RECEIVED
Jun 30 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Civil Action No. 2016-CP-14-198
Appellate Case No. 2019-001970
Op. 2022-UP-265 (filed June 15, 2022)

Rebecca J. Robbins and Marie Babayan, individually
and on behalf of all those similarly situated, ... Appellants,

v.

Town of Turbeville and the Town of Turbeville Police Department, ... Respondents,

v.

The State of South Carolina, ... Third Party Defendants.

PETITION FOR REHEARING

John S. Simmons (SC Bar No. 10260)
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
jsimmons@simmonslawfirm.com
(803) 779-4600

Counsel for Appellants/Petitioners

Pursuant to Rules 221(a) and 240, SCACR, Appellants/Petitioners Rebecca J. Robbins and Marie Babayan, individually and on behalf of all those similarly (hereafter "Plaintiffs") respectfully file this Petition for Rehearing and move the Court for rehearing and/or to alter its opinion no. 2022-UP-265 of June 15, 2022, which held that Plaintiffs failed to prove the circuit court erred in finding their claims for injunctive and declaratory relief were moot because their arguments concerning the exceptions to the mootness doctrine were not preserved for appellate review. Because the Court's opinion overlooks evidence in the record that the shows that the exceptions were, in fact, raised to and ruled upon by the circuit court, Plaintiffs respectfully request that the Court grant this Petition for Rehearing, withdraw the previous opinion, and issue a new opinion reversing the trial court's rulings.

Plaintiffs further move the Court for rehearing and/or to alter its opinion affirming the entry of summary judgment on the grounds that a PCR action was the only remedy available to Plaintiff Babayan (and others similarly situated) because the Court's opinion overlooks evidence in the record showing that Plaintiffs only sought the equitable remedy of disgorgement and never sought to void the convictions of either Babayan or others similarly situated. Because this was never a wrongful conviction case, the Court misapprehended the PCR statute and its applicability to the case at bar and the Court should grant the Petition and reverse the lower court.

I. The Court Overlooked Evidence Showing the Exceptions to the Mootness Doctrine Were Raised to and Ruled Upon by the Trial Court and Further Misapprehended the Stated Intent of Error Preservation Rules.

The Supreme Court has ruled that when a circuit judge implicitly rejects an argument raised by a party, the issue is preserved for appellate review. *See Doe v. City of Duncan*, 2015-MO-019 (S. Ct. Apr. 15, 2015) (*per curiam*) (reversing the Court of Appeals and finding that while the trial judge failed to specifically state that the Servicemembers Civil Relief Act did not toll the time for service of petitioner's summons and complaint, the court's ruling that service was not timely

nevertheless reflected an implicit rejection of the petitioner's argument that the Act applied and therefore the issue was preserved for review).[1]

"Judicial economy is not served when a case, ripe for decision, is decided on a procedural technicality of this nature. In the interests of justice and fair play, cases should be decided on the merits when deficiencies of this nature can be easily corrected." *Pertuis v. Front Roe Restaurants, Inc.* 423 S.C. 640, 649, 817 S.E.2d 273 (finding error by Court of Appeals in concluding issue not preserved for appellate review) (*quoting Silk v. Terrill,* 898 S.W.2d 764, 766 (Tex. 1995)) (citation omitted) (finding an intermediate appellate court abused its discretion in denying a party's motion to supplement the record then concluding the resulting insufficiencies in the record procedurally barred the substantive consideration of the legal issues where the omitted documents had not previously been at issue and the appellate court was not in any way misled or its decision hindered or delayed); *see also Atl. Coast Builders & Contractors, LLC v. Lewis,* 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the "over-zealous application" of "long-standing error preservation rules" and discouraging a "hypertechnical application" of those rules resulting in appellate arguments being procedurally barred); *Herron v. Century BMW,* 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.... Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." (quotation marks and citations omitted)); *Wilder Corp. v. Wilke,* 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.")).

