

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Berkeley County

SC Court of Appeals

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

APPELLANT,

V.

MARCUS GREENE,

RESPONDENT.

APPELLATE CASE NO. 2013-001976

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

This circuit court erred in granting respondent's motion to bifurcate the elements of first-degree sexual conduct with a minor.

COUNTER-STATEMENT OF ISSUE ON APPEAL

Whether the court acted within its discretion, while ruling on a Rule 403, SCRE, motion, by ordering respondent's trial on the elements of first-degree CSC with a minor bifurcated to prevent undue prejudice to respondent by allowing the jury to first reach a verdict on the underlying offense, and then decide if the element of respondent having to register as a sex offender was proved during a bifurcated hearing?

STATEMENT OF THE CASE

Respondent agrees with appellant's statement of the case.

ARGUMENT

The court acted within its discretion, while ruling on a Rule 403, SCRE, motion, by ordering respondent's trial on the elements of first-degree CSC with a minor bifurcated to prevent undue prejudice to respondent by allowing the jury to first reach a verdict on the underlying offense, and then decide if the element of respondent having to register as a sex offender was proved during a bifurcated hearing.

Relevant Facts

S.C. Code §16-3-655 states a person is guilty of first-degree criminal sexual conduct with a minor if he does the following: "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 to 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 S.C. Code §36-3-655(A)(2) (emphasis added).

At the September 9, 2014 hearing, the judge noted that she understood the concern of the defense about the undue prejudice under Rule 403, SCRE if the jury learned of respondent having to register as a sex offender at the same time it was judging whether he committed criminal sexual conduct with a minor, the offense for which he was indicted. R. 3, l. 1 – 11, l. 25.

The judge's ultimate ruling in this case was both straightforward and fair to the state and respondent. It was made in the interests of fundamental fairness to respondent, and the judge correctly noted that the state did not suffer any prejudice. The judge ruled that she would bifurcate the trial. The jury would first hear evidence of the underlying crime and determine whether respondent engaged in a sexual battery with the alleged victim who was

sixteen years of age. If the jury found respondent guilty of that offense there would be a second stage where the jury would simply determine whether the state could prove the other element of the offense: Whether respondent had been ordered to be included in the Sex Offender Registry pursuant to Section 23-3-430(D). If respondent was convicted of the underlying criminal sexual conduct with a minor offense, the second stage of the trial would likely be a short formality. R. 12, l. 1 – 23, l. 20.

The state argues in its brief that the first-degree criminal sexual conduct with a minor statute is analogous to burglary in the first-degree statute. The trial judge observed, “I think it’s well within the legislature’s purview to put the *third element on it being the prior registry or the prior conviction*. **That doesn’t mean that a jury has to hear that before the other two elements. It is a cart-before-the-horse situation.** I know y’all want to put it in that he was on the registry . . . and I’m not going to find the statute [and Rule] 403 [are] inconsistent. What I’m going to probably find is that under the facts of this case I need to sever that particular issue in my discretion under Rule 42(b) of the Rules of Civil Procedure which apply to the criminal rule.” R. 12, l. 20 – 13, l. 10. (emphasis added).

The judge noted she had not yet ruled but she found this to be a matter of logic. “It is A and then B. If they don’t find that it’s an assault with an intent to commit a sexual battery occurred, then they never have to get to B because they didn’t get past A. It is done this way in civil trials all the time.” R. 14, l. 18 – 15, l. 3. The judge noted “the statute doesn’t say *how you have to find the element, but you have to prove the elements of the offense.*” The judge found there was no harm to the state in her proposal to have the jury hear the underlying facts of the offense and reach a verdict first. Conversely it was substantially more prejudicial to the defendant if the jury heard evidence he was on the Sex

Offender Registry before or at the same time it decided whether he committed the underlying sexual offense with a minor. R. 15, ll. 8-21; 16, l. 23 – 17, l. 8. (emphasis added).

