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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KRISTY OLYMPIA DAVIS,

PETITIONER

Opinion No. 2023-UP-342 (S.C. Ct. App. Filed October 25, 2023)

APPELLATE CASE NO. 2021-001017

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion issued in the case on October 25, 2023, a Petition for Rehearing was filed on November 1, 2023, which was denied by the South Carolina Court of Appeals on November 17, 2023.

QUESTION PRESENTED

The Court of Appeals erred in upholding the trial judge's denial of petitioner's directed verdict motion on the offense of domestic violence per its holding that the matter concerned the existence of the evidence presented, rather than the weight of the evidence submitted, because petitioner's claim addressed the application of an unconstitutional element included within this offense, which in turn meant that the state's evidence could not support a conviction, and the objectionable erroneous charge did not cure the matter.

STATEMENT OF THE CASE

Petitioner Kristy Olympia Davis was found guilty of domestic violence in the third degree¹ per jury trial held during the August 2021 term of the Abbeville County General Sessions Court before Judge Donald B. Hocker. Petitioner was sentenced to imprisonment for a period of ninety days. Assistant Solicitors Jane H. Merrill and Myreon S. Williams represented petitioner at trial, and Assistant Solicitors Micah E. Black and C. Yades Brown appeared on behalf of the state. On August 26, 2021, a post-trial hearing was held before Judge Hocker on petitioner's new trial motion. Petitioner was represented by Attorney Tristan M. Shaffer at the hearing and Assistant Solicitor Micah E. Black appeared on behalf of the state. On September 14, 2021, Judge Hocker issued an Order denying petitioner's new trial motion.

Petitioner appealed her conviction and sentence. On October 25, 2023, the South Carolina Court of Appeals affirmed petitioner's conviction and sentence. See State v. Kristy Davis, Unpublished Opinion No. 2023-UP-342 (S.C. Ct. App. Filed October 25, 2023). App. 1-3. On November 1, 2023, petitioner filed a petition for rehearing in the case. App. 4-10. On November 17, 2023, the South Carolina Court of Appeals denied the petition for rehearing. App. 11. This petition requesting a review of the Court of Appeals' decision in this appeal follows.

¹ Petitioner was charged with domestic violence of a high and aggravated nature per S.C. code Ann. {16-25-65(A)}.

STATEMENT OF THE CASE

Petitioner Kristy Olympia Davis was found guilty of domestic violence in the third degree¹ per jury trial held during the August 2021 term of the Abbeville County General Sessions Court before Judge Donald B. Hocker. Petitioner was sentenced to imprisonment for a period of ninety days. Assistant Solicitors Jane H. Merrill and Myreon S. Williams represented petitioner at trial, and Assistant Solicitors Micah E. Black and C. Yades Brown appeared on behalf of the state. On August 26, 2021, a post-trial hearing was held before Judge Hocker on petitioner's new trial motion. Petitioner was represented by Attorney Tristan M. Shaffer at the hearing and Assistant Solicitor Micah E. Black appeared on behalf of the state. On September 14, 2021, Judge Hocker issued an Order denying petitioner's new trial motion.

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¹ Petitioner was charged with domestic violence of a high and aggravated nature per S.C. code Ann. {16-25-65(A)}.

ARGUMENT

The Court of Appeals erred in upholding the trial judge's denial of petitioner's directed verdict motion on the offense of domestic violence per its holding that the matter concerned the existence of the evidence presented, rather than the weight of the evidence submitted, because petitioner's claim addressed the application of an unconstitutional element included within this offense, which in turn meant that the state's evidence could not support a conviction, and the objectionable erroneous charge did not cure the matter.

The issue in the case concerned an unconstitutional element included in the domestic violence offense charged against petitioner in the case. The issue raised on appeal follows:

The trial judge erred in failing to grant appellant's motion for a directed verdict on the domestic violence charge because the element of a household member was not proved to the extent that appellant was the same sex as the alleged victim, and in charging the jury that a person in a same sex relationship would qualify as household member under the statute.

Petitioner was tried for domestic violence against Belicia Evans. Evans testified that she and petitioner (also female) were romantically involved, and that in July 2019, she moved into petitioner's home. Evans explained that on January 28, 2020, she and petitioner were engaged in a physical altercation. Evans stated that petitioner sent a text previously requesting that she (Evans) leave the residence. Then, petitioner approached her while they were both inside the residence and started punching her. Evans stated that she responded by pushing petitioner into a glass coffee table, and then walking to the bedroom to pack her clothes to leave. Then, as she packed, Evans claimed that petitioner punched her, and that she (Evans) punched petitioner back in response. Evans added that minutes later, petitioner struck her on the head with a golf club (driver). R. 54, l. 3 – p. 68, l.9; R. 92 lines 9-25. Evans informed the court and jury that she and petitioner were not married and did not have children together. R. 73, lines 6-14.

