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May 26 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY

General Sessions Court
Honorable Grace Knie, Circuit Court Judge

Appellant Case № 2021-000599
Lower Case Nos 2020GS4200001, 00002, 00003, 2019GS4201035

State of South Carolina Respondent

vs.

Mark Anthony Gilbert. Appellant

Initial Reply Brief

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Argument

Question I

Did the trial court err in failing to dismiss the four indictments because they were multiplicitous and unduly prejudiced Mark Gilbert by leading the jury to believe Mr. Gilbert was charged with four different crimes when they were actually just one crime?

In relying upon *State v. Smith*, 276 S.C. 484, 280 S.E.2d 56 (1981), the state ignores an important distinction. The indictments in this case allege a single crime committed over a period of some 27 months. The indictments in *Smith* were for two acts that occurred in a brief period of time. If the state had the knowledge to know the specific dates for any of the allegations of crime in this indictment occurred, they could have alleged a different crime for each day they could prove. Lacking this ability, the state elected to allege one offense over a 27 month period of time. If a person commits a rape at 10 am in the morning and then commits another rape upon the same person at 3 pm in the afternoon, of course the state may allege two separate and distinct crimes. The indictment would refer to two crimes separated by time, and the fact that the rapes were similar or different is simply not relevant. Thus, the facts in *Smith*, that the second assault was by a different means is simply not relevant. Two indictments could have been obtained even if the same means of rape was used in both.

Mr. Gilbert would have welcomed the opportunity to prove on any specific date the crime could not have occurred. But when the indictment covers a 27 month period, the ability to establish even an alibi is impossible. The ability to prove the minor child was not at the house on a specific date vanishes. The ability to prove other people were present on a specific date is not available. Simply put, by alleging the crime occurred over 27 months, Mr. Gilbert is seriously

hampered in his defense. The best he can muster is the simple denial. This is especially true in this case where no physical or medical evidence supports the testimony of his daughter. *See, People v. Beauchamp*, 74 N.Y.2d 639, 641, 539 N.E.2d 1105, 1106 (1989)(Defendant was entitled to pretrial notice of the charges so that he would be able to adequately prepare a defense.)

In alleging the acts of criminal sexual conduct occurred over a 27 month period, the state has elected to present one continuous crime. This fact alone distinguishes this case from the *Smith* case. Whether criminal sexual conduct with a minor can ever be a continuous crime is subject to some question. As one court said, “We thus align ourselves with the Rhode Island, New Hampshire, and New York courts and hold that a single count that charges multiple incidents of those offenses, committed other than in the course of a single criminal episode of relatively brief temporal duration, cannot be sustained as non-duplicious on the theory of a continuing offense.” *Cooksey v. State*, 359 Md. 1, 23, 752 A.2d 606, 618 (2000)

As noted in the opening brief, the crime of criminal sexual conduct could be committed in a variety of ways. The simplest way to illustrate the error here is to assume the state had tried Mr. Gilbert on one count of the indictment and he had been acquitted. The State could not have then indicted Mr. Gilbert for criminal sexual conduct over the same 27 month period of time but allege a different means of accomplishing the criminal sexual conduct. Such a conviction would violate double jeopardy of the state and federal constitutions.

The State has argued, “It is absurd to think the people of South Carolina and our legislature would intend for Appellant to only face one charge for his repeated sexual assaults of the Victim.” Br. of Resp. at 13. The decision to charge the crime as one continuous crime over a period of 27 months was that of the solicitor and not the legislature. The legislature gave the

solicitor permission to bring individual counts on individual days regardless of whether the acts were similar or not. The solicitor elected not to do that. Apparently this was due to the difficulty of finding any specific day the alleged abuse occurred. To overcome this difficulty with the proof, the solicitor elected to allege one continuous course of conduct. By breaking the one continuous course of conduct down into four separate crimes, the solicitor has made it easier to convict the defendant. Making the requirement of the state to prove the defendant guilty easier should not be the goal of our criminal justice system. “It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent.” *Com. v. Bujanowski*, 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992).

