STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2011-199686

IN THE MATTER OF THE CARE AND TREATMENT OF VINCENT NEAL WAY — Petitioner/Respondent

v.

THE STATE OF SOUTH CAROLINA, — Respondent/Petitioner

PETITION FOR REHEARING

On September 3, 2014, this Court issued its opinion in In the Matter of the Care and Treatment of Vincent Neal Way, Op. No. 27444 (S.C. Sup.Ct. filed September 3, 2014). In the opinion, the Court addressed the State's certiorari review by dismissing certiorari as improvidently granted. However, the Court dismissed certiorari based on the State not being the aggrieved party below, thereby precluding any certiorari review by a party if it ultimately is successful—for example based on harmless error—no matter what law is created or abused in the process. The State believes this Court misapprehended or overlooked the language of Rule 242(a), SCACR, and misapplied the case law and statutory provisions cited in the opinion. The State asks this Court to reconsider its opinion, remove the section discussing its reasoning for dismissing certiorari as improvidently granted, and either dismiss certiorari as improvidently granted without

analysis or determine the Court's opinion forecloses any need to separately address issues raised by the State. The State believes the published statement conjoining the requirement a party be aggrieved with the certiorari process is improper and establishes a troubling precedent.[1]

Rule 242(a), SCACR, states: "The Supreme Court, or any two (2) justices thereof, may in its discretion, on motion of **any party** to the case, or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals." (Emphasis added). This Court's decision eliminates the ability of "any party" to petition for a writ of certiorari. The opinion ties the ability to see certiorari to whether the party was an "aggrieved party" in the Court of Appeals. The Appellate Court Rule clearly contemplates any party being entitled to seek certiorari from the Supreme Court, not just the losing party.

The ability of any party to seek certiorari is in this Court's best interest as opposed to limiting its jurisdiction to only those cases in which the losing party or an "aggrieved party" seeks certiorari. The ability of any party to seek certiorari is especially important where the State is a party because it is not representing a single entity unlikely to be impacted by the decision again in the future. When the State is a party, especially in cases such as sexually violent predators and criminal cases, the rulings of the Court of Appeals could have long term effects on the State's ability to try a case and directly impact the State's ability to protect the public and fulfill its constitutional and statutory duties. Under this Court's opinion, even though the Court of Appeals may apply

[1] The State does not contend this Court cannot consider such a factor in its internal deliberations on whether to grant or deny the writ of certiorari, or in determining whether to dismiss certiorari as improvidently granted. The State contends it is improper to place the restriction on the ability of a party to even seek redress.

incorrect law or misinterpret the law, if it ultimately concludes a conviction is affirmed or a person is properly committed as a sexually violent predator based on harmless error or other reason, the State is categorically prohibited from petitioning for a writ of certiorari to correct the error because it is not an "aggrieved party."

By way of extreme example, if the Court of Appeals were to rule it always improper for the State to present the testimony of a victim at trial, but ultimately concluded it harmless in that case because numerous witnesses saw and testified regarding the defendant's actions, then the State would have no redress under the current opinion of this Court. It would be at the mercy of either the defendant to petition for certiorari or this Court on its own motion. The State, or any other party equally affected by a Court of Appeals' opinion, should not be restricted from asking this Court to correct such clear errors of law. This is precisely the effect of this Court's opinion in which it found the State was not an "aggrieved party" from the Court of Appeals' opinion, even though the Court of Appeals ruled in a way that adversely affected the State's position[2] and ability to prosecute cases in the future. If Way had not filed his Petition for Writ of Certiorari, the State would have had no means of obtaining clarification of the law because the Court of Appeals ultimately affirmed the commitment of Way as a sexually violent predator based on harmless error.

Additionally, Rule 242(b) of the Appellate Court Rules provides five representative criteria upon which this Court usually bases its decision on whether to exercise its discretion in granting a writ of certiorari. For example: Where there are novel

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[2] The State maintained it was entitled to present closing argument about the failure to call a witness. No case in South Carolina had previously precluded the State's closing argument. This Court, in this opinion and in State v. Gonzales issued at the same time, found for the first time it could not argue the adverse inference because the witness was an expert witness.

questions of law; where there is a dissent in the decision of the Court of Appeals; where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; where substantial constitutional issues are directly involved; and/or where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR; see also, Haggins v. State, 377 S.C. 135, 137 (2008) (discussing discretion and application of criteria for considering grant of certiorari). If the Court of Appeals rules directly in contravention of a prior South Carolina Supreme Court case, or incorrectly rules on a novel issue of law, against the State, but ultimately finds any error harmless, this Court's opinion proscribes the ability of the State to seek relief. This is true even though the State will be bound by the Court of Appeals' incorrect ruling in its prosecution of future cases. This Court's opinion even seems to prohibit the State from seeking a cross-petition for writ of certiorari in the event the defendant's or other party's petition fails to seek review of all relevant issues.[3]

Further, the State believes this Court incorrectly relied on inapposite cases and statutes to tie the "aggrieved party" requirement to the seeking of certiorari. None of the cases or statutes cited by the Court restrict a party's ability to seek a writ of certiorari from the Court of Appeals. The primary statute relied upon by this Court, section 18-1-30 of the South Carolina Code relates to the bringing of an initial appeal. In the instant case, this statute applied to Way's initial appeal to the Court of Appeals from the order committing him as a sexually violent predator, but not to the certiorari review to the Supreme Court. Further, Rule 201 of the Appellate Court Rules also applies to the initial

[3] This is precisely what occurred in this case, as the State filed a cross-petition seeking review of additional issues raised by the Court of Appeals in its opinion, which were favorable to Way and, therefore, not contested in his Petition.

review from circuit court and not to the seeking of certiorari. If it applied to certiorari, Rule 242 would reference back to Rule 201 for a determination of who may petition for certiorari; instead, it specifically broadened the permission to seek review by indicating "any party" may file a petition.

