THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENWOOD COUNTY COURT OF
GENERAL SESSIONS WYATT T. SAUNDERS, JR.,
CIRCUIT COURT JUDGE

ON CERTIORARI TO THE S.C. COURT OF APPEALS

UNPUBLISHED OPINION NO. 2005 -UP-122
S.C. CT. APP. FILLED FEBRUARY 17,2005
CASE NO. 2002-GS-47-40)

THE STATE…………………………… .... RESPONDENT

v.

KENNETH E. SOWELL,.. PETITIONER

BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

U. S. Constitution, (5th and 14th Amendments, Due Process)

S.C. Constitution, Article 1, Sec 3

In Re Ruffalo. 390 U.S. 544,88 S. Ct. 1222,20 L.Ed.2d 117 (1968),

Burdge. v. State Board of Medical Examiners. 304 S.C. 42,403 S.E.2d 114, (1991)

State v. Edwards. 302 S.C. 492, 397 S.E.2d 88 (1990)

State v. Freddie Owens, 346 S.C. 637, 552 S.E.2d 745 (2001)

State v. Schrock, 283 S.C. 129,322 S.E.2d 450 (1984)

Burns v. Universal. 340 S.C. 509, 532 S.E. 2d 26 (Ct. App. 2000)

The Magna Charter

QUESTIONS PRESENTED FOR REVIEW
STATEMENT OF ISSUES ON APPEAL

1 Petitioner was never charged or given notice of the charges upon which the Court of Appeals based their finding of Contempt of Court in violation of Petitioner's Due Process rights?

2 Did the Court of Appeals, by their holding based on that issue that was never before the court, deprive the Petitioner of fundamental fairness by finding Petitioner of Contempt of Court even though he was not informed of the charges against him and the allegations he would confront at trial- or in this case- after trial, in violation of the Petitioner's Due Process rights under the 5th and 14 amendments to the U.S. Constitution and the S.C. Constitution?

3. Did the Court of Appeals, by their holding based on that issue that was never raised or discussed before the court, deprive the Petitioner of fundamental fairness and Due Process rights and the presumption of innocence by finding Petitioner of Contempt of Court even though no evidence was presented to the lower court on the issue of which the Court of Appeals found Petitioner in violation, in violation of the Petitioner's Due Process rights under the 5th and 14 amendments to the U.S. Constitution and the S.C. Constitution and the right to be presumed innocent?

4 Did the lower court and the Court of Appeals err in finding that petitioner failed to explain to Gore the obligation of secrecy, even though the testimony reflected that Gore was an experienced investigator, had been advised several times, knew and was warned to not disclose any contents of the files, and no witness disputed such testimony and even all witnesses as to such issue denied any disclosure and receipt of such information?

5 Did the lower court and the Court of Appeals err in finding "that Gore testified that he was not given any instruction regarding the release of this information to other individuals," when that is not the testimony offered?

STATEMENT OF THE CASE

This appeal arises from a finding of Contempt of Court in which the Petitioner! Attorney Sowell was adjudicated guilty of contempt of court upon a finding in a non-jury proceeding before the Court of General Sessions and affirmed by the S.C. Court of Appeals.

1 PROCEDURAL HISTORY

Attorney Sowell represented one of many defendants charged with related drug offenses prosecuted by the State Grand Jury division of the S.C. Attorney General's office.

Pursuant to discovery requested by several defense attorneys, Judge Saunders issued his order dated March 4,2002 directing that grand jury information be provided to all defense attorneys, ordered that all such information was to be protected from disclosure and ordered that all attorneys be subject to the provisions of S.C. Code 14-7-1720, specifically noting that the attorneys could use such information for trial preparation.

Based on Attorney Sowell's release of that grand jury information to his experienced investigator, Prosecution brought a Rule To Show Cause on September 20, 2002 alleging that by release to his investigator, Attorney Sowell committed Contempt of Court. In all statements of prosecution, and in the Rule to Show Cause, the offense was stated to be the release of information to that investigator and the investigator's alleged release to Curtis, a target of that prosecution team. Attorney Sowell admitted that he has released such information to his investigator, after warning the investigator of the requirement of secrecy. Sowell denied that he did anything in contempt of court or the court system and denied that any grand jury information was given to Curtis, a target of the investigation..

