

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

DEC 19 2014

SC Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

Opinion No. 5280 (S.C. Ct. App. filed November 12, 2014)

Appellate Case No. 2012-212663

THE STATE,RESPONDENT,

v.

DONNA LYNN PHILLIPS,APPELLANT.

RETURN TO PETITION FOR REHEARING

On November 12, 2014, this Court issued a published opinion which affirmed Appellant's (Phillips') conviction for homicide by child abuse in connection with the death of her grandson. State v. Phillips, Op. No. 5280 (S.C. Ct. App. filed November 12, 2014) (Shearouse Adv. Sh. No. 45 at 76). On December 1, 2014, Phillips submitted a Petition for Rehearing and by letter dated December 16, 2014, this Court requested that Respondent (the State) submit a return within ten days of the date of the letter. This return to the petition for rehearing now follows.

The State respectfully asks the Court to deny the petition for rehearing pursuant to Rules 208(b)(7) & 221(a), SCACR, because every argument presented in the petition is based on an issue/claim that simply was not preserved for appellate review. The “waiver rule,” now argued by Phillips for the first time, was: (1) not raised to or ruled upon by the trial court, (2) not raised or argued in Phillips’ brief, (3) not stated as a reason for the supplemental citations submitted by Phillips on September 3, 2014, and (4) not argued or mentioned a single time during oral arguments on September 10, 2014.

Phillips appears to recognize that she failed to raise any argument whatsoever regarding the “waiver rule” to this Court, and is now seeking to circumvent the well-established rules of error preservation to raise the issue in a petition for rehearing. She argues her September 3, 2014, letter called this Court’s attention to State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), and that: “Pursuant to the limitation contained in Rule 208(b)(7), SCACR, Ms. Phillips did not include any argument in her letter.” However, the limitation on including an argument with a supplemental citation is only one part of the Rule. The complete subsection provides:

When pertinent and significant authorities come to the attention of a party after his initial brief(s) has been served and filed, the party shall promptly advise the clerk of the appellate court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to an issue to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations . Any response shall be made promptly and shall be similarly limited.

Rule 208(b)(7), SCACR (emphasis added). Here, Phillips’ letter asked the Court to “take notice of the following cases which counsel may cite at oral argument” and then listed three citations to directed verdict cases, including Hepburn. Phillips did not reference a page number of her brief or an issue to which the citations pertain, and she failed to state

a substantive reason for any of the three supplemental citations. Indeed, in regard to the “waiver rule” it would not have been possible to reference a page number or issue to which the citations pertain because the “waiver rule” was not argued in Phillips’ brief. Phillips did not mention the “waiver rule” at all in her letter and the three cases cited appear to simply be some of the latest published opinions where an appellate court has reversed a trial court’s denial of a motion for directed verdict. Phillips also did not mention the “waiver rule” during oral arguments despite her current contention that, as the “central holding in Hepburn” the “waiver rule” was the reason she listed Hepburn as a supplemental citation. This contention defies belief. The State submits that under the plain, unambiguous, and mandatory terms of Rule 208, Phillips’ supplemental citation letter was deficient and did nothing to raise or preserve an issue she failed to argue in her Appellate brief. Furthermore, to the extent this Court finds the letter was sufficient under Rule 208, Phillips’ subsequent failure to argue the “waiver rule” during oral arguments constitutes a waiver of her right to pursue it by way of rehearing or a future petition for writ of certiorari in the South Carolina Supreme Court.

As to the merits of the petition, the State submits the sole ground supporting the request, as alleged by Phillips, is entirely without merit. Phillips argues this Court “overlooked or misapprehended State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013) when considering the standard of review for directed verdict motions” and goes on to argue the “waiver rule” that was discussed in Hepburn requires the grant of rehearing and reversal of her conviction. Yet, in its opinion, this Court clearly and correctly recited the standard of review for considering the denial of a directed verdict, and then properly applied that standard of review in affirming Phillips’ conviction. Phillips, Shearouse

Adv. Sh. No. 45 at 81-86. As explained by our supreme court in Hepburn, the “waiver rule” concerns “*what* evidence we deem appropriate for consideration at the appellate stage of review.” Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 (emphasis in original). Thus, the “waiver rule” has nothing to do with the standard of review itself in regard to directed verdict motions. Consequently, Phillips’ stated basis for seeking rehearing is patently without merit and her petition should be denied.¹

