

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS

The State,)
)
)
-vs)
)
Stephanie Irene Greene,)
)
)
Defendant.)

Brief in Support of
Motion to Quash Indictments
13-GS-42-5124 to 13-GS-42-5159

Stephanie Irene Greene has been indicted in 38 separate indictments, each containing two counts for a violation of S. C. Code §§ 44-53-390(3) and 44-53-395(3). The indictments in this case basically track the wording of the statute and instead alleges that the defendant did “knowingly, or intentionally acquire or obtain possession of Hydrocodone 7.5, a schedule III controlled substance, through an unlawfully obtained prescription, obtained from and signed by D.r Carol Kooistra, a medical practitioner licensed in South Carolina, from CVS pharmacy by misrepresentation, fraud, forgery, deception or subterfuge, at CVS Pharmacy #4185 located at 11211 Asheville Highway, Inman, SC in violation of §§44-53-390”¹

The United States Supreme Court in *United States v. Cruikshank*, 92 U.S. 542, 558 (1875) “It is an elementary principle of criminal pleading, that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it

¹ The indictments differ only in the name of the drug obtained, the date and the doctor. The dates cover a period of about 12 months. The other doctor is Suzanne Kovacs.

must state the species,-it must descend to particulars.” This quote was cited with approval in *Russell v. United States*, 369 U.S. 749 (1962). *Russell* was decided after the passage in 1946 of Rule 7(c), of the Federal Rules of Criminal Procedures. Rule 7(c) eliminated technical errors in indictments. Thus, the United States Supreme Court has said that even in the era of modern pleadings in criminal cases, generic terms are not sufficient in an indictment.

The principles established by the United States Supreme Court have been cited with approval in many states. See, *People v. Tucker*, 631 P.2d 162 (Co. 1981); *State v. Davis*, 1 Or.App. 285, 462 P.2d 448 (1969); *Harris v. State*, 37 Ga.App. 113, 131 S.E. 99 (1927); *Haughn v. State*, 159 Ind. 413, 65 N.E. 287 (1902). The Oregon Court of Appeals in reversing a case because the indictment was not sufficient said “The quoted language above is taken from ORS 419.476(1)(e) relating to children within the jurisdiction of the juvenile court. It furnishes no guidelines as to what conduct on the part of a mother is necessary for the physical, the mental or the emotional well-being of her child.” *Davis* at 289, 462 P.2d at 450. The court in *Davis* reaffirmed the long established principle in Oregon that a generic term in an indictment is not sufficient. In *State v. Smith*, 182 Or. 497, 188 P.2d 998 (1948) the court had held “It is not sufficient . . . that the indictment undertake to describe the crime by the use of mere generic terms; it must ‘descend to particulars’” *Smith* at 502, 188 P.2d at 1000.

The reason for such a rule is simple. When a generic term, such as “fraud,” is used, the state must put the defendant on notice of what was done by the defendant to make the act criminal. On the civil side, this theory is embraced in Rule 9(b) of the South Carolina Rules of Civil Procedure. The rule provides “ In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” The indictment in the present

case would be subject to a motion to dismiss in civil court. Rule 9 of the South Carolina Rules of Civil Procedure requires that “In all averments of fraud or mistake shall be stated with particularity.” A like requirement should be imposed in a criminal case.

The South Carolina Supreme Court has also recognized the need for particularity in pleadings in an indictment. In *State v. Johnston*, 149 S.C. 195, 146 S.E. 657 (1929) the court first recognized that “ It is quite true that many of the formalities and technicalities required in indictments under the common law have been abrogated under the provisions of section 89 of the Code of Criminal Procedure, vol. 1, Code of 1922” *Id.* at ___, 146 S.E. at 659-660. Even under the more relaxed standard for reviewing an indictment, the court reversed the case stating “The serious objection to the indictment was the second, which challenged the instrument for failure to allege to whom the false statements were made. This should have been done, in our opinion.” *Id.* at ___, 146 S.E. at 660. The same is true in the present case. What act or omission did the defendant do to defraud anyone? The indictment does not answer that question. Portions of the indictment in *Johnston* were held to be adequate. A comparison of the fraud allegations which were held to be constitutional in *Johnston* to the allegations in this case establish that the allegation in this case are lacking. As to the other fraud allegations the court in said:

It is also our opinion that the indictment met the first objection of the appellant, as it distinctly stated the nature of the statements alleged to have been made by the defendants, and further alleged to have been falsely made. The second specification averred that the defendants had made statements that the bank had on deposit a sum of money greatly in excess of the actual deposits. The third specification averred that the statement made failed to show a certain liability of the bank by way of mortgage to the extent of \$100,000. These specifications sufficiently advised the defendants

as to the false statements charged against them.” *Johnston* at ____, 146 S.E. at 660.

