THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Dec 02 2020

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case № 2019-GS-23-01146A
Appellant Case No. 2019-001815

The State, ... Respondent,

vs.

William D. Lewis ..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Question I

Did the lower court err in failing to declare South Carolina Code § 8-1-80 unduly vague in violation of the Due Process Clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America as the statute contains undefined and ambiguous words such as "official misconduct," "habitual negligence," "corruption," "fraud," or "oppression" which either separately or collectively fail to put a reasonable public official on notice as to exactly what act or acts are prohibited?

Standard of Review

This issue is controlled by an error of law. "[W]e review questions of law *de novo*, and 'will reverse the decision of the PCR court when it is controlled by an error of law.'" *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)(internal citations omitted)

Preservation of Issue

The constitutionality of S. C. Code § 8-1-80 was twice presented to the trial judge. First was in a motion filed by Mr. Lewis months before the trial. In this Motion, Mr. Lewis specifically noted the terms "official misconduct, habitual negligence, corruption, fraud or oppression" were overly vague in violation of the Fourteenth Amendment of the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina. Rec. on App. at 25-29. The State, in its response, argued the statute was constitutional. Rec. on App. at 44-54. Admittedly, the judge did not rule on the Constitutionality of either the statutory violation or the common law violation, notwithstanding the fact that the constitutional

issue as to vagueness was addressed in the brief of Mr. Lewis and the response of the State. Again, at the beginning of the trial, counsel again made the specific verbal motion to dismiss the indictment on the ground that S. C. Code § 8-1-80 was unconstitutional. At that time, counsel made specific reference to the previous hearing on the motion. The trial judge at that point denied the motion. Notably, neither the trial judge nor the state ever contended the motion made before the trial started was a new motion or any different from the previous motions argued considering the constitutionality of the statute or the vagueness of the indictment. The issue of the constitutionality of the statute was presented to the trial judge and he ruled upon it. While with the use of hindsight, the argument may well have been presented in a better manner, the state below well understood the constitutionality of the statute was raised. Just as a defendant is not entitled to a perfect trial but a fair trial, this Court is not entitled to a perfect record, but a fair record. The question is was the issue of the unconstitutionally vague indictment presented to the court below and did he rule upon it? The trial judge did rule upon it.

Discussion

The proof that the statute in this case is vague is very simple to prove and very obvious. In the entire brief of the State, they never stated specifically what act or acts William D. Lewis did to violate the statute. What act constituted "official misconduct," or "habitual negligence," or "corruption," or "fraud" or "oppression"? The State has not argued that Mr. Lewis is guilty because of any specific act or acts that fit under the statute nor which provision it fits under.

The State has argued that because the conduct of Mr. Lewis squarely falls within in the prohibition of the statute, he lacks standing to contest the validity of the statute. In support of this the State has cited *State v. Gambrell,* 274 S.C. 587, 266 S.E.2d 78 (1980) and *State v.*

Michau, 355 S.C. 73, 583 S.E.2d 756 (2003). None of these cases are applicable to the facts of this case. In *Gambrell* the criminal sexual conduct statute was attacked as being overly vague. This Court described the offense as, "In the early morning hours of September 9, 1978, an assailant kicked in the back door of the victim's residence, tore a telephone from the kitchen wall, stole approximately $300 in cash and a sapphire ring, and committed sexual battery upon the victim." *Id.* at 589, 266 S.E.2d at 80. Of course this conduct clearly came within the prohibition of the statute. In *Michau*, the issue was whether the contributing to the delinquency of a minor was vague. As to the facts, this Court said, "At trial, the victim testified appellant offered him marijuana and beer in exchange for sex. The victim stated he told appellant he was seventeen years old. Appellant's act of encouraging a minor to drink beer and smoke marijuana, conduct which is illegal, clearly endangers the morals, if not the health, of the minor." *Id.* at 77, 583 S.E.2d at 758–59. Of course this conduct clearly falls within the prohibition of causing a minor "To so deport himself or herself as to wilfully injure or endanger his or her morals or health or the morals or health of others." S. C. Code § 16-17-490(10). The State has not argued what specific act or acts of Mr. Lewis clearly fall within one of the vague terms of the Statute. Nor did the trial judge in his charge limit the words to such an extent that a jury was required to find the sexual act was non-consensual in order to find Mr. Lewis guilty. In fact, the State at trial argued such a finding was not necessary to the case. Rec. on App. at 1096, ll 6-13; 1107, ll 2-8; 1119, ll 9-16; 1121, l 5 to 1122, l 13; 1132, ll 1-8; 1135, ll 14-25;1136, ll 12-14; 1147, ll 9-12; 1160, ll 2-10. Neither at the trial nor in the brief has the State ever stated what specific act or acts of Mr. Lewis clearly fall within the statute.

