THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

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

THE STATE, ... PETITIONER,

v.

DAVID ZACKARY LEDFORD, ... RESPONDENT.

REPLY BRIEF OF PETITIONER

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The Court of Appeals erred in summarily dismissing the State's appeal before briefing as "not immediately appealable" because it 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. Consistent with this Court's recent decision in State v. Rearick,[1] the State is an "aggrieved" party entitled to immediate appeal because the trial judge's order affects a substantial right and prevents a judgment from which an appeal may be taken. 2

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[1] 417 S.C. 391, 790 S.E.2d 192 (2016), cert. denied, ___ S. Ct. ___, 2017 WL 1366762 (April 17, 2017).

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QUESTION PRESENTED

Did the Court of Appeals err in summarily dismissing the State's appeal before briefing as "not immediately appealable" because it 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? In other words, is the State an "aggrieved" party entitled to immediate appeal because the trial judge's order affects a substantial right and prevents a judgment from which an appeal may be taken?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Petitioner (the State) hereby incorporates by reference the Statement of the Case and the Statement of the Facts as set forth in its March 13, 2017, Brief of Petitioner, which has been filed with this Court.

ARGUMENT

The Court of Appeals erred in summarily dismissing the State's appeal before briefing as "not immediately appealable" because it 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. Consistent with this Court's recent decision in State v. Rearick, the State is an "aggrieved" party entitled to immediate appeal because the trial judge's order affects a substantial right and prevents a judgment from which an appeal may be taken.

Before the Court of Appeals, Respondent moved to dismiss the State's appeal asserting "the decision of the trial court to charge the jury the definition of willfully as alleged in the State's indictment is the State's acknowledgment that its evidence is insufficient to sustain a conviction." He argued the State has no right to appeal a mid-trial jury charge ruling which substantially impairs the prosecution, despite the fact that the State would be left without a remedy for the legal error committed by the trial court if it is not able to appeal before final judgment.

Respondent also asked the Court of Appeals to remand the case to the court of general sessions for dismissal of the charge which was, in essence, a request for the appellate court to direct a verdict on an issue neither raised to nor ruled upon by the trial court. The State argued both of Respondent's requests were without merit; however, the Court of Appeals disagreed in part and granted Respondent's motion to dismiss the State's appeal as "not immediately

appealable." The State contends the summary dismissal by the Court of Appeals was in error and has now asked this Court to reverse its decision.

The Court of Appeals should only have dismissed the State's appeal if Respondent was able to show in his motion that the State was statutorily prohibited from taking an appeal from the trial court's ruling in this case. However, Respondent's arguments to the Court of Appeals were faulty and he failed to make the requisite showing. The trial court's ruling is immediately appealable because, without recourse to challenge that ruling in the appellate courts, the State will be precluded from correcting the egregious error in the trial court's interlocutory ruling and will be left without a remedy. The State is an "aggrieved" party and is entitled to pursue this appeal.

The right to appeal a trial court's decision in a criminal matter was recently examined by this Court. See State v. Rearick, 417 S.C. 391, 398, 790 S.E.2d 192, 196 (2016), cert. denied, ___ S. Ct. ___, 2017 WL 1366762 (April 17, 2017) (holding that the denial of a defendant's motion, following mistrial, to dismiss any subsequent prosecution on double jeopardy grounds was an interlocutory order from which no appeal could be taken). In Rearick, following the circuit court judge's declaration of a mistrial over defense counsel's objection, Rearick moved to bar subsequent prosecution of the charge on the ground a second trial would violate the Double Jeopardy Clause of the South Carolina and United States Constitutions. Id. at 392, 790 S.E.2d at 192-93. Rearick sought to appeal the trial judge's order denying his motion, arguing the denial of a motion to dismiss on double jeopardy grounds is immediately appealable. Id. at 392, 790 S.E.2d at 193. He acknowledged a prior opinion from this Court in State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986), expressly holding that an order denying a double jeopardy claim is not immediately appealable; however, he contended that opinion conflicts with the United States

Supreme Court's decision in Abney v. United States, 431 U.S. 651 (1977), and asked this Court to overrule its prior opinion. Id. at 396-97, 790 S.E.2d at 195. Although recognizing a split of authority on the issue, this Court ultimately found it was persuaded by the holdings in those state jurisdictions that decline to adopt Abney and that despite Rearick's arguments to the contrary, Abney does not alter the rule in Miller. Id. at 404-05, 790 S.E.2d at 199-200.