Although Petitioner and his investigator testified that the investigator was very experienced and was warned about disclosure and there was no evidence presented to support that the investigator did release any information, the Lower Court in a non jury proceeding on November 12, 2002 held that by such release to his investigator, Petitioner did commit such offense. The Order of the lower court was dated November 19,2002 and amended by Order dated April 21, 2003.

Attorney Sowell filed and perfected an appeal on May 9, 2003.

The Court of Appeals issued it's opinion that the release to the investigator was not a violation of contempt of court, but held that Petitioner did not warn his investigator of release of information and, with no advance notice to Petitioner that such issue would even by raised, that by Petitioner's failure to advise the lower court of the release to his investigator, Petitioner committed the offense of contempt of court, without giving Petitioner the opportunity to present evidence of his letter to the lower court advising of such release.

Attorney Sowell filed a Petition for Rehearing before the S.C. Court of Appeals on March 2,2005. The S.C. Court of Appeals denied that Petition for Rehearing on April 21, 2005.

Attorney Sowell filed a Petition for Writ of Certiorari on June 22, 2005, and by Order dated September 21,2005 the S.C. Supreme Court granted that Writ.

2 ORDER OF THE LOWER COURT

In the Order of the lower court and the Amended Order of the lower court Judge Saunders made findings and supported his conclusion that Petitioner committed the offense of Contempt of Court by finding:

A "Gore stated in his testimony that he was not given any instruction regarding the release of this information to any other individuals from (Petitioner)"

This was not Gore's testimony. He actually said "that at the time that the Grand jury information was given to him, no instructions were given to him" (about what Petitioner wanted him to do.) (R.p.43, line 24-p. 44, line 3). It is true, that when the box of files where left in the office we shared after my office building burned, I had not told Gore about what we would be doing with it yet. However, Gore and Petitioner testified that Gore was a very experienced investigator (helping with numerous murder and drug cases) and that before Attorney Sowell ever opened his file, he reminded Gore that all information was to be kept secret. (R.p.77, line 13 21) Apparently such warnings were successful, for Gore did not release any such information. (R.p64, line 3-p.66, line 22 and R.p.68 line 14-p.69, line 18.).

B "That when Curtis was named by Ballew as a co-conspirator. Gore told Curtis about that statement."

This is not was the testimony offered. Actually Gore and Curtis both

testified that Gore did not tell Curtis about such statement. Gore only told Curtis that "based on Gore's investigation, everybody in the area knew that Curtis was Lewis's supplier." (Rp 64, line 3-p.66, line 22) Curtis stated that Gore never told him about the Grand Jury information, and that he never saw or was told about that information/material. (Rp64, line 3-p66, line 22 and Rp. 68 line 14-p.69, line 18.).

C "That Petitioner's release of the discovery to Gore was the basis for the finding of Contempt of Court."

However, the Court of Appeals found that the release of information to Gore was not a violation of Contempt of Court. The prosecution did not appeal from that ruling, and it is the law of this case.

3 OPINION OF THE COURT OF APPEALS

In the opinion of the Court of Appeals, the court affirmed the findings and Order of the lower court finding Petitioner of Contempt of Court based on a finding that 1) Petitioner did not advise the investigator to keep the grand jury information secret and 2) did not advise the lower court that he had released the information to his investigator. There was no evidence to support either finding.

STATEMENT OF THE FACTS

Attorney Sowell represented Bobby Joe Lewis on drug offenses, investigated by the State Grand Jury.

Petitioner, as attorney for Lewis, was provided two sets of Grand Jury information, one before the first trial, and the second before Lewis' retrial. Judge Saunders ordered the numerous defense attorneys to honor the secrecy requirement of S.C. Code 14-7-1720.

Lewis's first trial resulted in a "hung jury" and mistrial. At that trial, law enforcement testified that substantial drug activity was being conducted at the home of Floyd Ballew, (Dooney). That home was used by many friends, including Lewis, as the local pool hall. Lewis' major defense at the first trial centered on his allegations that it was Ballew, and not he, Lewis, who was dealing drugs and placing phone calls to a drug supplier from Ballew's home. (R.p.28 32) (That drug supplier was apparently Curtis.)