The State is also incorrect in contending that this case does not have First Amendment

implications because Mr. Lewis was performing his role as sheriff and not as a private individual. As a general rule, government employees acting in their private citizen capacity have first amendment protections. The United States Supreme Court has said, "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). But such control by the employer does not apply when it is the employer acting. Any sheriff has the right, without fear of criminal prosecution, to announce either verbally or in writing, regulations concerning the conduct of his employees. A regulation at times may step over the line and infringe on an employee's First Amendment rights. But, no rational person would ever suggest that the regulation would be deemed to be "oppressive" and violate the criminal code. A sheriff has to have the right to impose regulations without fear of being arrested. Due process demands no less and the First Amendment demands no less.

Musser v. Utah, 333 U.S. 95 (1948) was remanded to the Utah Supreme Court to review in view of the guidelines set forth by the United States Supreme Court. In so remanding the case, the Court noted, "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Id.* at 97. The statute involved in this case runs afoul with the guidelines set forth in *Musser.*

The State's reliance upon *Measure for Measure* is also misplaced. Had Mr. Lewis agreed to free the brother of Isabella in exchange for sexual favors, he would have been guilty of bribery under S.C. Code § 16-9-220. That statute clearly would apply to such conduct. But to

force a vague statute to cover such conduct is not legally permissible. As noted in the opening brief, a statute that prohibited sheriffs from engaging in "improper conduct" would cover the Isabella case. But that fact would not prevent any reasonable court from declaring the statute unconstitutional for being vague.

The contention by the State that "[C]ountless public officers in South Carolina have had no difficulties understanding - and avoiding - the conduct prohibited by it for nearly *two centuries*, which strongly demonstrates the statute is sufficiently definite to be fairly understood by both ordinary people and the specific people to it was designed to apply." Br. of Resp. At 26 (emphasis in original). There are no facts in this record or in the decided cases in our state to support this conclusion. A fair assumption can be made that at least one high ranking official in our State did not recognize that either using a state car to go to the airport for a trip out of the country would be a violation of this statute. And the same would be true if he used a state employee to drive him to the airport. Even leaving misinformation with staff members would be using public resources to facilitate an adulteress relationship. Under the State's theory, any elected official who simply uses their government cell phone to facilitate an adulteress relationship would be guilty of this crime. Few elected officials would recognize this as a crime for which they can be imprisoned.

The State's reliance upon *State v. Solomon,* 245 S.C. 550, 141 S.E.2d 818 (1965) is not persuasive. In that case, this Court used a long history of defining "a work of necessity." This Court said, "Our decisions have held that a work of necessity means labor reasonably necessary for the worker to perform to save himself from some unforeseen or irreparaable injury or loss, or necessary for the welfare of the community in which he resides, viewed in the light of the facts

and circumstances existing at the time. It does not mean that which is indispensable, but it means something more than that which is merely needful or desirable. *Id.* at 570, 141 S.E.2d at 829. No such decision exists in this case where this court has interpreted S. C. Code § 8-1-80. This writer has only found six cases that have included the wording of this statute in the opinions. None have interpreted all of the words of the statute. As noted in the opening brief, the closest this Court has come to interpreting the statute is to suggest the act must violate a statute. In *State v. Elliott*, 94 S.C. 35, 77 S.E. 728 (1913), this Court said, "The indictment does not charge him with a failure to perform a duty simply imposed upon him by the board of trustees, but by the statute." *Id.* at ___, 77 S.E. at 729-730. No such allegation was made in this case.

Question II

Did the trial court err in failing to quashing the indictment on the ground the indictment was vague when it alleged William Lewis did "misuse public resources and abuse power and authority of his office for the corrupt purpose of pursuing or facilitating an adulterous relationship" as the allegation did not inform Mr. Lewis of the specific act of omission or commission he committed so that he could properly prepare a defense to refute the allegations, what evidence would be needed to refute the charges contained in the indictment nor what evidence would be sufficient to establish the allegations?

Standard of Review

As the failure to quash an indictment involves no findings of fact by the trial judge, this is an error of law which should be reviewed *de novo.* "[W]e review questions of law *de novo*, and 'will reverse the decision of the PCR court when it is controlled by an error of law.'" *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)(internal citations omitted)

Discussion

The State asserts that because defense counsel was supplied with a hard drive of information which included all of the State's evidence, he cannot be heard to complain that he was unaware of exactly what facts the State would use in proving the use of public resources. Br. of Resp. at 31. This argument simply ignores the purpose of an indictment. A defendant should use the indictment to determine which evidence is relevant to the charge. A defendant should not be required to use the discovery to determine what the indictment means. An indictment is a notice document. A very general allegation is not notice.

