

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

RECEIVED

JUN 14 2013

S.C. Supreme Court

DEREK S. CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213168

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Is Petitioner entitled to a vacation of his thirty-year sentence under S.C. CODE ANN. § 16-3-85 where the statute is unconstitutional under the due process and equal protection clauses of the South Carolina and the United States Constitutions when under its provisions, a defendant whose actions only amount to “aiding and abetting” is subject to vastly different penalties for identical conduct depending solely under which section of the statute the defendant is charged?

- II. Did Petitioner’s plea counsel err in failing to object to Petitioner’s guilty plea under S.C. CODE ANN. § 16-3-85(A)(1) where the Petitioner’s actions only amounted to “aiding and abetting” under Subsection (A)(2) of § 16-3-85 and Petitioner would have received a maximum sentence of twenty years instead of the thirty year sentence he received under Subsection (A)(1)?

STATEMENT

Indictments

On March 27, 2001, Petitioner Derek Shane Carter was indicted by the Anderson County Grand Jury for great bodily injury upon a child. App. 379-80. On May 1, 2001, Petitioner was subsequently indicted by the Anderson County Grand Jury for homicide by child abuse. App. 377-78.

Plea Hearing

On June 11, 2001, pre-trial motions in the case against Petitioner were heard by the Honorable John Kittredge. App. 1 – 175. Petitioner was represented by Robert E. Treacy, Jr., and the State was represented by Druanne D. White. App. 1.

On June 12, 2001, Petitioner pled guilty to great bodily injury upon a child pursuant to S.C. CODE ANN. § 16-3-95. App. 176, ll. 3-5; 179, ll. 12-15. Petitioner also pled guilty to homicide by child abuse under Subsection (A)(1) of § 16-3-85 which provides that a person is guilty of homicide by child abuse if the person “causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.” App. 176, ll. 7-13; 179, ll. 12-15.

By pleading under Subsection (A)(1) instead of (A)(2), which provides that a person is guilty of homicide by child abuse if the person “knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven,” Petitioner faced a possible sentence of twenty years to life instead of a sentence of ten years to a maximum term of twenty years. See § 16-3-85(C).

Judge Kittredge sentenced Petitioner to thirty years for homicide by child abuse and for twenty years for great bodily injury upon a child with the sentences to run concurrent. App. 204, ll. 2-11. Petitioner did not file a direct appeal.

First Application for Post-Conviction Relief (2002-CP-04-1791)

On June 3, 2002, Petitioner filed his first application for post-conviction relief (“PCR”). App. 206-12. The State filed its Return on September 17, 2004. App. 213-17. On December 8, 2005, the PCR court dismissed Petitioner’s first PCR application, noting that Petitioner had made a motion to withdraw his PCR application. App. 218.

Second Application for Post-Conviction Relief (2009-CP-04-2033)

On May 15, 2009, Petitioner filed a second PCR application, asserting the unconstitutionality of the homicide by child abuse statute. App. 219-25. Petitioner filed a Memorandum of Law in Support of his PCR application on September 25, 2009. App. 226-56.

The State filed its Return and Motion to Dismiss on April 9, 2010. App. 257-61. Petitioner opposed the State’s Motion to Dismiss on April 21, 2010. App. 262-66. The PCR court initially issued a Conditional Order of Dismissal on May 5, 2010, ruling that “the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety.” App. 269.

On June 2, 2010, the PCR court ultimately granted Petitioner a post-conviction relief hearing and did not dismiss Petitioner’s second PCR application, finding “sufficient reason exists for the proceedings in this matter to continue.” App. 271-72.

PCR Evidentiary Hearing (2009-CP-03-2033)

An evidentiary hearing was held before the Honorable R. Lawton McIntosh on March 8, 2012. App. 321-63. Petitioner was represented by Tommy Thomas, and the State was represented by Kaelon May. App. 321. Petitioner and plea counsel testified at the evidentiary hearing. App. 326-59.

Following the testimony, the PCR court took the constitutional issues under advisement. App. 359-60. After the hearing, both Petitioner and the State submitted briefs to the PCR court regarding the constitutionality of § 16-3-85. App. 364-68; Supp. App. 157-60.

Order of Dismissal

On August 10, 2012, the PCR court denied and dismissed Petitioner's PCR application, ruling that Petitioner had "not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief." App. 369-75.

Petitioner filed a Motion to Alter or Amend on August 24, 2012 to preserve his argument that § 16-3-85 is unconstitutionally vague because the statute does not provide ascertainable standards of guilt to protect against arbitrary and discriminatory enforcement of the statute. Supp. App. 161-62.

The PCR court denied the motion to reconsider on September 17, 2012. Supp. App. 163-64.

This petition for writ of certiorari follows.

ARGUMENT

I. Petitioner is entitled to a vacation of his thirty-year sentence under S.C. CODE ANN. § 16-3-85 because the statute is unconstitutional under the due process and equal protection clauses of the South Carolina and the United States Constitutions where under its provisions, a defendant whose actions only amount to “aiding and abetting” is subject to vastly different penalties for identical conduct depending solely under which section of the statute the defendant is charged.

In a PCR proceeding, a defendant may raise any claims of constitutional violations relating to his conviction. S.C. CODE ANN. § 17-27-20(a); Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 601 (2008).

In this case, Petitioner asserts that the statute under which he was convicted, S.C. CODE ANN. § 16-3-85, unconstitutionally violates the due process and equal protection clauses of the South Carolina and the United States Constitutions because under its provisions, a defendant whose actions only amount to “aiding and abetting” is subject to vastly different penalties for identical conduct depending solely under which section the defendant is charged.

The due process clause requires that citizens be afforded fair warnings of proscribed conduct. Rose v. Locke, 423 U.S. 48, 49 (1975). “The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.” Curtis v. State, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001).

Under the due process clause, a statute is unconstitutionally vague where either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary person can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary, erratic, or discriminatory

enforcement. City of Chicago v. Morales, 527 U.S. 41, 56 (1999); Kolender v. Lawson, 461 U.S. 352, 357 (1983).

Under the second prong, a statute is unconstitutional if it invites an inordinate amount of police discretion in determining what conduct proscribes or what conduct complies with a statute in any given case. See City of Spokane v. Douglass, 795 P.2d 693, 697-98 (Wash. 1990); see also Morales, 527 U.S. at 64.

“Sentencing provisions may also violate due process if they do not afford fair notice of the penalty that applies to the forbidden conduct, [and] [a]mbiguities as to the applicable penalty must be resolved in favor of lenity, granting the defendant the benefit of the doubt.” Thomas v. Davis, 192 F.3d 445, 455 (4th Cir. 1999).

The equal protection clause also forbids arbitrary application of the law. For instance, selective enforcement based on unjustifiable standards such as race, religion, or other arbitrary classification is prohibited by equal protection. See Oyler v. Boles, 368 U.S. 448, 456 (1962).

The homicide by child abuse statute, codified under § 16-3-85, under which Petitioner was convicted purportedly provides for two separate ways a person may be guilty of homicide by child abuse.

Under Subsection (A)(1) of § 16-3-85, a person is guilty of homicide by child abuse if the person: “causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.” If a person is found guilty under Subsection (A)(1), the person faces a sentence of a term not less than twenty years up to life in prison. § 16-3-85(C)(1).

Under Subsection (A)(2) of § 16-3-85, a person is guilty of homicide by child abuse if the person: “knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.” If a person is found guilty under Subsection(A)(2), the person faces a sentence of a term not less than ten years up to a maximum term of twenty years. § 16-3-85(C)(2).

At first glance, there may appear to be nothing vague or arbitrary about the provisions of this statute. As to Petitioner, however, his alleged conduct subjected him to either Subsection (A)(1) or Subsection (A)(2) of the statute based upon the arbitrary discretion of law enforcement and the solicitor. The only difference between these two Subsections was the vastly different punishment.

The record in this case shows that at the time of the alleged crimes, Petitioner was employed by a local automotive plant where he consistently worked a fifty to seventy hours a week. App. 17, ll. 13-18; 196, ll. 23-25, 238. Petitioner’s wife, Ila M. Carter, step-mother to the Petitioner’s daughter, was unemployed and stayed home to care for the children while Petitioner worked long hours. App. 196, ll. 17-22; 199, ll. 19-21; 238.

In April 2000, Petitioner received a telephone call while he was at work from Ila Carter reporting that two of the children, including the deceased minor child (hereinafter referred to as the “minor child”), were injured while playing on the bunk beds. App. 292, l. 21 – 293, l. 10. Petitioner took both of the children to the hospital. The minor child suffered a head injury during that alleged fall from the bunk beds. App. 198, ll. 7-16. Petitioner would discover after the minor child’s death that his wife’s story that minor child hurt herself while playing on the bunk beds was false. App. 292, l. 21 – 293, l. 10.

On October 2000, a pediatric neurologist examined the minor child to determine the cause and prescribe treatment for some apparent “spells” she was experiencing since the April 2000 injury. The neurologist’s examination revealed signs of improvement since the initial visit five months earlier. App. 201, ll. 15-25.; Supp. App. 6.

Sometime around noon on October 14, 2000, Ila Carter telephoned Petitioner while he was at work several times and reported that the minor child was experiencing “spells” again. App. 238; 297, l. 17 – 298, l. 14; 299, l. 24 – 300, l. 5. After Ila Carter arrived at Petitioner’s place of work around 12:30 p.m., Petitioner rushed Ila Carter and their infant son home and then rushed the minor child to Greenville Memorial Hospital. App. 36, ll. 1-10; 238; Supp. App. 4.

Upon arriving at the hospital, the minor child became slightly unresponsive, but in the following days, her condition deteriorated and she died on October 17, 2000. Petitioner was arrested on October 25, 2000. App. 239.

The facts in the record establish that Petitioner did not directly commit the act which caused the minor’s child death. During the pre-trial hearings of Petitioner’s trial before he pled guilty, the State presented evidence that a head injury caused the minor child’s death. App. 146, ll. 15-17. The State was prepared to show that Ila Carter was the one who directly inflicted the blow to the minor child which caused her death. App. 202, ll. 2-4.

During Ila Carter’s trial, in which she was convicted of homicide by child abuse under Subsection (A)(1) of § 16-3-85 and received a life sentence without parole, the State presented evidence that the subdural hematoma that caused the minor child’s death occurred during the general time frame in which the minor child was admitted to the hospital. App.

287, l. 21 – 288, l.12; 330, l. 20 – 331, l. 2. At Ila Carter’s trial, the solicitor argued to the jury that Ila Carter was the person who “struck the fatal blow.” App. 304, l. 24 – 305, l. 1.

There was never any evidence that Petitioner inflicted the injury that caused the minor child’s death. App. 353, ll. 6-12. The State, however, argued that Petitioner was guilty under Subsection (A)(1) even though he did not inflict the injuries which caused the minor child’s death, and Petitioner’s plea counsel permitted him to plead guilty under Subsection (A)(1) which contained a significantly greater penalty than provided under Subsection (A)(2) for aiding and abetting.

The unconstitutionality of § 16-3-85 comes into play because Petitioner’s alleged exact same conduct subjected him to either Subsection of the statute at the arbitrary discretion of law enforcement and the solicitor even though the penalties under each subsection are vastly different.

Under § 16-3-85(B)(1), “child abuse or neglect” is defined as “an act or omission by any person which causes harm to the child’s physical health or welfare.” The definition of “harm” to a child’s health or welfare occurs when a person, among other things, “inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment.” § 16-3-85(B)(2)(a).

Therefore, “child abuse or neglect” includes any act or omission by any person which causes harm to the child’s physical health or welfare by inflicting or allowing to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment.

Incorporating this definition of “child abuse and neglect” into Subsections (A)(1) and (A)(2), it is clear that the conduct of someone like Petitioner can be arbitrarily classified as falling under either Subsection and subject him to exceedingly different punishments.

Under Subsection (A)(2), a person is guilty of homicide by child abuse if he or she knowingly aids or abets another person to commit any act or omission which causes harm to the child’s physical health or welfare by inflicting or allowing to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment.

At pre-trial hearings, the State emphasized Petitioner’s alleged lying to the doctors about what happened to the minor child and letting his “daughter die because of not being diagnosed properly because of a false history.” App. 120, ll. 23-25. The State further emphasized Petitioner’s act in driving the minor child to Greenville Memorial Hospital instead of Anderson Memorial on the day of her fatal injury. App. 353, ll. 3-5; 354, l. 20 – 355, l. 1; 357, l. 19 - 358, l. 9. During Ila Carter’s trial, the solicitor argued to the jury that Petitioner was only guilty of “allowing the child to be neglected enough to stay with someone you know is abusing the child.” App. 306, ll. 17-20. These allegations were all part of the State’s argument that Petitioner was guilty of homicide by child abuse, and certainly these alleged acts fall under Subsection (A)(2) which provides for the lesser penalty.