Additionally, none of the cases cited by this Court apply to the ability of a party to seek review pursuant to a writ of certiorari. For example, Dunson v. Dunson, 278 S.C. 210, 294 S.E.2d 39 (1982), applies longstanding law that a party who is not aggrieved cannot appeal an issue where the party was successful. In that case, the wife sought a divorce and sought an appeal to have it declared on a different ground than that declared by the family court. The case involved an appeal directly from family court to the Supreme Court and occurred prior to the Court of Appeals hearing cases beginning in October 1983. The Dunson case did not relate to a party's ability to see certiorari review.

Similarly, Bivens v. Knight, 254 S.C. 10, 173 S.E.2d 150 (1970), involved an appeal directly from common pleas to the Supreme Court by a judgment debtor who admitted he had no interest in stock and equipment required to be sold under a ruling to enforce a judgment. Again, this case does not involve a party's ability to seek certiorari but only its ability to seek an initial appeal, nor does the court's holding have any effect on the legal or factual analysis of any future case.

In Wilson v. S. Ry., Carolina Div., 123 S.C. 399, 115 S.E. 764 (1923), the court explained an appellant who received a favorable verdict below generally cannot appeal because they are not an aggrieved party. Again, this case deals with initiating a direct appeal and not the standard for seeking certiorari review. The Court, however, even on direct appeal, recognized that form does not trump substance. This Court stated:

> If it be conceded that an exceptional case is presented where a finding or verdict **is favorable in form** to a party, but does not give him all he is entitled to, or **is otherwise prejudicial to his legal rights**, the aggrieved party should present that question to the trial court in the first instance, and the appeal should be taken from the refusal to set aside or correct the verdict.

Wilson, 115 S.E. at 767 (emphasis added).

There is a clear policy reason for why direct appeals may only be brought by an aggrieved party. The party has already recovered their full relief and nothing in the order, judgment, or decree would be binding on any other party. The orders or judgments of the circuit court and family court do not have any precedential value. They are not binding on other circuit courts or family courts. They merely affect the parties. As a result, if a court reached the right final conclusion by the wrong means, it does not have any long term effect.

An opinion by the Court of Appeals, on the other hand, has long term effect. It is binding on all lower courts. If the Court of Appeals correctly reaches the right conclusion, for example affirming a conviction or the commitment of an SVP, but did so using completely incorrect analysis, reasoning, or interpretation of the law, that incorrect holding is now binding and has precedential value unless it is changed by this Court. The form of the opinion—finding for the party—would be allowed to trump the substance of the opinion—the clearly inaccurate legal determination—even though the substance could be applied in countless future cases in lower courts bound by the determination. The State or any "successful" party would be entirely at the mercy of the opposing party or the Court to seek a review of the clearly inaccurate legal determination. This should not be the policy of this Court.

Another policy reason to allow certiorari to be filed by the prevailing party has been explained:

> Seldom would a winning party want to seek Supreme Court review of a favorable decision. Yet there may be situations where, even though the losing party may not seek certiorari, the prevailing party below deems that the issue on which he or she prevailed is a recurring one and is presented in a strong factual and procedural posture; or prevailing governmental counsel may believe it appropriate to seek Supreme Court approval of the lower court's ruling on an important or vexatious issue.

Eugene Gressman et al., Supreme Court Practice, 87 (9th ed. 2007).

Finally, the State believes this Court misapprehended or overlooked the facts and procedural posture of this case. First, the State did not file a cross appeal as stated in the opinion. The State did not challenge any findings made by the circuit court. The State did not appeal to the Court of Appeals from the circuit court, but acted as the respondent. The State took issue with the legal analysis and factual findings made by the Court of Appeals in its opinion. The State filed a cross petition which was granted and allowed for certiorari review. The State submits it is an "aggrieved party" to the extent any legal determinations or analysis used by the Court of Appeals in finding error on the part of the trial court did prejudice the State's legal rights by impacting future cases. Even if not an "aggrieved party" under the legal definitions of Bivens and other cases, the State was certainly impacted by the Court of Appeals decision, and would be impacted in all future SVP cases. As a result, this Court should not have dismissed the certiorari as improvidently granted to the State on the basis it had to be an aggrieved party to seek relief.[4]

[4] Again, the State does not contest the right of the Court to dismiss certiorari as improvidently granted to the State. Certiorari is an entirely discretionary writ. The Court's decision sets forth a precedent requiring

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, remove subsection B entitled State's appeal and all the analysis which follows, and either find all issues raised by the State were addressed in the opinion or dismiss as improvidently granted without stating a basis as none is necessary.

Respectfully submitted,

ALAN WILSON
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ATTORNEYS FOR
RESPONDENT/PETITIONER

September 17, 2014

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only one party may seek certiorari, even preventing a cross-petition by a party who was successful in form through harmless error or other means at the Court of Appeals. This Court could dismiss certiorari as improvidently granted for many reasons in this case, or no reasons at all, without establishing a policy that limits the ability to seek relief and could limit this Court's ability to uphold the law.

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 17th day of September, 2014.

Sally Ellison

SALLY ELLISON
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 17 2014
S.C. Supreme Court

September 17, 2014

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: In the Matter of Vincent Neal Way,
Appellate Case No. 2011-199686

Dear Mr. Shearouse:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures
cc: LaNelle C. DuRant, Esquire (2 copies enclosed)
Victim's Services (enclosure)