Before Lewis' first trial, Sowell retained Gore, to locate witnesses and conduct an investigation to assist Lewis and Sowell. Gore had previously assisted Sowell in several drug and murder trails and had substantial experience and knew the necessity of secrecy of information provided by Sowell. (Rp.81, line 16-19» Before providing Gore with access to his file and instructing Gore as to his role, Sowell reminded Gore of the secrecy requirement imposed. (Rp.77, lines 12-22)

After Gore began his new investigation for Lewis' second trial he discovered that law enforcement had previously made a controlled drug buy from Ballew before Lewis' first trial but had not effected an arrest. That buy was never disclosed to Sowell pursuant to discovery requests. (Rp.28-32) When Sowell complained to prosecution about the failure to disclose,

pursuant to discovery requests, the drug buy from Ballew, prosecution just responded that "Well, we did not know about that."

Prior to Lewis' second trial, Sowell moved for an order dismissing the charges based on the failure to disclose the prior drug buy from Ballew and res judicata. (Rp.28-32) Prosecution defended against such motion with the statement that the law enforcement officials who made the buy did not tell the prosecution, even though agents from both counties attended both trials.

Before Lewis' second trial, additional grand jury information was provided to Sowell, and Sowell provided that to Gore for use in Gore's investigation. Sowell had already warned his experienced investigator of the secrecy requirement before delivering this new grand jury information to Gore, (Rp. 81, line 3-5 and line 16-19, Rp 77, line 11-21 and Rp 80, line 18 22), but at that time, Sowell did not explain to Gore how he intended to use that material in order to prepare for trial. (Rp.43, line 24-p.44, line 3).

Curtis had bought several cars from Gore, whose usual occupation was a car dealer, and he often traveled to Gore's lot to consider additional purchases. Sowell represented Curtis on a DUI charge that was pending during Lewis' proceedings, and Gore rented an office in his building to Petitioner who used that office as his Greenville branch office after his office building burned.

Prior to Lewis' second trial, Gore and Sowell learned that Ballew had finally been arrested pursuant to that drug buy which occurred prior to Lewis's first trial, and Attorney Sowell met with Ballew in the Laurens County LEC and took an affidavit and statement from him.

After substantial investigative work and after Sowell's interview with Ballew in the

Laurens County jail, Gore confronted Curtis with the fact that every one in Laurens County knew that he supplied drugs to Ballew's pool house. (R.p.64, line 3-p.66, line 22 and Rp68, line 14-p. 69, line 18). Gore told Curtis that he should turn himself in and try for a reduced sentence. Curtis immediately left Gore's location, and has not returned.

Both Curtis and Gore testified that Curtis never saw any grand jury material, and was never told anything about grand jury material or documents. (R.p64, line 3-p.66, line 22 and . R.p.68, line 14-p.69, line 18.).

Both Gore and Sowell testified that before the grand jury information was released to Gore, Sowell warned Gore and Gore knew to never reveal any information from his file or anything Sowell told him.(R.p.81, line 3-5 and 16-19, R.p.77, line 11-21 and Rp.80, line 18-22)

Sowell released grand jury information only to his alter ego, his experienced employee/investigator to prepare for Lewis' trials.

Gore never released any grand jury information to anyone.

Curtis testified that he never saw or was informed of any grand jury information. (Rp64, line 3-p.66, line 22 and Rp68 line 14-p.69, line 18.).

There no evidence or testimony that Sowell ever released any grand jury information to anyone except Gore, his employee, after explaining the requirement of secrecy.

ARGUMENT

1 In violation of Attorney Sowell's Due Process rights as provided in the S.C. and U.S. Constitutions and affirmed by decisions of several courts, the Court of Appeals, in their decision ruled that Attorney Sowell had committed the Offense of Contempt of Court, and found that Petitioner committed acts which were never alleged or raised 1) In the State's Motion and Rule to Show Cause, or 2) before the lower court and 3) never raised before the Court of Appeals, therefore depriving petitioner of the opportunity to defend against such allegations raised by the Court of Appeals. Attorney Sowell became aware of such issue only by the reading of the Opinion of the Court of Appeals. The issue was first raised in Attorney Sowell's Petition for Rehearing before the Court of Appeals because that was Attorney Sowell's first chance to raise that issue. If the prosecution or the lower court or the S.C. Court of Appeals had ever raised the issue as to whether Sowell had ever notified the court of disclosure of information to Gore, Sowell could have produced a copy of his letter to Judge Saunders to prove that no offense occurred.

