

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

MAR 03 2016

APPEAL FROM PICKENS COUNTY

S.C. SUPREME COURT

D. Garrison Hill, Circuit Court Judge

Supreme Court Appellate Case Number 2015-000351

The State

Respondent,

v.

Donna Lynn Phillips,

Petitioner.

Petition for Rehearing

Pursuant to Rule 221, SCACR, Donna Lynn Phillips respectfully petitions this Court to rehear this case because this Court overlooked or misapprehended the following points:¹

- A. This Court never identified any evidence that Ms. Phillips administered the child Tussionex; nor could it because the reviewable record is devoid of such evidence.**

By considering Ms. Phillip's case in chief, this Court departed from its holdings in *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) (defendant did not, by testifying, waive appellate consideration of the evidence as it stood at the time of defendant's mid-trial motion for directed verdict) and *State v. Palmer*, 413 S.C. 410, 413,

¹ The State has also petitioned for rehearing.

776 S.E.2d 558, 559 (2015) (“In our review we rely solely on evidence from the State's case-in-chief in order to avoid any of the directed verdict issues that can arise when jointly tried codefendants blame each other in their defense cases.”). This Court, therefore, should rehear this case and consider only the evidence presented during the State's case in chief. The State did not present any evidence in its case in chief establishing that Ms. Phillips administered the fatal medication. *See* Brief of Petitioner, pp. 8-15 for discussion of evidence presented by the State at trial.

Even considering Ms. Phillip's case in chief, there is not any direct or substantial circumstantial evidence that Ms. Phillips administered the medication that caused the child's death. *See State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); and *State v. Ewards*, 298 S.C. 272, 379 S.E.2d 888 (1989). The holding in this case further clouds the already murky jurisprudence concerning how trial courts are to review directed verdict motions in circumstantial evidence cases generally and when identity is a contested issue in particular.

This Court concluded, “We find there is direct and circumstantial evidence that, when construed in the light most favorable to the State, could allow the jury to conclude Phillips acted with extreme indifference in administering the medication that caused Child's death.” Slip Opinion, p. 9. This Court, however, never identified *any* evidence that Ms. Phillips administered the child Tussionex. In fact, this statement by the Court is contrary to this Court additional conclusion, “There is no question that Child was in the care and custody of Phillips and her son, Jamie Morris, at the time of the lethal dose.” Thus, Ms. Phillips' son could have provided the lethal does. Dr. Foery, in fact, linked the

child's symptoms to Mr. Morris administering medication to the child on Sunday afternoon:

[T]he child begins to exhibit some unusual symptoms starting Sunday afternoon, as I recall from the [statement] from the father. And the child is cranky, ornery, falls asleep, fighting sleep, wakes up again. . . . The child is in some sort of distress. It seems obvious to the father that the child is in some sort of distress.

And then the child gets something from the father.

And then the child goes home. And the child is somewhat cranky, goes home, but, eventually, goes to bed at 9:00 at night and seems out of it. And it seems like out of it immediately, and the baby didn't want to eat anything. I think the mother's [statement] was that she wanted to give the baby some milk. And the baby didn't drink from the sippy cup, put the sippy cup down, and then basically was out of it.

And so from 9:00 on Sunday night until the baby was discovered Monday morning, she was out of it. . . . I'm thinking the baby received the drug prior to that. . . .

The baby did not wake up when the baby was changed [at 8:00 a.m. Monday morning]. And then at 10:00, I think the baby had severe respiratory distress. And so I'm thinking that one of the reasons the baby was in some kind of distress on Sunday afternoon was that *possibly* the baby had received that drug as early as Sunday afternoon.

R. 348, line 9 – 349, line 15 (emphasis added).

This Court held that, under the waiver rule, evidence presented by Ms. Phillips can be considered when reviewing the denial of the directed verdict motion. This Court, therefore, must consider that a third person in the house, Ms. Phillips' teenage child, could have administered the medication. Not only did the State's evidence not demonstrate that Ms. Phillips administered any medication, it did not exclude the other two people in the house from administering the medication. This Court reasoned, "As we

noted in *Bennett*, while ‘the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt.’” Slip Opinion 4 (emphasis supplied by court) (citing *Bennett*, Op. No. 27600 (S.C. Sup.Ct. filed January 6, 2016) (Shearouse Adv. Sh. No. 1 at 19). Not only did this Court not identify any reviewable evidence from which the jurors could infer that Ms. Phillips, this opinion misapplies *Holland v. U.S.*, which cautioned about the dangers of associated with the prosecution relying on circumstantial evidence and explained the role of the trial judge in reviewing the sufficiency of the evidence:

It is, of course, not for [courts] to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done.

348 U.S. 121, 135-36. The State's proof, therefore, must negate the other reasonable explanations inconsistent with the guilt of the accused. On at least two occasions this Court, while using the substantial circumstantial evidence standard of review, has

supported its conclusion by using the “to the exclusion of every other reasonable hypothesis” standard of review, once to reverse a conviction and once to affirm a conviction. As former Chief Justice Toal stated in her concurring opinion affirming the conviction, “Put another way, the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis.” *State v. Daniels*, 401 S.C. 251, 263, 737 S.E.2d 473, 479 (2012). Support for this standard of review is also found in reversing the conviction in *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009) where, in footnote 2, after citing the “to the exclusion of every other reasonable hypothesis” standard, the Supreme Court stated “it nonetheless illustrates the lack of evidence against Petitioners.” *Id.* at 626, 677 S.E.2d at 606.