The State has argued that the charges are a versatile one and may be committed in different ways and different times. Br. of Resp. at 34. This is a basis for the indictment to be even more specific and not an excuse or reason to make it vague. What the "use of public resources" includes in its meaning is limited only by the imagination of the prosecutor. Use of public resources could be as varied as using a cell phone, using a county-owned automobile, using the ability to hire and fire, using his position of authority, giving a county-owned car, or any other basis the creative mind can imagine. An indictment should not be so vaguely worded that a defendant has to be clairvoyant to understand its meaning. The State, presumably, knows their theory of the case and knows exactly how public resources were used. And the State should have known this before the defendant was indicted. All a valid indictment requires is that the State share that specific information with the defendant. Fairness demands no less. Due process requires it.

This Court can decide what is the obligation of the State in informing the defendant of the

allegations against him. The State, prior to indictment, should know what the allegations against a defendant are. The State should not be rewarded for ambiguity. The State should be required to share its theory with the defendant. If the State does not share its theory, a defendant can go to trial with one theory from the ambiguous wording and the State go to trial on an entirely different theory. This does not promote a fair trial.

The State has argued, "Under such circumstances, the indictment made clear to Appellant the *precise* criminal basis for his charge and left no question as to the criminality of this offense in light of the details provided." Br. of Resp. at 36 (emphasis added). What is "precise" about a general allegation of "misuse public resources"? Or what is precise by alleging he did the act of "official misconduct, habitual negligence, corruption, fraud, or oppression." Rec. on App. at 13. Under this indictment, the State claims Mr. Lewis should have known what no other public official knew, that having an affair using a scintilla of public resources is an indictable offense for which one may be imprisoned for one year. The voters should be judges of the moral lapses of elected officials and not the courts.

As the indictment fails to inform Mr. Lewis of the theory of the State as to how the crime was committed, the indictment is too vague to survive constitutional muster.

Question III

Did the trial court err failing to direct a verdict as to fraud as the State produced no evidence of fraud sufficient to sustain a conviction?

Preservation of Issue

This issue is preserved for the simple reason that under Rule 19 of the South Carolina Rules of Criminal Procedure, a trial judge is under a legal obligation to direct a verdict on his

own motion if the evidence is not sufficient to convict. The Rule provides, "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." Thus, without a request from the defendant, the trial judge is required to direct a verdict on his own motion. This rule is very different from the rule in civil cases. Under Rule 50 of the South Carolina Rules for Civil Procedure, the rule states, "When upon a trial the case presents only questions of law the judge may direct a verdict." The civil rules uses the permissive "may" while the criminal rule uses the obligatory "shall." The logic of this position is best expressed by the Iowa Supreme Court when they said, "What kind of system of justice do we have if we permit actually innocent people to remain in prison?" *Schmidt v. State*, 909 N.W.2d 778, 789 (Iowa 2018). If this court finds that a judge on his own motion should have directed a verdict, then this Court should hold that this Court has the authority to correct that error. The State should have no interest in keeping a factually innocent person in prison.

Secondly, this error is preserved as it come under the decision of *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013). While *Hepburn* did involve a defendant who made two requests for a directed verdict, this Court focused only on the motion made at the conclusion of the State's case. The motion made at the end of the case obviously covered damaging testimony against Ms. Hepburn given by the co-defendant. The motion at that point should have been denied by the trial judge. Here, Mr. Lewis, on the issue of whether there was evidence of fraud, asks this Court to look at the evidence presented in the State's case in chief. The testimony of Mr. Lewis and his witnesses, as well as the reply testimony of the State, adds nothing to the

record as to the fraud issue. A second motion for a directed verdict adds nothing to the merits of the first motion. If this Court were to find the testimony from Mr. Lewis or his witnesses helped establish evidence of fraud, obviously the issue would then have been waived under the *Hepburn* decision. As nothing changed as to the facts of the government's case after the first motion, the trial judge would have ruled in the same manner at the end of the State's case.

Discussion

This issue is, in many respects, a side issue to the two main issues in this case. As noted in the opening brief, in the event this Court finds that the other terms of vague, this matter should not be remanded for a trial on fraud as there was no evidence of fraud. In the brief of Respondent, the State does not respond to the specific allegation that there was no fraud. Instead, the State argues that the conduct of Mr. Lewis fits under the other vague terms of the statute. The State does not argue that a specific act of fraud was alleged against or committed by Mr. Lewis.

Conclusion

For the foregoing reasons,and the reasons set forth in the Initial Brief, this Court should declare S.C. Code § 8-1-80 unconstitutional as being vague and overly broad in violation of the Due Process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America. In the event this Court declares the word "fraud" is severable from the other vague words in the statute, this court should further reverse the conviction of William D. Lewis on the ground the State failed to prove the crime of fraud. Alternatively, this Court should declare the indictment in this matter as being vague and not fully informing William D. Lewis of the charges against him and reverse the conviction.

December 7, 2020

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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