convicted", by an impermissible 'stipulation' in order to establish an element of the offense (CSC) first degree.

The error is exposed when the trial court willfully and unlawfully committed a reversible error while charging jurors, that any sitting court should have been aware of.

Here, the trial judge erred by improperly amended the elements of (CSC) w/minor (1st degree), under Section §16-3-655(a)(2), of the S.C. Code of Laws, 1976 as amended, which is recorded as follows:

- (a) A person is guilty of criminal sexual conduct with a minor in the first degree if:
- (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in section §23-3-430 (c), or has been ordered to be included in the sex offender registry pursuant to section §23-3-430(d); See True Billed Indictment (Tr. tr. p. 255-256. Also see State's opening argument.

The trial court amended the "charge on the law" as to the elements of the offense during Appellant's trial as follows:

~~(1) alleged victim is under age of (16)~~

(2) defendant committed a sexual battery on victim and

(3) the defendant has previously been ordered to be included in the sex offense registry pursuant to section [23-04-430(d)]. (Tr. tr. p. 46, lines 1-7; p. 50, lines 1-18); R. Tr. p. 50, lines 1-25, p. 51, lines 1-18;); (R. Tr. p. 196, lines 5-7) and (R. Tr. p. 234; lines 10-16)

The trial Court allowed the amended elements during the trial, because the Appellant's prior offense being a Lewd Act with a minor (16-15-140), was deleted in 2012, and the crime is not enumerated in section (23-3-0430)(c). See)R. Tr. p. 46, lines 9-19). The court also stated the wrong section and subsection to one of the elements twice, once at the beginning and once towards the ending of trial, as if making their own laws and statutes. While saying the defendant be included on the sex registry pursuant to section (23-04-430) subsection (d). See (R. Tr. p. 51, lines 4-6) and (R. Tr. p. 234, lines 14-16).

Therefore, the trial court never acquired subject-matter-jurisdiction over the Appellat's case, as the indictment failed to include the correct elements of the charge Appellant was indicted for. See Arizona v. Ramsey, 467 U.S. 203.

Wherefore, the trial court retained an "affirmative duty" to provided the jury with the "accurate" elements of [CSC w/m 1st Degree], as outlined within the statute. And such failure to comply resulted in a highly prejudicial error. Moreover, if the trial court or prosecutor needed to amend the indictment, such would

have to be resubmitted to the grand jury. See Stirone v. U.S., 361

U.S. 212 (1960).

Here, the trial court first mentioned the amended indictment (charging the elements) during trial operated as a "surprise" to Appellant, in which the Appellant shall be entitled, upon demand, to a continuance of the cause pursuant to [S.C. Code of Laws, Section 17-19-100] However, such continuance was omitted.

A "variance between pleading and proof" which destroys a defendant's substantial right to be tried only on charges presented in an indictment returned by a Grand Jury, is too serious to be treated as nothing more than a variance and dismiss as harmless error. Stirone, supra, Id.

A defendant must be convicted, if convicted at all, of the particular offense and elements charged in the bill of indictment. Arizona, supra. Id. The Supreme Court expounded in Arizona v. Ramsey, "it was undisputed that the trial court misperceived the elements of the offense with which the [defendant] was charged and erred by this misinformation."

In this case at bar, Appellant's claim is essentially indistinguishable where, such misinformation was critical because the jury was misled the entire trial, and the deviation for the "charge on the law", violated Appellant's Due Process rights under the United States Constitution. See (R. Tr. p. 226, lines 1-12- Tr. p. 237, lines 1-18).

Not only that, the trial court erred also when amending the
elements during trial, by also "establishing an element by 'stipulation'". (See Appellant's Pro-se Brief on Appeal) It therefore becomes unnecessary not to consider the contention that the judge inadvertently permitted himself to abandon judicial [impartiality] and assume the role of the advocate (emphasis added), Holmes v. U. S., 271 F.2d 635. Due Process of the Sixth Amendment gives to criminal defendants, "a right to have the jury determine beyond a reasonable doubt, every essential element necessary to find a defendant guilty beyond a reasonable doubt". U.S.C.A. Amend. 5, 6th and 14th. A trial judge commits error of a constitutional magnitude, when he instructs the jury as a matter of law, that a fact essential to the conviction has been established by the evidence, thus depriving the jury of the opportunity to make its finding. See U. S. v. Johnson, 71 F.3d 139 (4th Cir. 1995).

