

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
R. Knox McMahon, Circuit Court Judge

Opinion No. 5399 (S.C. Ct. App. filed April 6, 2016)
Appellate Case No. 2014-001938

THE STATE,

Respondent,

v.

ANTHONY BAILEY,

Appellant.

PETITION FOR REHEARING

On April 6, 2016, this Court issued a published opinion reversing Appellant Anthony Bailey's conviction for threatening the life of a public official. *State v. Bailey*, Op. No. 5399 (S.C. Ct. App. filed April 6, 2016). Respondent (the State) respectfully petitions the Court for rehearing pursuant to Rule 221(a), SCACR. The State hereby seeks rehearing on the grounds that the Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court's ultimate conclusion that "the circuit court erred in concluding [victim] was a public official for purposes of subsection 16-3-1040(A)." Specifically, the State submits

this Court looked beyond the plain language of the statute and misapplied the common law elements used to distinguish public employees and public officials, pursuant to *Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762 (1907); *State v. Bridgers*, 329 S.C. 11, 495 S.E.2d 196 (1997), and *State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980). Further, the court failed to address the significant public policy in favor of finding a designated medical examiner a public official within the meaning of S.C. Code Ann. Section 16-3-1040(E)(1). For these reasons, the State respectfully asks this Court to grant this petition for rehearing and issue an opinion affirming Appellant's convictions.

Statement of the Case

On February 3, 2014, a Charleston County grand jury indicted Appellant for violating S.C. Code Ann. §16-3-1040, threatening the life of a public official. The Honorable R. Knox McMahon found Appellant guilty but mentally ill at the conclusion of a bench trial on September 4, 2014. Assistant Solicitors J. Ziegler and Nicholas Lewis represented the State. (R. p. 1.) Appellant was represented by Mary Ford, Esquire. Judge McMahon sentenced Appellant to five years' imprisonment, suspended upon the service of eighteen months, with five years' probation. (R. p. 94, lines 5-12.) On April 6, 2016, this Court issued a published opinion reversing Appellant's conviction. *State v. Bailey*, Op. No. 5399 (S.C. Ct. App. filed April 6, 2016). This Petition for rehearing follows.

Statement of Facts

Amy Cradock (Victim) is thirty-eight years old and has a bachelor's degree in psychology and a master's degree in social work. (R. p. 19, lines 21-23.) She is employed by the Charleston/Dorchester Mental Health Center, a subsidiary of the Department of Mental Health (DMH). (R. p 20, line 1.) She was originally employed at

the jail as a regular mental health counselor, but has since become the supervisor of the mental health team. (R. p. 21, lines 2-4.) She is also a Lowcountry hostage negotiator, which qualifies her to aid in the resolution of the jail's behavioral problems. (R. p. 21, lines 10-21.) At some point Victim was appointed as a designated mental health examiner (DE), for which she attends probate court hearings to determine a patient's need for inpatient or outpatient hospital care. (R. p. 22, lines 5-10.)

As a mental health professional for the jail, Victim sees inmates for a variety of reasons. (R. p. 22, lines 23-25.) She also handles inmates on suicide watch and determines when involuntary commitments are necessary. (R. p. 23, lines 4-16.) She makes housing recommendations and often develops behavior management plans. (R. p. 25, lines 19-20.) As a mental health professional with the DMH, she is required to serve the clients as they are referred to her, and she is unable to turn anyone away. (R. p. 31, lines 10-17.)

Debra Blalock, the executive director Charleston Dorchester Mental Health Center testified about the hierarchy of DMH. (R. p. 46, lines 23-25.) DMH is governed by a seven member commission, and those members are appointed by the Governor for five year terms. (R. p. 47, lines 1-9.) The commissioners select the state director of DMH, who is over the entire department of approximately 4,300 employees, including seventeen mental health centers, four hospitals, and four nursing homes. (R. p. 47, lines 1-9.) The director appoints deputy directors, of which there are three, and the deputies supervise the center directors. (R. p. 47, lines 15-21).