This issue was not raised before the lower court nor before the Court of Appeals in Briefs, nor in the Oral Argument, because it was not before the court until the issuance of the Opinion of the Court of Appeals. It was never an issue before the court prior to the release of the Opinion of the Court of Appeals. Such err deprived Attorney Sowell of fundamental fairness and Due Process as guaranteed by the S.C. and U.S. Constitution

In In Re Ruffalo. 390 U.S. 544, 88 S. Ct. 1222,20 L.Ed. (2d) 117 (1968), Burdge. v. State Board of Medical Examiners. 304 S.C. 42, 403 S.E.2d 114, (1991) and Bums v. Universal, 340

S.C. 509, 532 S.E. 2d 26 (Ct. App.2000) The courts have all held that the failure to give fair notice of the allegations against a defendant constitutes a denial of procedural due process.

This Petitioner (Sowell) was not given any notice at all that the notice to the lower court was an issue and thus was not notified of the charges against him and such was a violation of Due Process.

2 Did the Court of Appeals, by their holding based on that issue that was never before the court, deprive the Petitioner of fundamental fairness by finding Petitioner of Contempt of Court even though he was not informed of the charges against him and the allegations he would confront at trial- or in this case- after trial, in violation of the Petitioner's Due Process rights under the 5th and 14 amendments to the U.S. Constitution and the S.C. Constitution?

The argument and cites set forth in Argument No.1 concerning Due Process would be identical to this Argument Number 2 promoting Fundamental Fairness

3. The Court of Appeals, by their holding based on that issue that was never raised or discussed before the court, deprived the Petitioner of fundamental fairness and Due Process rights and the presumption of innocence by finding Petitioner in Contempt of Court even though no evidence was presented to the court on the issue of which the Court of Appeals found Attorney Sowell in violation, in contradiction and violation of Attorney Sowell's Due Process rights under the 5th and 14 amendments to the U.S. Constitution and the S.C. Constitution and the right to be presumed innocent. There was no evidence that Petitioner did not mail to the lower court notice of the release of information to his investigator. Therefore, any determination that Petitioner did not mail such notice would be not supported by evidence, but rather the result of a presumption of guilt, in violation of the 5th and 14 amendment to the U.S. Constitution.

4 The lower court and the Court of Appeals erred in finding that petitioner failed to explain to Gore the obligation of secrecy, even though the testimony reflected that Gore was an experienced investigator, had been advised several times, knew and was warned to not disclose any contents of the files, and no witness disputed such testimony and even all witnesses as to such issue denied any disclosure and receipt of such information? Such finding was totally without facts upon which the court could base such findings, , in violation of the Petitioner's Due Process rights under the 5th and 14 amendments to the U.S. Constitution and the S.C. Constitution and the right to be presumed innocent?

5 The lower court and the Court of Appeals erred in finding "that Gore testified that he was not given any instruction regarding the release of this information to other individuals," when that is not the testimony offered. The question asked at trial was, "at the time that the Grand Jury information was given by Sowell, did he give you any instructions about to do or anything about grand jury material?" The Record reflects that Nothing was asked of Gore as to "any release to others." It is true that when the boxes of files were left in our joint office, we did not discuss what we will do with them yet. Gore actually testified that he was an experienced investigator, knew, and Sowell had already informed him, of the requirement to not release information from the file. Such finding was totally without facts upon which the court could base such findings, in violation of the Petitioner's Due Process rights under the 5th and 14 amendments to the U.S. Constitution and the S.C. Constitution and the right to be presumed innocent.

In the state's Motion for Rule to Show Cause as to criminal contempt, the charges brought against Sowell were: (R.p.13-15)

1. Sowell released grand jury information to Gore.
2. Cutis was kept apprized of this investigation that pertained to him.
3. That Curtis was advised of statements of Ballew and Ballew's identity as a cooperating witness was revealed.
4. That when Curtis was advised of Ballew's arrest, there were discussions regarding paying the bond to release Ballew to ensure that he would not testify at trail.

