STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

APPELLATE CASE NO. 2016-000298

Opinion No. 2019-UP-042

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner respectfully requests rehearing because this Court may have overlooked the fact that it is *not the law* in South Carolina that because the jury convicted the defendant of a greater offense, murder, that the failure to charge, (or correctly charge as here), a lesser-included offense or an absolute defense such as accident is immaterial or harmless. See Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). The Supreme Court in Casey, in a published opinion, initially affirmed the refusal to charge involuntary manslaughter on the basis that "the jury returned a verdict of murder, which, necessarily embraced a finding of malice." Opinion at 14, attached to this petition as Exhibit A. The Casey Court cited State v.

Patrick, 289 S.C. 301, 306, 345 S.E.2d 481, 484 (1986) for the proposition that when the jury convicts of murder, finding malice, "the correctness of the instructions relating to manslaughter become immaterial." Opinion at 15, attached as Exhibit A.

Casey sought rehearing through then Assistant Appellate Defender Daniel T. Stacey. See rehearing petition attached as Exhibit B. The Supreme Court then withdrew the published opinion referenced above, and issued Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991), which reversed the trial court's refusal to instruct on involuntary manslaughter *citing* State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969), for the principle that "to warrant the court in eliminating the offense of manslaughter it should very clearly appear there is *no evidence whatever* tending to reduce the crime from murder to manslaughter." (Court's emphasis). This again was the Supreme Court's opinion after the prior opinion, Opinion No. 23402 (filed May 20, 1991), affirming, was withdrawn.

In the revised opinion, in Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991), the Court overruled State v. Patrick, 289 S.C. 301, 306, 345 S.E.2d 481, 484 (1986) where the Court had reasoned that "the judge clearly instructed the jury that manslaughter is distinguished from murder by the absence of malice and that if the jury found only criminal negligence by the appellant in the handling of a firearm, the jury could consider manslaughter. The jury returned a verdict of murder which, as clearly instructed in the jury charge, necessarily *included a finding of malice. Since the jury determined that the appellant acted with malice, it could not have returned a verdict for manslaughter, voluntary or involuntary.*" (emphasis added).

In the present case, accident was charged, but this Court respectfully employed the erroneous analysis originally applied in Casey in finding the charging error here immaterial or harmless because the jury found appellant's conduct intentional by convicting him of murder.

This Court correctly was concerned that the judge's accident instruction did not adequately convey the scope and meaning of the term "unlawful activity" when it charged accident. The instruction told the jury that appellant had to be acting "lawfully" to be not guilty by reason of accident where it was undisputed a low level "college student like" drug deal was in progress when the decedent, according to appellant, was accidently shot.

Further, as discussed at oral argument, an argument by defense counsel on this issue was not evidence, and it certainly was so substitute for adequate and correct instructions on the law. Appellant was entitled to a correct instruction on accident which explained what "unlawful" meant given the highly unusual facts of this case. The purpose of jury instructions are to enlighten and educate the jury so that it reaches a correct result. The jury was the trier of fact, and it had the right to correct and not confusing instructions on the law. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944).

This Court did not decide this issue because it respectfully erroneously found that by finding appellant guilty of murder the jury implicitly found his conduct was intentional. Therefore, any charging error as to accident was irrelevant and harmless.

Yet, by this reasoning every case where a jury found a defendant guilty of murder would result in a finding of harmless error where there was also evidence of a lesser-included offense -- voluntary or involuntary manslaughter. That is not the law. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008)(murder conviction reversed because involuntary manslaughter instruction not given); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003)(voluntary manslaughter conviction -- which means an intentional killing in a heat of passion on a sufficient legal provocation -- reversed because an involuntary manslaughter charge was not given).

The jury here could have found appellant guilty of murder because the judge's accident instruction misled the jury into thinking that accident was not a possible verdict because dealing in drugs was "unlawful." Because this Court's legal reasoning, respectfully on this issue was incorrect, appellant respectfully requests rehearing.

