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Nov 01 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KRISTY OLYMPIA DAVIS,

APPELLANT

APPELLATE CASE NO. 2021-001017

Appeal from Abbeville County

Honorable Donald B. Hocker, Circuit Court Judge

Opinion No. 2023-UP-342

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's ruling upholding the denial of appellant's directed verdict motion based on the sufficiency of the evidence (the existence, not weight of the evidence) on the elements included in the offense of domestic violence charged in the case. However, this Court might have overlooked the fact that appellant's argument was not whether the elements of the offense were met based on the sufficiency question, but rather that an element within the offense itself was unconstitutionally applicable in this case, which affected the issue of the sufficiency of the evidence. In support of this motion, counsel would submit the following points.

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

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.

Appellant was tried for domestic violence against Belicia Evans. Evans testified that she and appellant (also female) were romantically involved, and that in July 2019, she moved into appellant's home. Evans explained that on January 28, 2020, she and appellant were engaged in a physical altercation. Evans stated that appellant sent a text previously requesting that she (Evans) leave the residence. Then, appellant approached her while they were both inside the residence and started punching her. Evans stated that she responded by pushing appellant into a glass coffee table, and then walking to the bedroom to pack her clothes to leave. Then, as she packed, Evans claimed that appellant punched her, and that she (Evans) punched appellant back in response. Evans added that minutes later, appellant 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 appellant 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 appellant was charged was unconstitutionally inapplicable to appellant's case because both appellant 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, 1.16-p. 23, 1.22.

The trial judge noted that the Court had not completely “throw[n] the statute out” per the Doe<sup>1</sup> case. R. 24, 1.25-p. 25, 1.24.

Appellant 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.

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<sup>1</sup> Doe v. State, 421 SC 490, 808 S.E.2d 807 (2017).

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 appellant was not a household member under the definition of S.C. Code Ann. 16-25-10 (3) as appellant 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 appellant violated the due process and equal protection clauses. U.S. Const. 14<sup>th</sup> Amendment. R. 100, 1.24-p. 106, 1.17. The trial judge denied the directed verdict motion. R. 109, 1.6-12.

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, 1.12-20. 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 protection<sup>2</sup> 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, appellant'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 appellant 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 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). Also, when considering a motion for a directed verdict, the trial court is concerned

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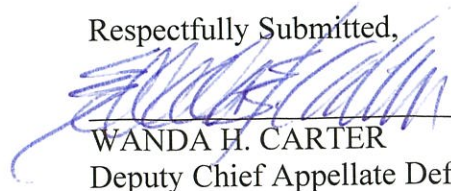
<sup>2</sup> S.C. Code Ann. 24-4-20 (b) defines household member from the domestic violence statute definition of household member under 16-25-10(3).

with the existence or non-existence of the evidence and not its weight. State v. Burdette, 385 S.C. 34, 515 S.E. 525 (1999).

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; and 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.

WHEREFORE, based on the points listed above, counsel would request a rehearing on the issue of how the unconstitutional element affected the sufficiency of the evidence, and how the jury charge was a comment on the facts of the case.

Respectfully Submitted,



WANDA H. CARTER  
Deputy Chief Appellate Defender

This 1<sup>st</sup> day of November, 2023

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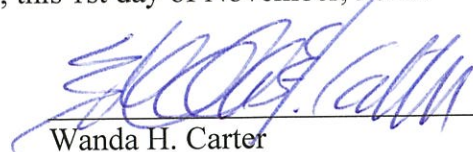
KRISTY OLYMPIA DAVIS,

APPELLANT

APPELLATE CASE NO. 2021-001017  
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Kristy Olympia Davis, at 1108 Cambridge St, Apt. 802, Abbeville, SC, this 1st day of November, 2023.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

**From:** [Leverett, Scott](#)  
**To:** [SC - FARTHING MARK](#)  
**Cc:** [Grace Sommer](#); [Carter, Wanda](#)  
**Subject:** Kristy Olympia Davis - Petition for Rehearing - Appellate Case No. 2021-001017  
**Date:** Wednesday, November 1, 2023 1:37:00 PM  
**Attachments:** [Kristy Olympia Davis - Petition for Rehearing - Appellate Case No. 2021-001017.pdf](#)

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Dear Mr. Farthing,

Attached please find a copy of the petition for rehearing in the above referenced case that is being filed today, November 1, 2023, with the Court of Appeals.

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