2011-192226

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 4798 (S.C. Ct. App. filed 3/2/2011)

07-GS-02-650 to 653

THE STATE,

RESPONDENT,

V.

JUAN OROZCO,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 21, 2011.

QUESTION PRESENTED

Did the Court of Appeals err in ruling its was proper for the trial judge to admit testimony regarding appellant's suicide attempt as evidence of his guilt, since this evidence should not be deemed probative of guilt because of its spurious tendency to cause a verdict on an improper basis and because it was unduly prejudicial effect pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

Petitioner Juan Carlos Orozco was indicted by the Aiken County Grand Jury for two counts of criminal sexual conduct with a minor, first degree and two counts of lewd act on a child. R. 216-223. On July 14, 2008, petitioner proceeded to trial before the Honorable J. Cordell Maddox, Jr. and a jury. David Mauldin represented petitioner. Brenda Brisbin was the Assistant Solicitor. R. 6, ll. 8-17.

The jury found petitioner guilty as charged. R. 209, ll. 12-24. The trial judge sentenced him to incarceration for twenty years for CSC with a minor, first degree, suspended upon service of fifteen years with five years probation to follow. The judge also imposed a twenty year term for CSC with a minor, first degree, suspended upon service of fifteen years with five years probation; fifteen years incarceration for lewd act on a child, and to fifteen years incarceration for lewd act on a child The judge ordered that all sentences be served concurrently and that petitioner be given credit for time served. R. 214, ll. 8-16.

Petitioner was represented on appeal by Celia Robinson. The Court of Appeals affirmed petitioner's convictions in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (2011); App. 1-12. Petitioner sought rehearing, which was denied. App. 13-22. This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in ruling its was proper for the trial judge to admit testimony regarding appellant's suicide attempt as evidence of his guilt, since this evidence should not be deemed probative of guilt because of its spurious tendency to cause a verdict on an improper basis and because it was unduly prejudicial effect pursuant to Rule 403, SCRE.

Relevant facts

The older child victim was born on July 17, 1996; she was eleven-years-old at the time of trial. R. 43, ll. 16-19. The child testified that petitioner is her uncle and that, up until the age of ten, she had regularly visited her uncle and aunt and their two male children at their home in Aiken. R. 44, l. 16 – 46, l. 6. The child said that her aunt was sometimes not at home during her visits because she had to go to work. R. 46, ll. 14-23. She was sometimes there with petitioner, his two sons, and sometimes petitioner's other nieces, the younger alleged child victim and her younger sister. R. 46, l. 24 – 47, l. 24.

The child claimed that during her visits petitioner took her into the room and forced her to touch his "private part" and he touched her "private part" with his "private part." R. 48, ll. 13-24. The older child testified that this abuse took place "probably more than once." R. 50, l. 7. She also claimed that petitioner put his private part in her mouth. R. 50, l. 4. The child testified that she moved to Greenville in 2005 when she was going into the fourth grade and that these incidents stopped happening. R. 51, ll. 19-20; r. 44, ll. 9-15. The child maintained that petitioner told her that if she said anything about the abuse, she would get in trouble. R. 51, l. 22 – 52, l. 2.

The younger child was born on October 5, 1999; she was eight years old at the time of trial. R. 71, l. 23 – 72, l. 1. The younger child testified that petitioner is her uncle and that she had been to her uncle and aunt's house lots of times. R. 72, 11. 12-20. She claimed that something happened

with petitioner during her visits. R. 72, ll. 21-23. She recalled one time when she was watching petitioner's son, "and when I turned around, [petitioner] was wiping something on his white shirt. It was green goo." R. 72, l. 25 – 73, 1. 3. This child testified that the "green goo" came from petitioner's "private part." R. 73, ll. 4-7. This child further testified that petitioner "once" made her "suck his private part." R. 73, ll. 8-12.

The child also claimed that petitioner "once got his finger and stuck it in my clothes and touched my private part." R. 74, ll. 12-13. She stated that she did not know if petitioner's finger went inside her "private part" or not. R. 74, ll. 14-15. The younger child testified that she had never talked to the older child about what petitioner did to her and that the older child had never told her what petitioner did to her. R. 75, ll. 16-20.

