

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 01 2012

Appeal from York County

SC Court of Appeals

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT TERRANCE HOOKER,

APPELLANT

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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 ISSUE ON APPEAL3

STATEMENT OF THE CASE4

ARGUMENT5

CONCLUSION.....10

PETITION TO BE RELIEVED AS COUNSEL11

TABLE OF AUTHORITIES

Cases

Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005)..... 7

State v. Myers, 313 S.C. 391, 438 S.E.2d 236 (1993)..... 8

State v. Quarles, 261 S.C. 413, 200 S.E.2d 384 (1973)..... 8

Statutes

S.C. Code Ann. § 17-19-100..... 7

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in granting the prosecution's motion to re-amend the dates contained within the stalking indictment, which allowed the prosecution to introduce evidence of Appellant's alleged prior bad acts that the trial judge had ruled were inadmissible in light of the dates contained within the amended indictment?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant for stalking, burglary in the first degree, and malicious injury to real property valued greater than \$2000. R. 343 Indictments. The prosecution, represented by Erin Joyner and Jennifer Colton, called the case for trial before the Honorable Lee S. Alford and a jury on August 9, 2011. R. 1; R. 6 lines 5-12. Melissa Inzerillo and Amy Sikora represented Appellant. R. 1. The jury found Appellant guilty of stalking, burglary in the first degree, and malicious injury to real property valued less than \$2000. R. 333 lines 5-16. Judge Alford then sentenced Appellant to fifteen years on the burglary conviction, five years on the stalking conviction, and thirty days on the malicious injury to real property conviction. R. 340 line 3 – R. 341 line 18.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in granting the prosecution's motion to re-amend the dates contained within the stalking indictment, which allowed the prosecution to introduce evidence of Appellant's alleged prior bad acts that the trial judge had ruled were inadmissible in light of the dates contained within the amended indictment.

The indictment originally alleged Appellant engaged in stalking between October 1, 2010 through February 28, 2011. R. 347 Indictment; R. 23 lines 1-5. Prior to the start of trial, the prosecutor moved to amend the indictment for stalking so that the dates would be December 1, 2010 through February 28, 2011. R. 347 Indictment; R. 23 lines 5-8. Appellant did not object. R. 23 lines 19-20. Therefore, the trial judge marked through the indictment to indicate the amendment. R. 347 Indictment; R. 23 line 21 – R. 24 line 2.

Subsequently, Appellant moved to prohibit the prosecution from introducing evidence of any alleged prior bad acts by Appellant occurring prior to December 1, 2010, the earliest date reflected in the amended indictment of December 1, 2010. R. 76 line 19 – R. 77 line 15. The prosecutor explained she intended to ask the victim what led to the break up of her relationship with Appellant, which would include alleged prior acts prior to December 1, 2010. R. 78 lines 14-16. The prosecutor anticipated the victim would testify that Appellant had become more violent and controlling, leading the victim to end the relationship. R. 78 lines 16-19. Additionally, the prosecutor anticipated the victim would testify that beginning in October 2010, Appellant entered the victim's home without consent, began calling her repeatedly, and acted jealous. Ultimately, the victim ended the relationship in December 2010. R. 79 lines 5-21.

The prosecutor argued she should be permitted to introduce the alleged prior bad acts because the charge of stalking required proof that the victim feared Appellant. R. 80 lines 5-11. The prosecutor asserted that the prior bad acts showed why the victim was fearful during the stalking. R. 80 lines 24-25. Then, the prosecutor remarked that the decision to move to amend the indictment had been made at least a week prior to trial and had been communicated to Appellant. R. 81 lines 1-5: The rationale for moving to amend was the prosecutor's assessment that "it wouldn't be fair, until that time that [the victim] said we are done and I want you out of my life, to allege that [Appellant] was stalking her." R. 81 lines 10-15.

Concerning the evidence the prosecutor proposed to submit occurring between October and December, the prosecutor asserted it was "not pattern evidence." R. 83 lines 8-9. The prosecutor argued "[w]e are not asking the jury to find him guilty of stalking based on those things." R. 83 lines 9-11. According to the prosecutor, the victim felt fear beginning on December 1, 2010. R. 83 lines 14-17; R. 84 lines 14-15.