In reaching this conclusion, this Court considered a criminal defendant's right to appeal in South Carolina, noting there is no constitutional right to appeal but rather the right to appeal is authorized by statutes and appellate court rules of procedure. Rearick, 417 S.C. at 398, 790 S.E.2d at 196. This Court further noted that to be entitled to appeal, a party must be "aggrieved" by a decision that is statutorily classified as one that is appealable, which generally involves a final judgment. Id. at 398-99, 790 S.E.2d at 196. The Court explained "[t]he General Assembly has expressly limited those decisions that are immediately appealable" and identified section 14-3-330 as the relevant statute allowing an immediate appeal in a law case. Id. at 399, 790 S.E.2d at 196. In part, the statute provides a party is aggrieved and may file an immediate appeal of: "An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal may be taken or discontinues an action . . . ." Id.; S.C. Code Ann. § 14-3-330(2). This Court concluded, consistent with Miller, that denial of a defendant's motion to dismiss any subsequent prosecution on double jeopardy grounds was an interlocutory order from which no appeal could be taken. Id. at 405, 790 S.E.2d at 200. This is because a trial court's refusal to dismiss a charge on double jeopardy grounds does not determine the action and prevent a judgment from which an appeal may be taken. As recognized by this Court, a criminal defendant can appeal that decision after sentence has been imposed if necessary. By comparison, and as argued in the Brief of Petitioner, the trial court's

decision to give the improper jury charge in Respondent's case effectively prevents a judgment from which an appeal may be taken. Regardless of the outcome, if the trial is allowed to proceed with the trial court's erroneous jury charge, the State will never be able to appeal that charge. Thus, unlike the situation in Rearick, in this case the State is an "aggrieved" party and should be allowed to pursue this immediate appeal.

In the Brief of Respondent, Respondent takes issue with several specific portions of the argument set out in the Brief of Petitioner. First, Respondent contends the State cited to State v. Bouknight, 55 S.C. 353, 33 S.E. 451 (1899) for the position that an appeal by the State can be taken after the jury is sworn, and he argues the case does not support such a proposition. (Brief of Respondent, p.6). However, the State's citation to Bouknight merely includes the parenthetical that "the State may appeal from a motion to quash the indictment granted during trial after the trial was suspended for appeal because the order would end the prosecution and the State would be denied appellate review of the order." (Brief of Petitioner, p.10). It makes no claim in regard to whether the appeal was taken before or after the jury was sworn, and instead is offered as one of many examples of the State appealing an order or ruling that significantly impairs to prosecution before final judgment. Bouknight stands for the proposition that the State may appeal where "no other opportunity may be afforded of reviewing the action of the circuit judge in granting the motion to quash." Bouknight, 33 S.E. at 452 (emphasis added). Here, if the Court of Appeals decision stands, no other opportunity will be afforded the State to review the jury charge decision of the trial judge.

Second, Respondent challenges the State's contention that the allegation of a "willful" violation in the language of the indictment is mere surplusage. He argues a mens rea is required in an indictment and offers a quotation from United States v. Balint, 258 U.S. 250, 251-52

(1922) and a case from Georgia, Henderson v. Hames, 697 S.E.2d 798 (Ga. 2010), in support of his argument. However, Respondent has given this Court only a partial quotation from Balint, omitting the USSC's recognition that "there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement." Id. at 252. In Balint, the USSC acknowledged scienter is not a necessary element in an indictment for some crimes and that: "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crime as in cases of mala in se." Id. The State respectfully submits that inflicting great bodily injury upon a child is a case of malum in se and therefore alleging the mens rea was not required in Respondent's indictment. Similarly, Henderson v. Hames lends no support to Respondent's argument because it dealt with a criminal statute that lists a specific mens rea as an actual element of the crime. Our statute for inflicting great bodily injury upon a child does not. Additionally, the State submits Respondent's argument that "[b]y including the mens rea of 'willfully' in the indictment, the State corrected any ambiguity in the statute as to the required mens rea," (Brief of Respondent, p.4), belies his contention that mens rea is required. If inclusion of a mens rea in an indictment is never surplusage and is instead required, the State would possess no authority to have "corrected an ambiguity" because the statute itself would control. For all of these reasons, the State maintains its position that the use of the word "willfully" was surplusage and that alleging the mens rea was not required in Respondent's indictment.