Neither child gave a specific time that these alleged abuses took place. The state had alleged that the incidents of CSC and lewd act upon the younger child took place between October 4, 2003 and October 4, 2005 and that the incidents of CSC and lewd act upon the older child took place between July 17, 2004, and July 31, 2005. R. 217-223. Thus, the state alleged that the last claimed incident of abuse took place approximately a year prior to disclosure. The state dated the allegations from the fact that the family moved to Greenville in July of 2005, almost a year prior to the disclosure in June of 2006. R. 173, ll. 17-20.

Officer Jason Feemster testified that petitioner voluntarily spoke to him. Petitioner told him there were times when he watched the children, including the older niece and the younger niece, along with his own little boys. R. 94, ll. 20-25. The officer testified that petitioner acknowledged there were times when he was the only adult present with the children. R. 95, ll. 4-6. The officer agreed that petitioner voluntarily came in to give a statement and that, after arrest warrants were obtained, he turned himself in on the warrants. R. 96, ll. 8-9.

Elizabeth Ann Leaphart is the mother of the older niece. R. 102, ll. 20-21. She testified that her daughter, sometimes along with the younger niece, habitually visited petitioner's home and that sometimes, petitioner's wife was at work at the time. R. 103, l. 25 – 104, l. 25. Leaphart testified that she found out the allegations had been made on June 22, 2006. R. 105, ll. 5-7. Leaphart said that she made a police report of her daughter's allegations "within a few days." R. 106, ll. 17-18.

Officer Tom Randall Gray testified that he was dispatched to a suicide attempt at 2:01 p.m. on June 22, 2006. R. 109, l. 22 – 110, l. 20. Gray recalled that when he arrived at petitioner's house, he found that petitioner was being treated by EMS for taking rodent poison by mouth. R. 111, ll. 1-8. Petitioner's wife was present in the home and there was also a note found. R. 11, l. 23 – 112, l. 3.

Dr. Maureen Dever-Bumba is a certified pediatric nurse practitioner. R. 121, ll. 1-3. She performed a medical examination on the older child on July 31, 2006. R. 122, ll. 5-12. The doctor testified that the child told her that she had been touched by petitioner's hand and penis to her vaginal area with partial penetration. R. 122, ll. 18-20. However, she said that the child could provide no real time frame; she reported that it happened "a significant time ago . . . at least a year or two earlier." R. 122, ll. 22-25.

Dr. Dever-Bumba performed a medical examination on the younger child on August 7, 2006. R. 125, ll. 23-25. The doctor testified that the younger child was "not very clear" as to the timing of the alleged abuse. R. 126, ll. 11-14. The doctor testified that the younger child had told her "that there had been various kinds of contact including penile contact with her mouth, her vaginal area, and her bottom, though she indicated the contact with her bottom was over clothes. R.

126, ll. 15-21. At least one time she indicated that "some green slime" came from the penis, though she did not say that the green slime touched her at all." R. 126, l. 23 – 127, l. 1.

The trial

As seen, petitioner was alleged to have committed criminal sexual conduct and a lewd act on two of his nieces, both under the age of twelve at the time. R. 217-223. At trial, the state was given leave to present the videotaped forensic interview of each of the victims. R. 10, ll. 21-24; r. 30, l. 10 – 31, l. 10. . Additionally, the state sought to admit evidence of petitioner's June 22, 2006, suicide attempt. R. 17, l. 14 – 18, l. 19.

The assistant solicitor argued that the attempted suicide call took place at 2:00 p.m. on the same day that petitioner was informed that a child had made allegations of sexual abuse against him. R. 17, l. 14 – 18, l. 2. She said that records indicated that at 2:15 p.m. officers were dispatched and found petitioner lying on the floor amidst a suicide note and a quantity of rat poison. R. 18, ll. 4-9. Petitioner was transported by EMS for emergency treatment for the ingestion of rat poison. R. 18, ll. 6-9. The state conceded that there is no South Carolina authority directly addressing the question of the admissibility of a suicide attempt to show consciousness of guilt. R. 18, ll. 13-19. However, the assistant solicitor asserted that the courts in most states have allowed evidence of an attempted suicide to be presented to the jury for whatever weight the jury chose to place upon it. R. 18, ll. 13-19.

