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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Aiken County
Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case Tracking No. 2011-192226

The State, Respondent,

v.

Juan Orozco, Petitioner.

State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011)

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural Statement of the Case.

Factual Background

Petitioner is the uncle of the two minor victims, who are cousins. The minor victims would occasionally visit Petitioner and his wife to play with Petitioner's children. (T.65-67; R. 46-48). The children's mothers and Petitioner's wife were all sisters.

Petitioner would take the older niece into his bedroom or one of the spare bedrooms and make her touch his "private part" and he would touch her "private part." (T.67; R. 48). Petitioner put his penis inside the older niece's vagina as well as in her mouth. (T.68-69; R.49-50). The older niece indicated Petitioner ejaculated and wiped it on a towel. (T.69; R. 50). Petitioner told the older niece she would get into trouble if she told anyone about what they were doing. (T.70-71; R.51-52). It was only after being questioned by her mother that the older niece confided in an aunt about the abuse. (T.71; R.52).

Petitioner also sexually abused the younger niece during her visits to his house. Petitioner made the younger niece, who was four or five at the time, perform oral sex on him in Petitioner's bathroom. (T.91-92; R. 72-73). Further, Petitioner placed his finger inside the younger niece's clothes and touched her genitalia. (T.93; R. 74).

The younger niece disclosed the abuse to a neighbor. (T.102-103; R. 83-84). The neighbor told the younger niece's mother, Suzie Sanchez-Martinez. Ms. Sanchez-Martinez informed the older niece's mother about the allegations. (T.124; R. 105). The older niece's mother, Elizabeth Leaphart, informed Petitioner's wife of the allegations.

(T.124-126; R. 105-107). She indicated it was before noon that she told Petitioner's wife of the allegations regarding the abuse of the younger niece. (R.106). After learning of the abuse of the younger niece, Ms. Leaphart learned of the abuse of her own daughter and subsequently filed a police report. (R.107).

Sometime after Petitioner's wife was told of the allegations of abuse made by the younger niece, Petitioner's wife returned home. Within a couple of hours, EMS was called to Petitioner's residence because he had attempted suicide by ingesting rat poison. (T.129-131; R. 110-112). Wife called in the request for help and also was present at the house with Petitioner when EMS arrived. (R.112).

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's ruling admitting testimony regarding Petitioner's suicide attempt as evidence of his consciousness of guilt. The evidence was properly admitted and its probative value exceeded any prejudicial effect.

The Court of Appeals correctly found evidence of an attempted suicide, similar to evidence of flight, is probative of a defendant's guilt and properly admitted the evidence in this case. The totality of the evidence in this case creates an inference Petitioner knew the likelihood of charges to be filed against him and he would soon be sought by law enforcement. Further, any prejudicial impact of its admission was greatly outweighed by its probative value.

The Court of Appeals correctly determined the issue of whether to admit testimony of an attempted suicide was an issue of first impression in South Carolina. As the Court found, however, there is no reason to consider evidence or testimony of Petitioner's attempted suicide any different than a court would consider evidence of flight or witness intimidation. In all instances, the defendant is seeking to avoid prosecution and has demonstrated a consciousness of guilt. See State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009) (finding evidence of witness intimidation is admissible to show consciousness of guilt); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension).

Attempted suicide could be viewed as the ultimate attempt to flee prosecution. As discussed by the Supreme Court of New Jersey:

> Daniel Webster once described suicide as a confession by conduct compelled by the overpowering force of a guilty conscience.
>
> > Meantime the guilty soul cannot keep its secret. . . . It betrays his discretion, it breaks down his courage, it conquers his prudence. When suspicions from without begin to embarrass him, and the net of circumstances to entangle him, the fatal secret struggles with still greater violence to burst forth. It must be confessed! It will be confessed! There is no refuge from confession, but suicide-and suicide is confession.