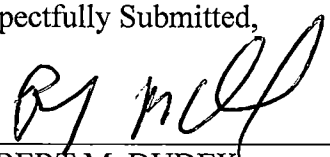
As to the "in happier times of life" photograph issue, this Court found it was erroneously admitted in violation of Rule 403, SCRE. This Court rejected the state's transparent argument that the photograph was relevant to any objective measure of size. However, this Court found there was not prejudice that was "potent enough to infect the fairness of the trial or pollute the verdict." Again, because rehearing should be granted on the failure to clarify the "unlawful activity" portion of the accident instruction, this harmless error holding should be reevaluated also.

Further, and respectfully, there was no charging error in State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), or State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), and the Supreme Court reversed in both cases on the issue this Court found harmless. This was respectfully so because seeking the sympathy of the jury through an inadmissible photograph should not be found harmless error since it was a blatant attempt to garner a jury verdict on an impermissible ground: Sympathy for the victim.

This goes to the core of disrespect for the jury system. Trying to convict a citizen and take his freedom away based on a cynical and impermissible play for sympathy should not be dismissed as "harmless" error, respectfully, for policy reasons alone. The same would be true of an attempt to convict a person because he or she was a bad person and the state thought needed to be punished regardless of their guilt for the crime for which they were on trial.

Most respectfully, what happened here, considering the clear holdings of Livingston and Langley encourages disrespect for our system because solicitors will conclude, if they have not already, that they can impermissibly garner sympathy from the jury, and the appellate court -- this Court -- will still affirm despite their misconduct. Rehearing respectfully should be granted on these two important legal issues.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 7th day of February, 2019.

Exhibit A

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Thomas Junior Casey, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Greenville County
Frank P. McGowan, Jr., Judge

Opinion No. 23402

Heard April 1, 1991 - Filed May 20, 1991

AFFIRMED

Assistant Appellate Defender Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General W. Teresa Nesbitt, all of Columbia, for Respondent.

CHANDLER, A.J.: In this Post-Conviction Relief (PCR) matter, we granted certiorari, pursuant to Davis v. State,[1] to review the direct appeal issues of Petitioner, Thomas Junior Casey (Casey).

We affirm.

FACTS

On October 28, 1976, Casey shot and killed Howard Westbrook (Victim) with a shotgun. According to testimony of the only available eyewitness, Janie Marlowe (Marlowe), sister of Casey, Victim threatened to "cut" Casey as he sat

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[1] 288 S.C. 290, 342 S.E.2d 60 (1986).

in his car in Marlowe's front yard. When Victim approached the car, Casey exited with a shotgun. Marlowe observed a scuffle over the gun between Casey and his cousin, Linda, a passenger in the car. While headed back to her house, Marlowe heard a shotgun blast. She turned and saw that Victim had been shot, from which injury he died.

At trial, the judge refused Casey's request to charge the law of involuntary manslaughter; he did, however, charge the law of murder, voluntary manslaughter, accident and self-defense. Casey was found guilty of murder and sentenced to life.

ISSUE

Did the Court err in refusing to charge the law of involuntary manslaughter?

DISCUSSION

Manslaughter is the unlawful killing of another without malice. S. C. Code Ann. §16-3-50 (1985). To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. S. C. Code Ann. §16-3-60 (1985). Involuntary and voluntary manslaughter are distinguished from murder "because the vital element of malice is missing." State v. Gandy, 283 S.C. 571, 573, 324 S.E.2d 65, 67 (1984).

Evidence of a struggle between a defendant and a Victim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986). This principle is no less applicable where the defendant, in struggling with a third person over a gun, shoots the victim. While Marlowe's testimony supports an involuntary manslaughter charge, trial court's refusal to do so does not constitute reversible error here.

The trial judge charged on murder, manslaughter, accident and self-defense. He advised the jury that murder requires a finding of malice aforethought. He further charged that manslaughter is the killing of a human being without malice, and that it is "the element of malice that distinguishes the offense of murder from that of manslaughter."

The jury returned a verdict of murder which, necessarily, embraced a finding of malice. Since the jury

determined that Casey acted with malice, "it could not have returned a verdict for manslaughter, voluntary or involuntary." Patrick, supra, 289 S.C. at 306, 345 S.E.2d at 484. (Emphasis supplied). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984).