The State cites numerous cases that support the proposition that a defendant can be charged with numerous counts of criminal sexual conduct if the separate acts occur over a period of time. As noted above, Mr. Gilbert has no quarrel with this argument. In the cases cited in Respondent’s brief, the acts refer to a specific encounter on a specific day, thus the State had not alleged a single continuous crime over a period of many months. The case closest to the present case is *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007). In that case the defendant appears not to have argued the state had alleged the state had alleged a single continuous crime over a period of years. The issue for which the State cites the case refers to an incident in the spring of 1994. The three charges, arising from that incident occurred at the same time on the same day. The Court said, “Here, there was both touching and two distinct sexual acts in a single encounter.” *Id.* at 705, 643 S.E.2d at 38. As the issue argued here is not the same as in *James*, it is not support for the state’s position.

The State appears to argue that had the state elected, they could have charge Mr. Gilbert with hundreds of counts of criminal sexual conduct for various types of acts. The minor child testified the alleged abuse occurred “Multiple times a week. Like four and seven.” Rec. on App. at 162, 21 -25. The State would be able to indict for multiple acts with a dildo, finger, penis or object. Such an approach would demonize any defendant. Demonizing even the guilty is a denial of due process. “But the prosecutor’s conduct here ‘so infected the trial with unfairness as to make the resulting [sentence] a denial of due process.’” *Bennett v. Stirling*, 842 F.3d 319, 327–28 (4th Cir. 2016)(internal citations omitted)

If over the 27 month period, only a sexual assault with a penis had occurred, under the theory of the State, a defendant could be indicted for as many count as the complaining witness would testify occurred. Thus, criminal sexual conduct with a minor that occurred over a period of a few months, regardless of the degree, could result in a virtual life sentence for any defendant.

Our supreme Court has recognized the problem with indictments for criminal sexual conduct that extent over a period of years. *See, State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015). Such indictments are fraught with problems for a defendant. Some states have even held much briefer periods of time deny a defendant of the due process of law. *See, People v. Keindl*, 68 N.Y.2d 410, 502 N.E.2d 577 (1986)(holding time period of 10 to 16 months to be unduly protracted).

This Court should take steps to assure that such problems are eliminated. Holding that the indictments in this case only charge one crime would make the process fairer for the defendant with no harm to the state. A reverse holding will open the door to abuse by the state by permitting the charging the charging of dozens of counts for what is essentially one criminal

charge. Permitting such a policy would seriously damage the presumption of innocence.

Question II

Did the trial court err in sentencing Mark Gilbert to a consecutive five year sentence on indictment № 19-GS-42-1035 when the sentence violated the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States of American and Article I, § 12 of the Constitution of the State of South Carolina?

The Appellant agrees with the State that the disposition of this issue also depends on how this Court disposes of question I. In the event the court hold the indictments are in fact multiplicitous, but the remedy is to dismiss three indictments, then this indictment should be one of the three. If all the indictments are multiplicitous, a consecutive sentence is improper.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Opening Brief, this matter should be reversed and remanded for a new trial on only one indictment.

May 26, 2022

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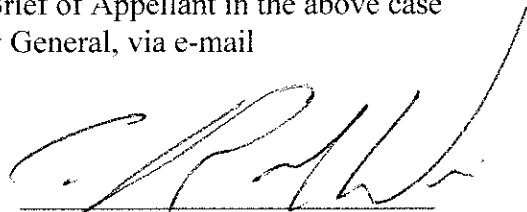
vs.

Mark Anthony Gilbert Appellant

CERTIFICATE OF SERVICE

PERSONALLY appeared before me, C. Rauch Wise who, after being duly sworn, deposes and says that he is the Attorney for the Appellant in the above entitled case. That on May 26, 2022, he did forward a copy of the Initial Reply Brief of Appellant in the above case addressed to William M. Blicht, Jr., Office of the Attorney General, via e-mail wblitch@scag.gov.

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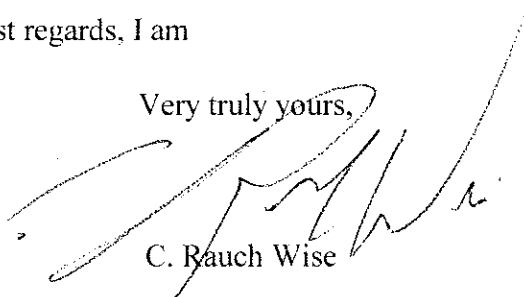
Re: State vs. Mark Gilbert, Appellate Case No. 2021-000599

Dear Ms. Kitchings:

I am enclosing herewith for filing the Initial Reply Brief of Appellant together with the Certificate of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,


C. Rauch Wise

CRW/slt
Enclosure

cc William Blitch