Defense counsel adamantly opposed the admission of the suicide note arguing there was no authority from this state allowing for its admission as tantamount to flight evidence or evidence of guilt. "[I]t hasn't been done in South Carolina and I would ask Your Honor not to do it." R. 18, l. 21 – 19, l. 6. Defense counsel further argued that while the solicitor had informed him that petitioner's wife had first learned of the allegations on June 22, 2006, there was no direct evidence

as to how or when petitioner learned of the allegations against him. R. 19, ll. 7-18. Defense counsel argued:

> [I] think even to introduce evidence of flight, which I suppose that they're asking you to equate suicide here, that the factual determination needs to be that he is aware of the charges against him and that the flight or suicide attempt was made in order to evade those charges. And from what [the assistant solicitor] told me that she intends to present, there's no direct evidence that he was aware of the charges against him. However, there is a suicide note where he does talk about that he does not want to go to prison because somebody lied on him. . .

R. 19, ll. 10-21.

Defense counsel further indicated that the state had informed him that, although she intended to introduce evidence as to petitioner's suicide attempt, she would not seek to introduce the suicide note. R. 19, ll. 16-24. Counsel argued that if the state were permitted to introduce the suicide attempt as evidence of a "guilty conscience or tantamount to a confession, here they have evidence that he is denying it or did not confess it. So, I believe for the reasons behind the suicide attempt are not from a guilty conscience but rather perhaps from a lack of faith in the judicial system or a worry that he will be incarcerated wrongly. For that reason, I believe that the prejudice as introducing this evidence outweighs the probative value and it should not be admitted and also it would factually confuse the jury on that basis it should not be admitted as well." R. 19, l. 7 - 20, l. 12.

The judge then asked the solicitor if she was going to introduce the suicide note. The solicitor replied, "I do not have it. We did have it interpreted in writing or translated. I would not ask to admit it because I believe it is hearsay. It's not against his interests, it's more in his favor. And as to that issue, there is case law that says we don't have to have proof the attempted suicide was because of the allegations." R. 20, ll. 15-20.

The judge ruled that the law was not clear but "it's clear in other states. And I think evidence of flight is admissible." R. 21, ll. 14-21. Aiken County Sheriff's Deputy Tom Randall Gray testified that on the afternoon of June 22, 2006 he was dispatched to petitioner's home in Aiken. He found "[t]he victim on my incident report here, Mr. Carlos, was laying in his bedroom. He was being treated by EMS for taking rodent poison." R. 111, ll. 2-4. The solicitor asked if the was any other "evidence of an attempted suicide," and when Gray said there was not, the solicitor prompted him:

Q. Was there any note? Letter?

A. Oh, yes. Yes, there was a note there.

R. 111, ll. 20-24.

Gray said petitioner's wife was also present. R. 111, l. 25 – 112, l. 3. Gray stated on cross-examination that the note was in Spanish, that he could not read it, and that he did not know if anyone took the note as evidence. R. 112, ll. 7-18. In her closing argument the solicitor reminded the jury of petitioner's suicide attempt: "Now, we don't know what was in his mind but do you think it was a coincidence that he tried to commit suicide, swallowed rat poison, a few hours after his wife was told about the allegations of him sexually abusing his niece?" The solicitor asked to jury to "think about" whether it was more likely that a person would attempt to commit suicide because they were accused of molesting a child or "because they're guilty and they're going to jail? Think about it." R. 181, ll. 10-20.

Court of Appeals

The Court of Appeals noted that whether "evidence of attempted suicide is probative of the accused's consciousness of guilt is an issue of first impression in South Carolina." App. 5. The Court noted that flight evidence was relevant when there was a nexus between the flight and the

offense charged." App. 7. The Court reasoned evidence of the suicide attempt was relevant and admissible because "[T]he totality of the evidence creates an inference that Orozco's actions in attempting suicide were motivated as a result of his belief that sexual misconduct allegations had been made against him." App. 8.

Discussion

The solicitor asked to jury to "think about" -- to speculate -- about why petitioner attempted to kill himself when he learned he had been accused of molestation. Defense counsel correctly agued that this is just the type of evidence that could confuse -- have the tendency to mislead -- the jury.

The assistant solicitor conceded that the suicide note was more in petitioner's favor and not an admission against his interests. The state argued that there is case law indicating that the state did not have to prove that the reason petitioner attempted suicide was because of the allegations. R. p. 20.