Defense Counsel Groeber cited State v. James, 355 S.C. 25, 583 SE.2d 745 (2003), by analogy. He noted in a first degree burglary case that the judge had the right to weigh the probative value of the evidence the state sought to introduce to prove the prior burglaries element of the statute. In James, the Court ruled that evidence of defendant's seven prior convictions for burglary were outweighed by their unduly prejudicial effect under Rule 403, SCRE. R. 22, l. 17 – 23, l. 8.

The solicitor then expressed her concern that the state could be subject to a successful directed verdict motion for failing to prove the element that respondent was on the Sex Offender Registry. R. 23, ll. 9-17. The judge then stated, understanding the state's concern, that the court would not direct a verdict for the state having failed to prove that element of the offense "since this court had constrained the mode of trial. So, you are not being prohibited from introducing evidence that the state needs to prove its elements, **it is merely the mode and manner of the way in which the evidence is presented.**" R. 23, l. 19 – 24, l. 4. (emphasis added).

The trial judge ruled the state had the right to prove the element of the offense but that the court could also protect the defendant against the unduly prejudicial evidence by bifurcating the trial. R. 24, l. 5 – 26, l. 1. The judge ultimately ruled, "I'm just trying to protect everybody's rights particularly under Rule 403 so y'all don't have to do this all over again." The judge then ruled:

But that being said, unless anybody has anything else they need to put on the record my inclination is to bifurcate it.

But I do want to make sure that the State puts on any evidence that they want to put on. I think what - - the safest thing we can do, if you do go forward tomorrow, and that is completely up to y'all, is to put up your evidence and then we will note a proffer of whoever your witness is to talk about the registry, Mr. Groeber can cross-examine them, Mr. Schwacke can, and that will be short and it is completely unnecessary for purposes of this trial. But for purposes of error preservation, you might just want to do that.

And then if the jury comes back with a not guilty verdict and no - it found no intent to commit - no assault with intent to commit a sexual battery, then we don't even have to get to the registry issue. If they find yes, then we get to the sexual registry issue. And I don't suspect that they will be out very long on that because he either is or isn't on the registry.

Anything else?

MR. GROEBER: Not with regard to that.

THE COURT: What do you want to talk about on record?

MR. WILLIAMS: I think the next two motions are the State's. Do you have other motions beside the denoted and two that we just did?

MR. GROEBER: I have a litany that I can go through. The Court did rule that we bifurcate?

THE COURT: The motion to bifurcate is granted as to the issue of the sex offender.

MR GROEBER: Thank you, Your Honor.

THE COURT: Granted over the State's objections.

MS. WILLIAMS: Thank you, Your Honor.

R. 32, l. 24 - 34, l. 10.

The following day, September 10, 2013 the state moved for the judge to reconsider its order that the trial be bifurcated. The judge denied the motion to reconsider finding the

statute was constitutional. She noted that case law in other states provided for bifurcation in such situations “and in fact I think in Vermont and New Jersey a circuit court was reversed for not bifurcating the case due to the prejudicial nature of the Sex Offender Registry information. That is my ruling. It is a Rule 403 ruling. I’m not finding the statute unconstitutional, I’m just talking about the mode in which the case would go to the jury. We still need to hammer some of that out.” R. 49, ll. 9-19.

The judge repeated that the legislature had the authority to make the elements of the offense, but the judge had the discretion under Rule 403 to control the prejudice. R. 53, l. 20 – 54, l. 2; R. 56, l. 4 – 57, l. 21.

Discussion

The judge acted within her extremely well-reasoned discretion by allowing the state to prove the registry aggravator element of the criminal sexual conduct in the first-degree offense while crafting a remedy pursuant to Rule 403, SCRE and State v. James that recognized the extraordinarily prejudicial effect of this evidence upon the defendant without prejudicing the state in any way. Respectfully, since the state was not prejudiced by this procedure it has no complaint on appeal.

Under the procedure approved by the trial judge in this case the state would put forth its evidence about appellant allegedly molesting the minor. The judge stated that she would not direct a verdict for the defense pertaining to the failure to prove the “registry aggravator” since that would be unfair to the state given that she determined the mode of trial.

If the jury found appellant guilty of the underlying sexual offense with a minor, there would then be a short bifurcated hearing where the state would be allowed to prove to the jury that respondent was on the Sex Offender Registry to cover that element of the offense.

