

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Eugene C. Griffith, Jr., Circuit Court Judge

Order (S.C. Ct. App. filed February 5, 2016)
Appellate Case No. 2016-000791

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SC Court of Appeals

State of South Carolina, Petitioner,

v.

David Zackary Ledford, Respondent.

**REPLY TO RESPONDENT'S RETURN TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did Respondent misconstrue the State's position in the underlying Petition for a Writ of Certiorari where that position is not a concession that the trial would require dismissal in the event the appeal is ultimately denied?

STATEMENT OF THE CASE

David Zachary Ledford (Respondent) was indicted by the Greenwood County grand jury for inflicting great bodily injury upon a child in violation of S.C. Code Ann. § 16-3-95 (2003 & Supp. 2015) (App.p.1-p.2). He proceeded to a jury trial before the Honorable Eugene C. Griffith, Jr. At a charge conference after the close of all of the evidence, the trial court agreed to give a jury instruction that had been requested by Respondent. The State objected to the charge and expressed a desire to appeal the ruling. The trial court agreed to recess the trial and hold the matter in abeyance without releasing the jury, to allow the State to attempt to pursue an appeal of the jury charge ruling.¹

On November 5, 2015, the State filed and served notice on appeal from the oral ruling with the South Carolina Court of Appeals. (App.p.20-p.21). On November 10, 2015, Respondent filed a "Motion to Dismiss Appeal and Remand the Case" as well a Memorandum in support of his motion. (App.p.22-p.31). On November 30, 2015, the State submitted a Return to the Motion to Dismiss with the Court of Appeals (App.p.32-p.41), and on the same day filed a "Motion to Certify Appeal" with this Court. (App.p.47-p.51). On December 7, 2015, Respondent filed a Reply to the State's Return to his motion to dismiss. (App.p.42-p.46).

On February 5, 2016, the Honorable Stephanie P. McDonald filed an Order on behalf of the Court of Appeals granting Respondent's motion to dismiss the State's appeal in the above captioned case: "Because the ruling is not immediately appealable under section 14-3-330 of the South Carolina Code (1976 & Supp. 2015)." (App.p.52) On February 8, 2016, the State submitted a petition for rehearing and by order filed March 18, 2016, the petition was denied by a three judge panel of the Court of Appeals. (App.p.53-p.58). On March 23, 2016, this Court

¹ Although a transcript of the trial was requested from the court reporter on November 5, 2015, the transcript as not yet been received. If this Petition is still pending when the transcript is received, the State will submit a supplemental Appendix to include the portions of that transcript relevant to the issue on certiorari.

filed an Order denying the State's motion to certify the appeal as moot. (App.p.59). On April 11, 2016, the State filed a Petition for a Writ of Certiorari with this Court. On May 16, 2016, Respondent filed a Return to the Petition and this Reply on behalf of the State now follows.

STATEMENT OF FACTS

As noted above, Respondent was indicted by the Greenwood County grand jury for inflicting great bodily injury upon a child in violation of S.C. Code Ann. § 16-3-95 (2003 & Supp. 2014). The indictment alleges:

That David Zachary Ledford, on or about December 16, 2013, in Greenwood County, **willfully** and unlawfully inflict great bodily injury upon a child; in that the said defendant did violently shake and/or hit the victim . . . which acts caused great bodily injury to the child, in violation of the provisions of section 16-3-95 of the South Carolina Code of Laws, 1976, as amended.

(App.p.1-p.2) (emphasis added). The statute referenced in the indictment and prohibiting the conduct, Section 16-3-95 of the South Carolina Code, states: "It is unlawful to inflict great bodily injury upon a child." The statute does not contain the word "willfully" and does not contain any language requiring the specific intent suggested by Respondent's proposed jury charge that a defendant "knew his act would inflict great bodily injury upon a child."

Respondent proceeded to trial before the Honorable Eugene C. Griffith, Jr., and a jury. A charge conference was held after the close of all of the evidence and the trial court's denial of Respondent Ledford's directed verdict motion. At the conclusion of the charge conference and over the State's objection, the trial court orally ruled it would give Appellant's "Request to Charge No. 1," to include the definition of "willfully," but it would omit the last sentence of that request to charge. The trial court referenced the State's use of the word "willful" in the indictment in support of its decision. Respondent's "Request to Charge No. 1" states:

“It is unlawful to inflict great bodily injury upon a child.” To violate this statute, the state is required to prove that Zack Ledford acted wilfully. To act wilfully, the state is required to prove that Mr. Ledford knew his act would inflict great bodily injury upon a child. It is not sufficient that the state prove that he acted negligently, grossly negligent or reckless in his action. Such actions are not wilful as alleged in the indictment.

(App.p.19). The State objected to the jury instruction which was contrary to and added an element to the statute prescribing the offense. The State expressed a desire to appeal the ruling because the incorrect charge would impair its ability to proceed with trial. The trial court agreed to recess the trial and hold the matter in abeyance without releasing the jury, to allow the State to attempt to appeal the jury charge ruling. Respondent acknowledged that the filing of a notice of appeal would divest the trial court of jurisdiction to proceed with the trial during the pendency of the appeal.

On November 5, 2015, the State filed and served notice on appeal from the oral ruling. In the notice of appeal, the State explained it was appealing because “that the trial court’s order affects a substantial right and **prevents a judgment from which an appeal might be taken.**”

(App.p.20-p.21).

