THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William D. Lewis, Appellant

Appellate Case № 2019-001815

RECEIVED
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S.C. SUPREME COURT

Appeal from Greenville County
G. Thomas Cooper, Jr. Circuit Court Judge

Opinion № 28051
Heard March 2, 2021 - Filed August 11, 2021

Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, William D. Lewis requests this Court to Rehear this matter based upon the following:

I. This Court failed to apply *Stromberg v. California*, 283 U.S. 359 (1931) to this case.

The Court failed to consider and discuss the First Amendment argument made as to the charge of "oppression." Br. of App. at 9-10; Reply Br. at 3-4. As Mr. Lewis has raised a substantial First Amendment right as to what he legally can tell his employees to do or not do, the principle established by the United States Supreme Court in *Stromberg v. California*, 283

U.S. 359 (1931) applies to this case. The State argued at the trial below that oppression was Mr. Lewis telling his officers exactly what he had a legal right to do. Rec. on App. at 1160, ll 6-25.

Under *Stromberg*, if a general verdict permits the conviction of a defendant upon a ground prohibited by the Federal Constitution, then the conviction must be reversed. Under *Stromberg*, the state presented three theories of conviction to the jury. The first theory was found to violate the First Amendment to the United States Constitution. In reversing the general verdict, the Court said, "The first clause of the statute being invalid upon its face, the conviction of the appellant which so far as the record discloses may have rested upon that clause exclusively, must be set aside." *Id.* at 369-370.

This Court did not discuss the issue as to the use of the word "oppression" in the context of violating the First Amendment. As noted above, the solicitor urged the jury to convict Mr. Lewis for what he said to the officers, an activity protected by the First Amendment. The Court in *Griffin v. United States,* 502 U.S. 46 (1991) recognized this distinction. The Court said, "This language, and the holding of *Stromberg* do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have arrested on that ground." *Id.* at 53.

The jury could have easily convicted Mr. Lewis for "oppression" on the exact ground urged by the solicitor. The ground urged by the solicitor violated Mr. Lewis' right to free speech. This requires that this Court reverse the conviction.

II. This Court failed to acknowledge that criminal negligence was charged to the jury.

This Court erred in concluding that the issue of negligence as used in the statute was not before the jury. While the record is confusing as to the issue being presented to the jury, the trial judge clearly defined the term criminal negligence for the jury. Rec. on App. at 1230, ll 8-18. The charge to the jury clearly permitted the jury to convict Mr. Lewis of the crime based upon criminal negligence which was defined as reckless.

III. The conduct of William D. Lewis does not clearly fall within the statute.

This Court erred in finding that the conduct of Mr. Lewis clearly falls within the statute. The error of the Court is the fact that while stating Mr. Lewis's conduct clearly falls within the statute, the Court did not state what specific conduct clearly fell within the statute and how the statute specifically prohibited the conduct.. The Court did state in detail the facts of the case. A reading of the opinion does not tell one exactly what Mr. Lewis did that violated the statute. The apparent factual basis upon which this Court affirmed Mr. Lewis' conviction does not constitute any criminal act. Hiring an assistant at a high salary is not a crime. Having sex with a subordinate is not a crime. Planing a trip to Reno to have an affair is not a crime. Telling employees not to date Savanna Nabors is not a crime. Nothing in the statute would put Mr. Lewis on notice that these non-criminal acts would constitute a crime if committed by an elected official. This Court's reliance upon *Measure for Measure* is misplaced. "Shakespeare's Measure for Measure, turns on officeholder Angelo's attempt to secure the seduction of the innocent Isabella. Angelo's feigned use of his power to pardon Isabella's brother in order to get her consent is official misconduct."*People of the Territory of Guam v. Camacho*, 103 F.3d 863, 867 (9th Cir. 1996).

Demanding sex in exchange for a pardon is bribery. Bribery is a crime. This Court has

recognized that sexual favors in exchange for a personal recognizance bond is bribery. "Our review of this file convinces us that disclosure of it to the appellants would have provided them with a good faith basis for seeking to impeach Roxanne for false swearing, if not for attempted bribery or bribery of a judicial officer." *State v. Gunn*, 313 S.C. 124, 137, 437 S.E.2d 75, 82 (1993). If the State in this case alleged bribery, it is not in the indictment. Nor did the state argument such a theory to the jury.

