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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

Opinion No. 5252 (S.C. Ct. App. filed July 30, 2014)

THE STATE,

RESPONDENT,

V.

DAISY LYNN MIMMS,

PETITIONER.

Appellate Case No. 2014-002198

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 upon by the Court of Appeals on September 17, 2014. App. 102.

QUESTION PRESENTED

Whether the Court of Appeals erred by affirming the rulings of the Circuit and Magistrate Courts that no criminal intent is required for the crime of driving under the influence?

STATEMENT OF THE CASE

This appeal arises out of Daisy Mimms' conviction for driving under the influence in violation of S.C Code § 56-5-2930. On April 11, 2011, Ms. Mimms was tried in the Magistrate's Court of Orangeburg County with the Honorable Meree D. Williamson presiding.

At the jury charge conference, Counsel requested the court instruct the jury on criminal intent. The court refused, ruling that driving under the influence is a strict liability crime. App.* Electronic Recording of Trial.

Ms. Mimms was found guilty. The court imposed a sentence of thirty days incarceration, suspended upon the payment of a fine of $997.00. App. 5. The motions were renewed after the verdict, and were denied. A Notice of Appeal was filed on April 21, 2011. App. 29.

The appeal to the Circuit Court was heard by the Honorable Edgar W. Dickson on January 5, 2012. The undersigned again represented the Appellant, and Assistant Solicitor Anne Hutto represented the State. App. 34. Judge Dickson issued an Order dated September 6, 2012, finding that there were no legal or factual grounds constituting error on the part of the magistrate and dismissed the appeal with prejudice. App. 55. Appellant filed and served notice of appeal dated September 14, 2012.

On July 30, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Mimms*, ** S.C. **, 763 S.E.2d 46, 50 (2014). App. 89. Petitioner subsequently filed a petition for rehearing on August 14, 2014. App. 99. The South Carolina Court of Appeals issued an Order denying the petition for rehearing on September 17, 2014. App. 102.

This Petition for a Writ of Certiorari to the Court of Appeals follows.

ARGUMENT

The the Court of Appeals erred by affirming the rulings of the Circuit and Magistrate Courts that no criminal intent is required for the crime of driving under the influence.

Relevant Facts

On the night of October 23, 2010, Trooper James H. Burriss of the South Carolina Highway Patrol was notified of a driver driving erratically on Interstate 26. App. 32. The Trooper testified he saw a car that fit the description and travelled behind the car. He saw the vehicle veer outside of the lane of travel, crossing the white line on the right side of the roadway but not leaving the paved portion of the roadway, and then return to the travel lanes. App.* Electronic Recording of Trial. This occurred once whereupon he initiated his blue lights and stopped the vehicle. App.* Electronic Recording of Trial. The Trooper testified he smelled the odor of alcohol. App. 32.

At the scene, Ms. Mimms was given the horizontal gaze nystagmus test. App. 32. Trooper Burriss testified Ms. Mimms was unable to keep her balance and that he felt the roadside was unsafe to administer any further field sobriety tests. App. 32.

The Trooper testified that Ms. Mimms stated she was being treated for cancer and was taking chemotherapy as a result thereof. App.* Electronic Recording of Trial. Trooper Burriss' testified he believed Ms. Mimms might be suffering from cancer as he observed that she did not have any hair. App.* Electronic Recording of Trial. The Trooper testified Ms. Mimms stated that she had consumed one alcoholic drink earlier. App.* Electronic Recording of Trial. There was no evidence that Ms. Mimms knew that consuming a beer while undergoing chemotherapy would impact her ability to drive. App.* Electronic Recording of Trial. Ms. Mimms was arrested. She refused to take a breathalyzer test.

Ms. Mimms did not testify at the trial. After deliberations, the jury returned a verdict of guilty.

Discussion

The law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The trial court in the instant matter declined to instruct the jury on the issue of criminal intent believing driving under the influence is a strict liability crime. This was error. When the lack of criminal intent is raised by the evidence, as it was in this case, due process requires the jury be instructed on criminal intent.

