STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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AUG 21 2014

SC Court of Appeals

Appeal from Lexington County
Honorable Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

WAYNE STEWART CURRY,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On August 6, 2014, this Court issued an opinion in which it reversed Curry's conviction and sentence. State v. Curry, Op. No. 5258 (S.C. Ct. App. filed August 6, 2014) (Shearouse Adv. Sh. No. 31 at 116). Pursuant to Rule 221(a), SCACR, Respondent ("the State") respectfully petitions for rehearing on the following points the State believes were possibly misapprehended or overlooked by this Court.

A.

Most importantly, this Court's decision to reverse Curry's conviction based solely on its determination that the Trial Judge erred in not submitting a GBMI verdict to the jury constituted certain error. In the absence of any evidence that he was NGRI, any possible error in not submitting a GBMI verdict to the jury was *per se* harmless error. The GBMI statue codified the diminished capacity 'irresistible impulse defense' for sentencing considerations expressly distinct from the adjudication of guilt. The legislature intended the GBMI statute to function

within South Carolina's rich history of adherence to *M'Naghten.* By reversing Curry's conviction, this Court has indirectly ushered in a troubling new era where the accused can now attack the adjudication of guilt from the backdoor conduit of the GBMI statute despite over a century of jurisprudence that has forbid him from asserting an 'irresistible impulse' insanity defense.

In State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992), the Supreme Court of South Carolina upheld the imposition of a death sentence on a defendant whom the plea judge found was GBMI under S.C. Code Ann. § 17-24-70 (2003). In doing so, the Court rejected Wilson's contention that a death sentence was not contemplated by the legislature[1]. The Court pointed to two provisions in the statute that supported its holding and which Wilson had ignored. First, the statute provides that " '[i]f a verdict is returned of 'guilty but mentally ill' the defendant **must** be sentenced ... as provided by law for a defendant found **guilty** ...' (emphasis added)." Wilson, 306 S.C. at 502-03, 413 S.E.2d at 22 (emphasis in original).

Based upon this sentence, the Court held that "the plain language of the GBMI statute clearly allows for a death sentence in an appropriate case." Id. at 503, 413 S.E.2d at 22. The Court further noted that:

> Beyond the plain language of § 17-24-70, however, there exist other reasons why we are convinced that the legislature intended that a sentence of death be possible for certain GBMI defendants. First, we are persuaded that [S.C. Code Ann. § 17-24-20(C) (1989 Cum.Supp.)], which provides "[t]he verdict of 'guilty but mentally ill' may be rendered only during the phase of a trial which determines guilt or innocence and **is not a form of verdict which may be rendered in the penalty phase,"** (emphasis added) is indicative of a legislative intent that a bifurcated capital case may be necessary for some GBMI defendants. We interpret this language to prohibit juries or judges from treating the defendant as anything

[1] This Court notably did not reconcile its opinion in the present case with the Court's seminal GBMI opinion in State v. Wilson.

other than an ordinary "guilty" defendant for purposes of rendering their sentencing verdict.

Secondly, it is well established that the purposes for the enactment of GBMI statutes nationwide are: (1) to reduce the number of persons being completely relieved of criminal responsibility due to their mental condition; and (2) to insure that mentally ill defendants receive treatment while incarcerated for their benefit as well as society's. See generally, Annotation, "Guilty But Mentally Ill" Statutes: Validity and Construction, 71 A.L.R.4th 702, 777-780 (1989); People v. Smith, 124 Ill.App.3d 805, 80 Ill.Dec. 310, 465 N.E.2d 101 (1984); People v. Ramsey, 422 Mich. 500, 375 N.W.2d 297 (1985); Commonwealth v. Trill, 374 Pa.Super. 549, 543 A.2d 1106 (1988). Hence, as a general proposition, GBMI statutes were created in part to narrow the field of defendants who could successfully claim a lack of culpability via the insanity defense. Wilson seeks here to use the verdict as a shield to protect him from punishment, which is contrary in a fundamental way to its creation as a mechanism to enable the state to punish and treat a larger group of defendants.