The fact that people may not agree Mr. Lewis' conduct is appropriate is not a basis for making the acts a crime under an ambiguous statute. If the South Carolina legislature wants to make sexual harassment by a public official a crime, they could do so. If the legislature wants to make it a crime to hire an employee at an excessive salary, it could do so. But the legislature could not pass a constitutional law that would prohibit a sheriff from telling deputies that they could not date or socialize with the sheriff's administrative assistant. This Court, under the guise of interpreting the ambiguous phrase "official misconduct" cannot make such legal conduct a crime.

The problem with an ambiguous statute is that any conduct can be said to fall within the statute because the statute is vague. Men of common intelligence would not agree upon what conduct falls within this statute. As the United States Supreme Court said, "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgressions." *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939). Under this Court's loose definition of "official misconduct," many, if not most, elected officials would be greatly surprised to learn that an affair at a government sponsored event could result in their imprisoned for a year. The holding of this Court in the *Lewis* opinion sanctions such a result.

If Mr. Lewis had committed a criminal act, then there is a basis for saying his conduct clearly falls within the meaning of "official misconduct." When his conduct, which is not a crime per se, is deemed to be a crime because a reviewing court does not approve of the conduct, then the reviewing court is making the law and not the legislature. Instead of finding a law that clearly fit the facts of this case, the prosecutor here forced the facts to fit the law. This can only be done with an inherently vague statute.

IV. The ruling in this case violates the ex post facto provisions of the State and Federal Constitutions.

Under the terms used in S.C. Code § 8-1-80, what words would put an elected official on notice, prior to this opinion, that an affair at a government sponsored event would cause them to be imprisoned for one year? The opinion in this case is not clear as to exactly what act of Mr. Lewis fell under "official misconduct" or "corruption" or "oppression." Nor does this Court explain how the wording of the statute put Mr. Lewis on notice as to when his non-criminal conduct crossed a line. Based upon the opinion, was the affair the reason for a criminal violation? Or was it the salary? Was the violation his threat to cut back the perks after she refused to go to Reno? Or was it the "oppression" when he told the deputies not to date Ms. Nabors? Or was it a combination of one, two, three or four of these facts?

The problem with the statute is it gives almost unfettered discretion to prosecutors and law enforcement as to what facts they elect to apply under the statute. If a prosecutor is offended morally by the actions of an elected official, he could deem that moral lapse to be a crime. Never before in our state has an elected official been indicted for having an affair and overpaying the person with whom they had the affair. This fact alone demonstrates that no prosecuting attorney

has ever believed this statute applies to a situation such as this. "There is always a first time," is an adage that cannot, consistent with the ex post facto provision Article I, § 4 of the South Carolina Constitution, be applied in a criminal case. As the United States Supreme Court has said, "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964).

Here, this Court has taken a series of acts by Mr. Lewis, none of which either collectively or separately would constitute a crime, and made the act or acts criminal. Nothing in this statute would reasonably put Mr. Lewis on notice that an affair with an allegedly overpaid assistant would result in a conviction and imprisonment for one year. By applying that standard to Mr. Lewis this Court is violating the ex post facto clauses of the Constitution of the State of South Carolina and the Constitution of the United States of America.

V. The crime found by the Court is not clearly prohibited by the Statute and therefore ambiguous.

This Court has stated that the crime committed by Mr. Lewis was he "utilized the public fisc to curry sexual favors with Nabors and then threatened consequences when his advances were rejected." *State v. Lewis*, Op. № 28051 (S.C.Sup. Ct. Filed August 11, 2021) (Howard Adv.Sh. № 27 at 39.). If the threatening of consequences is the crux of the case, the statute in question hardly puts any defendant on notice that such conduct violates the statute. Nor would an affair with an assistant be found under the ambiguous words. As official misconduct has no established definition, then the violation becomes what this Court says it is.