Third, Respondent challenges the State's argument about the impropriety of the requested jury charge itself on grounds that charge sought to define the term "willfully" to require not just

that the act itself must be willful, but that the result of the willful act was in fact known to the actor. Relying on Cheek v. United States, 498 U.S. 192 (1991), Respondent contends the USSC has held this is the exact definition of a willful violation of the law. (Brief of Respondent, p.9). Yet, the quotation from Cheek merely says willfulness requires proof "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Cheek, 498 U.S. at 201 (emphasis added). Knowing the duty imposed by the law and willfully violating that duty is simply not the same as knowing the result of the willful act when the known duty is knowingly violated.

Finally, Respondent challenges the State's claim that because the statute is silent as to a particular mental state, it was only necessary for the State to show, at most, criminal negligence or indifference or, alternatively, strict liability. Specifically, he takes issue with the alternative nature of this argument that this could be a strict liability statute and offers examples of how this could potentially lead to absurd results not possibly intended by the Legislature. The State submits that while Respondent's examples constitute an interesting diversion, Respondent loses sight of the underlying point made at trial and throughout this case: that the trial court's decision to charge the jury that the State was required to prove willfulness to include knowledge that the act would in fact result in the infliction of great bodily injury upon a child was improper and constitutes immediately appealable and reversible error.

The trial court's ruling in this case is premised upon legal error that heightens the State's burden of proof and materially impairs its ability to proceed when the jury charge adds a non-existent element after all of the State's evidence has been presented. Because jeopardy has attached, preventing an appeal after final judgment, no appellate remedy exists to vindicate the substantial right of the State to a proper jury instruction, other than to permit an immediate

appeal pursuant to S.C. Code Ann. § 14-3-330(2). Unlike a defendant who can appeal a guilty verdict on grounds of an improper jury charge, the State cannot appeal a jury verdict of "not guilty" on grounds of an improper jury charge, even if the trial court clearly misstated the law.

In conclusion, 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 this Court to reverse the decision of the Court of Appeals, reverse the trial court's ruling to give an improper jury charge, and order that the trial proceed with a jury charge that accurately sets forth the elements of the charged offense.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court: (1) reverse the decision of the Court of Appeals, (2) reverse the trial court's ruling to give an improper jury charge, and (3) order that the trial proceed with a jury charge that accurately sets forth the elements of the charged offense.

Respectfully submitted,

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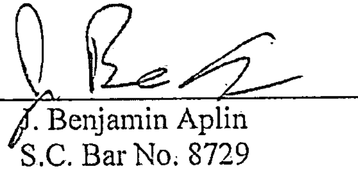
BY: 

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PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Reply Brief of Petitioner* dated April 21, 2017, on Respondent by depositing two copies of the brief in the United States mail, postage prepaid, addressed to his attorney of record:

C. Rauch Wise, Esquire
Law Office of C. Rauch Wise
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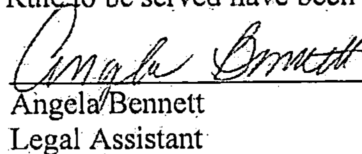
I further certified that all parties required by Rule to be served have been served. This 21st day of April, 2017.



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The State, Petitioner, v. David Zackary Ledford, Respondent
Appellate Case No. 2016-000791

Dear Mr. Wise:

I am enclosing two (2) copies of the Reply Brief of Petitioner in the above-referenced case.

Sincerely,

J. Benjamin Aplin
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JBA/ab
Enclosures

cc: Honorable Daniel E. Shearouse (original and fourteen copies of Reply Brief enclosed)
Honorable David M. Stumbo, Solicitor
Victim Services