In this case, Respondent Town of Turbeville (hereafter "Turbeville") filed a motion for summary judgment, arguing that Plaintiffs' claims for injunctive and declaratory relief were moot because the town had repealed the ordinances following the filing of the Plaintiffs' lawsuit. R. pp. 253-261. In their Response in Opposition to Turbeville's motion, Plaintiffs argued that two longstanding and important exceptions to the mootness doctrine necessitated the circuit court's

---

[1] Counsel recognizes that citation to unpublished opinions is disfavored under Rule 268(d)(2), SCACR. However, counsel respectfully submits that, because of the similar nature of the facts presented, this unpublished opinion may assist the Court in its review of this matter.

review nonetheless. R. pp. 318-322. Thereafter, a hearing was held where the circuit court heard argument from the parties (for which no transcript is available due to the death of the court reporter). On October 30, 2019, the circuit court issued its order granting Turbeville's motion on the grounds that the claims for injunctive and declaratory relief were moot, thereby rejecting Plaintiffs' argument that their claims were still ripe under certain exceptions to the mootness doctrine. R. pp. 1-8.[2] Put another way, Turbeville's motion for summary judgment was opposed by Plaintiffs; thus, the trial court must have considered the exceptions to the mootness doctrine – as raised in both Plaintiffs' Response in Opposition and at oral argument – when it found that the claims for injunctive and declaratory relief mooted.[3]

In *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000), the Supreme Court found that a negligence claim was raised and ruled upon for purposes of summary judgment, even though a cause of action for negligence was not even pled by the plaintiff in his complaint. There, the trial court considered the parties' cross-motions for summary judgment, argument was heard as to negligence, and the plaintiff sought to amend his complaint - over the city's objection – to add a claim for negligence. The trial court did not respond specifically to the motion to amend but nonetheless addressed the negligence claim in its order granting summary judgment in favor of the city on the taking and due process claims.

The Court of Appeals reversed, finding "that there were material issues of fact surrounding whether the city was grossly negligent in revoking the building permit." 339 S.C. at 411-412. The

---

[2] Turbeville has never asserted that the "exceptions to mootness" issue was not preserved for appellate review or was not considered by the trial court in entering its rulings on the parties' cross-motions for summary judgment. *See* Resp. Br. ; *See also State v. Williams*, 435 S.C. 288, 296 n.6 (S.C. Ct. App. 2021) (finding issue preserved when it was clear it was presented "on the ground" and stating that "[n]otably, the State did not raise preservation as an issue in its respondent's brief) (relying upon, in part, *Atl. Coast Builders & Contractors, LLC v. Lewis* , 398 S.C. 323, 332–33, 730 S.E.2d 282, 287 (2012) ("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.") (Toal, C.J., concurring in result in part and dissenting in part)).

[3] Again, the transcript of the summary judgment hearing was unavailable to the parties due to the unforeseen death of the court reporter. Plaintiffs acknowledge that they agreed to proceed without the transcript of that hearing in an effort to seek relief for themselves and others similarly situated and that the lower court's order did not separately address Plaintiffs' contention that the matter required review pursuant to two long-established exceptions to the mootness doctrine.

City, in its petition for rehearing, argued for the first time that the negligence claim was not pled by Mr. Staubes nor ruled upon by the trial court, therefore the appellate court should not have addressed the issue. *Id.* The Supreme Court disagreed and found there was no error in the Court of Appeals' addressing the negligence claim, noting "the issue . . . is whether a negligence claim was **effectively raised** and ruled upon for purposes of summary judgment." Id. at 412 (emphasis added). Finding the issue preserved, the Court noted the claim was "definitely raised to the trial court at the summary judgment hearing" and that "the parties and the trial court treated the motion for summary judgment as one involving both a taking claim and a negligence claim." 339 S.C. at 412-413. The Supreme Court further recognized that the court "does not require parties to engage in futile actions in order to preserve issues for appellate review." Id. at 415 (while recognizing that "it would have been more appropriate for the trial court to have expressly ruled on the motion to amend and allowed amendment of the pleadings before ruling on the negligence claim", the negligence claim was nevertheless held to have been "raised to and ruled upon by the by the trial court.").

Similarly, here the record reflects that the exceptions to the mootness doctrine were explicitly raised in the Plaintiffs' Response in Opposition to Turbeville's Motion for Summary Judgment and it can be presumed the issue was argued at the hearing. While the trial court declined to explicitly address the exceptions in its order, the absence of same does not support the Court's decision finding the issue unpreserved and the Court misapprehended the stated intent of error preservation rules. *See, e.g.*, *Lewis*, supra (noting the "good practice for us to reach the merits of an issue when error preservation is doubtful"); *See also Mictronics, Inc. v. S.C. Dep't. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) (affirming South Carolina's "policy favoring the disposition of issues on their merits rather than on technicalities.") The Court should therefore grant this Petition for Rehearing, withdraw its opinion and find the argument preserved, and issue a new opinion reversing the trial court's rulings.

