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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MILLANYO A. WOODY,

APPELLANT

APPELLATE CASE NO. 2013-002317

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to quash the indictment for lewd act upon a child as vague and overbroad when the time frame alleged spanned over four years and failed to provide sufficient notice of what Appellant was required to defend?

STATEMENT OF THE CASE

In September of 2012, the Greenville County Grand Jury indicted Appellant Woody for criminal sexual conduct with a minor second degree and lewd act upon a child, indictments #2012-GS-23-7385, 7386A. On October 14, 2013, Appellant proceeded to jury trial before the Honorable G. Edward Welmaker. Dorothy Manigault represented Appellant at trial. Judy Munson prosecuted the case. The jury returned verdicts of guilty and Judge Welmaker sentenced Appellant to One Hundred and Seventy Seven (177) months in prison. A timely notice of intent to appeal was served on October 25, 2013. This appeal follows.

ARGUMENT

The trial judge erred in failing to quash the indictment for lewd act upon a child as vague and overbroad when the time frame alleged spanned over four years and failed to provide sufficient notice of what Appellant was required to defend.

In May of 2006, Appellant's step daughter first reported that Appellant touched her in the shower. (Tr. p. 142, line 11 – 143, 144, lines 1-25; p. 53, line 14 – p. 54, lines 1-9). Police investigated the case but no charges were brought against Appellant at that time. The step daughter moved out of the house where she lived with Appellant and her mother and moved in with her Aunt Jamaica Griggs. In April of 2010, the step daughter reported additional instances of misconduct by Appellant. (Tr. p. 147, lines 14-25).

Appellant was indicted for both criminal sexual conduct with a minor second degree and lewd act. The indictment for lewd act alleges:

That MILLANYO ANTONIO WOODY did in Greenville County, between the 4th day of December 2005 and the 22nd day of April 2010, being over the age of fourteen years, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of M.J.P., a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-15-140 of the South Carolina Code of Laws (1976) as amended.

The indictment alleges an almost four and a half year time period with no information about what acts are alleged to have constituted lewd acts. The judge erred in failing to quash the indictment for being overbroad and not providing sufficient notice.

The indictment is a notice document. State v. Gentry, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005). The true test of the sufficiency of an indictment is not whether it could be made more definite and certain. Id. Rather, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. Id. The sufficiency of

the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged. Id.

In State v. Tumbleston, 376 S.C. 90, 98-99, 654 S.E.2d 849, 853-54 (Ct. App. 2007), the South Carolina Court of Appeals wrote:

While our supreme court has not created a new rule or standard for addressing this issue, this court has adopted a two-prong test for determining the sufficiency of an indictment involving a purportedly overbroad time period: (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. State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct.App.2005) (holding an indictment alleging commission of second-degree criminal conduct during periods of June 1 through July 20, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995, was sufficient as to time); State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct.App.1991) (finding an indictment charging first-degree criminal sexual conduct with a minor covering a two-year period was sufficient as to time); see also State v. Thompson, 305 S.C. 496, 500-01, 409 S.E.2d 420, 423 (Ct.App.1991) (“The specific date and time is not an element of the offense of first-degree criminal sexual conduct.”).

While time is also not an element of lewd act¹ and the time period covered by the indictment in the present case occurred prior to the return by the grand jury, in order to provide sufficient notice the indictment must do more than simply provide a time frame of over four years and recite the statutory elements of the charged offense. But see State v. Baker, 390 S.C. 56, 64, 700 S.E.2d 440, 444 (Ct. App. 2010)(certiorari granted November 17, 2011) (“The indictments clearly identify the elements of lewd act and

¹ State v. Baker, 390 S.C. 56, 64, 700 S.E.2d 440, 444 (Ct. App. 2010)(certiorari granted November 17, 2011)

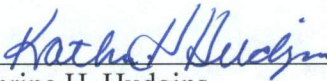
criminal sexual conduct. The indictments substantially track the statutory language so plainly that the nature of the charged offense can be easily understood. The indictments establish the offense of lewd act on a minor as defined by section 16-15-140 and the offense of criminal sexual conduct as defined by section 16-3-655. Baker's contention regarding the sufficiency of the indictments is without merit, and we discern no abuse of discretion in the trial court's ruling.”). One of the true tests of the sufficiency of the indictment is whether it apprises the defendant of what he must be prepared to defend. State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987). The indictment in Appellant’s case fails to meet the sufficiency test set out in Munn.

At trial the step daughter was fifteen years old and testified that Appellant touched her in the shower. (Tr. p. 53, line 18 - p. 54, 55, lines 1-12). The step daughter also testified that between the time of the shower incident in 2006 and appellant’s arrest in 2010, there were other instances of misconduct that took place at Appellant’s mother’s house and one instance that took place at the step daughter’s mother’s house after the mother and Appellant had separated and Appellant was no longer living in the house. (Tr. pp. 60 – 67). It is impossible to ascertain which instances of conduct are addressed in the lewd act indictment. The indictment fails to apprise the defendant of what he must be prepared to defend. The indictment fails to provide sufficient notice and the judge erred in failing to quash the indictment.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence for lewd act should be reversed and the case remanded for a new trial

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2014.

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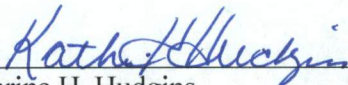
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Millanyo A. Woody 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 G. Edward Welmaker, which was held on October 16, 2013, 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 Millanyo A. Woody.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2014.

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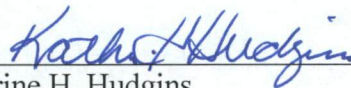
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript.

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

August 11th, 2014



Kathrine H. Hudgins
Appellate Defender

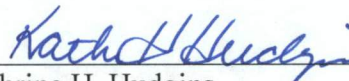
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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 Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 11, 2014



Kathrine H. Hudgins
Appellate Defender

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CERTIFICATE OF SERVICE

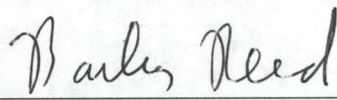
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Millanyo A. Woody, #227810 at Lee Correctional Institution, this 11th day of August, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of August, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021 .