DMH has a contract with the Charleston County Sheriff's Office to provide mental health care to the Al Cannon Detention Center. (R. p. 48, lines 7-10.) Five

employees are housed there, and one employee, supervised by Victim, serves as a liaison between DMH and the Detention Center. (R. p. 48, lines 9-13.) Victim is a Mental Health Professional 4, meaning she has a master's degree and three years of post master experience; and she serves as a chief, supervising all the administrative and clinical team at the Detention Center. (R. p. 49, lines 10-22). Victim's appointment as a DE was made by the DMH's medical director, through the authority granted to him by the Governor's Office. (R. p. 50, lines 6-12.) Victim assesses individuals to determine if they, and the public, will be safe in their placement. (R. p. 53, lines 13-18.) Her role is to determine the least restrictive level of care that will keep the patient and the community safe, including inpatient admission via the commitment process. (R. p. 54, lines 4-9.) Victim has a significant amount of discretion in her ability to initiate commitment proceedings. (R. p. 54, lines 16-23.)

On August 28, 2013, Victim was working at the jail and received a referral to see Appellant. (R. p. 27, lines 13-20.) She was informed Appellant threatened to kill a detention officer upon release, and she attempted to assess whether Appellant needed hospitalization for "homicidal ideations." (R. p. 27, lines 23-25 and p. 28, lines 1-2.) She was escorted to Appellant's cell and introduced herself. (R. p. 28, lines 7-10.) Appellant became agitated and said he wanted to "shoot up the mental health center and kill everyone in the mobil [sic] crisis." (R. p. 28, lines 15-16.) Appellant told Victim she would be added to the list if she did not leave. (R. p. 28, lines 17-18.) As she was walking away, Appellant stated he was going to kill her anyway. (R. p. 28, lines 21-23.) Victim knew of Appellant's prior history of dealings with the disciplinary unit, so she felt the threat was serious. (R. p. 29, lines 12-17.)

Argument

In its published opinion, this Court reversed and remanded Appellant's convictions, holding Appellant was "overcharged" with threatening a public official, pursuant to S.C. Code Ann. Section 16-3-1040 (E)(1) instead of threatening a public employee pursuant S.C. Code Section 16-3-1040(E)(2). The Court employed a de novo review of the question of law and concluded a designated medical examiner was not a public official after looking beyond the plain language of the statute to the common law for guidance. The State respectfully submits the Court misapplied the common law definitions of a public official and failed to address the strong public policy reasons for protecting these officials beyond the protection afforded to public employees.

This Court cited several rules of statutory construction for the general proposition the Court must ascertain the intent of the legislature, with the best evidence of that intent the plain and unambiguous language of the statute. *See generally Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)); *Media Gen. Commc'ns*, 388 S.C. at 148, 694 S.E.2d at 530 (quoting *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 360, 60 S.E.2d 682, 684(1950)). The Court then examined the language of Section 16-3-1040(E)(1), which defines a public official as "an elected or appointed official of the United States or of this State or of a county, municipality, or other political subdivision of this State." To determine whether a designated examiner was an elected or appointed official, the Court considered S.C. Code Ann. Section 44-23-10(4) for the following definition of the designated examiner.

A. For the purpose of carrying out the provisions of the laws relating to the commitment of mentally ill persons, the South Carolina Mental Health Commission hereby establishes the following qualifications needed for persons to act as designated examiners:

...
(5) Any mental health professional as listed in subsections (A)(1) through (4) who has the appropriate license and education, who has at least one year of intensive full-time experience working with committed patients in a unit of a Department of Mental Health psychiatric hospital, who is certified by the chief of professional services and the director of the facility as being competent and qualified to serve as a designated examiner, and who is approved by the Department of Mental Health Office of Quality Assurance—Standards, Advocacy and Monitoring *may be appointed as designated examiner* for examinations and hearings held within that facility.

S.C. Code Ann. Regs. § 87-1 (2012) (emphasis added).

Noting Appellant’s concession Victim was appointed as a designated examiner, the court said, “[t]hus, we accept that Craddock was appointed to the designated examiner position.” The Court should have ended its analysis there, as the cited rules for statutory construction require the Court to look to the plain language of the statute. This Court said, “Our inquiry for purposes of section 16-3-1040, however, does not end here because the fact that Craddock was “appointed” to her position does not—by itself—qualify her as a public official.” The State respectfully submits the definition of public official only requires the official to be “appointed” by a political subdivision of the State. Thus, this Court mistakenly stepped outside the boundaries of the plain language of the statute to interpret its meaning.