II. The Court Misconstrues the Plain Language of the PCR Act and Disregards Material Facts in the Record Which Show There is No Evidence to Support a Finding that the PCR Act was the Only Remedy Available to Plaintiff Babayan

The Court held that that "[t]he circuit court did not err in granting summary judgment on Appellants' claim for damages because a PCR action was the only remedy available to Babayan for conviction under an allegedly invalid ordinance." The Court overlooks the fact that nowhere

in the Amended Complaint is there a request to void the convictions of either Marie Babayan or others similarly situated; instead, Plaintiffs seek only the equitable remedy of disgorgement by way of claims for unjust enrichment and refund. Because this is not a wrongful conviction case, nor a case seeking exonerations or declarations of innocence from the State, the Court erred in affirming the trial court's application of the PCR Act, especially given the Supreme Court's decision in *Thompson v. State*, 415 S.C. 560, 785 S.E.2d 189 (2106), which explicitly found that that PCR Act did not apply to each and every challenge which may arise out of criminal proceedings. Again, the Act states, in part:

SECTION 17-27-20. Persons who may institute proceeding; exclusiveness of remedy

(A) Any person who has been convicted of, or sentenced for, a crime and who claims:
(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
(2) That the court was without jurisdiction to impose sentence;
(3) That the sentence exceeds the maximum authorized by law;
(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(B) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

The Court appears to have miscontrued or overlooked the plain language of the Act, which provides that a person "may" institute a proceeding under the Act to secure relief through challenging his or her conviction or sentence. By disregarding the plain language of the Act, the Court misapprehended or overlooked the law of statutory construction in South Carolina – to wit, the "plain meaning" rule – and the Court should therefore grant the petition for rehearing and reverse the circuit court's order. See *Eagle Container Co. v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005) (holding that "where the statute's language is plain and

unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning."); See also *Thompson, supra.* By its plain meaning, the PCR Act only covers those who "challenge the validity of the conviction or sentence." In the instant case, the record reflects that Plaintiffs have never sought to undo their convictions but rather seek to have done in equity what should be done (namely, the forfeiture by Turbeville of its ill-gotten fines). Thus, the Court disregarded the law of statutory construction. The Court further misapprehends the case of *State v. Truesdale*, as that case considered an analogy to a Uniform Traffic Ticket issued under S.C. Code Ann. §56-7-10. The tickets issued by Turbeville were not "Uniform Traffic Tickets" under state law and, accordingly, the Court disregarded the evidence in the record which shows that the Turbeville tickets were illegal and unconstitutional citations issued contrary to South Carolina traffic laws. Accordingly, the Court should grant the petition for rehearing and reverse the order of the lower court.

CONCLUSION

Plaintiffs respectfully request that the Court grant this Petition for Rehearing, withdraw the previous opinion, and issue a new opinion reversing the trial court's rulings, and enter such judgment and relief as requested in the underlying Brief of Appellants.

Respectfully submitted,

John S. Simmons (SC Bar No. 10260)
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
jsimmons@simmonslawfirm.com
(803) 779-4600
Counsel for Plaintiffs Rebecca J. Robbins and Marie Babayan, individually and on behalf of all those similarly situated

June 30, 2022
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Civil Action No. 2016-CP-14-198
Appellate Case No. 2019-001970
Op. 2022-UP-265 (filed June 15, 2015)

Rebecca J. Robbins and Marie Babayan, individually
and on behalf of all those similarly situated, ... Appellants,

v.

Town of Turbeville and the Town of Turbeville Police Department, ... Respondents,

v.

The State of South Carolina, ... Third Party Defendants.

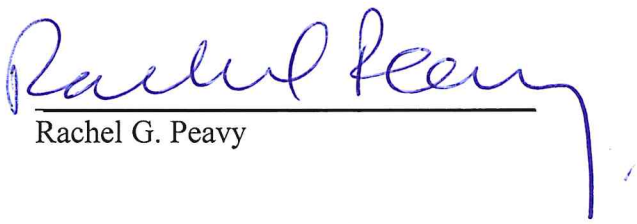
PROOF OF SERVICE

The undersigned hereby certifies that on June 30, 2022, the Appellants' **Petition for Rehearing** was served on all counsel of record via email:

John S. Wilkerson, III (SC Bar No. 6105)
Richard S. Dukes, Jr. (SC Bar No. 16563)
Turner Padget Graham & Laney, PA
Post Office Box 22129
Charleston, South Carolina 29413
(843) 576-2801
jwilkerson@turnerpadget.com
rdukes@turnerpadget.com

William H. Johnson (SC Bar No. 15167)
Johnson, DuRant & Nester, LLC
Post Office Box 137
411 N. Brooks Street
Manning, South Carolina 29102
(803) 435-0909
william@jdnlawfirm.com

Counsel for Respondents



Rachel G. Peavy