Fraud, being a generic term, can be committed in numerous ways. What method was used in this case is not alleged.²

The court in *Johnston* further noted that right of the defendant in the present constitutional provision “to be fully informed of the nature and cause of the accusation” is equally strong as the former provision that said “ "No person shall be held to answer for any crime or offense until the same is fully, fairly, plainly, substantially and formally described to him." *See, Johnston*, at ____, 146 S.E. at 660. *See, also, State v. Jeffcoat*, 54 S.C. 196, 32 S.E. 298 (1899). The indictment in the present case simply does not “fully, fairly, plainly, substantially and formally” advise Mrs. Greene of the charges against her.

In *Tucker* the court said, “As stated in *Zupancic, supra* and *Donachy, supra*, the indictment must answer the questions of “who, what, where, and how.” The question of who (the defendant), what (the amount of money embezzled), and where (the county from which the money was allegedly embezzled), were properly answered by the respective counts of the indictment. But, the question of how the embezzlement was accomplished is not sufficiently stated. It would be fundamentally unfair to require the defendant in this case to defend against twelve counts of the indictment as they are presently framed.” *Tucker*, at 163.³ The same

² Today the rule concerning an indictment is contained in S. C. Code § 17-19-20. This statute is identical to the rule cited in *State v. Johnston*, 149 S.C. 195, 146 S.E. 657 (1929).

³ The indictment in *Tucker* provided “ Frank G. E. Tucker, then being a public servant of the State of Colorado, the District Attorney for the Ninth Judicial District, did unlawfully and through false representations obtain possession of public monies of the County of Garfield, a political subdivision of the State of Colorado, in the sum of \$155.16, and converted same to his own use and to uses other than the authorized public use, committing a felony in violation of

problem exists in this case. The question of “who,” “what” and “where” are sufficiently answered in the present indictment. The question of “how” is not.

The South Carolina Supreme Court in *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) said the indictment is a notice document. As such all objections to the indictment must be made before a jury is sworn. The indictment must still be a notice of more than the fact that a defendant is accused of violating a certain statute. The indictment must state the underlying facts that make up that crime. As the court said in *Gentry*, the indictment must be sufficiently clear for “the defendant to know what he is called upon to answer.” *Id.* at 102, 610 S.E.2d at 500. As the indictment in this case simply alleges the prescription was obtained “unlawfully,” the indictment in the present case fails to inform the defendant of the nature of her charges.

The statute and the indictment uses the words “misrepresentation, fraud, forgery, deception or subterfuge.” No facts are listed in the indictment. While a “forgery” may be a form of “fraud” they could involve entirely different factual scenarios. What scenario has the indictment set forth that the defendant is to defend against? Has the defendant committed an act or an omission to obtain the prescription unlawfully? The defendant is only left to guess. In *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993) the supreme court held a vague indictment was saved because under the state grand jury procedure, the defendant could review the testimony before the grand jury. No such testimony is available in this case.

In *State v. Couch*, 54 S.C. 286, 32 S.E. 408 (1899) the South Carolina Supreme

[C.R.S. 1973, 18-8-407](#), Embezzlement of Public Property, and against the peace and dignity of the People of the State of Colorado.” *Id.* at 163

Court held an indictment defective because it did not contain the name of the person to whom the defendant sold the illegal liquor. The court said “It is the office of an indictment to fully disclose to the accused the nature and cause of the accusation. Any indictment which fails to fully disclose the offense to the accused is defective.” *Id.* at ___, 32 S.E. at 408. The *Couch* decision was interpreting the same constitutional provision that is found today in Article I, § 14 which provides that a criminal defendant has the right “to be fully informed of the nature and cause of the accusation” In the present case the indictment simply does not fully inform Mrs. Greene of the nature and cause of the accusation.

In *DeVaughn v. State*, 749 S.W.2d 62 (Tx. Ct. Cr. App. 1988) the Court held an indictment defective which did not allege from whom the items were stolen when the robbery was part of a burglary indictment. The Court said “A motion to quash should be granted only where the language concerning the defendant's conduct is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed.” In this case the allegations against Ms. Greene give her no notice as to what act or omission she committed to cause her to be charged with a crime.

In addition, the statute could permit the state to prove an omission by Ms. Greene. Was the “fraud, deception or subterfuge” alleged in the indictment committed by an omission by Ms. Greene? Again, Ms. Greene is left only to guess. As such the indictment violates Article I, §§ 3 and 14 of the Constitution of the State of South Carolina. The indictment should be dismissed.

March 13, 2014

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