State v. Mann, 625 A.2d 1102, 1107 (N.J. 1993) (citing Commonwealth v. Knapp, 7 American State Trials 395 (1830) (quoted in 2 Wigmore on Evidence § 276, at 132 (Chadbourn rev. 1979))).

"With a single exception, courts have unanimously held that an accused's attempt to commit suicide is probative of a consciousness of guilt and is therefore admissible." Annotation, Admissibility of Evidence Relating to Accused's Attempt to Commit Suicide, 73 A.L.R.5th 615, 624 (1999) (internal citations omitted). The Court of Appeals correctly looked to courts around the county for guidance on this issue. Numerous courts around the country have considered this issue and found evidence of an attempted suicide, similar to evidence of flight, is admissible to show consciousness of guilt and can be considered and given such weight as determined by the jury.

Petitioner notes in his brief that many cases discussing the admission of evidence regarding an attempted suicide arise from attempts while in custody. See People v. Barrett, 136 P. 520 (Cal. Dist. Ct. App. 1913); State v. Mitchell, 450 N.W.2d 828 (Iowa 1990); State v. Lawrence, 146 S.E. 395 (N.C. 1929); see also, State v. Painter, 44 S.W.2d

79 (Mo. 1931); State v. Hunt, 287 S.E.2d 818 (N.C. 1982); Com. v. Homeyer, 94 A.2d 743 (Pa. 1953). The fact they are in custody when they attempt suicide should not change its admissibility as long as there is evidence the intent is to avoid prosecution and punishment. Just as flight is not only admissible when it is escape from custody, suicide should not only be admissible when it is an attempt during custody.

Further, other cases have found attempted suicide admissible when the attempt is made at the scene of the crime. See Com. v. Sheriff, 680 N.E.2d 75 (Mass. 1997); State v. Campbell, 405 P.2d 978, (Mont. 1965). These cases, similar to the case at hand, admit evidence of an attempted suicide when the suicide occurs prior to custody. The defendant knew he would be sought for the murder and in each case was seeking to avoid prosecution and punishment.

Finally, several cases are very much on point with the situation of this case. In State v. Marsh, 66 S.E.2d 684 (N.C. 1951), the defendant fled the scene after committing a murder and robbery. While on the run, he attempted suicide. He was subsequently arrested, and the North Carolina Supreme Court found the attempted suicide would be properly admissible for purposes of establishing the defendant's guilt. Id. at 687.

In Walker v. State, 483 So. 2d 791 (Fla. Dist. Ct. App. 1986), the Court admitted evidence of the defendant's attempted suicide. After sexually assaulting and murdering a female student, the defendant returned to his housing provided by the college and placed a note on the door that he wanted to be left alone. The following day, his roommate discovered the attempted suicide and both police and medical personnel were called. Id. at 793. The Court found a jury instruction allowing the jury to consider the attempted suicide was proper given the facts of the case. Id. at 796.

A third case, Aldridge v. State, 494 S.E.2d 368, (Ga. Ct. App. 1997), is also very similar to the circumstances of this case. In Aldridge, the defendant was accused of molesting an eight-year-old girl by fondling her. Within hours of being accused, the defendant first attempted suicide by swallowing pills and then attempted twice to hang himself. Id. at 369. After analyzing the holdings of cases around the country and comparing evidence of an attempted suicide to evidence of flight, the Georgia Court found:

> [W]e conclude that evidence of attempted suicide by the accused "where such person is, at the time or thereafter, charged with or suspected of crime," is relevant as possibly indicating a consciousness of guilt and admissible for whatever weight the jury chooses to assign. Whether the acts of the defendant constitute flight, and were due to a consciousness of guilt, or whether such acts have an innocent explanation, is a question for the jury.

Id. at 370 (internal citations omitted).