Driving under the influence is not a strict liability crime. Longstanding South Carolina Supreme Court precedent has already categorized driving on a public highway by an intoxicated person as "*not only malum prohibitum*, but *malum in se*." *State v. Long*, 186 S.C. 439, 446-47, 195 S.E. 624, 627 (1938) (emphasis added). Indeed, the Court of Appeals opinion in the present case not only recognized this precedent, but also recognized the legal definitions of *malum in se* and *malum prohibitum*—both of which are present when driving while intoxicated in South Carolina: (1) "Malum in se is defined as 'a crime or an act that is immoral;'" and (2) "Malum prohibitum is defined as an 'act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.'" *State v. Mimms*, ** S.C. **, 763 S.E.2d 46, 50 (2014). In other words, driving while intoxicated in South Carolina is both an immoral crime or act that is also prohibited by statute—it is both *malum in se* and *malum prohibitum*. In fact, the criminal intent requirement for driving under the influence in South Carolina is best understood by further examining the key portion of *State v. Long*, which states as follows:

> We agree with the Supreme Court of Michigan, that the driving of an automobile upon the public highway by a person while

> intoxicated is not only *malum prohibitum,* but *malum in se.* In that case it is said: "It is true the statute forbids it and provides a penalty, but this in no way determines whether it is only *malum prohibitum.* The purpose of the statute is to prevent accidents and preserve persons from injury, and the reason for it is that an intoxicated person has so befuddled and deranged and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows as to be a menace in guiding an instrumentality so speedy and high-powered as a modern automobile. *Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unfit and unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operator to be in possession of his faculties.*
>
> . . . . .
>
> *It is gross and culpable negligence* for a *drunken person* to *attempt to guide and operate an automobile upon a public highway . . . .*"

State v. Long, 186 at 446-47, 195 S.E. at 627 (internal citations omitted) (emphasis added); *see also State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675-76 (1957) (quoting *State v. Long* with approval). In short, prior precedent readily indicates the intent requirement for driving while intoxicated in South Carolina is satisfied the moment the defendant committed the wrong of rendering himself unfit to drive.

Equipped with this clear understanding, the Court of Appeals acknowledged that "[a] corrupt purpose, a wicked intent to do evil, *is indespensible to a conviction of a crime which is morally wrong*. But no evil intent is essential to an offense which is merely malum prohibitum." *Mimms*, ** S.C. **, 763 S.E.2d at 50. However, despite the Court of Appeals' understanding that driving while intoxicated in South Carolina is both *malum in se* and *malum prohibitum*, and that a wicked or criminal intent is indispensible to a conviction of a crime deemed *malum in se*, it nonetheless erred by ruling against prior precedent and holding that driving while intoxicated in South Carolina is a strict liability offense—i.e. merely *malum prohibitum*—primarily based on a lack of intent language in the statute itself. *Mimms*, ** S.C. **, 763 S.E.2d at 51-2.

Strict liability crimes, with few exceptions, are regulatory in nature and do not involve substantial terms of incarceration. At the trial, the crime of driving under the influence of alcohol was analogized to speeding. However, driving under the influence carries significant penalties including a potential prison sentence of up to five years for a fourth offense. Therefore, driving under the influence is not a crime with insignificant consequences and due process requires criminal intent.

A legislative intent to do away with a mens rea requirement should not be lightly inferred and courts have imposed a mens rea requirement when one was not written into the statute. The crime of kidnapping is such a situation.

In *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240 (1952), the defendant was charged with violating a criminal statute. At the trial and in the lower appellate courts, it was asserted that if no mens rea appeared in the statute that there was no criminal intent required. The Supreme Court found that although there was no mens rea element in the statute, a court could impose such a requirement. The court stated, "We hold that mere omission ... of any mention of intent will not be construed as eliminating that element from the crimes denounced." Id. at 263 (Emphasis added.). The court explained its rationale with the following language:

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.

Id. at 251.

In *State v. Ferguson,* 302 S.C. 269, 395 S.E.2d 182 (1990), the defendant was charged with distribution of cocaine. The trial court ruled there was no mens rea requirement for the

offense of distribution of cocaine. Our Supreme Court determined that even though a mental state was not included in the statute, the court could determine the required mental state. The court imposed a criminal intent requirement although one was not written into the statute. Stated differently, the *Ferguson* Court recognized and applied the basic criminal law premise that a criminal intent of some form is ordinarily required in order to establish criminal liability.

