ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

APPELLATE CASE NO. 2016-000612

RECEIVED
AUG 08 2018
SC Court of Appeals

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2018-UP-343

RETURN TO PETITION FOR REHEARING

On August 1, 2018, this Court issued a per curiam unpublished opinion affirming Appellant's conviction and sentence. State v. Hernandez, 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). The state filed a petition for rehearing on August 2, 2018, pursuant to Rule 221(a), SCACR.[1] By a letter dated August 3, 2018, this Court requested undersigned counsel file a return. In compliance with this Court's direction and pursuant to Rule 221(a), SCACR, Appellant files this return.

[1] On August 6, 2018, undersigned counsel filed a petition for rehearing as well.

In its petition for rehearing, the state raised four essential points. The state's first argument was that the issue presented was not preserved for appellate review. The second argument was that even if the issue were preserved, then Appellant's argument fails on the merits. Third, the state requested this Court publish its opinion in this case with one caveat. Fourth, the state asked this Court omit or offer additional explanation regarding a footnote reference to recent unpublished decision by this Court address a similar issue on appeal. Appellant will address each argument in turn.

Error Preservation

Respondent argued that the issue regarding the jury instruction was not preserved because defense counsel did not re-assert the objection and request to charge at the conclusion of the jury instructions. Pet. at 1 n.1. Appellant respectfully disagrees. "Where a party has requested that a certain proposition of law be charged and, after opportunity for discussion of it, the trial judge has declined to so charge, it is of course not necessary, in order to preserve the point on appeal, that objection to such ruling be made at the conclusion of the charge." Rogers v. Florence Printing Co., 233 S.C. 567, 580, 106 S.E.2d 258, 264 (1958).

The Supreme Court encountered a set of circumstances similar to the case at hand in State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980). During a charge conference, the solicitor requested a jury instruction on flight. Id. at 405, 272 S.E.2d at 170. Grant's counsel objected. Id. at 406, 272 S.E.2d at 170. The judge charged the jury regarding flight. Id. "After his charge was completed, the judge invited counsel … to except to charges already made, or request additional charges. Counsel for the defendant interposed no exceptions or additional requests." Id. Responding to the state's argument that "defense counsel waived her objection by failing to object at the end of the charge," the Supreme Court held that "[w]hile there is imposed upon

counsel for a litigant the duty to assist the judge in his charge by pointing out alleged errors, ... that objection need not be interposed if earlier in the proceedings the judge had a fair opportunity to pass upon the issue." Id. The Court explained that the positions of the judge and defense counsel were "made well known prior to the commencement of the charge." Id. at 407, 272 S.E.2d at 171. Thus, the Court concluded, no "further objection was required." Id.; see also State v. Johnson, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998) (explaining that "where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions").

According to the record, the judge and the parties engaged in a charge conference in chambers. R. 152, ll. 13-18. Subsequently, defense counsel requested to put the substance of the charge conference on the record, and the judge agreed. R. 152, ll. 13-18. Thereafter, defense counsel articulated her request for the lesser-included instructions. R. 152, l. 23 – R. 156, l. 15. The judge then denied the request and explained his reasoning for doing so. R. 156, l. 16 – R. 157, l. 5. Thereafter, closing arguments and the jury instructions ensued.

At the conclusion of the jury charge, the judge asked, "Anything from the state involving the charge?" R. 188, l. 13. The prosecutor responded negatively. R. 188, l. 14. The judge then asked, "Defense?" R. 188, l. 15. Defense counsel responded, "No, Your Honor." R. 188, l. 16. This is exactly what transpired in Grant, supra. There was no requirement that defense counsel object again or renew her objection to the request to charge the lesser-included offenses because the record clearly disclosed defense counsel's request, the argument in support of her request, and the judge's denial of the request. Therefore, Appellant respectfully requests this Court

affirm its opinion to the extent this Court held the request for jury instructions was preserved for appellate review and deny the state's petition for rehearing on this ground.

Merits

The state argued this Court correctly determined "the trial judge committed no error by determining the statutory offenses of first-degree and second-degree assault and battery were not lesser-included offenses of second-degree criminal sexual conduct with a minor." Pet. at 1; see also Pet. at 2. Appellant disagrees. In his petition for rehearing, Appellant detailed the significant points overlooked or misapprehended by this Court in arriving at its decision. Appellant incorporates by reference the arguments made in his petition for rehearing. Succinctly put, this Court erred by concluding that assault and battery in the first and second degrees are not lesser-included offenses of criminal sexual conduct (CSC). Traditionally, the Supreme Court has held that assault and battery of a high and aggravated nature (ABHAN) is a lesser-included offense of CSC. This Court should maintain that tradition. When codifying assault and battery, the Legislature was aware of the Court's jurisprudence regarding ABHAN as a lesser-included offense of CSC and expressed no language to renounce such moving forward. Finally, in the assault and battery statutory scheme, the Legislature used language regarding "sexual touching" to evince its understanding that the assault and battery offenses were to be treated as lesser-included offenses of CSC.