306 S.C. at 503-04, 413 S.E.2d at 22.

The Court thereafter explained that:

South Carolina has chosen as its insanity defense what is commonly known as the *M'Naghten* test, or the "right and wrong" test. (The test is set forward in footnote three, *supra*). It was spawned in England, in M'Naghten's Case, 8 Eng.Rep. 718 (1843). M'Naghten shot the Prime Minister's private secretary, mistaking the secretary for the Prime Minister, and was acquitted based on an insanity defense. The outcry at the acquittal eventually led to the formulation of the aforementioned test for insanity. It is conceded that Wilson was not "insane", as that term is defined by our *M'Naghten* test. South Carolina has rejected the so-called "irresistible impulse" test as an insanity defense.

* * *

In South Carolina, the key to insanity is "the power [of the defendant] to distinguish right from wrong in the act itself-to recognize the act complained of is either morally or legally wrong. When this power exists in a defendant ... he must answer for his acts." State v. Grimes, 292 S.C. 204, 205 n. 1, 355 S.E.2d 538, 539 n. 1 (1987) (quoting State v. McIntosh, 39 S.C. 97, 17 S.E. 446 (1893)) (emphasis omitted). ....

* * *

Willard Gaylin, a respected psychoanalyst, has observed:

> We must maintain our distinctions between the purposes of psychiatry and the purposes of the law. Psychiatry serves the individual, and is directed at restoring him to health. The law serves the community, and is designed to secure its values and preserve its safety. The law demands an essential responsibility of its citizens. It assumes with Aristotle that "what lies in our powers to do, lies in our powers not do to." Gaylin, Legal Insanity: Gone Bonkers, Washington Post, June 20, 1982 at Cl, C5. (quoted in diGenova and Toensing, The Federal Insanity Defense: A Time For Change in the Post-Hinckley Era, 24 S.Tex.L.J. 721, 727-78 (1983).
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> Therefore, South Carolina has rejected the irresistible impulse test for insanity. As a constitutional matter, this is clearly permissible. In Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), FN4 the United States Supreme Court ruled that a defendant is not entitled, as a matter of fundamental due process, to an irresistible impulse insanity defense, and that states are free to adopt the *M'Naghten* test for insanity. South Carolina does not recognize that one acting under an irresistible impulse is somehow less culpable. Instead, the statutory scheme specifically provides that one acting under such an impulse is guilty, albeit "guilty but mentally ill." We are aware of no authority which requires this Court to recognize that the irresistible impulse test, when satisfied, conclusively demonstrates a lack of culpability. In fact, all authority of which we are aware indicates to the contrary-that this state is free to define culpability, as it relates to insanity, under the *M'Naghten* standard rather than the irresistible impulse standard. With this in mind, we turn now to Wilson's precise arguments.

Wilson, 306 S.C. at 505-08, 413 S.E.2d at 23-25.

In light of Wilson, a defendant who is not NGRI is not prejudiced by the failure to submit GBMI as a possible verdict because the treatment provided for by § 17-24-70 is merely a collateral consequence of the defendant being found guilty. South Carolina does not recognize a diminished capacity defense, the decision of whether a diminished capacity defense is purely a state law issue, and a defendant who is found GBMI is not less guilty than a defendant who is simply found guilty. Id. See also Gill v. State, 346 S.C. 209, 220, 552 S.E.2d 26, 32 (2001) ("The trial judge did not err by refusing to charge diminished capacity because it is not recognized in South Carolina. Furthermore, ... a defendant is not entitled to an instruction concerning his capacity to form the requisite intent for malice aforethought when the instructions, taken as a

whole, properly present elements of malice"); Goins v. Warden, Perry Correctional Institution, No. 13-6407, *15 (4th Cir., June 18, 2014) (unpublished) (rejecting the appellant's argument that the state court of appeals "erroneously 'confabulated the affirmative defense of diminished capacity with more traditional defensive efforts to introduce evidence to undermine the prosecution's burden' of proving intent," and observing that "[w]hat other courts may think of South Carolina law ...is of no moment – '[i]t is beyond the mandate of federal habeas courts [] to correct the interpretation by state courts of a state's own laws' ") (quoting Richardson v. Branker, 668 F.3d 128, 141 (4th Cir. 2012) and citing Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010) (per curium)). As a result, a jury verdict of GBMI in South Carolina carries the same legal effect as the standard guilty verdict aside from carrying some additional collateral consequences related to the treatment.

