

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

RECEIVED

NOV 12 2013

S.C. Supreme Court

DEREK S. CARTER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213168

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ARGUMENT IN REPLY 2

CONCLUSION 5

ARGUMENT IN REPLY

In State v. Smith, 2013 WL 5819275, No. 27328 (S.C. October 30, 2013), this Court held the language of S.C. CODE ANN. § 16-3-85 “unambiguously signal[ed] the General Assembly’s intent to codify two distinct crimes - homicide by child abuse as a principal pursuant to section (A)(1) and homicide by child abuse by aiding and abetting pursuant to (A)(2), each with distinct elements and sentencing ranges.” Id. at *2.

While the Legislature may have intended to create two distinct crimes, the statute’s vague language enables solicitors to circumvent the statute’s intent and use conduct that should only amount to aiding and abetting as a basis for a conviction of homicide by child abuse as a principal under section (A)(1).

In this case, the State has used Petitioner’s conduct of “knowingly aiding and abetting” his wife to commit “child abuse or neglect” as the “act” causing the death of the minor child under (A)(1). See § 16-3-85(A), (B)(1). The language of the statute therefore permitted the State to either prosecute Petitioner, for the same exact conduct, as a principal under (A)(1) or as an aider or abettor under (A)(2).

As Petitioner has already argued in his Petition, the solicitor’s decision on whether to prosecute one who “knowingly aided and abetted” under either (A)(1) or (A)(2) is completely arbitrary. The statute accordingly violates the due process clause where it does not provide fair notice of what penalty will apply to a person’s conduct when a person’s identical conduct can subject him or her to different sections of a statute providing for significantly different penalties. See Thomas v. Davis, 192 F.3d 445, 455 (4th Cir. 1999). The person prosecuted as a principal under (A)(1) faces up to life in prison while the person convicted as an aider or abettor under (A)(2) faces only a maximum of twenty years. This

obvious unequal treatment of persons identically situated further violates the guarantee of equal protection.

Should this Court determine that the statute as applied to Petitioner is constitutional, his plea counsel was nevertheless ineffective in failing to object to Petitioner's plea of guilty as a principal under (A)(1) rather than as an aider or abettor under (A)(2). In its Return, the State contends that Petitioner's conduct went further than just aiding and abetting and repeatedly focuses on injuries inflicted upon the child by Petitioner and injuries that Petitioner observed his wife inflicting upon the child. Petitioner, by pleading guilty to great bodily injury upon a child pursuant to § 16-3-95, has already acknowledged that he inflicted injuries upon the child and saw his wife inflict injuries upon the child.

The true issue is whether Petitioner knew when he left for work on October 14, 2000 that his wife was going to inflict a fatal head injury upon the minor child. The State argues that Petitioner did. As support for its argument, the State mischaracterizes the record and states that Petitioner knew his wife inflicted an earlier head injury upon the child in April 2000. See Return, p. 12. This is an inaccurate assertion. Petitioner was told by his wife that the minor child suffered the April 2000 head injury after falling from the bunk beds. Petitioner only learned that his wife's story was false after the minor child's death. App. 198, ll. 7-16; 292, l. 21 – 293, l. 10.

When Petitioner left for work on October 14, 2000, he did not know that his minor child would suffer a fatal head injury at the hands of his wife. The State relies upon the case of State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002) as authority supporting Petitioner's conviction under (A)(1) as a principal. In Jarrell, the mother of ten-month old infant was arrested for the death of the infant after the infant died from suffocation and

smothering. Id. at 95-96, 564 S.E.2d at 365-66. The mother admitted to law enforcement that the father was molesting the infant. The mother also later admitted that she and the father planned to kill the infant by smothering him to make his death appear to be SIDS related because the infant had an upcoming doctor's appointment and the sexual abuse of the infant would be readily apparent to anyone examining the infant. The mother and the father planned that the father would kill the infant while the mother was out shopping. Id. at 96, 564 S.E.2d at 366.

The mother was found guilty of homicide by child abuse as a principal under § 16-3-85(A)(1). Id. at 97,564 S.E.2d at 366. The Court of Appeals held "when [the mother] left home, [the mother] created a grave risk of death to her child, evidencing extreme indifference to his life. She left home knowing her child would be killed while she was gone." Id. at 99, 564 S.E.2d at 367.

Petitioner, unlike the mother in Jarrell, did not leave for work on October 14, 2000 knowing that his wife would inflict a fatal head injury upon his child. The State did not have a factual basis to charge and convict Petitioner as a principal under (A)(1) and therefore, Petitioner's plea counsel did not have a reasonable strategy in failing to object to Petitioner's plea under (A)(1). See Petition, pp. 14-15. Petitioner's plea counsel's failure to object to his guilty plea under (A)(1) constituted ineffective assistance of counsel and substantially prejudiced Petitioner where he received a sentence of thirty years rather than the maximum sentence of twenty years he could have received as an aider and abettor under (A)(2).

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari with the ultimate relief of either (1) vacation of his sentence under S.C. CODE ANN. § 16-3-85(A)(1); or (2) a remand for resentencing.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
R. Lawton McIntosh, Circuit Court Judge

DEREK S. CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the reply to the return to the petition for writ of certiorari in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derek Carter, #275938, Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069 this 12th day of November, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of November, 2013.

Walter J. Fubal (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.