Regardless of how the determination of the element of the sex offender registry was made after respondent was found guilty by the jury, the state would suffer absolutely no prejudice. The judge simply ruled under Rule 403, SCRE, that she could craft the bifurcation remedy to protect respondent from undue prejudice without prejudicing the state at all.

In State v. Jones, 234 Conn. 324, 662 A.2d 1199 (1995), the Supreme Court of Connecticut held that the trial court should have bifurcated that trial on the capital felony count so as to preclude admission of a prior murder conviction, and that the failure to do so required a new trial.

Similarly, the Utah Supreme Court determined, pursuant to its inherent supervisory power, that such a trial must be bifurcated. See State v. Florez, 777 P.2d 452 (Utah 1989). In State v. James, 767 P.2d 549 (Utah 1989), the Supreme Court of Utah also held that the appellate court had the inherent supervisory power over trial courts to adopt a bifurcated approach to an aggravated murder trial pursuant to Utah Code §76-5-202 (1)(h). The court held under that bifurcated approach the jury was not initially to be presented with evidence of the defendant's prior conviction. If the jury found the defendant guilty of an intentional and knowing killing, it would then be instructed on the prior conviction and deliberate on the existence or nonexistence of that prior conviction.

In Jackson v. State, 337 So.2d 1242 (Miss. 1976), the court held it had the inherent authority to bifurcate a death penalty trial into a guilt-finding phase and a sentence-determining phase.¹ In Hines v. State, 794 N.E.2d 469 (Ind. 2004), the Court held it was an abuse of discretion to deny the defendant's motion for a bifurcated trial, and the failure to bifurcate the trial denied the defendant a fair and impartial trial where

¹ Superseded by statute recognized in Gray v. State, 351 So.2d 1342 (Miss. 1977).

unlawful possession of a firearm by a serious violent felon was also a charge. See, also, Hines v. State, 801 N.E.2d 634 (Ind. 2004) (prosecutor should have accepted the defendant's proposed stipulation or the trial court should have bifurcated the trial); Monceaux v. State, 51 A.2d 474 (Del. 2012)(bifurcated trial did not violate *defendant's* due process rights).

In this case the trial judge correctly exercised her discretion under Rule 403, SCRE to craft a remedy to protect appellant from the extreme prejudice of the jury knowing he was on the Sex Offender Registry while not prejudicing the state one iota by bifurcating the trial in this manner.

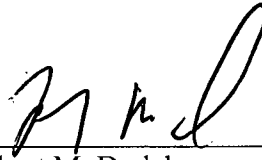
"[R]ules are made to secure justice, not defeat it." Gill v. State, 962 So.2d 552, 554 (Miss. 2007) *citing* Brewer v. Browning, 115 Miss. 358, 366, 76 So. 267 (1917).

"[A]ll courts have the inherit power to correct and make judgments speak the truth." Turner v. State, 212 Miss. 590, 594, 55 So.2d 28 (1951).

CONCLUSION

By reason of the foregoing arguments, the ruling of the lower courts should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

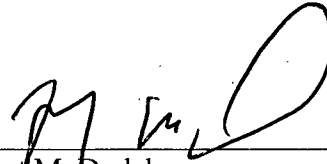
ATTORNEY FOR RESPONDENT.

This 6th day of January, 2015

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 6, 2015



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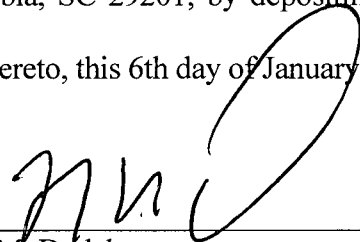
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CERTIFICATE OF SERVICE

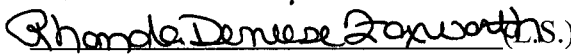
The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, by depositing it in the U. S. Mail, in an envelope with sufficient postage affixed thereto, this 6th day of January, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 6th day of January, 2015.


Notary Public for South Carolina
My Commission Expires: October 17, 2021.