Chief Justice Toal's opinion in Wilson represented a continued affirmation on the Court's jurisprudence concerning the viability of *M'Nghaten* and the rejection of the irresistible impulse insanity defense. In State v. Gilstrap, the South Carolina Supreme Court revisited the historical significance at issue.

> The appellant was also granted the right to review and attack previous decisions of this Court dealing with the doctrine of irresistible impulse as a defense-notably, State v. Levelle, 34 S.C. 120, 13 S.E. 319, 27 Am.St.Rep. 799; State v. Alexander, 30 S.C. 74, 8 S.E. 440, 14 Am.St.Rep. 879; State v. Bundy, 24 S.C. 439, 58 Am.Rep. 263. Error is assigned because the trial Court refused to charge this principle. This Court in the foregoing cases repudiated the doctrine of irresistible impulse as a valid defense against a charge of crime; and, in State v. Levelle, supra, quoted the following with approval from State v. Pagels, 92 Mo. 300, 4 S.W. 931: "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." [34 S.C. 120, 13 S.E. 321]. And the Court further stated: "It is a matter that is not susceptible of proof, and to allow a person to escape the consequences of his criminal act by asserting that he acted under an impulse which he could not restrain, although he knew his act to be unlawful, would be dangerous, if not destructive, to the peace of society.

State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163, 167 (1944). Subsequently, the Court issued the following omen in State v. Gardner that, "[i]t must be remembered that we have never accepted in this State the doctrine of uncontrollable impulse." State v. Gardner, 219 S.C. 97, 106, 64 S.E.2d 130, 135 (1951). Despite Curry's revisionist interpretation of the GBMI statute, even the contemporary detractors of the legislation poignantly noted its intended function.

> Although the South Carolina GBMI statute embodies the irresistible impulse test, the statute does not enlarge the definition of insanity beyond the cognitive, knowing right from wrong, test. Indeed, the statute appears to exist merely to emphasize that South Carolina's definition of insanity does not include any volitional aspect.

Rene J. Leblanc-Allman, Guilty but Mentally Ill: A Poor Prognosis, 49 S.C. L. Rev. 1095, 1114, n.8 (1998) (internal citations omitted). Because the Trial Judge correctly found that Curry was not entitled to a NGRI jury instruction, the State stresses that any error in not submitting a GBMI verdict is *per se* harmless error. See McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553, 104 S. Ct. 845, 848, 78 L. Ed. 2d 663 (1984) (internal citations omitted) ("We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "citadels of technicality."); United States v. Mechanik, 475 U.S. 66, 72, 106 S. Ct. 938, 942, 89 L. Ed. 2d 50 (1986) ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences."). As a result, this Court's decision to reverse Curry's conviction solely based upon the Trial Judge's failure to submit a GBMI verdict to the jury was erroneous.

B.

Next, even assuming this Court was correct in its determination that a GBMI verdict should have been submitted to the jury, the State contends that the remedy that this Court fashioned was entirely inappropriate because it was irrelevant to this Court's purpose in reviewing the lower court's adjudication of Curry's guilt. This Court's decision to reverse Curry conviction provides no legitimate remedial relief to him at this present juncture of his incarceration. Assuming arguendo that that upon remand a subsequent jury returns a GBMI verdict, the entire process provides no substantive benefit to Curry where he already possess the constitutional right to medical treatment during his term of incarceration.