Petitioner raises several cases in which the court's found improper the admission of evidence related to an attempted suicide. None of the cases are applicable to the situation in the instant case. In Pettie v. State, 560 A.2d 577 (Md. 1989), the Court never reached the issue of whether evidence of an attempted suicide was admissible. In Pettie, the Court found the State failed to prove the inmate even attempted suicide and was not just feigning a suicide. Specifically, the Court stated: "the facts here simply do not support the conclusion that Pettie tried to kill himself at all, much less that he did so as a reaction to any [sexual assault on another inmate]." Id. at 582. In the instant case, there is clear evidence Petitioner attempted suicide as EMS was called and he was treated based on ingesting rat poison, which was found at the scene. (R.111).

In State v. Mann, 625 A.2d 1102 (N.J. 1993), the Court reversed and remanded for a new trial because the trial court admitted the evidence of an attempted suicide without conducting an appropriate hearing and allowing the defendant to set forth any alternate reasons behind the suicide. Further, the Court found the trial court failed to give a proper jury instruction on the issue. In the instant case, Petitioner never asked for a jury instruction on the use of the evidence and has not raised the lack of an instruction as an issue on appeal. Further, he argued his alternative basis for the suicide to the trial court whom considered it and found the evidence of the attempted suicide admissible as demonstrating consciousness guilt. (R.19-21). Petitioner was not barred at trial from admitting any evidence he believed relevant to show the attempted suicide resulted from some basis other than guilt over his actions.

Next, State v. Coudotte, 72 N.W. 913 (N.D. 1897), involves a unique situation which has been distinguished by numerous cases. As described in State v. Plunkett, 149 P.2d 101(Nev. 1944), the Coudotte case "stands in a case by itself." Id. at 108. As the Court fully explained:

> [Coudotte] is a lone case which is distinguishable from the generality of authority on the point of attempted suicide by an accused being a circumstance in a homicide case proper to be considered by the jury in connection with all the evidence. . . . There were no other facts or circumstances with which it could be considered by the jury as tending to show guilt, and to be given such weight, or no weight, as the jury might determine. It was sought to be proven as an isolated circumstance sufficient in itself to furnish the corroboration of the testimony of an accomplice, required by the statute, as to the guilt of an accused. The court held that it was not enough and reversed the case. As pointed out in State v. Painter [329 Mo. 314, 44 S.W.2d 82], in reviewing the Coudotte case: "The court was not called upon to and did not decide whether or not, had there been otherwise a submissible case made, the attempt to commit

> suicide might have been proved as a circumstance for the consideration of the jury."

Id.

The case at hand has testimony from the victims, other witnesses, and the videotaped interviews. The jury in this case is not being asked to find guilt solely on the basis of the attempted suicide, but is instead being allowed to consider it as one of many facts upon which it could reach its verdict. This is no different than the consideration of flight or other post-crime actions which have a tendency to show the guilty conscious of the accused.

In State v. Onorato, 762 A.2d 858 (Vt. 2000), the trial court conducted a balancing test similar to that found in Rule 403, SCRE analysis and concluded the testimony regarding admission of a suicide note was prejudicial and not admissible. The appellate court, noted the difficulty in establishing the reasons behind the suicide were tied to the guilt of the accused. Ultimately the Court affirmed the trial court's suppression based on its standard of review, not by deciding the evidence could never be admitted. Id. at 859-860.

Finally, Petitioner cites to People v. Foster, 371 N.E.2d 961 (Ill. App. 1977). In Foster, the Court found the overall evidence of guilt was not sufficient to support conviction and found as a matter of law there was reasonable doubt as to the defendant's guilt. In doing so, the Court found a suicide attempt was not evidence of consciousness of guilt because it did not occur around the time of the murder and because testimony from a psychiatrist showed the defendant "took 20 aspirins because the police were drilling him and making belittling and vituperous epithets toward his mother." Id. at 970. Further, at no time did the Court find the evidence was inadmissible, it merely found the

evidence of the attempted suicide and other evidence in the record was insufficient to support guilt.

The holding of the Appellate Court was reversed by the Supreme Court of Illinois, finding the Appellate Court engaged in weighing the evidence and intruded upon the province of the jury. See People v. Foster, 392 N.E.2d 6 (Ill. 1979). In the instant case, there is no doubt sufficient evidence existed to send the case to the jury and the only question is whether the evidence of Petitioner's attempted suicide should be admitted, a question not addressed at all by Foster.