As to allegation # 1, "Sowell released information to Gore" the Court of Appeals ruled and held that Sowell was not prohibited from releasing information to Gore, his investigator, without prior court approval.

As to allegation # 2, "Curtis was kept apprized of this investigation that pertained to him", Curtis was not appraised of any grand jury information, nor did he testify that he was. He only testified that he was kept apprized of the investigation, and that information came from Lewis' first public trial. There was no testimony or evidence that he was apprized of grand jury information, and the only evidence on that issue was his testimony that he never saw or was told of any grand jury material..

As to allegation # 3, "Curtis was advised of statements of Ballew and Ballew's identity as a cooperating witness", that conversation occurred AFTER Gore advised that Ballew was in the Laurens County jail, and after Sowell's conversation with him in jail and after Ballew's identity was raised as a major issue in Lewis' first trial.

As to allegation # 4, "there were conversations regarding Curtis posting Ballew's bail to release Ballew to ensure that he would not testify at trial", there was no testimony that Curtis was asked to post Ballew's bail. Even if Curtis had posted Ballew's bail, or offered or agreed to do

so, which he did not, that would have no bearing on Sowell or anything in contempt of court.

During Sowell's Hearing on the Rule to Show Cause, the state explained that Sowell's violation did not involve any allegation of information release to Curtis, but "occurred when Sowell gave the information to Gore." (R.p.m. 74, line 4-14.) That statement of prosecution copied the allegations of the Rule To Show Cause.

The position that the prosecutor and the Order of the lower court under appeal stand for the erroneous proposition that the release of grand jury information to the attorney's investigator without prior court approval would be prohibited, but the prosecutor admitted that such release would be acceptable if the attorney would just warn his employee to maintain secrecy. (R.p.85, line 15-24) In this case, Sowell did remind and warn his experienced investigator to maintain that secrecy prior to the release of grand jury material to his investigator. (R.p 74, line 11-24). Apparently Gore knew to maintain the secrecy, for there was no testimony or evidence that grand jury information was released, and the target of the investigation even testified that he was not told of nor did he ever see any grand jury information or material. (R.p64, line 3-p.66, line 22 and R.p.68, line 14-p.69, line 18.).

The careful reading of the entire Record shows that there was absolutely NO testimony that any allegations set forth in the Rule to Show Cause had ever occurred.

In the order of the lower court, Judge Saunders made findings that:

1 "Gore stated in his testimony that he was not given any instruction regarding the release of this information to any other individuals from (Petitioner)"

This was not Gore's testimony. He actually said that at the time that the grand jury information was given to him he was not told what we would

be doing with it yet. (R.p.43, line 24-p.44, line 3). However, he also testified that he was experienced with such investigations and that before Petitioner ever presented his file to Gore, Attorney Sowell warned and reminded Gore that all information was to be kept secret. (R.p.77,line 3 21). Attorney Sowell also testified that Gore was experienced and was advised and reminded that all information provided by Sowell was secret.

2 "That when Curtis was named by Ballew, Gore told Curtis about that statement."

That was not the testimony offered. Actually Gore and Curtis both testified that Gore did not tell Curtis about such statement, but Gore only told Curtis that based on Gore's investigation, everybody in the area knew that Curtis was Lewis's supplier. (R.p64, line 3-p.66, line 22 and R.p.68 line 14 p.69, line 18.). Curtis stated that Gore never told him about the Grand Jury information, and denied that he knew saw that information.

3 That Petitioner's release of the discovery to Gore was the basis for the finding of Contempt of Court.

However, the Court of Appeals found that the release of information to Gore was not a violation of Contempt of Court.

During the Rule to Show Cause hearing before Judge Saunders, there was no evidence presented to support the allegations of the Rule to Show Cause, not just insufficient evidence of proof beyond a reasonable doubt, but no testimony at all in support of the bare allegations of the Rule to Show Cause. As set forth by the S.C. Supreme Court in State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), when there is a total lack of evidence to support the allegations of

prosecution, not only is there a lack of proof beyond a reasonable doubt, but the judge is required to issue a directed verdict of acquittal.