The Michigan Court of Appeals' opinion in People v. Ritsema, 307 N.W.2d 380, 384 (1981) (rejected on other grounds by People v. Gasco, 326 N.W.2d 397, 399 (1982) is instructive in the manner it fashioned a remedy from the lower court's error in not submitting a GBMI verdict to the jury. The defendant argued that the lower court erred when it instructed the jury on defense of insanity but declined to submit an accompanying GBMI verdict. In line with S.C. Code Ann. § 17-24-30, the Michigan legislature dictated that when an instruction on the defense insanity is warranted, a GBMI verdict must also be submitted to the jury. The Ritsema Court agreed with the defendant **but affirmed his conviction** and amended his sentence accordingly. (emphasis added).

> In order to eliminate any prejudice which may have been suffered by the defendant, we hereby amend defendant's sentence, pursuant to GCR 1963, 820.1(7), to provide that the defendant shall undergo further psychiatric evaluation and be given such treatment as is psychiatrically indicated for any mental illness or retardation that he may be found to have and that defendant shall in all respects be treated in accordance with the provisions of s 768.36 of the Code of Criminal Procedure.

Id., at 385. The court expounded on its justification for affirming the defendant's conviction.

> Under the circumstances of this case, however, we are not convinced that retrial is the appropriate disposition. Defendant was tried and found guilty of the charged offenses. The jury did not believe that defendant was insane. We have found no prejudicial error other than the trial court's acquiescence in defense counsel's request that the guilty but mentally ill instruction be omitted. The prejudice suffered by defendant was his being denied the possibility of having the jury find him guilty but mentally ill. The only consequence of the guilty but mentally ill verdict which differs from the guilty verdict is that a guilty but mentally ill defendant shall undergo further evaluation and be given such treatment as is psychiatrically indicated for his mental illness or retardation.

Id.

In the present case, the State contends that the underlying reasoning in the Ritsema court's holding to affirm the defendant's conviction is sound; however, the decision to amend the defendant's sentence is inapposite here because of the doctrine of mootness. In this jurisdiction, "a defendant found GBMI is entitled to **immediate treatment** and **evaluation.**" State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997) (citing S.C. Code Ann. § 17-24-70) (emphasis added). In relevant part, the statute states:

> If the sentence imposed upon the defendant includes the incarceration of the defendant, the defendant **must first be taken to a facility** designated by the Department of Corrections for treatment and **retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence.**

S.C. Code Ann. § 17-24-70(A) (emphasis added). Curry entered the Department of Corrections subsequent to his conviction in November of 2012. Curry's continued confinement now, nearly two years later, negates this Court's concerns of whether Curry was entitled to the submission of a GBMI verdict because the ultimate benefit that Curry could reap upon remand is entirely moot. S.C. Code Ann. § 17-24-70 only provides for immediate evaluation and treatment for an inmate found to be GBMI. See Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon

existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.").

Moreover, this Court's decision to reverse Curry's conviction is more nonsensical and unnecessary where a separate forum presently exists for Curry to challenge the sufficiency of medical treatment, as a condition of his confinement, he either has or has not received from Corrections during his current term of imprisonment. Thus, the fact that Curry has served nearly two years in Corrections creates only two plausible scenarios. Either Curry has adjusted favorably to his housing in general population, encompassing the sufficiency of any medical treatment he may or may not have received; or, Curry adjusted unfavorably because of questionable mental illness which provides him a distinct civil rights cause of action against the Department of Corrections. See People v. Manning[2], 227 Ill. 2d 403, 422, 883 N.E.2d 492, 504 (2008) (citing Estelle v. Gamble, 429 U.S. 97 (1976)) ([T]here is virtually no difference in the treatment that defendant will receive under GBMI as opposed to a guilty plea. The eighth amendment to the United States Constitution requires that inmates receive adequate medical care.").

Therefore, this Court's chosen remedy inequitably prejudices the State. See Mechanik, 475 U.S. at 72 (internal citations and quotations omitted) ("Even if a defendant is convicted in a second trial, the intervening delay may compromise society's interest in the prompt administration of justice, United States v. Hasting, and impede accomplishment of the objectives of deterrence and rehabilitation."). Even if this Court remains unconvinced of the State's argument that error in not submitting a GBMI verdict is *per se* harmless, the South Carolina

[2] See Leblanc-Allman, 49 S.C. L. Rev. at 1095 ("The Illinois legislature enacted its GBMI statute for substantially the same purposes as South Carolina.").