Prior to trial, trial counsel argued that the domestic violence statute upon which petitioner was charged was unconstitutionally inapplicable to petitioner's case because both petitioner and Evans were two females in a same sex relationship. Defense counsel's position was stated as follows:

Defense Counsel: And, your Honor, under 16-25-10, Subsection (3), household member is defined as a spouse, a former spouse, persons who have a child in common or a male and a female who are cohabitating or formerly have cohabitated. Our client does not fit into any of these definitions. She and Ms. Evans were never married. They were not married and then divorced. They did not have a child in common and they are both female, so they are not a male and female who are cohabitating or formerly have cohabitated. So our argument is that this DVHAN statute does not apply because Ms. Davis does not fall into one of those categories.

There is the Doe v. State case that the Court referenced earlier, ...as we discussed in chambers, but just to put it on the record, in the conclusion section I would argue this—this holding is fairly narrow and, in fact, the opinion discusses that this is unconstitutional as applied to this case, and it states that to address this issue it is unconstitutional as applied to Doe. Therefore, the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an order of protection, and this is—the pinpoint of that 510 just for the record, Your Honor.

The Court: Okay.

Solicitor: And we argue that that's a fairly narrow holding and it does not apply and, in fact, it's impermissible for the Court to expand the definition or the meaning of the case to include a criminal statute because—or included in this definition when that case was decided in 2017, it's 2021 and as of now the Legislature still has not acted to change that. R. 22, l.16-p. 23, l.22.

The trial judge noted that the Court had not completely “throw[n] the statute out” per the Doe² case. R. 24, l.25-p. 25, l.24.

² Doe v. State, 421 SC 490, 808 S.E.2d 807 (2017).

Petitioner was charged in the indictment which read as follows:

...[that appellant] did cause physical harm or injury to Belizia Evans, a household member, or did offer or attempt to cause physical harm or injury to said household member with apparent present ability under circumstances reasonably creating fear of imminent peril. In addition, the offense was committed under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim resulted and/or the offense was committed, with or without an accompanying battery, under circumstances manifesting extreme indifference to the value of human life, which would reasonably cause a person to fear imminent great bodily injury or death.

At the close of the state's case, the defense put forth the ground that the state failed to establish its burden of proof on the element of household member under the domestic violence statute because petitioner was not a household member under the definition of S.C. Code Ann. 16-25-10 (3) as petitioner was not a spouse, or a former spouse, or a person who had a child in common, or a male and female cohabitating, or a male and female who formerly cohabitated in the case; and therefore, since the statute did not include same sex couples as household members, then the expansion of the household member definition to prosecute petitioner violated the due process and equal protection clauses. U.S. Const. 14th Amendment. R. 100, l.24-p. 106, l.17. The trial judge denied the directed verdict motion. R. 109, l.6-12.

Also, counsel objected to the trial judge's jury charge that a person in a same-sex coupling would qualify as a household member in this case because this was a charge on the facts, and a violation of due process, separation of powers, and the rule of lenity. R. 111, l.12-20.

The trial judge's household member jury charge follows:

Household member means a spouse, former spouse, persons who have a child in common, male and female who are cohabitating or formerly have cohabitated together or a same sex couple who are cohabitating or formerly cohabitated together. R. 149, lines 1-5.

S.C. Code Ann. {16-25-20 states that it is unlawful to cause physical harm or injury to a

person's own household member, and a household member is defined under S.C. Code Ann {16-25-10(3) as

1. A spouse
2. A former spouse
3. Persons who have a child in common
4. A male and female cohabitating or formerly have cohabitated

In Doe v. State, 421 SC 490, 808 S.E.2d 807 (2017), the petitioner was denied an order of protection³ on the ground that she did not qualify as a person who could obtain such an order because she, as female, and her partner, who was female, meant that her same sex relationship excluded her from recognition as a household member who could gain a protection order. See definition of household member under S.C. Code Ann. 16-25-10(3). The Court in Doe found that the definition of household member was unconstitutional as it applied to Doe and that Doe's denial of an order of protection based on the statutory definition that excluded her from being listed as a household member due to her same sex status was unconstitutional. The Doe Court's rationale follows:

We find there is no reasonable basis, and the State has offered none, to support a definition that results in disparate treatment of same-sex couples who are cohabiting or formerly have cohabitated. Because it is clear that the definition of "household member" violates the Equal Protection clauses of our state and federal constitutions, we must declare it unconstitutional.