However, under the provisions of the statute, the State maintains this very conduct which subjects Petitioner to the penalty provided for Subsection (A)(2) can also subject Petitioner to the much greater penalty for committing homicide by child abuse under (A)(1). Under Subsection (A)(1), a person is guilty of homicide by child abuse if he or she causes the death of a child . . . while committing any act or omission which causes harm to the

child's physical health or welfare by inflicting or allowing to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment."

Because "knowingly aiding or abetting" a person to commit child abuse is in itself an "act" which can cause "harm to a child's physical health or welfare" and thus can constitute "child abuse and neglect" under the statutory scheme provided under § 16-3-85, a person who therefore "knowingly aids and abets" another person to commit child abuse is guilty of committing "child abuse or neglect" himself under Subsection (A)(1) and is subject to the greater penalty of twenty years to life instead of the lesser penalty of ten to twenty years for "aiding and abetting."

When a person who commits an act that can be deemed to fall under either Subsection (A)(1) or Subsection (A)(2), for what crime the person is charged is subject to the "arbitrary, erratic, or discriminatory" discretion of law enforcement and the solicitor, violating the due process clause where the statute does not provide for ascertainable standards of guilt. See City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

The sentencing provisions of § 16-3-85 also violate due process because they do not provide fair notice of what penalty will apply to a person's conduct when a person's conduct can subject them to different sections of the statute which in turn exposes the person to significantly different penalties. See Thomas v. Davis, 192 F.3d 445, 455 (4th Cir. 1999).

In addition to violating the due process clause, the statutory scheme set forth in § 16-3-85 also violates equal protection because when a person such as Petitioner commits an alleged act that could be punished under either of the two Subsections of §16-3-85, the person faces punishment for identical conduct in two very disparate ways.

In their treatise on criminal procedure, Professors LaFave, Israel, and King discussed statutory schemes where a defendant's identical conduct could subject him to two different punishments and have observed such a scheme is highly objectionable:

It is likely to be a consequence of legislative carelessness, and even if it is not, such a scheme serves no legitimate purpose. There is nothing at all rational about this kind of statutory scheme, as it provides for different penalties without any effort whatsoever to explain a basis for the difference. It cannot be explained in terms of giving assistance to the prosecutor. Where statutes are identical except for punishment, the prosecutor finds not the slightest shred of guidance. It confers discretion which is totally unfettered and which is totally unnecessary.

4 Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* § 13.7(a), 95-97 (1999 and Supp. 2002).

Because “knowingly aiding and abetting” can be considered an act itself which constitutes “child abuse and neglect,” the elements under Subsection (A)(1) and Subsection (A)(2) for homicide by child abuse are virtually identical. The only difference between the two crimes set forth in Subsection (A)(1) and (A)(2) is the punishment.

The solicitor's decision on whether to prosecute one who “knowingly aided and abetted” under either Subsection (A)(1) or Subsection (A)(2) is completely arbitrary. The person prosecuted under Subsection (A)(1) faces up to life in prison while the person prosecuted under Subsection (A)(2) faces only a maximum term of twenty years. Such obvious unequal treatment of persons identically situated clearly violates the guarantee of equal protection.

Based upon the foregoing arguments, Petitioner therefore requests that his sentence for homicide by child abuse under § 16-3-85(A)(1) be vacated.

II. Petitioner’s plea counsel erred in failing to object to Petitioner’s guilty plea under S.C. CODE ANN. § 16-3-85(A)(1) where the Petitioner’s actions only amounted to “aiding and abetting” under Subsection (A)(2) of § 16-3-85 and Petitioner would have received a maximum sentence of twenty years instead of the thirty year sentence he received under Subsection (A)(1).

In the alternative to Argument I., Petitioner asserts that plea counsel erred in failing to object to Petitioner’s plea of guilty under Subsection (A)(1) of § 16-3-85 instead of Subsection (A)(2) which provided a maximum sentence of twenty years versus the sentence of thirty years received by Petitioner.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

There is absolutely no question in this case that Petitioner did not inflict the fatal injury to the minor child. The State’s position has always been that Ila Carter inflicted the fatal injury and that Petitioner was only guilty by his acts of assisting the abuse, such as allowing the minor child to stay in an environment where she was continually abused by Ila Carter, driving the to minor child to a hospital farther away on the day of her fatal

injury, and allegedly giving the doctors a false medical history of the child which hindered the physicians' ability to diagnose the child on the day she suffered the fatal injury. See infra pp. 8-10.