Supreme Court's uniform rejection of the 'irresistible impulse' insanity defense compels this Court to amend its pronouncement to, at a minimum, affirm Curry's conviction separate and apart from his sentence, and any collateral consequence that a GBMI verdict would have triggered.

C(i.)

Additionally, in its opinion, this Court further erred by misconstruing several critical facts in arriving at its decision. First, this Court wholly misconstrued the facts of Curry's sanity during the commission of the offense in stating "the circuit court focused on the testimony of Dr. Domino and the lack of specific expert or lay testimony that Curry could distinguish right from wrong and conform his conduct to the requirements of the law on the date of the incident." Correctly, Dr. Domino, the only mental health professional to conduct a forensic evaluation on Curry, gave the expert opinion that Curry had the capacity to distinguish right from wrong at the time of the offense. However, this Court ignores the fact that Curry obstructed other mental health professionals from offering relevant findings here. He should not receive the windfall from his own obstinance. See White v. Livingston, 231 S.C. 301, 308, 98 S.E.2d 534, 537 (1957) (It may be added that the evidence adduced before the referee indicates that the result of the case is not a serious miscarriage of justice, if it is a miscarriage at all. At any rate, appellant has made his bed and he must lie in it."). Thus this Court further erred in stating "Curry's affirmative actions of stockpiling his feces under his sink and placing feces on his face and clothing at the time of the offense created a jury question as to whether he truly appreciated the nature of his actions." See State v. Bentley Collins, S.C. Ct. Op. No. 27439 (filed August 20, 2014) ("The Court of Appeals's obvious revulsion for the evidence, while certainly understandable, permeated its legal analysis.").

C(ii.)

Second, this Court abused its function as a court of error when it determined the Trial Judge erred in not submitting GBMI verdict to the jury based upon this Court's speculative and contingent facts undeveloped at the lower court. Because Curry was indisputably a sociopath who committed a despicable crime, this Court ventured through the looking glass to speculate that Curry's abnormal personal characteristics and behaviors "**may have** prevented Curry from being able to conform his conduct to the law at the time of this offense." (emphasis added). This Court further hypothesized that, "**if** Curry was willing to keep his feces in his living quarters and even smear them on himself, the jury could reasonably conclude he lacked the requisite mental capacity to be able to abide by the law." (emphasis added). This Court's conjecture is troubling where it has ignored the undisputed and pronounced history of Curry's serial malingering. See Ravan v. Greenville Cnty., 315 S.C. 447, 469-70, 434 S.E.2d 296, 309-10 (Ct. App. 1993) ("Verdicts may not be permitted to rest on surmise, conjecture or speculation.").

Last, this Court placed undo significance on Dr. Means's opinion that Curry suffered from mania without reconciling the absence of critical evidence necessitated to create a jury question on whether the diagnosis affected Curry's ability to conform his conduct to the requirements of the law when he assaulted the victim Corrections Officer.

Conclusion

Based on the foregoing, Petitioner requests that the panel reconsider this matter, and affirm Curry's conviction and sentence.

Respectfully submitted,

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August 21, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
Honorable Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

vs.

WAYNE STEWART CURRY,

APPELLANT.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the Respondent's Petition For Reharing on his Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Susan B. Hackett, Esquire, SC Commission on Indigent Defense, Division of Appellate, Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 21st day of August, 2014.

Norma Bigbee
Administrative Assistant
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ALAN WILSON
ATTORNEY GENERAL

August 21, 2014

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: **State of South Carolina v. Wayne Stewart Curry**
Appellate Case No: 2012-213370

Dear Ms. Kitchings:

Enclosed please find the Original of the Respondent's Petition For Rehearing in the above case.

Sincerely,

W. Walt Whitmire
Assistant Attorney General
Bar No: 100793

WWW/nb

Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen