THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 23 2015
S.C. Supreme Court

On Petition for Writ of *Certiorari*
To the Court of Appeals

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

Supreme Court Appellate Case Number 2015-000351
Court of Appeals Appellate Case Number: 2012-212663

The State Respondent,

v.

Donna Lynn Phillips, Petitioner.

Reply to State's Return to Petition for Writ of *Certiorari*

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
charles@groselawfirm.com

Attorney for Petitioner

Table of Contents

Table of Authorities

Cases

Rules

In Reply

The petitioner, Donna Lynn Phillips, replies to the State's return to her petition for writ of *certiorari* (hereinafter "State's Return") as follows:[1]

A. Error Preservation.

The State argues Phillips did not preserve for appellate review her argument that this Court's opinion in *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) entitles her to a directed verdict. State's Return 10-11. The State's primary argument is that Phillips did not properly call the Court of Appeal's attention to *Hepburn*.[2] This argument overlooks four important facts that are beyond dispute. First, Phillips properly moved for a directed verdict at trial. R. 395-97. Second, she sought review of the trial court's denial of directed verdict. *See* Brief of Appellant to Court of Appeals. Third, she called the Court of Appeal's attention to *Hepburn*. A. 26. Fourth, the Court of Appeals was aware of *Hepburn* when it issued its opinion. A. 7-8 (fn. 2). These four facts create a sufficient record for this Court to review the Court of Appeal's decision. As discussed in the Petition for Rehearing, A. 12-16, 20-21, and Section B, *infra*, Phillips' record on appeal is very similar to the *Hepburn* record on appeal.

---

[1] Footnote two of the State's Return, at p. 3, suggests, "[I]t appears Petitioner inadvertently failed to include copies of the briefs [in the Appendix] as required by Rule 242(e), SCACR." This suggestion is not correct. Petitioner filed the final briefs on March 10, 2015. *See* http://ctrack.sccourts.org/public/caseView.do?csIID=58799 (last viewed April 14, 2015).

[2] The State might be trying to push this issue into post-conviction relief, which would only result in additional delay. This Court, however, has an adequate record to determine the applicability of *Hepburn*. Ms. Phillips should get the benefit of this case, decided during the pendency of her appeal.

The State argues the trial court did not rule on the "waiver rule." Return, p. 10. In this respect, Phillips' case is no different than *Hepburn*. The applicability of the waiver rule, and the exceptions to the rule, were addressed for the first time during Hepburn's appeal. *See* Record on Appeal in *Hepburn*, Directed Verdict Motions, Volume III, at pp. 786-809, and Volume IV, at pp. 1336-38.[3] After all, the "waiver rule" and the exceptions to that rule concern the standard of review on appeal – "*what* evidence [the appellate courts] deem appropriate for consideration at the appellate stage of review." *Hepburn*, 406 S.C. at 429-30, 753 S.E.2d at 409 (emphasis original).[4]

B. Evidence that Can Be Properly Considered.

The State argues that the waiver rule does not exclude consideration of evidence presented at trial by the co-defendants or Phillips. State's Return 11-14. This contention completely overlooks this Court's holding in *Hepburn*, including the exceptions to the waiver rule. After *Hepburn*, the appellate court reviews the sufficiency of the State's evidence as it stood at the end of the State's case.

The State argues *Hepburn* "is limited to co-defendant testimony." State's Return 12. This assertion overlooks the record this Court considered in *Hepburn*, which pointed

---

[3] Found at http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed December 23, 2014).

[4] In the Court of Appeals, the State argued *Hepburn*, the "waiver rule," and the exceptions to that doctrine of law have "nothing to do with the standard of review in regard to directed verdict motions." Return to Petition for Rehearing, A. 36. The *Hepburn* opinion refutes this contention. 406 S.C. at 442, 753 S.E.2d at 416 ("While we are mindful that the net result of our decision is to overturn a jury verdict reached with all due deliberation and diligence, we are called by our ***standard of review*** to consider the evidence as it stood after the State presented its case, and we are not satisfied that the evidence was sufficient to sustain the State's ultimate burden of proof in this case." (emphasis added)). The State appears to have abandoned this position by not including it in its return to the petition for writ of *certiorari*.

out, [T]he decision of a codefendant to testify ***and produce witnesses*** is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial." *Hepburn*, 406 S.C. at 435, 753 S.E.2d at 412 (2013) (emphasis added and citing *United States v. Belt*, 574 F.2d 1234, 1236–37 (5th Cir. 1978). In addition to his own testimony, co-defendant Lewis actually called eight witnesses during his defense case. *See Hepburn* Record on Appeal (found at http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed November 30, 2014)). In addition to her own testimony, Hepburn called three witnesses. *Id.*

The State next argues, "[T]here was absolutely noting preventing the State from calling both Kayla and Brandon in reply, at which point the prosecution could have elicited the very same information." State's return 12. But this is exactly the point—the prosecution ***did not*** call these witnesses, and the standard of review in joint trials limits the evidence to what was the State presented in its case-in-chief. Important policy considerations related to the "waiver rule" arise from Solicitors and criminal defense lawyers' respective roles in our adversarial system. "[P]rosecutors . . . are ministers of justice and not mere advocates. Their special responsibility carries with it specific obligations to see the defendant is accorded procedural justice." *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (internal quotes and citations omitted) (citing *State v. Quattlebaum,* 338 S.C. 441, 527 S.E.2d 105 (2000) and Comment, Rule 3.8 of Rule 407, SCACR). A criminal defense lawyer's obligation is to advocate for the client. "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. . . . Undivided allegiance and faithful, devoted

service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948). The defense lawyer, not restricted by any of the additional special duties of prosecutors, is free to advocate every advantage for the client. *See also Amicus Curie* Brief of The South Carolina Association of Criminal Defense Lawyers in *Hepburn*, pp. 16-17 (found at http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed November 30, 2014).