To the extent this Court finds Phillips’ petition is not actually based on an allegation of overlooking or misapprehending the standard of review, despite Phillips specifically making this claim, the State submits it is nonetheless without merit for a variety of reasons. First, since Phillips did not raise the “waiver rule” to the trial court when she renewed her motion for a directed verdict at the close of the trial, the issue not preserved for appellate review regardless of any supplemental citation or argument made on appeal. Furthermore, as argued in detail in State’s final brief, the trial court properly denied Phillips’ motion for a directed verdict based on the totality of the evidence. When viewed in a light most favorable to the State, the evidence presented during trial constituted substantial evidence establishing Phillips’ guilt for each element of the offense of homicide by child abuse, including that Phillips committed a deliberate act causing the victim’s death under circumstances manifesting an extreme indifference to human life. Direct evidence from the trial supports the conclusion that Phillips deliberately gave the victim adult prescription Tussionex. It also supports the conclusion she failed to seek medical treatment for the victim after the Tussionex was ingested. The

¹ Appellant complains that this Court’s only reference to Hepburn is in footnote 2 of the written opinion; however, this is because Hepburn was only being cited to explain why this Court chose not to directly address an additional sustaining ground raised by the State for the denial of Phillips’ motion for a directed verdict. The Stated continues to maintain that Phillips’ failure to seek medical care after the child was given multiple doses of Tussionex constituted child abuse or neglect.

trial court properly considered the existence of evidence as opposed to its weight and was required to deny Phillips' directed verdict motion and submit the case to the jury.

Statement of the Case, Statement of Facts, and Argument

The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

In her petition for rehearing, Phillips argues this Court "acknowledged that Kayla Roper's testimony . . . was the only evidence presented during the trial that provided any evidence tending to prove that Ms. Phillips committed child abuse by providing the child Tussionex." The State submits this is not accurate. While this Court may have relied heavily upon Roper's testimony as "direct evidence" of child abuse, it never found it was the only evidence presented during trial. Indeed, this Court described significant circumstantial evidence in both its recitation of the facts and its analysis of the evidence proving Phillips' mental state. Phillips, Shearouse Adv. Sh. No. 45 at 77-81 & 83-86. This evidence alone was enough to survive the motion for a direct verdict and allow the case to go to the jury, particularly in light of the alternate sustaining grounds argued by the State.

Phillips also argues her own testimony should not have been considered as direct evidence that she knew giving the child her prescription medication created a risk to the health of the child; yet, this is the very essence of the "waiver rule" recognized in Hepburn. When Phillips presented testimony she lost the right to have the court review the sufficiency of the evidence based upon the State's evidence alone. Because the referenced evidence was presented by Phillips herself, and was not merely responsive to testimony elicited by her co-defendants, it was not subject to a recognized exception to

the waiver rule and was properly considered in regard to the denial of her motion for a directed verdict. Hepburn, supra.

Finally, Phillips argues that since this is what she describes as a purely circumstantial evidence case, the trial court should have granted a directed verdict because the State failed to exclude “every other reasonable hypothesis,” i.e. that someone other than Ms. Phillips gave the child the lethal dose of medication. This simply is not the correct standard of review at the directed verdict stage, even if the evidence was entirely circumstantial. Our supreme court has instructed:

When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. “Suspicion” implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.**


State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (citations omitted). For all of these reasons, the State submits this Court properly affirmed the trial court’s denial of Phillips’ motion for a directed verdict.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Appellant, the State respectfully requests that this Court deny Appellant’s petition for rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
December 19, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

Opinion No. 5280 (S.C. Ct. App. filed November 12, 2014)

Appellate Case No. 2012-212663

THE STATE,RESPONDENT,

v.

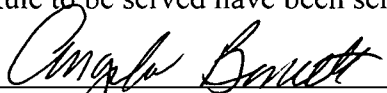
DONNA LYNN PHILLIPS,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Return to Petition for Rehearing*, dated December 19, 2014, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

I further certified that all parties required by Rule to be served have been served.
This 19th, day of December, 2014.



Angela Bennett
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

December 19, 2014

RECEIVED
DEC 19 2014
SC Court of Appeals

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

State v. Donna Lynn Phillips
Appellate Case No. 2012-212663

Charles

Dear ~~Mr. Grose~~:

I am enclosing one (1) copy of the Return to Petition for Rehearing in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services