The Court's reliance upon *State v. Green,* 397 S.C. 268, 724 S.E.2d 664 (2012) is misplaced. In *Green*, this Court said, "In view of this compelling interest, the question becomes whether section 16–15–342 is narrowly tailored to achieve the interest for which it was intended. As will be discussed, we find the statute is narrowly drafted to prohibit criminal conduct rather than protected speech." *Id.* at 278, 724 S.E.2d at 668. The statute in this case is hardly "narrowly tailored." The statute in *Green* was very specific as to they type of language that was prohibited. The statute in this case is broadly written so that no elected official knows or understands the purpose of "official misconduct" except that as presently interpreted by this Court, morally reprehensible conduct, otherwise legal, is now illegal. This is hardly a standard by which one should be imprisoned for one year. No one disputes that asking a 14 year old girl to have sex with them is both morally wrong and criminal. The broad wording of the misconduct statute defines no act. The statute in *Green* defined very specific acts. The acts defined as criminal in *Green*, had long been declared criminal. As this Court stated, "In analyzing Green's constitutional challenge to section 16–15–342, we initially note that speech used to further the sexual exploitation of children has been routinely denied constitutional protection as the State has a compelling interest in preventing the sexual abuse of children." *Id.* at 268, 277, 724 S.E.2d at 668. In this case, the acts this Court deemed to be criminal did not have a long history of being illegal. Simply put, what in the phrase "official misconduct" or the words "oppression" or "corruption" would put an elected official on notice that an act, otherwise legal, would violate the statute? This Court did not answer this question nor does the opinion provide much guidance as to how the law should be enforced in the future.

This Court failed to consider that, unlike *Green*, this statute failed to give minimum

guidelines to guide law enforcement and prosecutors. "Perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Under the statute in *Green,* one does not have to guess as to whether their conduct falls under the statute. The statute is specific. The statute in question here is not specific.

VI. The Court failed to recognize that a vague statute and precedent in our state requires the indictment to be more specific and not less specific.

This Court erred in failing to recognize that because the crime of statutory misconduct in office "can be committed in various ways," (*Lewis,* at 41), the indictment needs to be more precise and not less precise. If the State truly understood their theory of the case, there would have been no problem in setting forth that theory in the indictment. Due process of law demands no less. If the wording of this indictment were used in a civil case, the complaint would be subject to a claim to be made more definite and certain. If such is the rule in a civil case, due process of law demands that such a rule apply in a criminal case. Because "the threshold for an indictment to be valid is generally not high," (*Lewis*, at 42) does not mean a threshold does not exist.

In *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005), this Court said, "The indictment is a notice document." Implied in that statement is that it is a notice of what the defendant is charged with doing to constitute a crime. It is not mere notice that he has committed a specific crime. To simply say in an indictment a "defendant committed a burglary on June 12, 2021," is notice he is charged with a specific crime. It is not notice of the details of the burglary

sufficient for a defendant to prepare a defense. In *Lewis,* this Court has sanctioned such an indictment. This Court should not reward poorly drafted indictments. Properly drawing and indictment is not an undue burden.

In the opinion, this Court stated, "Lewis utilized the public fisc to curry favors from Nabors and then threatened consequences when his advances were rejected." *Lewis*, at 39. While this might be the theory this Court gleamed from the testimony, the indictment does not allege this. All the indictment says of substance is, "William D. Lewis did, from the date he took office through April 24, 2017, misuse public resources and abuse the powers and authority of his office for the corrupt purpose of pursuing or facilitating an adulterous affair." *Lewis*, at 42. Nothing in that language would suggest the crime is a threat was made against Ms. Nabors when his advances were rejected. Nothing in the jury charge required a jury to find that as an element of the crime. Nothing in this record suggests that what this Court found was in fact the basis for the grand jury indictment. This creates the exact problem with a vague indictment that the United States Supreme Court discussed. "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell v. United States*, 369 U.S. 749, 766 (1962). And in this case, the jury, under the State's argument to the jury, could have convicted Mr. Lewis for telling his deputies they could not date Ms. Nabors. The jury charge as to common law misconduct in office required a finding he "oppressively and willfully abuses his authority." Rec. on App. at 1227, l 24. The statutory violation, as defined by the judge, only required he act recklessly in being oppressive. The jury easily could have

concluded he was merely reckless when he oppressed the deputies from dating Ms. Nabors. They could have found the trip to Charlotte was not a misuse of county funds because it was attended by and approved by Joe Kernell, the County Administrator. Rec. on App. at 413, l 19 to 414, l 15; 447, ll 10-14. There is nothing in this record to establish the money was misspent. As the indictment is so vague, this Court can only guess as to what act the jury found violated the statute but did not violate the common law misconduct in office. And this Court is also only left to guess as to the basis for the grand jury indictment. Mr. Lewis easily could have been convicted upon a ground rejected by the grand jury or not even considered by the grand jury. Both would violate Mr. Lewis right to have a grand jury indict him for a crime.

