ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ROBERT PALMER,

APPELLANT

APPELLATE CASE NO. 2011-203766

RECEIVED
FEB 27 2014
SC Court of Appeals

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5198

PETITION FOR REHEARING

Pursuant to Rule 221(a) SCACR, appellant petitions this Court for rehearing as it may have overlooked or misapprehended several points in this case.

The Proffer Agreement

This first argument raised on appeal was that the trial court erred in refusing to enforce a proffer agreement made between the State and appellant. This Court disposed of the issue as follows:

> Regarding Palmer's argument that the State violated its agreement with him, we find it is not a "proffer agreement." *See United States*

> *v. Gillion*, 704 F.3d 284, 292 (4th Cir. 2012) (defining a "proffer agreement" as an agreement "intended to protect the defendant against the use of his or her statements," particularly when "the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement"). Regardless of this finding, we affirm on the basis that Palmer failed to demonstrate how enforcement of the agreement would affect him. (emphasis supplied)

The Court is urgently asked to reconsider its ruling that this was not a "proffer agreement."[1] The proffer was drawn up by the assistant solicitor. She called it a "proffer" and an "agreement." She set the terms of the agreement. Both Palmer and his attorney accepted the agreement, including taking and passing a polygraph test. Appellant was also required to be a witness at trial. In return, the State shall consider the extent and degree of cooperation by appellant in the election of charges and at sentencing and shall advise the Court of appellant's extent and degree of cooperation.[2], [3] The assistant solicitor reneged on her argreement. She used as her excuse, "He has not provided us, he has not given us the smoking gun in this case." (R. p. 12, lines 4 – 5). See, State v. Gates, 299 S.C. 92, 382 S.E.2d 886 (1989).

Appellant was prejudiced by the State's failure to keep their part of proffer in the following respects:

1. Appellant was not allowed to testify against the co-defendant at trial. Instead, he had to sit at the co-defendant's table with the co-defendant and be tried under the doctrine of "guilt by association." **The Solicitor has freely admitted that they did not know who did this crime so they were prosecuting both parties!** (R. p.23 line 22-p. 25, line 9; R. p. 34, line 25- p.35, line 9). The State obviated their burden of proof by trying

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[1] Respectfully, even the Court casts doubt on this statement when it begins the next sentence with "Regardless of this finding…"

[2] Originally the State charged co-defendant Gorman with homicide by child abuse and appellant was charged with unlawful neglect of a child.

[3] The proffer agreement is found at R. p. 506 – p. 507.

appellant under the doctrine of "guilt by association." There was not sufficient evidence to convict appellant by trying him alone.

2. Instead of the State having to elect favorable charges in return for appellant's cooperation, they were now able to go after appellant on the highest charges.

3. The State offered no help at sentencing contrary to their agreement.

4. The State was able to gain information through their debriefing of appellant and their interviews to try to make a case against appellant.

The Directed Verdict Issue

This case should not have gone to trial. The assistant solicitor admitted twice that she did not know who did this crime so she was going to prosecute both parties. When the directed verdict motion was first made, the trial judge said, "I don't know how this case will go, that's why we have juries."(R. p. 727, line 24- p. 728, line 21). At sentencing, the trial judge remarked, "whoever did it, struck the blow, knew very well what you were doing or just did not care what you were doing." (R. p. 990, lines 23 – 24). During oral argument in this case, Judge Pieper asked the assistant attorney general if this had happened with five adults in the house and if you did not know who did it, would you try all five of them. He replied that he would! This represents the prosecutorial mindset in this case. By contrast, Justice Harlan wrote in a concurring opinion in In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), the following:

> I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

397 U.S. at 372, 90 S.Ct. at 1077.

The majority opinion cites no evidence meeting the legal standard to demonstrate who is guilty beyond a reasonable doubt. The Court wrote:

> The State relies entirely on circumstantial evidence, however, to prove who inflicted the injuries that killed the child. Because the child was in the exclusive custody of Palmer or Gorman, or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or Gorman, or both Palmer and Gorman, inflicted the child's injuries. (emphasis supplied).

Then the Court posits two scenarios under which appellant could be guilty.

> First, the evidence supports that Palmer injured the child while Gorman was at work.

And the second scenario:

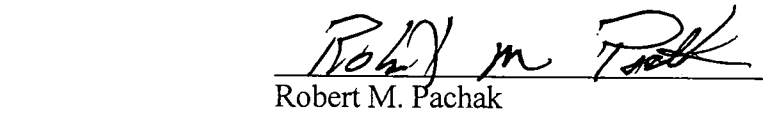
> Palmer could have injured the child while Gorman was at the grocery store. (emphasis supplied).

Respectfully, the majority opinion is speculating as to guilt. A directed verdict should be granted when the evidence raises only a suspicion as to guilt. A "suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (citations omitted). The State did not present substantial circumstantial evidence reasonably tending to prove appellant's guilt. They have convicted an innocent man.

CONCLUSION

Rehearing should be granted and a directed verdict should be granted to the charges against appellant.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

This 27th day of February, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of February, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day of February, 2014.

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