Of apparent concern to the Court of Appeals in the present case was an alleged "slippery slope," wherein a mens rea requirement for the offense of driving while intoxicated would lead to "an unreasonable and absurd result." Specifically, the Court of Appeals' concern was based upon the State's argument that "any person *convicted* [sic] under this statute could argue he or she did not 'intend' to become intoxicated such that his or her faculties to drive a motor vehicle were materially and appreciably impaired." *Mimms*, ** S.C. **, 763 S.E.2d 52 (emphasis added). Simply stated, this concern is unfounded. Any "slippery slope" apprehensions harbored by the Court of Appeals are easily addressed and quelled by other longstanding South Carolina precedent holding that voluntary intoxication is no defense. *See, e.g.*, *State v. Hartfield*, 300 S.C. 469, 388 S.E.2d 882 (1990) ("The general rule is that voluntary intoxication or use of drugs does not constitute a defense to a crime."); *State v. Vaughn*, 268 S.C. 119, 125, 232 S.E.2d 328, 330 (1977) ("We adopt the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific."); *State v. Paulk*, 18 S.C. 514, 518-19 (1881) (accepting the well settled, general rule that "voluntary drunkenness of whatever degree constitutes no defense to the commission of crime."). Yet, rather than reading South Carolina precedent in harmony regarding both (a) the *malum in se* intent required for driving while intoxicated, with (b) the

prohibition of voluntary intoxication as a defense, the Court instead interpreted the law regarding driving while intoxicated to be one of strict liability.

Moreover, the Court of Appeals' holding that driving while intoxicated is one of strict liability is likewise contradicted by the last sentence in the section of its opinion on the matter. There it held, "[o]ur ruling does not apply to situations wherein a drug is involuntarily or unknowingly ingested while consuming alcohol." *Mimms*, ** S.C. **, 763 S.E.2d 52. In short, the Court of Appeals held that if a person did not knowingly become intoxicated, then the ruling that driving while intoxicated is a "strict liability" offense does not apply. This is facially inconsistant and illogical, particularly given that a "strict liability" offense is, by definition, the criminalization of an act or omission *regardless of fault*. *See, e.g.*, *State v. Ferguson*, 302 S.C. 269, 271-72, 395 S.E.2d 182, 183 (1990) ("Of course, the legislature, if it so chooses, may make an act or omission a crime regardless of fault. These crimes are referred to commonly as 'strict liability' offense[s].") (internal citation omitted). Perhaps more importantly, such inconsistancy regarding the law in the published opinion would have been avoided had the Court of Appeals simply applied precedent and harmonized the following: (a) the basic criminal law premise that a criminal intent of some form is ordinarily required in order to establish criminal liability; with (b) the point at which the criminal intent for driving while intoxicated is shown; and (c) the fact that voluntary intoxication is no defense.

The issue in this case is whether Ms. Mimms knew her chemotherapy treatment and the consumption of one beer would impact her ability to drive. As there was no evidence that she was aware of any potential negative impact on her ability to drive, the issue of criminal intent was an appropriate issue for submission to the jury. The trial court was empowered to instruct the jury on criminal intent, and Due Process required it do so. However, because the trial court

refused to do so, Ms. Mimms was deprived of the right to have the jury even consider her defense. Moreover, the trial court's ruling—affirmed by both the Circuit Court and Court of Appeals—permitted the State to try its case to the jury and obtain a conviction without having to prove a material element to the offense; the trial court's ruling absolved the State from proving any intent whatsoever. *See, e.g.*, *In re: Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). As a result, Ms. Mimms was prejudiced.

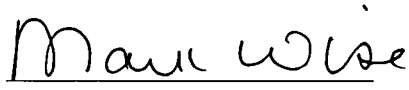
Accordingly, because the decision of the Court of Appeals is in conflict with prior precedent,[1] and a substantial constitutional issue is directly involved,[2] Ms. Mimms respectfully requests that this Court grant her Petition for Writ of Certiorari to the Court of Appeals.

[1] *See* Rule 242 (b)(3), SCACR.
[2] *See* Rule 242 (b)(4) and (5), SCACR.

CONCLUSION

Based on the foregoing reasons, Petitioner Daisy Mimms respectfully requests that this Court grant her Petition for Writ of Certiorari to the Court of Appeals and allow further briefing on the issue.

Respectfully submitted,



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This 10th day of November, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Edgar W. Dickson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DAISY LYNN MIMMS,

PETITIONER.

Appellate Case No. 2011-212931

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 Salley Elliott, Esquire, P.O. Box 11549, Columbia, SC 29211 and the S.C. Court of Appeals, P.O. Box 11629, Columbia, SC 29211 this 10th day of November, 2014.

Mark Wise
Assistant Public Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of November 10, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: March 5, 2018