

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC Court of Appeals

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable R. Knox McMahon, Circuit Court Judge

Opinion. No. 5399 (S.C. Ct. App. Filed April 6, 2016)

THE STATE,

Petitioner,

vs.

ANTHONY BAILEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals err in finding the Victim was a not public official within the meaning of S.C. Code Ann § 16-3-1040 (A), when the Victim is a Designated Examiner for the Department of Mental Health, an appointed position with regulated qualifications in which she executes the sovereign authority of the State?

STATEMENT OF THE CASE

Procedural History

On February 3, 2014, a Charleston Country grand jury indicted Anthony Bailey for violating S.C. Code Ann. §16-3-1040, threatening the life of a public official, on August 28, 2013. (R. pp. 114-115.) The Honorable R. Knox McMahon found Bailey guilty but mentally ill in a bench trial September 4, 2014. Assistant Solicitors J. Ziegler and Nicholas Lewis represented the State. (R. p. 1.) Bailey was represented by Mary Ford, Esquire. Judge McMahon sentenced Bailey to five years' imprisonment, suspended upon the service of eighteen months, with five years' probation. (R. p. 94, lines 5-12.) Bailey then timely filed and perfected an appeal.

Subsequently, following oral argument, the Court of Appeals issued a published opinion reversing Bailey's conviction. *State v. Anthony Bailey*, Op. No. 5399 (S.C. Ct. App. filed April 6, 2016) (App. pp. 1-8.). The State petitioned the Court of Appeals for rehearing, and the petition was denied. (App. p. 23.) The State now files this petition for a writ of certiorari in the Supreme Court.

Factual History

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 at trial 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 Bailey. (R. p. 27, lines 13-20.) She was informed Bailey threatened to kill a detention officer upon release, and she attempted to assess whether Bailey needed hospitalization for "homicidal ideations." (R. p. 27, lines 23-25 and p. 28, lines 1-2.) She was escorted to Bailey's cell and introduced herself. (R. p. 28, lines 7-10.) Bailey 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.) Bailey 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, Bailey stated he was going to kill her anyway. (R. p. 28, lines 21-23.) Victim knew of Bailey's prior history of dealings with the disciplinary unit, so she felt the threat was serious. (R. p. 29, lines 12-17.)

ARGUMENT

Did the Court of Appeals err in finding the Victim was a not public official within the meaning of S.C. Code Ann § 16-3-1040 (A), when the Victim is a Designated Examiner for the Department of Mental Health, an appointed position with regulated qualifications in which she executes the sovereign authority of the State?

The Court of Appeals reversed Bailey's conviction after concluding a designated examiner was not a public official for purposes of S.C. Code Ann. § 16-3-104 (A). (App. p. 8.) In support of that conclusion, the Court of Appeals determined the position did not meet the common law requirements that distinguished a public official from one who is merely a public

employee. (App. pp. 5-7.) Contrary to the Court of Appeals' conclusion, a designated examiner does satisfy the common law elements of a public official because she was appointed to her position, that position was created by the General Assembly, and she exercises some sovereign authority of the State of South Carolina. Accordingly, the trial judge correctly ruled Bailey threatened the life of a public official when he threatened to kill the Victim and the other members of the mobile crisis unit to which she belonged, and the Court of Appeals erred in reaching a contrary conclusion. The State's petition for a writ of certiorari should be granted.

Analysis

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. To conclude otherwise would result in inconsistency in the application of the statute.

Bailey contests his guilt under S.C. Code Ann § 16-3-1040, threatening the life of a public official or employee, arguing Victim is not a "public official" within the meaning of S.C. Code Ann. § 16-3-1040 (A). Bailey submits Victim is a "public employee" pursuant to § 16-3-1040 (B). The statute provides this distinction:

- (1) "Public official" means 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.
- (2) "Public employee" means a person employed by the State, a county, a municipality, a school district, or a political subdivision of this State, except that for purposes of this section, a "public employee" does not include a teacher or principal of an elementary or secondary school.

S.C. Code Ann. § 16-3-1040 (E). The Department of Mental Health Regulations allow for the appointment of a designated examiner. *See* S.C. Code Ann. Regs. 87-1. Thus, by the plain

language of the statute, a designated examiner is a public official because she is appointed to her position.

