

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
COURT OF GENERAL SESSIONS
HONORABLE 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UNPUBLISHED OPINION NO. 2005-UP-122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. FILED FEBRUARY 17,2005
CASE NO. 2002-GS-47-40

THE STATE..... RESPONDENT

v.

KENNETH E. SOWELL,PETITIONER

REPLY BRIEF OF PETITIONER

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STATEMENT OF ISSUES RAISED IN THIS REPLY BRIEF

In Respondent's Brief and in the Statement of Issues on Appeal therein, the two issues raised in response to Petitioner's Brief are:

- 1) Whether Petitioner's Due Process claim was preserved when it was never raised to and ruled upon by the trial judge, and
- 2) Whether the Court of Appeals correctly affirmed the trial court's ruling that Petitioner was in criminal contempt when he disclosed State Grand Jury information.

The information discussed in this Reply is a review of some of the allegations contained in Petitioner's brief and are restated herein in response to and to refute the allegations and implications of Respondents Brief. Therefore, the petitioner would pray that this Reply be used as a summary of Petitioner's Brief and submitted to show that Petitioner denies the allegations and implications of Respondent's Brief.

ARGUMENT

I

PRESENTATION OF DUE PROCESS CLAIM AS RAISED IN RESPONDENT'S BRIEF

As to Issue No.1, whether the Due Process claim was preserved, that allegation/claim was never raised before the trial court judge, because it was not even an issue until the issuance of the Opinion of the Court of Appeals. The Court of Appeals held that "there is not dispute that

Sowell failed to inform the court that he disclosed the grand jury material to Gore..." That issue had never before been raised before any court, or even discussed with or by anyone, nor did the Court of Appeals have any evidence upon which to base that finding. In the Motion to hold Sowell in contempt and in all discussions and in all statements to the court or before the trial court, in the Briefs filed with the Court of Appeals and in oral argument, and in all discussions with the petitioner, the Attorney General always alleged and explained that the defendant/petitioner was charged with releasing the Grand Jury material to Gore, his experienced investigator without prior court approval. When Sowell showed that no grand jury information was released by Gore to Curtis, the statement of the deputy attorney general was, "the offense occurred that Sowell gave the information to Gore!" (R.p.74, line 4-14)

The Court of Appeals correctly held that Sowell did not need prior court approval, but must explain the secrecy requirement to Gore prior to the release, and must advise the lower court of the prior release subsequent to that release of information.

With no basis for such finding, the Court of Appeals held that Sowell did not advise the lower court of such release. There was no testimony upon which to make that finding, and no allegations of such ever alleged, ever testified to and no evidence ever presented to or even questioned before the lower court, or before the Court of Appeals in Motions, Briefs, Oral Argument, statements or otherwise.

The Court of Appeals made such finding with no evidence ever presented to any court and never alleged and the petitioner was never advised that such issue was ever or would ever be raised or alleged.

The issue of whether the petitioner advised or provided or advised the lower court of the

prior release of the grand jury materials was never alleged, raised, testified to or mentioned prior to the release of the opinion of the Court of Appeals.

Therefore, the issue was never before the lower court, or even before the Court of Appeals. Therefore, the Petitioner/defendant did not preserve such issue for appellant review, because it was never an issue and was therefore not preserved. It was not an issue, so the Petitioner could not even know that it was in issue, much less preserve that issue for appellant review. If it had been ever raised or alleged, petitioner would have known to just open his file and present a copy of his letter mailed to the lower court advising of the release to Gore.

Sowell could not have known to preserve an issue that had never been alleged or raised. Thus Petitioner should not be adjudged to have waived the Due Process Claim that had never been an issue.

II

WAS THERE ANY EVIDENCE THAT SOWELL RELEASED GRAND JURY MATERIAL WITHOUT WARNING ABOUT THE SECRECY REQUIREMENT

As to Issue Two of Respondent' s Brief, The lower court and the Court of Appeals found that Petitioner disclosed the Grand Jury materials to Gore with no instructions. There was absolutely no testimony that Sowell released the materials to Gore with no instructions concerning secrecy.

Sowell testified that he hired Gore as investigator, and that Gore was very experienced, had worked with Sowell in several murder and drug investigations and trials. (R.p. 81, line 16

19) He testified that after Sowell's office burned, Sowell and Gore shared an office, that Gore was warned about secrecy prior to giving Gore any instructions and information and grand jury materials and that Gore knew to refuse to release information about the grand jury materials.

(R.p. 77, line 12-22) The only testimony offered by the state was Gore's testimony, that when Sowell left the box of materials in the office he shared with Gore, Sowell told him nothing about the files or the secrecy requirements. But Gore further testified that before Sowell and Gore began to examine the files, Sowell warned him about the secrecy requirement. (Rp. 81, line 3-5 and 16-19, Rp. 77, line 11-21 and R.p. 80, line 18-22)

In Respondent's Brief, it is stated that Sowell would not let Lewis "flip." However, the testimony was actually that Curtis only had the "understanding" that Sowell would tell Curtis, there was no testimony that Sowell agreed to anything and no testimony that Sowell could control Lewis if he decided to turn in Curtis. (Rp. 57, line 10 -line 23.)