Even if this Court properly looked to the common law for guidance on the definition of a public official, the Court gave weight to only two of the elements distinguishing officials from employees, one of which was mistaken, and then failed to properly consider the remaining elements. The State agrees with the Court that the

relevant case law for defining a public official, if looking outside the language of Section 16-3-1040(E)(1), includes *Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762 (1907) (holding a public officer is one who exercises some continuing sovereign power of a public concern), and *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) (finding four distinctions between public officers and employees: 1) whether the position was created by the General Assembly, 2) whether the qualifications for appointment are established by law, 3) whether the duties, tenure, salary, bond, and oath are prescribed by law, and 4) whether the person is a representative of the sovereign.) Though *Bridgers* offered these guidelines the court also said, “no single criterion is dispositive and not all the criteria are necessary to find that an individual is a public officer.” *Id.*

In the instant case, the trial court properly found Victim to be a public official within the context of § 16-3-1040 by applying the standards put forth in *Bridgers* and *Sanders*, and with particular deference to the public policy argument presented at trial. In reversing the trial court, this Court misapplied the common law standards, and did not acknowledge the public policy argument.

First, the position of “Designated Examiner” is created and defined by the Legislature in S. C. Code Ann. §44-23-10 (4):

"Designated examiner" means a physician licensed by the Board of Medical Examiners of this State or a person registered by the department as specially qualified, under standards established by the department, in the diagnosis of mental or related illnesses.

S.C. Code Ann. § 44-23-10(4). The Department of Mental Health Regulations, which are authorized by statute and are subject to the approval of the General Assembly, further delineate her responsibilities and qualifications in 87-1, as noted earlier on page 5. Thus,

a designated examiner satisfies the first two prongs of the *Bridgers* test, as the position is created by the Legislature and her qualifications for appointment are provided in the Regulations.

As a designated examiner, Victim had the duty and ability to commence commitment proceedings when she went to assess Appellant. The Legislature mandated her duty below;

No person who is mentally ill or who has an intellectual disability shall be confined for safekeeping in any jail. If it appears to the officer in charge of the jail that such a person is in prison, he shall immediately cause the person to be examined by two examiners designated by the Department of Mental Health. . . . If hospitalization is ordered, the person shall be discharged from the custody of the officer in charge of the jail and shall be admitted to an appropriate mental health or intellectual disability facility.

S.C. Code Ann. § 44-23-220. This Court noted Victim testified she did not believe she was acting as a designated examiner when she assessed Appellant. However, despite Victim's earlier testimony, she clearly was acting in her capacity as a designated examiner when she attempted to assess Appellant, as she would have begun the admission process had she deemed it necessary. The State notes the finding of whether Victim was acting as a designated examiner is a question of fact, and that finding by the trial court at Appellant's bench trial is entitled to deference. See *Hunt v. Forestry Com'm*, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004) ("While a trial court's findings of fact in a nonjury action at law should not be disturbed on appeal unless they are without evidentiary support, a reviewing court is free to decide questions of law with no particular deference to the trial court.") Moreover, Victim's appointment as a designated examiner gave her the authority to initiate commitment proceedings any time she examined an inmate at the detention center. Her duty did not stop and start depending

on the circumstances of her assessment. Thus, her duties were continual, not intermittent, as required by *Sanders*. Her duty, outlined in part by S.C. Code Ann § 44-23-220, also satisfies the third prong of the *Bridgers* analysis.

Victim's status as a public official for purposes of § 16-3-1040 is also supported by her actions as a sovereign of the state. In *Sanders*, the court examined whether the job required the exercise of "sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent," *Id.* at 174, 58 S.E. at 763. Victim makes determinations on matters of patient housing, refers appropriate treatment plans for inmates of the detention center and other clients of DMH, and is a member of the crisis response team. She initiates commitment proceedings through the probate court if she deems it necessary for the protection of the patient and the public at large.¹ She exercises discretion in making her recommendations; she does not merely perform duties required of her by her employer. By the standards set forth in *Sanders* and *Bridgers*, Victim's authority to initiate commitment, as granted by the Legislature, is clearly a function that concerns the public. Thus, she acts as a sovereign of the State when she makes treatment determinations. Victim is also bound by her obligations as a sovereign of the State, by her inability to turn away clients or refuse treatment to the public at large. That distinction from a mental health professional in private practice, who may opt to refuse to treat a patient, leads to the most compelling reason to find Victim is a public official-- the high degree of public interest to protect the safety of mental health worker. The State respectfully disagrees

¹ This authority is somewhat analogous to an officer representing the State in magistrate's court. See In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar 309 S.C. 30, 422 S.E.2d 123.

with this Court's conclusion Victim exercises no sovereign authority of the State. The State submits the ability to initiate proceeding to protect the public from the dangerously mentally ill is a clear exercise of sovereignty. This Court misapprehended the fourth *Bridgers* factor in concluding this criterion had not been met.