In the Petition for a Writ of Certiorari which is now before this Court, the State argues there are special and important reasons for this Court to exercise its discretion to grant certiorari and to review the summary decision of the Court of Appeals in this matter pursuant to Rule 242(b), SCACR. Specifically, the State argues the decision of the Court of Appeals dismissing the State’s appeal before briefing as “not immediately appealable under section 14-3-330 of the South Carolina Code” failed to consider or address the unusual circumstances presented by the action of the trial court, the patently erroneous nature of the ruling by the trial judge, and the novel question of law that was presented by the pursuit of this interlocutory appeal. The State respectfully asked this Court to grant this petition for a writ of certiorari and issue an opinion

which: (1) reverses the Court of Appeals' decision to dismiss the appeal, (2) reverses the trial court's ruling that it would give a patently erroneous jury charge, because that erroneous charge materially and appreciably impairs the State's ability to proceed with the trial, and (3) directs the trial court to proceed with the trial after giving a complete and proper jury charge that includes an instruction on the actual elements of the statutory offense without adding an element that is not part of the statute.

ARGUMENT

Respondent misconstrues the State's position in the underlying Petition for a Writ of Certiorari because that position is not a concession that the trial would require dismissal in the event the appeal is ultimately denied.

In responding to the State's Petition for a Writ of Certiorari, Respondent contends:

The State has represented to the trial court, to the South Carolina Court of Appeals and this Court, that by filing this appeal, the charge to the jury giving the definition of "willfully" as alleged in the indictment, "determines the action" as required by S.C. Code § 14-3-330. By so doing, the State has acknowledged that the evidence in this case is insufficient to sustain a conviction for a willful violation of S.C. Code § 16-3-95.

(Return to Petition, p.3). He goes on to argue that the erroneous jury charge "hardly prevents the State from winning, unless the State has acknowledged that the evidence does not establish willfulness" and that because of this acknowledgement, "the State should dismiss the case in the event this appeal is denied." (Return to Petition, p.3). The State submits Respondent has significantly misconstrued the State's position in this matter as it was argued to the trial court, the Court of Appeals, and this Court.

At trial the solicitor referenced the particular sentence in Respondent's requested charge that: "It is not sufficient that the state prove that he acted negligently, grossly negligent or reckless in his action." He argued such language "would basically direct the jury to find him not

guilty.” (R.p.493, line 23-p.494, line 7). However, this argument was made in the context of the preceding sentence in the requested charge which did not merely use the word wilfully as unnecessarily included in the indictment, but sought to define that term to require not just that the act itself must be was wilfull, but that the result of the wilfull act was in fact known to the actor. Specifically, Respondent asked the trial judge to insert what was essentially a specific intent requirement by charging that “the state is required to prove that Mr. Ledford knew his act would inflict great bodily injury upon a child.” While the solicitor argued the requested charge as a whole was akin to directing a verdict of not guilty, he never argued a not guilty verdict would be the only possible result if the charge was given. Indeed, the State has never conceded to the trial that a jury verdict of guilty would be an impossibility under the proposed jury charge.

Instead, the State has maintained it is pursuing a proper interlocutory appeal because, regardless of the verdict reached after being given the erroneous jury charge, the State would be precluded from pursuing an appeal to challenge what it alleges is the trial court’s erroneous ruling. In other words, as specifically argued in the Petition for a Writ of Certiorari:

An order affecting a “substantial right” is defined as one which discontinues an action, **prevents an appeal**, grants or refuses a new trial, or strikes an action or defense. Mid-State Distrib., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993) (emphasis added); see also Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89 (2000) (stating that immediate appeals are permitted where a substantial right could not be vindicated on appeal). An immediate appeal of an interlocutory order is permitted when no appellate review is available to correct the trial court’s error after the final judgment. Id. (citing Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985)). In South Carolina, an immediate appeal may be taken where the rights of the State would be substantially impaired if the appeal is not heard. When error in the decision or ruling cannot be vindicated on appeal, a substantial right is involved. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000).

(Petition p.8-p.9). Thus, the inability to appeal the erroneous jury charge would affect a substantial right and determine the action because there would be no way to vindicate the trial court's ruling on appeal, not because the ruling would make a guilty verdict much less likely. For this reason, the State submits that to the extent certiorari is denied, this Court should simply remand this matter to the trial court for further proceedings. The State further submits this would be the only proper course of action where the Court of Appeals itself declined to address Respondent's request to remand the case to the court of general sessions to dismiss the action. Dismissal is not an issue before this Court because it was not ruled upon by the Court of Appeals.

In conclusion, the State asks this Court to accept and evaluate the State's position as set forth in the Petition for a Writ of Certiorari and not as misconstrued by Respondent when determining whether to grant certiorari and request briefing from the parties.

CONCLUSION

For all of the foregoing reasons and the reasons in the Petition for a Writ or Certiorari, the State respectfully submits that the Court of Appeals erred in granting the motion to dismiss and in summarily dismissing the State's proper interlocutory appeal. If the appeal is not permitted to proceed, the State will be left without a means to correct a legal error that substantially impairs the prosecution of Respondent's criminal conduct. The Court of Appeals failed to consider the unusual circumstances presented by the action of the trial court, the patently erroneous nature of the ruling by the trial judge, and the novel question of law presented by the pursuit of this interlocutory appeal. The trial judge erred in ruling it would give an improper jury charge that added a non-statutory element to the offense, and the Court of Appeals erred in finding this error

was not immediately appealable. The State respectfully asks that this Court grant the petition for a writ of certiorari and issue an order: (1) reversing the decision of the Court of Appeals, (2) reversing the trial court's ruling to give an improper jury charge, and (3) ordering that the trial proceed with a jury charge that accurately sets forth the elements of the charged offense. If the Court grants the petition for a writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.


Respectfully submitted,

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