In Respondent's brief, Respondent wrongly states that Gore advised Curtis about the Attorney General's investigator's activities and that such information was given to Gore by Sowell. But Respondents fail to mention that these conversations occurred after Lewis's first trial, and that all information given by Gore to Curtis was testified to during open court at Lewis's first trial. Further, Respondent implies that Dooney's identity and existence was first discovered by Sowell from the Grand Jury material. That also was incorrect, in that Dooney's existence was a major issue in Lewis's first trial, where Sowell learned of Dooney and told Gore about Dooney during Lewis's first, public trial, months before the hidden tape incident. (R.p.28 32) In fact, law enforcement had made a control buy of drugs from Dooney prior to Lewis's first trial, refused to advise Sowell of that buy pursuant to discovery requests, and had even extradited

Dooney back to South Carolina. Lewis told Sowell that Dooney was at the LEC and Sowell had even met with Dooney in the Laurens County LEC and obtained an affidavit from him prior to the conversation between Gore and Curtis in which Gore advised Curtis that "everybody knows who you are."

Respondent implies that Gore warned Curtis of Grand Jury material and told Curtis that law enforcement knows everything about you. The truth, as testified by both Gore and Curtis, was that everyone Gore met during his investigation knew about Curtis, Gore told Curtis that everyone knew about him, and that Curtis should just turn himself in to law enforcement. (R.p. 64, line 3-p. 66, line 22 and R.p. 68, line 14-p. 69, line 18)

Both Gore and Curtis testified that Gore never told or showed Curtis any grand jury material and never discussed that material with Curtis. They both testified that Gore told Curtis about the information and testimony of Lewis's first trial and that based on Gore's investigation, everyone in Greenwood knew about Curtis as Lewis's supplier, and Curtis should just turn himself in. (R.p. 64, line 3-p. 66, line 22 and R.p. 68, line 14-p. 69, line 18)

The tape of Curtis's conversation was inaudible, but, yes, it was possible to hear that Curtis learned information from Gore, but that information was from Lewis's first trial.

There was no testimony or evidence that Gore told Curtis or showed Curtis any grand jury information. Both denied that, (R.p. 87, line 14-p. 88, line 15) and there was no other evidence on that issue, except that Gore know what happened at Lewis first public trial and told Curtis. There was no prohibition to prevent Gore from telling Curtis has happened at Lewis's first trial, and nothing wrong with Gore telling Curtis of his investigation or telling him about my conversation with Dooney.

There was no testimony that Sowell released any information without warning Gore of the secrecy requirement. There was testimony that Sowell left the box of materials in the office he shared with Gore, but both Sowell and Gore testified that before Gore was shown or told anything about the box, Sowell warned Gore about the secrecy requirement. (R.p. 77, line 11 line 24) And Gore must have understood, because there was absolutely no evidence or testimony that Gore told anyone, Curtis or anyone else about the grand jury materials. And both Gore and Curtis testified that no information or documents about grand jury materials were ever shown or disclosed to Curtis.

Therefore, in contradiction to Respondent's implications,

- 1 Sowell warned Gore about the secrecy requirements before his receipt of any information from that box of grand jury materials.
- 2 Sowell told Gore about Lewis's first open trial where all the state's witnesses were subjected to cross examination and testified about their investigations
- 3 Gore told Curtis about the information that came from Lewis's first trial
- 4 Gore advised Curtis that based on Gore's investigations, everyone knew about Curtis, and Curtis should just turn himself in, which he did.
- 5 No one ever told or showed Curtis any grand jury material
- 6 Gore used the grand jury information to conduct his investigations, and never released it to anyone.
- 7 Sowell never did any act to violate the court order and never committed any act in contempt of court.

CONCLUSION and PRAYER

Based on the allegations above and those contained in Petitioner's Brief, the Petitioner would pray that the Opinion of the Court of Appeals and the Order of the lower court be reversed and judgment be entered to dismiss the conviction of Petitioner.

Respectfully submitted,

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February 2,2006

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PROOF OF SERVICE

I, Kenneth E. Sowell, pro se, certify that I have served the within Reply Brief on Respondent by depositing three (3) copies of the same in the U. S. Postal Service, postage prepaid addressed to :

Jennifer D. Evans, Chief, State Grand Jury, and The Hon. Henry McMaster, Attorney General, and John W. McIntosh, Chief Deputy Attorney General, POB 11549, Columbia, S.C. 29211

I certify that all parties required by Rule to be served have been served.
February 6 , 2006

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