This Court, therefore, has followed reasoning similar to *Holland's* reasoning for reviewing the sufficiency of the evidence. *E.g. Hernandez* (held that that suspects occupying rented moving truck which arrived at place designated for a controlled drug exchange, closely behind car driven by others implicated in transaction, knew occupants of car and thus had guilty knowledge of drugs in tractor trailer being driven by undercover agents was pure speculation, and insufficient to support suspects' conviction); *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004) (defendant's fingerprint on coffee cup inside deceased's car abandoned in Tennessee near location where deceased's body was found was insufficient to establish accused's presence at scene of murder in Colleton County); and *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 453 (1984) (“The evidence presented by the State in the instant case may raise a suspicion of Schrock's guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable

doubt, to his guilt. From the record before us, we can reach no other conclusion but that Schrock was entitled to a directed verdict of not guilty based on the lack of evidence.”).

This Court conflated proof of identity with the element of “extreme indifference” necessary to prove homicide by child abuse, S.C. Code Ann. § 16-3-85(A)(1), by observing, “It is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous.” *Id.* This Court then observed, “Importantly, Phillips herself testified she would never give Child medication not prescribed to him and nor would she give any medication to a child under the age of two.” *Id.* Thus, Ms. Phillips’ embracing something that is common knowledge became support for her guilt when there is no evidence she administered the child the medication.

This Court’s decision in this case, furthermore, is in conflict with *Palmer* and *Hepburn*. In both of these homicide by child abuse cases, the defendant was in the home when the child suffered the fatal injuries, but this Court held that the State failed to present substantial circumstantial evidence to submit the charges against Hepburn and Palmer to the jurors. This Court, however, affirmed submitting to the jurors the charge against Palmer’s co-defendant. The nature and timing of the small child’s injuries were significant to this Court’s analysis in *Palmer*. “The State’s evidence place[d] Gorman alone with the victim at 4:00 pm when she first returned home and again at 6:00 pm when the victim was found in grave distress.” *Palmer*, 413 S.C. at 420, 776 S.E.2d at 563. Furthermore, “[t]he medical evidence would support a finding that Gorman inflicted the fatal blow when she first returned home and that when she and Palmer checked on the child from the doorway at 4:15 pm, the victim’s injuries may not have been apparent to a

layperson. Alternatively, there was evidence that the blow(s) must have been inflicted immediately preceding the expression of symptoms, which is evidence from which a jury could conclude that Gorman injured the child when she went alone to check on him at 6:00 pm.” *Id.*

This Court, therefore, should reconsider and enter a directed verdict of acquittal.

B. The Court erred by stating, “There is no question that Child was in the care and custody of Phillips and her son at the time of the lethal dose.” Slip Opinion at 6.

This Court found Dr. Foery testified the first dose would have been given some twenty-four to thirty-six hours prior to the blood being drawn at 12:30 p.m. on Monday, March 17, 2008. Slip Opinion at 2.² The evidence in the record does not support this statement. Regarding the timing of the fatal dose(s), Dr. Foery actually testified, “Based on the half life of the drug, I would say it was probably given sometime between midnight on [Saturday going into] Sunday *up until the time in which the baby was found*. So approximately 24 to 36 hours before the blood was drawn.” R. 331, lines 7-10 (emphasis added). Thus, the fatal dose of hydrocodone could have been administered at the home of the child’s mother when Ms. Phillips was not even present. The Child, in fact, was at his mother’s house for much of this time frame.

Dr. Foery, likewise, was unable to determine if the child received one large dose of medication or multiple doses over time. This Court erred by stating, “[Dr.] Foery could not opine on the dosage that was likely administered to Child, but stated he believed this could have been a repetitive dosing.” Slip Opinion 2. Dr. Foery further testified, “[T]he data indicates that the concentration of the drug in the blood is somewhere between two

² The blood was actually drawn at 2:00 p.m.

and a half and five times higher than it should be for a therapeutic dose, if it were given to an adult.” R. 346, line 22 – 347, line 2. Based on the concentration, Dr. Foery opined “more than one dose was given” but could not “say how many doses or when” the doses were given. R. 347, lines 3-7. Dr. Foery, therefore, could not “state unequivocally that it was a repetitive dose.” R. 331, lines 19-20. *See also* R. 341, lines 7-20 (Regarding repetitive dosing, Dr. Foery “can’t rule it in or rule it out.”).

This Court, therefore, should reconsider and enter a directed verdict of acquittal.

C. This Court also erred by stating, Robert Foery, a forensic toxicologist, testified as to tests performed on the urine and blood taken from Child. Foery stated the tests revealed chlorpheniramine⁵ and hydrocodone in the blood, as well as hydrocodone, hydromorphone, and chlorpheniramine in the urine.” Slip Opinion at 2.

A close review of the State’s evidence reveals it never proved the presence of Tussionex in the child’s blood. The State’s toxicologist, Dr. Foery, testified that chlorpheniramine was not found in the child’s blood. Although a “screening procedure” indicated the possible presence of chlorpheniramine in the blood, that result is not admissible in court.” Regardless of whether that resulted was a negative test result, as set forth in the written report, or an insufficient sample of blood, chlorpheniramine must be present to prove that Tussionex was present in the child’s blood. R. 324, line 6 – 326, line 24; 337, line 19 – 339, line 23; 865.

This Court, therefore, should reconsider and enter a directed verdict of acquittal.

Conclusion

This Court, therefore, should reconsider and enter a directed verdict of acquittal.

Respectfully Submitted,

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March 2, 2016
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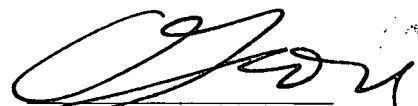
Donna Lynn Phillips,

Petitioner.

Certificate of Service

I certify that I have served the Petition for Extension of Time, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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