STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5198 (S.C. Ct. App. filed 2/12/2014)

10-GS-26-2196

THE STATE,

RESPONDENT,

V.

ROBERT PALMER,

PETITIONER

APPELLATE CASE NO. 2011-203766

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR PETITIONER.

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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 7, 2014.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in upholding the trial court's refusal to enforce a proffer agreement made between the State and petitioner when it was binding on the parties?

II. Whether the Court of Appeals erred in upholding the trial court's refusal to grant a directed verdict to the charges of homicide by child abuse and unlawful conduct toward a child when the State failed to present any substantial circumstantial evidence beyond a reasonable doubt that petitioner committed the acts?

STATEMENT OF THE CASE

Petitioner was indicted along with a co-defendant, Julia Gorman, for homicide by child abuse, homicide by child abuse-aiding and abetting, and unlawful conduct toward a child at October 2008 and May 2010 terms of the Horry County Grand Jury.

On June 10, 2010, a hearing was had on the enforceability of a proffer agreement before the Honorable Benjamin H. Culbertson. He held that the solicitor was allowed to withdraw the proffer and that it was not an immunity agreement.

On January 11-12, 2011, a hearing was held before the Honorable Larry B. Hyman on petitioner's motion to have appellant's two polygraphs admitted as being scientifically reliable. Petitioner passed both a SLED polygraph and an independently performed polygraph. On May 26, 2011, a hearing was held on respondent's motion to amend Judge Hyman's order excluding evidence of the two polygraph examinations pursuant to Rule 702 and the Jones factors. Judge Hyman granted respondent's motion to amend the order.

On October 31, 2011, a hearing was held on the co-defendant's motion to sever, on various voir dire questions, an amendment of the indictments in reference to the date of the incident, a discussion on autopsy photos, and an in camera hearing on the admissibility of petitoner's and the co-defendant's statement. The statements were held admissible.

On November 14-18 the jury trial proceeded. Both petitioner and the co-defendant were found guilty as charged. They were both sentenced to thirty-five (35) years for homicide by child abuse, to twenty (20) years for aiding and abetting, and to ten (10) years for unlawful conduct toward a child.

Petitioner appealed his convictions and filed an amended final brief on February 26, 2013. Respondent filed its final brief on February 25, 2013. Petitioner filed a final reply brief of appellant on February 4, 2013.

Oral argument was heard by the Court of Appeals on October 9, 2013. On February 12, 2014, the Court affirmed the convictions for homicide by child abuse and unlawful conduct toward a child and reversed the conviction for aiding and abetting. Judge Pieper concurred in the granting of a directed verdict to aiding and abetting and dissented on the decision not to grant directed verdicts to homicide by child abuse and unlawful conduct toward a child. Appellate Case No. 2011-203766, Opinion No. 5198.

Petitioner filed a petition for rehearing on February 27, 2014. Respondent filed a return to the petition for rehearing on March 10, 2014. Respondent also filed its own petition for rehearing on March 13, 2014. On April 7, 2014, the Court denied petitioner's petition for rehearing with Judge Pieper adhering to his dissent and stating he would grant rehearing. Also, on April 7, 2014, all three judges voted to deny respondent's petition for rehearing.

This petition for writ of certiorari follows.

ARGUMENT I

The Court of Appeals erred in upholding the trial court's refusal to enforce a proffer agreement made between the State and petitioner when it was binding on the parties.

The Court of Appeals disposed of this 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 of Appeals was 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. Petitioner was also required to be a witness at trial. In return, the State was to consider the extent and degree of cooperation by petitioner in the election of charges and at sentencing and was to advise the Court of petitioner's extent and degree of cooperation.[2], [3] The assistant solicitor reneged on her agreement. 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). The proffer agreement, however, did not require a "smoking gun." The assistant solicitor, like the Solicitor's Office, in State v. Gates, 299 S. C. 92, 382 S.E.2d 886 (1989), used this

[1] Respectfully, even the Court of Appeals 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 petitioner was charged with unlawful neglect of a child.

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

as an excuse to get out of the agreement. Petitioner was honest and truthful with the assistant solicitor. He passed not one, but two polygraphs. He could not tell them what he did not know as he was outside walking the dog when the co-defendant was alone with the victim. Did the assistant solicitor expect him to lie?

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

1. Petitioner 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 petitioner under the doctrine of "guilt by association." There was not sufficient evidence to convict petitioner by trying him alone.
2. Instead of the State having to elect favorable charges in return for petitioner's cooperation, they were now able to go after petitioner 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 petitioner and their interviews to try to make a case against petitioner.

ARGUMENT II

The Court of Appeals erred in upholding the trial court's refusal to grant a directed verdict to the charges of homicide by child abuse and unlawful conduct toward a child when the State failed to present any substantial circumstantial evidence beyond a reasonable doubt that petitioner committed the acts.

Petitioner's case should never have gone to trial.[4] 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.

[4] The facts surrounding the victim's death are presented on pages 3 – 14 of the Amended Final Brief of Appellant.

In State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), recently decided by this Court, and also a homicide by child abuse case similar to petitioner's case, the Court summed up the case in two sentences:

> While undoubtedly present at the scene, the only inference that can be drawn from the State's case is that one of the two co-defendants inflicted the victim's injuries, but not that *Appellant* harmed the victim. Thus, we reverse the trial court's refusal to direct a verdict of acquittal because the State did not put forward sufficient direct or substantial circumstantial evidence of Appellant's guilt.

753 S.E.2d at 416.

The above two sentences were also quoted in Judge Pieper's dissent in petitioner's case. (App. p. 15).

A key element of the offenses which the State had the burden of proving was the identity of the person who committed the offenses. In State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987), the Court dealt with a case where two defendants were charged as principals in vehicular homicide. The identity of the driver was disputed. The Court wrote that when "two or more defendants are charged as principals in a vehicular crime, the jury must be instructed to first determine which of the defendants was the driver of the vehicle at the time of the offense." The Court went on to note that "the jury, faced with a difficult factual question as to the identity of the driver, could have resolved the issue by convicting both defendants to insure a conviction of the driver." In this case the solicitor did not know who committed the offenses. The judge also did not know. The jury very likely also did not know and convicted both defendants.

In State v. Martin, 340 S.C. 597, 533 S.E. 2d 572 (2000), the Court granted a directed verdict where the State failed to place either defendant inside the apartment where a homicide

was committed. The solicitor admitted to the trial judge, "We don't know which person actually held [victim's] head in that pan of water" and "Your Honor, the whole point is we don't know if they acted in concert."

In State v. Schrock, 283 S.C. 129, 322 S.E. 2d 450 (1984) the Court granted a directed verdict holding that the evidence presented "may raise a suspicion of Schrock's guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt, to his guilt." The Court noted earlier, "By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the crime." The Court went on to say, "Coming into Court, Schrock was clothed with the presumption of innocence. It was not incumbent upon him to prove that he was not guilty of these murders."

In State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001), the Court directed a verdict to the charges of murder and attempted armed robbery. The Court wrote that "the circumstantial evidence relied upon by the State is not substantial and merely raises a suspicion of guilt." The Court noted that "suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof."

The majority opinion in this case 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 petitioner 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).

(App. p. 9).

The majority opinion is just 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 petitioner's guilt. They have convicted an innocent man.

CONCLUSION

Petitioner's writ should be granted.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 1st day of May, 2014

STATE OF SOUTH CAROLINA
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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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 1st day of May, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day of May, 2014.

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