The common law further supports a plain reading of the language of the statute. In *State v. Bridgers*, 329 S.C. 11, 13-16, 495 S.E.2d 196, 197-99 (1997), the South Carolina Supreme Court addressed the meaning of the term “public official” pursuant to S.C. Code Ann § 16-3-1040 (A). The court considered whether a highway patrolman was a “public official” for purposes of this statute when the defendant was indicted for threatening to kill a patrolman who came to his house to investigate a traffic accident. *Id.* at 12-13, 495 S.E.2d at 197. When distinguishing between public officers and public employees, the court used the following criteria: (1) whether the position is created by the Legislature; (2) whether the qualifications for appointment are established; (3) whether the duties, tenure, salary, bond, and oath are prescribed or required; and (4) whether the one occupying the position is a representative of the sovereign. *Id.* at 14, 495 S.E.2d at 198. Though the court offered these guidelines, they also said, “no single criterion is dispositive and not all the criteria are necessary to find that an individual is a public officer.” *Id.*

The *Bridgers* court further elaborated a strong public policy basis for finding consistency in protecting those that serve the public. Because city police officers had been held to be public officials, it was nonsensical to treat Highway Patrol Officers differently. *Id.* at 15-16, 495 S.E.2d at 198, 199. These officers are similarly charged with protecting and serving the public at large. The court touched on this reasoning in *Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762 (1907). An important factor in the *Sanders* analysis of the distinction between a public officer and an employee was that the public “is evidently concerned in the performance of these duties.” *Sanders* at 171, 58 S.E. at 764. Similarly, in *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994),

the court concluded that a reading of the common law definition of public official shows the greater the duty to the public at large, the more likely the individual will be a public official.

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. First, the position of "Designated Examiner" is created and defined by the Legislature by statute:

"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). DMH Regulations, which are authorized by statute and are subject to the approval of the General Assembly, delineate her responsibilities and qualifications:

87-1. Designated Examiners.

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 (emphasis added). Thus, a DE 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.

Victim testified that in the context of her employment at the detention center, she acts as a mental health professional in various capacities. (R. p. 22, lines 23-25.) On the day of the incident, August 28, 2013, Victim received a written referral and a phone call indicating Bailey was making threats. She went to assess the situation to determine “whether or not he needed to be in the hospital for homicidal ideations.” (R. p. 28, lines 1-2.) During cross examination, this exchange occurred concerning her role that day:

Q. When you were seeing Mr. Baily that day at the jail, August 28th of last year, you were not seeing him as a designated examiner, correct?

A. No

Q. But if he raised a concern of being a threat to himself or others, you have the ability to make a referral, correct?

A. Yes.

Q. And then the probate court would – I guess they would get two designated examiners at that point; is that what happens?

A. No. If I felt like he was a danger to himself or someone else, then we would complete the commitment papers.

(R. p. 35, lines 5-17.) Though Victim testified she was not necessarily intending to see Bailey as a designated examiner that day, she also testified that had she determined it necessary to commit Bailey as a designated examiner, she had the ability to do so. The Legislature mandated this 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. Thus, despite Victim’s earlier testimony, she clearly was acting in her capacity as a designated examiner when she attempted to assess Bailey, as she would have begun the admission process had she deemed it necessary. Her duty, outlined in part by S.C. Code Ann § 44-23-220, 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. *See State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980), quoting *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762,763 "one who merely performs the duties required of him by persons employing him under an express contract or otherwise . . . is a mere employee" In *Sanders*, the court also 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. 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 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. 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. *Carter* and *Bridgers* 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 (1997). The trial court found this same reasoning persuasive:

[T]he 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).

Court of Appeals Opinion

In the case *sub judice*, the Court of Appeals erroneously concluded Bailey was “overcharged” with threatening a public official instead of threatening a public employee. (App. p. 8.) 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. (App. pp. 5-7.) The Court of Appeals 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.

First, the Court set aside the basic rules of statutory construction to ascertain the intent of the legislature. The Court said, “Our inquiry for purposes of section 16-3-1040, however, does not end here because the fact that Cradock was “appointed” to her position does not—by itself—qualify her as a public official.” (App. p. 5.) The State respectfully submits the definition of public official only requires the official to be “appointed” by a political subdivision of the State. Thus, the Court of Appeals mistakenly stepped outside the boundaries of the plain language of the statute to interpret its meaning.

Even if the 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, finding those elements were not satisfied. The Court was mistaken in its analysis. As further delineated above, Victim certainly exercises sovereign authority of the State. 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 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 Court found no sound public policy basis for finding individuals in Victim's position to be public officials. (App. p. 7.) 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. 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 Bailey 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.

The Court of Appeals concluded Bailey was overcharged in its published opinion. (App. p. 8.) On the contrary, a person who threatens to kill a designated examiner and her 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.

The State's petition for a writ of certiorari should be granted, and Bailey's conviction should ultimately be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

SUSANNAH R. COLE
Assistant Attorney General

BY: 

Susannah R. Cole
S.C. Bar #68383

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

ATTORNEYS FOR PETITIONER

June 1, 2016