There was no South Carolina authority supporting admission of evidence of a suicide attempt as evidence of consciousness of guilt as the Court of Appeals recognized. Further, the analogy to flight and guilty knowledge is deeply troubling for problems well beyond the defendant being aware of charges against him or that he is being sought by the police for purposes of arrest. However, petitioner will deal first with the nexus. Cf. State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); See, also, State v. Brown, 528 A.2d 1098 (R.I.1987); Commonwealth v. Jones, 457 Pa. 563, 576, 319 A.2d 142, 150 (1974) (circumstances justify inference that accused's actions were motivated as result of his belief that officers were aware of his wrongdoing and *were seeking him* for that purpose), cited in State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

In State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (S.C. 2006), this Court held that proof that the accused was aware of the charges and sought to avoid them was critical. The Pagan Court held that without proof that the accused was aware of the charges against him at the time of his flight, the evidence of flight was irrelevant and its admission was erroneous. Defense counsel argued that, here, the suicide note was the only indication that petitioner was aware of the accusations. An analogy to flight should fail in this case because the evidence involved only recognition of an accusation.

The trial judge ruled, "Well, I'm going to allow it to be introduced. I think that the law is not clear. It's clear in other states. And I think evidence of flight is admissible. I'll tell you, I understand this puts a burden on the defense to make a decision about the note, but at some point I'd be inclined to introduce the note, just so you know, based upon this ruling." There are good reasons why defense counsel would not want to put a suicide not into evidence – such as not losing the right to last argument, a substantial right – for an a piece of evidence that is going to be harmful at some level. See State v. Mouzon, 326 S.C. 199, 485 S.E.2d 910 (1997); State v. Rogers, 269 S.C. 22, 235 S.E.2d 808 (1977);

Beyond the nexus of attempted suicide to the awareness of an accusation or an arrest warrant or that police are looking for a person, this evidence is troubling not only at as a legal matter but as a moral matter. Suicide is often a matter of despair rather than desperation. Meaning, it is many times much more complicated than understanding the sad case of a suspect surrounded by armed police killing himself rather than being captured.

Suicide is often attributable to the feeling that the sheer number of obstacles in one's life have become too much to overcome. The loss of a loved one coupled with deep money worries, legal problems such as foreclosure or eviction, domestic problems with a spouse or children and an

arrest can lead people to believe that death must be a better choice or a way out. Any one or two of those problems may be capable of being overcome whereas the person sees them together as an insurmountable obstacle. To use a suicide attempt in a court of law in this state as evidence of guilt of a criminal offense to achieve a conviction should *most respectfully*, be distasteful and not allowed. Respectfully, this Court alone should make the final decision on whether it will be allowed and certiorari should be granted on this important issue for that reason alone. See Rule 226(b)(a), SCACR.

In Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989) the court held it was error to admit evidence of an alleged suicide attempt as evidence of the accused's consciousness of guilt. The court cited various reasons for its holding. They included that the inmate accused of various sex offenses may have feigned attempted suicide to invite mitigation on the sentence he was serving when the alleged sexual offense occurred. The court also noted that the suicide note itself was never even offered into evidence nor was it contents explained to the jury. The court refused the answer the question whether evidence of a suicide attempt *was ever admissible.*

In State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1993), the court found it was reversible error to admit evidence of an attempted suicide without first conducting a full pretrial hearing on the issue. The defendant argued he had a preexisting propensity to commit suicide because of other factors in his life, and the court cautioned that such ambiguities weigh strongly in favor of extreme caution before such evidence can be admitted. A defendant's psychological, social or financial situation may play a role in the suicide attempt. In short, an accusation of criminal wrongdoing can be the last straw in an otherwise troubled life.

The court in Mann also stated that if evidence of a suicide attempt was ever properly admitted that jury instructions were necessary that if the jury could credit *any alternative*

explanation for the suicide attempt it could not infer consciousness of guilt. In South Carolina, of course, the analogy to flight in this context is equally troubling since instructions of evidence of flight are improper. See, State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980).

The court in State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897), opined that a jury showed never be able to treat a suicide attempt as evidence of guilt. The court reasoned that the one who flees seeks to escape punishment where one who attempts suicide *seeks to avoid the disgrace* that attaches to being charged with a crime. The court stated that this motive "of delicacy" would be more powerful in an innocent, rather than a guilty person. While it may have been a cultural truth the court also wrote the incidence of suicide was higher among innocent than guilty persons.[1]

The court in State v. Onorato, 171 Vt. 577, 762 A.2d 858 (2000) held that the probative value of an attempted suicide and suicide note was substantially outweighed by unfair prejudice and a confusion of the issues. The court noted that the reasons for an attempted suicide are "numerous and complex, and may be even less indicative of guilt than flight evidence." The Court went on to say that evidence of attempted suicide is "highly equivocal and circumstantial" such that its admissibility "may introduce remote, secondary concerns that might confuse the jury."