This Court should conclude, consistent with the overwhelming majority of cases throughout the country, evidence of an attempted suicide is admissible in the same manner in which flight evidence or evidence of tampering with evidence would be admissible. Any arguments by the defendant that other reasons apply for the suicide attempt could have been placed in front of the jury and the jury was entitled to give such weight to the evidence as it deemed appropriate. The cases cited by Petitioner all have a specific factual basis for denying admission and do not stand for a general exclusion of the evidence. As a result, the Court of Appeals correctly evaluated the admission of the attempted suicide similar to the admission of evidence of flight, and correctly found it admissible in this case. This Court should affirm the holding of the Court of Appeals and trial court finding evidence of an attempted suicide admissible and analyzed in a manner consistent with the admission of evidence of flight.

As the Court of Appeals found, the critical determination is whether the totality of the evidence indicates Petitioner knew he was sought by authorities prior to the attempted

suicide. The South Carolina Supreme Court discussed the admission of evidence of flight in State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006). The Court found:

> The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. It is sufficient that circumstances justify an inference that the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Flight or evasion of arrest is a circumstance to go to the jury.

Pagan, at 209, 631 S.E.2d at 266 (citing State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999)).

In the instant case, there is clear circumstantial evidence linking Petitioner's attempted suicide to the accusations of the currently charged crimes. Elizabeth Ann Leaphart, the mother of the older niece and sister of Petitioner's wife, met Suzie Sanchez-Martinez, the mother of the younger niece and also a sister of Petitioner's wife, at Martinez's place of work. Martinez detailed to allegations against Petitioner related to the victimization of the younger niece. (T.119-120; 124; R. 100-101; 105). Leaphart testified she then went to meet Petitioner's wife to tell her about the allegations and the fact Martinez was planning to file a police report. Leaphart testified she told Petitioner's wife what happened around noon on June 22, 2006. (T.124-125; R.105-106).

At around 2:00 p.m. on June 22, 2006, Officer Tom Gray testified he was called to Petitioner's residence. (T.128-129; R. 109-110). EMS was on scene and it appeared Petitioner had attempted suicide by swallowing rat poison. (T.129-130; R.110-111). Officer Gray testified Petitioner's wife was also at the scene of Petitioner's attempted suicide. (T.130-131; R.111-112).

The circumstantial evidence, including the timing of when Leaphart was told and when she told Petitioner's wife who was present at the time of his attempted suicide, leads to the clear inference Petitioner learned of the allegations and upcoming police report from his wife while she was home with him between noon and 2:00 p.m. on the day of his attempted suicide. The jury could certainly reach the conclusion his attempted suicide by ingesting rat poison was the result of his wife telling him what she had just shortly before learned from Leaphart. As a result, the trial court properly allowed the jury to consider and give such weight to Petitioner's attempted suicide as it determined was appropriate.

Further, the evidence is clearly relevant, and is more probative than prejudicial. The evidence demonstrated a clear consciousness of guilt and is an expression of Petitioner's desire to avoid facing prosecution, which is the same showing made by evidence of flight. Its probative value outweighs its prejudicial value because his attempted suicide can be tracked directly to his learning of the allegations and upcoming police involvement. The Court of Appeals correctly affirmed the trial court's ruling allowing the jury to consider the evidence of Petitioner's attempted suicide. This Court should find the evidence was properly admitted and affirm the decision of the Court of Appeals.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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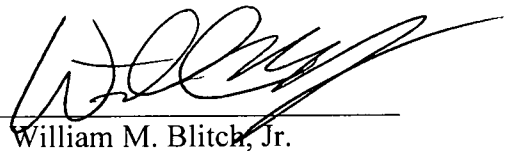
BY: 
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May 22, 2013

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 22nd day of May, 2013.

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