This case presented the Court the opportunity to add substance to the promise of this Court in *Gentry* that an indictment is a notice document. This Court has now held that the threshold of a sufficient indictment is indeed very low. As to the promise of *Gentry*, the ruling in the *Lewis* is "but to 'keep the promise to the ear and break it to the hope.'" *State v. Prescott*, 125 S.C. 22, 117 S.E. 637, 638 (1923)(Cothran, dissenting). This Court should rehear the issue as to the sufficiency of the indictment and require a solicitor to put meaningful substance in the indictment. Our constitution requires it. "Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; *to be fully informed of the nature and cause of the accusation.*" S.C. Const. art. I, § 14 (emphasis added). This indictment does not fully inform Mr. Lewis of the nature and cause of the accusation. Our state constitution also requires, "The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms." S.C. Const. art. I, § 23. This Court is required to hold that

indictments must "fully inform" a defendant.

To be fully informed is not and should not be a low threshold. This Court set a higher threshold in *State v. Johnston*, 149 S.C. 195, 146 S.E. 657 (1929). The opinion in this case is contrary to the holding in *Johnston.* In that case this Court stated, "The serious objection to the indictment was the second, which challenged the instrument for failure to allege to whom the false statements were made." *Id.* at ___, 146 S.E. at 660. This Court then concluded, "To go further and require him to defend himself on the charge of making a false statement to some undisclosed person would not preserve to him his right, as declared by the Constitution, to be fully 'informed' of the accusation against him." *Id.* at ___, 146 S.E. at 661. Holding an indictment as being too vague for failing to disclose to whom a statement was made, is at least equal to an indictment that fails to disclose how one misused public resources. A person should know to whom the statement was made. A defendant would not know what pubic resources were misused. The opinion in this case cannot, therefore, be reconciled with the opinion in *Johnston*. The threshold in *Johnston* was not low.

This Court further erred in holding that defendants are now required to examine the discovery to determine what the indictment means. The reverse should be the standard. A defendant should be able to read the indictment to determine what discovery is relevant. The discovery in this case was so voluminous that it was submitted to counsel on a hard drive. Rec. on App. at 91, ll 16-19. To require any defense counsel to go through literally hundreds of thousands of page of discovery to determine what an indictment means is an absurdity. No counsel for any defendant should be forced to do such. All the State should be required to do is place their theory with precision in the indictment. At that point, defense counsel can review

discovery knowing what facts they are looking for. Defense counsel should not be required to become clairvoyant and determine the theory of the State and seek out the facts from the discovery. We do not require a defendant in a civil case to review all the discovery to try and determine the theory of the case by the plaintiff. Under a constitutional government in which the liberty of a citizen is more important than the wallet of a citizen, this indictment must be held to be invalid. If not, the wallet trumps liberty.

VII. This Court did not recognize prior precedent in our state requires the statutory misconduct in office an allegation of a violation of a statute.

In the opinion in this case, the Court failed to consider the requirement by precedent in our State that statutory misconduct in office requires a duty that is imposed by statute. *State v. Jacques,* 65 S.C. 178, 43 S.E. 515 (1903). In *Jacques*, one of the specific allegations in the indictment was that he failed to issue the bid to the lowest bidder. On that specific issue this Court said, "After careful investigation, we are unable to find any statute requiring that contracts such as those mentioned in this count of indictment should be let to the lowest responsible bidder." *Id.* at ___, 43 S.E. at 517. The indictment for statutory misconduct in office must contain an allegation of a violation of a statutory duty. Not giving a contract to the lowest bidder easily could be a misuse of public resources. The indictment in this case failed to allege a statutory violation..

VIII. The Court failed to recognize that prior precedent in our state requires that the elements of fraud be set forth in the indictment.

In the indictment in this case alleges fraud as simply being "fraud." It does not set forth the elements of fraud. In this respect the indictment is not sufficient as to fraud. Again, In

Jacques this court set forth the clear requirements to allege fraud. This Court said, "In alleging fraud, it is well settled, both at law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient." *Id.* at __, 43 S.E. at 517. The rule established in *Jacques* was not followed in this case.

CONCLUSION

For the foregoing reasons, this Court should rehearing this matter and amend the opinion to comply with the prior precedents of this Court and the United States Supreme Court decision in *Stromberg v. California*, 283 U.S. 359 (1931). The opinion, following the prior precedents, should declare the statute unconstitutional and being overly broad and vague. In the alternative, the case should be reversed to follow the prior precedents of this Court and declare the indictment as overly broad and quash the indictment.

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