THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case № 2011-196627

Appeal From Laurens County
Eugene C. Griffith, Jr. Circuit Court Judge

Opinion № 5114
Heard March 12, 2013 - Filed April 10, 2013
Withdrawn, Substituted, and Refiled April 11, 2013

The State, ... **Respondent,**

vs

Teresa Blakely, ... **Appellant.**

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellant Court Rules, Teresa Blakely, the Appellate above, hereby Petitions this Court to Rehear this matter based upon the following:

1. This Court improperly applied *State v. Fletcher,* 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996) in two important respects. First, *Fletcher,* unlike the present case, involved the continuation of a prosecution for presenting and pointing a firearm that began at the same time as the municipal court charges. The defendant was originally charged with presenting and pointing at the time of her municipal court charges. Secondly, again unlike the present case, the solicitor

gave an explanation for the charging decision which the trial court accepted.

In *Fletcher,* this Court noted "The mere continuation of the prosecution of an existing charge does not constitute action which is constitutionally prohibited as retaliatory in nature, and it does not give rise to the suggestion that a presumption of vindictiveness is warranted" *Id.* at 262, 471 S.E.2d at 705. In the present case there was not a continuation of a prosecution but a totally separate decision to prosecute after Ms. Blakely had been to trial on the murder charge. Thus, *Fletcher* is simply not applicable.

2. In *State v. Patrick*, 349 S.C. 203, 562 S.E.2d 609 (2002) the South Carolina Supreme Court did find the prosecutor had acted vindictively when he re-instated charges that had been dismissed years before. In an attempt to justify re-filing the charges, the prosecutor gave an explanation for his decision. The Court rejected the explanation saying "The solicitor stated he prosecuted the previously *nol prossed* charges on retrial because it was in the interest of the State of South Carolina and the people of Abbeville County. He also stated that once a solicitor had a life sentence on one charge, it was common practice not to prosecute the additional charges. These are fairly weak reasons for bringing the charges, especially considering the length of time between the original trial and the retrial. Additionally, the charges were *nol prossed* ***prior*** to the first trial because they 'vanished.'" *Id.* at 210, 562 S.E.2d at 612 9emphasis in original).

In the present case in her motion to dismiss, the defendant stated the theory that the charges were brought in retaliation for the previous acquittal and the state did not bring the accessary after the fact charge at the original trial because they had sought to gain a tactical advantage. Rec. on App. at 5, ll 2-23. In response the prosecutor, unlike the prosecutor in

Fletcher or *Patrick,* gave no reason for the decision to bring additional charges after the acquittal of Ms. Blakely. The prosecutor instead equated Ms. Blakely's vindictive prosecution with a selective prosecution and cited only selective prosecution cases to the court. Rec. on App. at 8, l 22-25 to 10, ll 1-11. The prosecutor in *Fletcher* gave a very valid reason which the court accepted. In *Patrick*, the prosecutor gave a lame excuse and the Court found the prosecution to be vindictive.

What this Court has done in this case is to simply say that no excuse is better than a poor excuse. If the prosecutor in *Patrick* had given no excuse instead of a poor one, would the result have been different?[1] This Court failed to consider that the total failure of the state to give a reason for the second trial should give rise to a presumption of vindictiveness.

3. This Court erred in relying upon *United States v. Kendrick*, 682 F.3d 974 (11th Cir. 2012). In *Kendrick* the Eleventh Circuit specifically noted "The government responded that, at the time of the original indictment, there was insufficient evidence to indict Kendrick for the alien smuggling charge, and, indeed, it was not until his admissions during the first case that it had a sufficient evidentiary foundation to bring the new charge." *Id.* at 980. Thus, unlike this case, the government did not have the information to indict Kendrick at the time of the original trial. *Kendrick*, however, recognized a presumption of vindictiveness which the court found had been rebutted by an adequate explanation. Here, there was no explanation.

4. This Court also erred in relying upon *United States v. Johnson,* 171 F.3d 139

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[1] While Thomas Fuller, the English historian, has been quoted as saying "Bad excuses are worse than none" and George Washington has been quoted as saying "It is better to offer no excuse than a bad one" neither was committing on the propriety of the state justifying a second prosecution on the same facts after an acquittal.

(2nd Cir. 1999). The facts in *Johnson* are substantially different from this case. In *Johnson* the gun charge had been brought originally in state court. The trial of that case was delayed until after the acquittal of the RICO charge. The gun charge also apparently did not arise out of the RICO charges. Here the second charge arose from the identical facts as the charge on which Ms. Blakely was acquitted.

5. This Court also erred in relying upon *United States v. Rogers*, 18 F.3d 1425 (8th Cir. 1994). In *Rogers*, the government amended the indictment after a mistrial and not an acquittal. In addition the government gave an explanation for the additional gun charge by advising the court it was based upon evidence discovered after the original indictment but too late to file a superseding indictment before the first trial. Again, in this case, no reason was given.

6. This Court erred in relying upon *United States v. Esposito*, 968 F.3d 300 (3rd Cir. 1992). In *Esposito*, the court found "Here the government explains that it chose not to indict for all possible crimes in the *Accetturo* trial because to do so would have made the trial unmanageable and would have possibly confused the jury." *Id.* at 306. Again, unlike the present case, the government elected to give a reason and the reason was accepted by the lower court.

7. This Court erred in holding that the Standards of the American Bar Association did not provide due process relief to Blakely. Merely because the ABA Standards are not binding, does not mean the standards cannot be used to establish a due process violation. The term "due process" is vague and intentionally so. As the United States Supreme Court has said "This phrase, 'due process of law,' has always been one requiring construction; and, as this court observed long ago, never has been defined, and probably never can be defined, so as to draw a

clear and distinct line, applicable to all cases, between proceedings which are by due process of law and those which are not." *Freeland v. Williams*, 131 U.S. 405, 418 (1889). But because it is a vague term is not a reason to apply the concept to prevent a government from being overreaching. The ruling from this Court places no limit upon the state to try any defendant any number of times as long as the state can be imaginative enough to find another crime. After this decision, the state can go back to the General Session Court of Laurens County and seek consecutive sentences for the common law crime of obstruction of justice, false statement to a police officer in violation of S. C. Code § 16-17-725, or contributing to the delinquency of a minor in violation of S. C. Code § 16-17-490. Nothing in the opinion as written gives Ms. Blakely any protection from further charges by the state. This Court should recognize the logic of the position of the ABA Standards and the fact that they promote efficiency in the criminal justice system. If all charges against Ms. Blakely had been brought at one time, the judicial system would have operated more efficiently.

CONCLUSION

For the foregoing reasons, this matter should be re-heard and a decision entered reversing the conviction of Teresa Blakely.

April 24, 2012

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Eugene C. Griffith Jr., Circuit Court Judge

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on April 24, she did deposit in the United States Mail with proper postage affixed thereto, three copies of the Petition for Rehearing in the above case addressed to William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 24 day

of April, 2013.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22