The alleged acts asserted by the State fell under the "aiding and abetting" provision of Subsection (A)(2) rather than Subsection (A)(1) and therefore Petitioner should have only faced a maximum punishment of up to twenty years imprisonment. § 16-3-85(C)(2). Petitioner's plea counsel should have recognized that Petitioner could not have been convicted under Subsection (A)(1) and should have objected to his guilty plea under Subsection (A)(1). App. 327, ll. 15-22; 342, l. 20 – 343, l. 9.

There was no dispute that Petitioner was at work when Ila Carter inflicted the fatal blow upon the minor child. Therefore, the State could not have used an accomplice theory of liability to convict Petitioner under Subsection (A)(1) as Petitioner's plea counsel believed. Under the "hand of one is the hand of all" theory of accomplice liability, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

Petitioner did not personally inflict the fatal injury, nor was he present at the scene when such injury was inflicted upon the minor child. At most, Petitioner's actions prior to and after the infliction of the fatal injury to the child by Ila Carter amounted to aiding and abetting, which is defined as "assisting or facilitating the commission of a crime or . . . promoting its accomplishment." BLACK'S LAW DICTIONARY 81 (9th ed. 2009). Aiding and abetting "comprehends all assistance rendered by words, acts,

encouragement, support, or presence, actual or constructive, to render assistance if necessary.” State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004).

In State v. Smith, 391 S.C. 353, 366, 705 S.E.2d 491, 498 (Ct. App. 2011), the court observed that if a jury found that the State did not prove beyond a reasonable doubt that the defendant inflicted the fatal chest injuries to the child or personally administered the pseudoephedrine from which the child overdosed, the jury could nevertheless find the defendant guilty of aiding and abetting if the jury found the State proved beyond a reasonable doubt that the defendant knew amount the injuries or about the pseudoephedrine but failed to seek medical care for the child.

The facts of this case are similar to Smith above. The State would have not been able to prove beyond a reasonable doubt that Petitioner inflicted the injuries to the minor child or was there at the time the fatal injuries were inflicted to the minor child. Therefore, his actions, like those in Smith, would have only amounted to aiding and abetting under Subsection (A)(2) of § 16-3-85; Cf. State v. Smith, 359 S.C. 481, 492, 597 S.E.2d 888, 894 (Ct. App. 2004) (affirming directed verdict for homicide by child abuse under Subsection (A)(1) where the evidence established that both the defendant and the child’s mother were the only adults with the child during the time frame that she received her injuries and were the only people that could have possibly caused her injuries).

The failure of Petitioner’s plea counsel to object to his guilty plea under Subsection (A)(1) instead of Subsection (A)(2) of § 16-3-85 constituted ineffective assistance of counsel. Substantial prejudice resulted this ineffective assistance of counsel because Petitioner received a sentence of thirty years instead of the maximum sentence of twenty-years that he could have received under Subsection (A)(2). App. 341,

ll. 11-14.

In this case, both the deficient performance and prejudice prongs of the Strickland test are met. Petitioner accordingly request that in the alternative to the relief sought under Issue Number One of this Petitioner, that his case be remanded to the Trial Court for resentencing under §16-3-85(A)(2).

CONCLUSION

For the reasons set forth herein, the PCR court erred in denying Petitioner's Application for Post-Conviction Relief. This Court should grant Petitioner's writ of certiorari with the ultimately relief of either (1) the vacation of his sentence under S.C. CODE Ann. § 16-3-85(A)(1); or alternatively, (2) a remand for resentencing.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of June, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

DEREK S. CARTER,

PETITIONER,

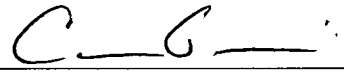
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STATE OF SOUTH CAROLINA,

RESPONDENT

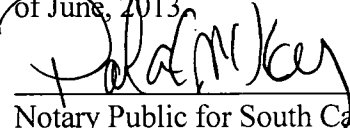
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of June, 2013.


Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of June, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.