Patrick and Gandy are consistent with decisions in a majority of jurisdictions which hold that, when a defendant has been convicted of murder, the correctness of instructions relating to manslaughter becomes immaterial. See, generally, Annotation, 15 A.L.R.4th 118. As was stated by the Supreme Court of Kansas in State v. Metcalf, 203 Kan. 63, ___, 452 P.2d 842, 845 (1969):

> * * * where the jury, under proper instruction, have found a defendant guilty of every element of the superior offense, erroneous instructions, or a total failure to instruct, with reference to an offense inferior in degree, and including less criminality cannot, logically, be said to have influenced the jury. The failure of the court can only be said to be prejudicial to the defendant on the theory that the jury failed to fully comprehend the definition of the superior degree, or misconstrued and misapplied the law to the facts. To indulge in such presumptions, even though we know that mistakes are made by juries and courts alike, is to overturn the whole theory of the administration of justice. (Citations omitted). (Emphasis supplied).

Here, we find no prejudice in the failure to instruct on involuntary manslaughter.

Casey's remaining exception is affirmed pursuant to Supreme Court Rule 23: State v. Barwick, 280 S.C. 45, 310 S.E.2d 428 (1983).

AFFIRMED.

GREGORY, C.J., HARWELL, FINNEY and TOAL, JJ., concur.

Exhibit B

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Thomas Junior Casey, Petitioner.

V.

The State, Respondent,

Appeal from Greenville County

Frank P. McGowan, Jr., Judge

Opinion No. 23402

PETITION FOR REHEARING

Petitioner respectfully moves for rehearing on these grounds:

1. The Court may have overlooked that, "due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction." Respondent's Brief at page 4; Petitioner's Brief, page 2.

2. The case of State v. Metcalf, 203 Kan. 63, ___, 452 P.2d 842, 545 (1969) appears to be no longer followed in Kansas. State v. Roberson, 210 Kan. 209, 499 P.2d 1137 (1972); State v. Wever, 210 Kan. 721, 504 P.2d 178 (1972). "Another consequence of enactment of [statute requiring charges on lesser offenses supported by evidence] is that the principle referred to in State

v. Metcalf, supra, no longer remains valid." [Emphasis added] 504 P.2d, at 183.

3. This case appears to over-rule sub silentio a long and unbroken line of cases finding that it is reversible error to not grant a requested charge on a lesser included offense that has evidentiary support:

State v. Knox, 98 S.C. 114, 82 S.E. 278 (1914);

State v. Hughes, 107 S.C. 429, 93 S.E. 5 (1917);

State v. Shea, 226 S.C. 501, 85 S.E.2d 858, (1955);

State v. Gorey, 235 S.C. 301, 11 S.E.2d 560 (1960);

State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981);

State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987);

State v. Ritter, 296 S.C. 51, 370 S.E.2d 610 (1988);

State v. Gilliam, 296 S.C. 295, 373 S.E.2d 596, (1988)

4. That the cited language with reference to finding of malice taken from State v. Patrick and State v. Gandy is obiter dictum only in those cases.

5. That trial judges could be free to ignore their duty to charge the law under Article V, §21 of our State Constitution, as there exists no appellate check upon refusal to submit lesser included offenses supported by the evidence, as the judge did in this case because he did not believe the evidence.

WHEREFORE, Petitioner respectfully asks for rehearing in this case.

Respectfully Submitted,

Daniel T. Stacey
Assistant Appellant Defender

By Daniel T. Stacey

This 29th day of May, 1991.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Frank P. McGowan, Jr., Judge

THE STATE,

RESPONDENT,

V.

THOMAS JUNIOR CASEY,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above entitled case has been served upon opposing counsel by mailing same in an envelope properly addressed with postage prepaid this 29th day of May, 1991.

Daniel T. Stacey
Assistant Appellant Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of May, 1991.

(L.S.)
Notary Public for South Carolina

My Commission Expires: 05/09/99.

Petition Granted

C.J.

A.J.

A.J.

A.J.

A.J.

September 9, 1991

LGL LTR

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ahshaad Mykiel Owens, #366983, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of February, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of February, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.