The Court of Appeals held that the release of information to Gore was not a violation of Contempt of Court, as Sowell was charged.

However, the Court of Appeals held Sowell in contempt of court because they assumed that Sowell did not subsequently notify the lower court of the release of grand jury information to Gore, as required by S.C. Code Sec. 14-7-1720(B)(2). That issue was never raised by the State, by the Lower Court or by the Court of Appeals, nor was Sowell ever advised that he was charged with the violation of failing to advise the court of prior release of information. He was always advised and the state always told him and the court that the violation for which he was charged was the initial release of the information to Gore. Never was he advised that the charge would be changed to the failure to subsequently advise the court.

If Sowell had been advised or charged that the violation as charged would be the subsequent failure to report the release of information, he could have just produced a copy of the letter mailed to the lower court. But the prosecutor alleged in the Rule to Show Cause, and fully explained to the court that the gist of the state's case was Sowell's release of the information to Gore.

Sowell testified to the court that he warned Gore to protect the secrecy of the file, that Gore did protect such secrecy and no information was released. Sowell was never advised, nor was the lower court advised nor did the prosecutor prosecute Sowell for an alleged failure to subsequently report the release of information to Gore. Nor was that alleged in the Rule to Show Cause. The prosecutor prosecuted Sowell for the initial release of information to Gore,

and the Court of Appeals deterrmined that was not a violation.

The Due Process clause of the 5th and 14th amendment to the U.S. Constitution and
Section 3 of Article 1 of the Constitution of the State of S.C. and that ancient historical document, the Magna Charter, all provide that no person shall be deprived of life, liberty or property without due process of law. Several U.S. Supreme Court cases have held that due process clause requires that a criminal defendant be advised of the charges against him. This legal theory is supported by the Supreme Court for South Carolina in many cases, including The State v. Freddie Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) in which the court held that Due Process prohibits a defendant from being convicted on the bases of information or charges which he had no opportunity to deny or explain, as was Sowell. Also, in State v. Edwards. 302 S.C. 492, 397 S.E.2d 88 (1990) the court held prosecution offends Due Process when the defendant is not given fair notice of the violation and conduct prescribed.

Normally, if a defendant is not advised of the charges against him, due process issues are resolved by the grant of a continuance. Failure to raise that Due Process claim at trial can result in a waiver of that issue. Sowell was not afforded the opportunity to raise that issue, and was not allowed the opportunity to raise that defense, because the charges were not raised or prosecuted until after trial, until after oral argument before the Court of Appeals. The Opinion of the Court of Appeals holds in effect that although Sowell prevailed on all issues raised and alleged by the state, other issues for which he is assumed guilty and not allowed to defend justifies a conviction.

The Due Process Clause of the State and U.S. Constitution and all cases reported in the federal and state courts hold that a defendant is entitled to advance notice of charges for which he is to be tried. And even to a greater degree, Sowell and all defendants are entitled to be allowed

the opportunity to answer charges, even if they are given no advance notice of the charges before or during trial. Sowell was at least entitled to have the prosecution, or the lower court or the Court of Appeals charge him and advise him that he is being charged with the failure to advise the lower court of the prior release of information. He was at least entitled to be asked the question, "Did you write a letter to Judge Saunders?" The failure to allow Sowell to be advised of the charges against him and at least be allowed to comment thereon and the opportunity to present evidence on such issue is a violation of the Due Process Clause and the presumption of innocence. Not only did such failure to advise Sowell of the charges for which he was charged violate the Due Process Clause and the presumption of innocence, but also shifted the burden of proof, requiring Sowell to prove his innocence instead of requiring the state to prove his guilt.

CONCLUSION

Sowell was entitled to be advised of the charges lodged against him.

Sowell was entitled to the requirements of proof beyond a reasonable doubt. Sowell was entitled to a directed verdict or entitled to verdict in his favor based on the fact that no evidence or testimony was presented to support any allegation or finding of violation as raised in the State's Rule to Show Cause upon which the action was based.

Based upon the foregoing, Attorney Sowell would respectfully pray that the Orders of the lower court and the Court of Appeals be reversed and the Rule to Show Cause upon which this matter arose be denied.

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November 14, 2005