In otherwords, the State prosecution is required "to prove every single element of the crime, beyond a reasonable doubt". The conviction of the defendant, when the prosecution provided no evidence on a essential element of the offense, is subject to appeal. See U.S. v. Meadows, 91 F.3d 526, 633 (7th Cir. 1996). The State here, did not submit evidence or exhibits to the jury to prove "every element" beyond a reasonable doubt, but was lended a hand from the trial court. See (R. Tr. p. 227, lines 1-13; p. 228, lines 1-2).

Appellant's trial counsel on this basis, "moved for a directed verdict, because the State had failed to put forth any evidence

~~1 (1st Cir. 2000). To render a guilty verdict, the jury must hear~~
sufficient evidence to avoid resorting to excessively strained in-
ferences or guess work. U.S. v. Peterson, 238 F.3d 848 (7th Cir.
2001).

In Appellant's trial, the evidence was less than clear and
convincing. The danger of prejudice resulting from the "limiting
Instruction", for outweighed its Probative Value. The Verdict was
based on something "that was concededly not an element". See Sul-
livan v. Louisiana, 508 U.S. 275 (1993)

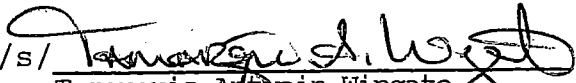
Therefore, the trial court erred in denying the Appellant's
Directed Verdict, based on the State's lack of proof of Every ele-
ment of the crime charged, beyond a reasonable doubt, to wit: (CSC
w/m/ First Degree). And under the law, "a new trial should be grant-
ed if the verdict:

- (1) is against the clear weight of the evidence
- (2) is based upon evidence which is false (or)
- (3) will result in a Mis-Carriage of Justice even
though there may be substantial evidence which
would prevent direction of the verdict.
See Cline v. Wal-Mart (4th Cir. 1998)

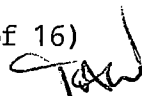
Wherefore, and in Conclusion "why the Writ of Certiorari com-
pels this Honorable Court to grant such; is Issues I, II, and III,
as well as; "A court cannot find a defendant guilty solely on cir-
cumstantial evidence unless the facts proven by the evidence, ex-
clude every reasonable hypothesis of innocence. And on that basis
as well as the others above. Appellant graciously moves This High
Court, for the State of South Carolina, to reverse the opinion of

~~the Court of Appeals, as it's decision is in direct conflict with~~
the prior Stukes decision by this Court. And remand with instructions to vacate the lower court's judgment for a new trial. And for any other relief this Court may deem necessary in order to conform the lower court's decision with this Honorable Court.

Respectfully Submitted,

/s/ 
Tamarquis Antwain Wingate
Broad River Corr. Institution
4460 Broad River Road
Columbia, S.C. 29210

cc: att. gen. s.c.
filed
5/12/2017



APPENDIX

- A.) Copy of Record on Appeal (TRANSCRIPT (257 pgs), SUPPLEMENTAL Appendix (23 pgs)
INDICTMENT
- B.) Copy of the Decision of the Court of Appeals on which
Certiorari is sought (4 pgs)
- C.) Copy of the Petition for rehearing filed in the Court
of Appeals and the Court's Ruling on that Petition
- A.) Handwritten (3 pgs + Cert of Service) Typed (2 pgs)
 - B.) Court's Ruling on Petition (1 pgs)

State of South Carolina

in the Court of Appeals

Appeal from Florence County
Donald B. Hocker, Circuit Court Judge

Tamarquis Antwain Wingate,

Petitioner,

v.

The State,

Respondent.

Appellate Case No. 2014-002717

CERTIFICATE OF SERVICE
Proof of Service

The Petitioner hereby declares under the penalty of perjury, that on this date, I have served a true copy of: "Petition for a Writ of Certiorari" and Appendix in the above referenced case has been served upon the following:

- 1.) S.C. Supreme Court Clerk Shearouse(1231 Gervais, Columbia)
- 2.) S.C. Court of Appeals Clerk Kitchings(Po Box 11629, 29210)
- 3.) Attorney Generals Office C/o J.B. Aplin(Po Box 11549)

by placing a copy of same, in prison mailroom officials hands, for depositing in the United States Mail, first class postage affixed.

/s/ Tamarquis Antwain Wingate 5/15/17
Tamarquis Antwain Wingate
Pro se Petitioner

SUBSCRIBED AND SWORN TO before me

this 17 day of May, 2017

S
Notary Public for South Carolina
My Commission Expires: 9/16/2022

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SC Court of Appeals

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