Based on the holding in Doe, petitioner's directed verdict motion of acquittal on the domestic charge should have been granted as the state did not prove every element of the domestic offense charged, i.e. household member, because petitioner was a person in a same sex relationship, which in turn excluded her as household member under the statute; and since being a household member is an element of the domestic violence statute, the state's case was not

³ S.C. Code Ann. 24-4-20 (b) defines household member from the domestic violence statute definition of household member under 16-25-10(3).

proved. Due process requires the prosecution to prove every element of the offense charged beyond a reasonable doubt before a conviction can be obtained. Jackson v. Virginia, 443 U.S. 307 (1979). Clearly, the presumption is that the elements are constitutional.

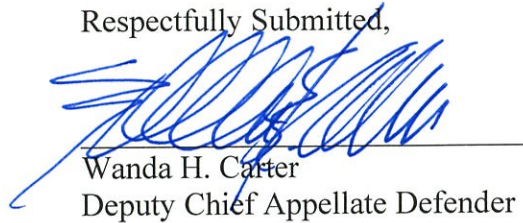
In addition, it was error for the trial judge to charge the jury that a person in a same sex couple would qualify as a household member under the statutory definition of household member under 16-25-10(3). Again, in Doe it was clearly noted that same sex couples were excluded as household members under the statute. Furthermore, Doe did not judicially amend the statute to include same sex couple as a household member. A trial judge must charge the correct law applicable in the case. State v. Mattison, 388, SC 469 S.E.2d 5-78 (2010). Moreover, the judge's improper jury charge in question violated the rule of lenity and the separation of powers under U.S. Constitution articles I, II, and III and S.C. State Const. Article 1, section 8. The rule of lenity applies when a criminal statute is ambiguous and requires any doubts about the scope of the statute to be resolved in the defendant's favor. Furthermore, the rule of lenity is not a device to create ambiguity, nor should the court invoke it before considering the words of the statute. State v. Miles, 421 S.C. 154, 805 S.E.2d 204 (2017). Another foundation of the rule of lenity is the separation of powers because criminal offenses are derived solely from the legislative branch. State v. Miles, supra. Finally, the trial judge erred in giving the improper charge because it was a prohibited charge on the facts in violation of S.C Const. Article V, 21.

The Court of Appeals erred in holding that the existence of evidence, not weight of the evidence, was the sufficient analysis to support the trial judge's denial of petitioner's directed motion because it was the unconstitutional element of the offense which warranted the acquittal, which was not cured by the objectionable jury charge in the case that was upheld by the Court of Appeals.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised matters.

Respectfully Submitted,



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ATTORNEY FOR PETITIONER

This 18th day of December, 2023.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KRISTY OLYMPIA DAVIS,

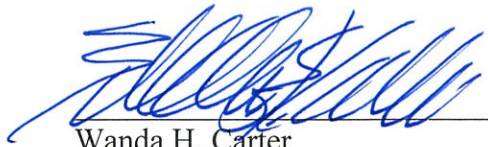
PETITIONER

Opinion No. 2023-UP-342 (S.C. Ct. App. Filed October 25, 2023)

APPELLATE CASE NO. 2021-001017

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals and Appendix in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Kristy Olympia Davis at 1108 Cambridge St., Apt 802, Abbeville, SC 29620, this 18th day of December, 2023.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

From: [Leverett, Scott](#)
To: [SC - FARTHING MARK](#)
Cc: [SC - COLLINS CAROLINE](#); [Carter, Wanda](#)
Subject: Kristy Olympia Davis - Petition for Writ of Certiorari to the Court of Appeals - Appellate Case No. 2021-001017
Date: Monday, December 18, 2023 4:56:00 PM
Attachments: [Kristy Olympia Davis - Petition for Writ of Certiorari to the Court of Appeals - Appellate Case No. 2021-001017.pdf](#)
[Kristy Olympia Davis - Appendix - Appellate Case No. 2021-001017.pdf](#)

Dear Mr. Farthing,

Attached please find a copy of the Petition for Writ of Certiorari to the Court of Appeals and accompanying Appendix in the above referenced case.

-Scott Leverett
Admin. Asst. for Wanda Carter
Appellate Defense