Lastly, this Court found no sound public policy basis for finding individuals in Victim's position to be public officials. Respectfully, the State could not disagree more. Our courts have shown a preference for policy reasons for the inclusion of professionals particularly at risk in their capacity to protect and serve the public.

In *Bridgers*, the court recognized the public interest and concern for highway patrol officers, and as the trial court concluded, a similar "public concern in the area of mental health, particularly those that may deal with a population of individuals, inmates in jail, clients if they are transferred to the Department of Mental Health, because of the potential for those individuals to harm themselves or others." (R. p. 80, lines 14-19.) Victim distinguishes herself from other employees of the Department of Mental Health in this regard. Unlike an administrative assistant or even general counsel for DMH, Victim's service as a designated examiner and mental health professional puts her on the front line with the patients and inmates who need her services. In fact, when Appellant exhibited threatening behavior to the detention center guard, *the guard called Victim* to assess the situation. Arguably, Victim is even more at risk than the guard. Furthermore, whereas private practice professionals may refuse to treat dangerous patients, Victim has no such option and instead is dependent on the safety measures of the facility as well as the punitive deterrent of the statute to protect her from harm.

Lastly, Victim is entitled to the protection of §16-3-1040 (A) because, in her role as a designated examiner, she is subject to the same risks and serves the same protective function of the public at large as other correctional officers. *Bridgers* and cases such as *State v. Carter*, 324 S.C. 383, 478 S.E.2d 86 (1996) demonstrate the court's inclination to find consistency in the application of the statute. In *Bridgers*, the court took issue with treating city police and patrolmen differently: "An individual may threaten the life of a city police officer and violate the statute, while no violation of the statute would occur if that individual made the same threat to a Highway Patrol officer. No rational basis exists for this inconsistency." *Bridgers*, at 13-16, 495 S.E.2d at 197-99. The trial court found this reasoning persuasive:

the law is also very inconsistent where the same threat could have been made to a correctional officer in the detention center, and he could have been charged with a violation of a threat to a public official, and the threat having been made to a mental health professional and designated examiner, that charge could have been made under Subsection (B).

(R. p. 81, lines 15-22.) To conclude Victim is an employee under §16-3-1040 (B), but a corrections officer is a public official under §16-3-1040 (A), would lead to an absurd and unjust result. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App.1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011). The State respectfully submits this Court's opinion defeated the plain legislative intent of

classifying public officials and public employees differently for purposes of sentencing those who threaten them. It is absurd to conclude corrections officers are public officials but designated examiners, given the risk involved and the service to the public, are not.

This Court's concluded Appellant was overcharged in its published opinion. On the contrary, a person who threatens to kill a designated examiner (and her family and co-workers) because she is duty-bound to assess him is undercharged if facing a maximum sentence of only thirty days' imprisonment. The State submits Victim, because of her service to the public at large, should not be considered expendable personnel for these purposes. Thus, Victim, as a mental health professional who is a designated examiner for the Department of Mental Health, should be deemed a public official pursuant to §16-3-1040 (A) by the plain language of the statute, in accordance with the tenants of common law, and for the compelling policy reasons to protect those at risk who serve the public.

Conclusion

For all of these reasons, the State submits this Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court's ultimate conclusion that a designated examiner for the Department of Mental Health is not considered at public official for purposes of subsection 16-3-1040 (A). The State respectfully asks this Court to reconsider its application of the common law and public policy to the unique facts of Appellant's case in rehearing this matter and affirming Appellant's convictions.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this

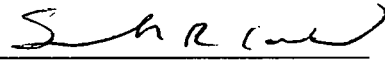
petition for rehearing, reconsider and rehear this matter, and issue an order affirming Appellant's convictions and sentence.

Respectfully submitted,

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April 19, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
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The Honorable R. Knox McMahon, Circuit Court Judge

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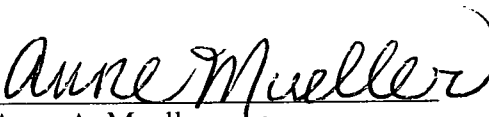
Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 19th day of April, 2016.


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