In People v. Foster, 56 Ill.App.3d 22, 371 N.E.2d 961, 13 Ill.Dec. 869 (1977), the court held that evidence of the defendant's suicide attempts were not admissible because there was not a sufficient nexus between the actions taken and the crime charged. The court found that not only was there too much time between the suicide attempt and the offense *but also* the defendant's psychological problems and interactions with police could be credited for his behavior.

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[1] There was also a North Dakota statute that mandated an accomplice's testimony must be corroborated to maintain a conviction.

The majority of cases cited by the respondent in the Court of Appeals in support of equating evidence of attempted suicide with flight evidence were incidents of the defendants attempting suicide while in some form of police custody. Brief of the Respondent P. 6-7. For example, in State v. Lawrence, 146 S.E. 395 (N.C. 1929), the defendant attempted suicide after being arrested for murder. Likewise, in State v. Mitchell, 450 N.W.2d 828 (Iowa 1990), the defendant attempted suicide while in the back of a police squad car. In these incidents, there was substantial evidence that the attempted suicides were in response to knowledge of the crime charged and a desire to avoid prosecution and punishment.

Those cases cited by respondent that do not follow that pattern deal with murder/suicides. Brief of the Respondent P. 6-7. In State v. Sheriff, 680 N.E.2d 75 (Mass. 1997), the defendant brutally murdered his wife after allegations of her infidelity. He was found surrounded by pill bottles and foaming at the mouth next to her body. Similarly, State v. Campbell, 405 P.2d 978 (Mont. 1965) and State v. Brown, 517 A.2d 831 (N.H. 1986) also deal with defendants who murdered an individual and attempted suicides at the scene of the crime. The remaining outlier case is State v. Marsh, 66 S.E.2d 684 (N.C. 1951) in which the defendant attempted suicide after being on the run from police.

In this case the solicitor took full advantage of the situation. The state introduced evidence of the suicide attempt and the solicitor argued to the jury that petitioner tried to kill himself because he knew he was guilty of molestation and that he was going to jail.

What petitioner, a Hispanic man, who wrote the suicide note in Spanish knew of our justice system after such a serious accusation was leveled against him remains unclear. His attorney offered that petitioner may have feared a wrongful conviction for something he did not do. His fears respectfully may not have been without a foundation since many criminal lawyers

believe child sex cases are the most difficult to defend given the emotions that people feel when they believe a child has been harmed. Someone is going to pay, and an entire cottage industry has grown surrounding these cases.

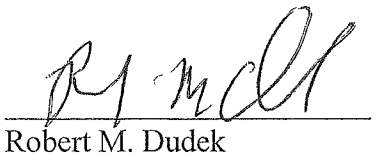
Petitioner submits the trial judge erred by admitting this attempted suicide evidence, and that the Court of Appeals erred by approving its admission. Even if this evidence was properly admitted as relevant under Rule 401, SCRE, it should have been excluded under Rule 403, SCRE because its probative value was substantially outweighed by its unduly prejudicial effect and its tendency to *confuse* the jury and invite a verdict on an improper basis. See Rule 403, SCRE.

The solicitor here – again – took full advantage of this attempted suicide and suicide note evidence and argued it to the jury. The state asked for a verdict on its basis by asking the jury to "think about it." The solicitor also opined the state did not even have to prove a nexus between the attempted suicide and the alleged crime. The prejudice is apparent in this case.

CONCLUSION

For all the forgoing reasons, a writ of certiorari should be granted to allow full briefing on this issue.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of July, 2011

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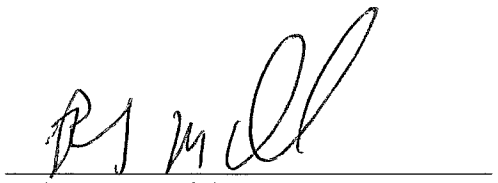
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, and the S.C. Court of Appeals this 22nd day of July, 2011.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of July, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021