Next, the state argues the "waiver" rule should not apply because Phillips presented her case before Honeycutt. State's Return 13. Again, this overlooks the record that was before this Court in *Hepburn*. In *Hepburn*, Hepburn actually presented her case before co-defendant Lewis presented his case. *See Hepburn* Record on Appeal (found at http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed November 30, 2014)). Despite this sequence of testimony, our this Court held:

> We find this rationale persuasive. Here, [Hepburn] did not dispute the State's contention that the victim died from homicide by child abuse inflicted by one of the two defendants. Instead, her testimony rebutted Lewis's contention that she killed the victim. Thus, we recognize an exception to the waiver rule where a codefendant testifies, implicating the defendant, and will not consider Lewis's testimony, or testimony elicited by [Hepburn] that is responsive to Lewis's testimony, for purposes of determining whether the State presented substantial circumstantial evidence sufficient to survive [Hepburn's] mid-trial motion for directed verdict.

Hepburn, 406 S.C. at 436, 753 S.E.2d at 412 (citing *United States v. Belt,* 574 F.2d 1234, 1236–37 (5th Cir.1978).

Finally, the State argues Phillips own testimony supplied her knowledge about "the health risks associated with giving children medication prescribed to adults." State's

return 13-14. ***This statement is not inherently incriminating.*** In finding significance to this testimony, the Court of Appeals relied on Kayla Roper's testimony that Phillips admitted to giving the child the medication. Under Hepburn, reliance on this testimony was outside the proper standard of review.

C. Remaining Evidence is Not Sufficient.

The State contends, "Even if this Court determines the Court of Appeals erred in considering the testimony of Kayla Roper and Brandon Roper, the remaining evidence was sufficient to withstand Petitioner's motion for a directed verdict." State's Return 14. The State argues the prosecution "presented substantial evidence to support a finding that Petitioner deliberately administered adult prescription Tussionex to the victim, that she was aware of the gravity of the danger in doing so and thereby acted with extreme indifference for human life, and that she subsequently failed to get the victim medical help after the Tussionex has been administered." State's Return 15. The ***only*** evidence that Phillips administered the child Tussionex is the testimony of Kayla Roper, which cannot be considered under *Hepburn*. In the absence of this evidence, Phillips statements that she is aware of the dangers of giving adult medication to a child without a prescription does nothing more than support her denial that she gave the child the drug.

Finally, the State takes one quote form the petition out of context and argues Phillips did not cite the "correct standard of review at the directed verdict stage." State's Return, 18. Both Phillips and the State agree that the standard set forth in *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 572 (2000) applies. Brief of Appellant, p. 15; Petition for Rehearing, p. 12; Return to Petition for Rehearing, p. 6; and Petition for Writ of Certiorari, p. 23-24. Under the applicable standard of review, including *Hepburn*, two

people other than Phillips could have given the child Tussionex—Jamie Morris and Phillips' daughter, both of whom were present in the home and had opportunity and access to the medication.[5] As this Court has pointed out, the "traditional circumstantial evidence charge" was useful as it "illustrate[d] the lack of evidence against Petitioners" in *State v. Hernandez*, 382 S.C. 620, 626, 677 S.E.2d 603, 606 (2009). The same can be said here. *See also State v. Palmer*, 408 S.C. 218, 236, 758 S.E.2d 195, 205 (Ct. App. 2014), *cert. granted* (Sept. 24, 2014) (Konduros, J., concurring) ("I also would find there was insufficient evidence of the codefendants' guilt for homicide by child abuse and unlawful conduct toward a child because the State did not present any direct or substantial circumstantial evidence to reasonably prove which codefendant harmed the child.") (citing *State v. Lane,* 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) ("The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes.")).

Phillips has never contested the Tussionex caused the child's death. Rather, the State never proved who gave the child the medication. Because there is no direct or substantial circumstantial evidence that Phillips gave the child the mediation, Phillips is entitled to a directed verdict.

[5] This statement assumes that the medication was not administered at Honeycutt's house, a possibility the prosecution considered by indicting and trying Honeycutt for homicide by child abuse.

Conclusion

The Court of Appeal's opinion conflicts with *Hepburn*. This Court, therefore, should grant the writ, apply the exceptions to the "waiver rule" as outlined in *Hepburn*, reverse the Court of Appeals, and direct a verdict of acquittal.

Respectfully Submitted,

By: _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

Attorney for Petitioner

April 20, 2015
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

Supreme Court Appellate Case Number 2015-000351
Court of Appeals Appellate Case Number: 2012-212663

The State Respondent,

v.

Donna Lynn Phillips, Petitioner.

Certificate of Service

I certify that I have served the Reply to the State's Return to the Petition for Writ of *Certiorari* on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

J. Benjamin Aplin, Esquire
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

April 20, 2015
Greenwood, South Carolina

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: chasgrose@gmail.com
Web: GroseLawFirm.com

April 20, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: State v. Danna Lynn Phillips
Court of Appeals Appellate Case Number: 2012-212663

Dear Mr. Shearouse:

Enclosed please find the original and six copies of Ms. Phillips' Reply to the State's Return to her Petition for Writ of *Certiorari* .

If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: J. Benjamin Aplin, Esquire