Therefore, Appellant respectfully requests this Court deny the state's petition for rehearing on this ground.

Unpublished Opinion

Appellant agrees with the state that the issue presented is "an important legal issue that has not yet been directly addressed in a published appellate decision." Pet. at 2; see also Pet. at

5. As mentioned in Appellant's petition for rehearing, it is undersigned counsel's belief that numerous criminal sexual conduct cases have been resolved as assault and battery offenses either through guilty pleas or through jury instructions. Further, it is Appellant's understanding that members of the bench and bar have been operating under the well-reasoned belief that statutory assault and battery offenses are lesser-included offenses of CSC.

The state requested publication of this Court's opinion in light of the significant legal issue addressed. Despite Appellant's agreement that the legal issue addressed is important and not directly addressed in a published appellate opinion, Appellant respectfully disagrees that the opinion warrants publication due to its erroneous conclusion and the potential ripple effect the publication of an erroneous opinion of this magnitude may have. Appellant and the state agree that the trial bench and bar routinely address questions concerning lesser-included offenses and the specific question of whether statutory the assault and battery offenses are lesser-included offenses of CSC has arisen numerous times; however, Appellant disagrees with the notion that this Court's current opinion would add clarity because it is Appellant's argument that the opinion is erroneously decided. Therefore, Appellant respectfully requests this Court deny the state's petition for rehearing on this ground and maintain the opinion as unpublished.

Reference to State v. Dawkins

Finally, the state requested this Court publish its opinion, but only if this Court omitted or further explained a footnote regarding State v. Dawkins, Op. No. 2017-UP-442 (S.C. Ct. App. filed Nov. 29, 2017). Pet. at 5. In a footnote, this Court stated, "[i]n an unpublished opinion from November 29, 2017, State v. Dawkins, 2017 WL 5900266, at *1 (Ct. App. 2017), this Court held ABHAN is a lesser-included offense of CSC with a minor because our courts have traditionally made such a finding." The state argued "the decision in Dawkins has no relevance

to Hernandez's case since its conclusions were based on the law in effect prior to the adoption of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 as opposed to after its adoption." Pet. at 4. According to the state, this Court's reference to Dawkins in the footnote and the use of the present tense verb "is," "this Court's opinion could potentially be misconstrued or misapprehended to unintentionally suggest ABHAN – either common law or statutory – remains a potential lesser-included offense of criminal sexual conduct offenses, including the offense of second-degree criminal sexual conduct with a minor." Pet. at 4.

Appellant's familiarity with Dawkins is limited to the publicly available information. According to this Court's opinion, the charges against Dawkins concerned, in part, events prior to November 30, 2009 and on November 30, 2009. The appellate briefs refer only to events on or before November 30, 2009. Therefore, the criminal charges against Dawkins arose prior to the enactment of statutory ABHAN and assault and battery, and Dawkins could not have been charged with those statutory offenses. See Jernigan v. State, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000) (discussing when an ex post facto violation occurs); see also, Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); Garner v. Jones, 529 U.S. 244, 253 (2000).

Despite the state's current argument that the argument in Dawkins "was wholly based on the law in effect before common law ABHAN was abolished," the state's appellate brief in Dawkins argued the issue as if the question were whether statutory ABHAN was a lesser-included offense of criminal sexual conduct with a minor. See Pet. at 3.[2] In light of the state's argument in its appellate brief in Dawkins, Appellant cannot agree that the reference in a footnote to Dawkins in Hernandez "could potentially be misconstrued or misapprehended to unintentionally suggest

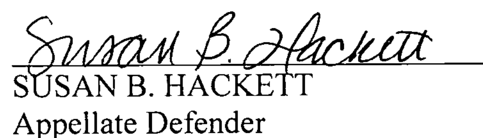
[2] Undersigned counsel has been informed that the state submitted a letter to this Court stating that an oversight had been made regarding the applicable law in the preparation of the briefs and conceding that the issue presented concerned common law ABHAN, not statutory ABHAN. This letter is not publicly available.

ABHAN – either common law or statutory – remains a potential lesser-included offense of criminal sexual conduct offenses, including the offense of second-degree criminal sexual conduct with a minor." Due to the framing of the issue by the state on appeal in Dawkins, this Court may have held that common law or statutory ABHAN is a lesser-included offense of criminal sexual conduct charges, and, therefore, any construing or apprehending of the opinion in such a way would be entirely proper. Despite the contention that a clarifying letter was submitted concerning the state's concession that the governing law concerned common law ABHAN, the unavailability of such a letter to the bench and bar creates confusion regarding the exact issue resolved by this Court in Dawkins. Therefore, Appellant respectfully requests this Court deny the state's petition for rehearing on this ground.

Conclusion

Appellant respectfully requests this Court deny the state's petition for rehearing.

Respectfully submitted,



SUSAN B. HACKETT
Appellate Defender

This 8th day of August, 2018.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Benjamin Cervantes Hernandez, #367274, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 8th day of August, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 8th day of August, 2018.

_______________ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023