The trial judge ruled that the victim could testify as to what was happening in the relationship that caused her to end the relationship. R. 85 lines 14-18. The judge explained the victim could testify that Appellant became more controlling, came to the house unexpectedly, and questioned the victim about other relationships. R. 85 lines 21-25. However, the judge ruled that in order for the prosecutor to introduce evidence of Appellant breaking into the house, the indictment would need to include the months of October and November. R. 86 lines 3-6. The judge inquired if the prosecution wanted to amend the indictment back. R. 86 line 14. The prosecutor moved to amend the indictment back to the October 1, 2010 date. R. 86 line 25 – R. 87 line 1. The trial judge

then inquired: “Any opposition from the defense? Obviously you are not prejudiced by that. You were already aware of the dates.” R. 87 lines 2-4. Appellant responded, “Yes, Your Honor.” R. 87 line 5.

Thereafter, the victim testified about alleged prior bad acts by Appellant occurring prior to December 1, 2010. The victim testified that beginning in October of 2010, Appellant became more “violent, aggressive, [and] controlling.” R. 150 lines 5-9. She testified Appellant accused her of seeing other men. R. 150 lines 11-18. Additionally, the victim claimed Appellant put holes in her door and walls and threw beers. R. 150 line 25 – R. 151 line 1. She also testified that Appellant would appear at her home uninvited every week. R. 151 lines 2-8. The victim testified that starting in October, when the relationship began to sour, she was not afraid of Appellant. R. 163 lines 2-5.

An indictment serves as notice to a criminal defendant “of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted.” Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). Pursuant to statutory law, an indictment may be amended “[i]f (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence in proof thereof” as long as “such amendment does not change the nature of the offense charged.” S.C. Code Ann. § 17-19-100. Case law permits an amendment to an indictment if it does not change the nature of the offense, the amended charge is a lesser-included offense of the original crime charged in the indictment, or the defendant waives

presentment to the grand jury and pleads guilty. State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993).

When a trial court is confronted with the issue of amending the date alleged in an indictment, the court must determine whether the indictment alters the nature of the offense charged and surprises the accused, preventing a fair trial. State v. Quarles, 261 S.C. 413, 417, 200 S.E.2d 384, 385 (1973).

In the instant case, the trial judge permitted the prosecutor to re-amend the indictment from December 2010 to October 2010, which changed the nature of the offense charged by increasing the type and number of alleged acts Appellant was required to confront. Although the trial judge was correct that Appellant had notice of the October 2010 date based upon the original indictment, the prosecutor admitted that she advised Appellant of the proposed amendment several weeks before the trial. Thus, Appellant relied upon the prosecutor's notice concerning the nature of the charges to be addressed.

Compounding the injustice here was the prosecutor's motivation for re-amending the indictment - the trial judge ruled against the prosecutor concerning the admission of alleged prior bad acts occurring outside the dates contained within the amended indictment. In order to introduce those alleged prior bad acts, the prosecutor moved to re-amend the indictment, which the trial judge not only permitted, but suggested.

The prosecutor stated she moved to amend the indictment originally because she did not believe it was fair to Appellant to accuse him of stalking while he was in a relationship with the victim; in short, the prosecutor did not believe Appellant had engaged in stalking until the victim actually informed Appellant she no longer desired a

relationship with him. In addition to the prosecutor's stated motivation for moving to amend the indictment – a concern for Appellant's fair trial rights, the prosecutor clearly realized the evidence of Appellant's alleged conduct prior to December 1, 2010 did not satisfy the statutory offense of stalking in light of the victim's testimony that in October of 2010, she did not fear Appellant.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand the matter to the circuit court for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT TERRANCE HOOKER,

APPELLANT

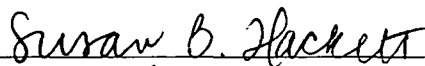
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Terrance Hooker states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Lee S. Alford, which was held on August 10, 2011, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Robert Terrance Hooker.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT TERRANCE HOOKER,

APPELLANT

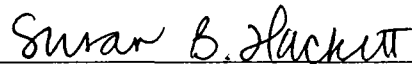
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Entire Trial Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

June 1st, 2012



Susan B. Hackett
Appellate Defender

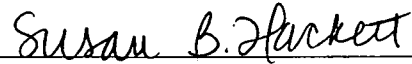
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 1st, 2012



Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

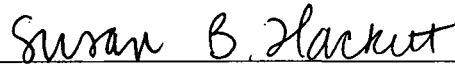
V.

ROBERT TERRANCE HOOKER,

APPELLANT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Robert Terrance Hooker, #347354 at McCormick Correctional Institution, this 1st day of June, 2012.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of June, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .