

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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DEC 20 2013

Appeal from County

SC Court of Appeals

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NINA BATES,

APPELLANT

APPELLATE CASE NO. 2013-002022

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the plea court erred in punishing appellant for her infant son's death when she was not charged with that offense?

STATEMENT OF THE CASE

Appellant appeared before the Honorable Thomas L. Hughston on June 13, 2013, in Greenwood County and pled guilty to manufacture of methamphetamine and unlawful conduct toward a child. Respective sentences of five (5) and ten (10) years suspended on service of five (5) years with five (5) years probation were imposed. Megan Flannery, Esquire, was plea counsel and Cam Morrow, Esquire, was the assistant solicitor.

This appeal follows.

ARGUMENT

The plea court erred in punishing appellant for her infant son's death when she was not charged with that offense.

The indictment charging appellant with unlawful conduct toward a child reads as follows:

That Nina Pamila Falkingham, in Greenwood County, on or about December 12, 2012 willfully and unlawfully while being a person who had charge or custody of a child, or who was the parent or guardian of a child, or who was responsible for the care and support of a child, one Timothy Alexander Bates, did place the said child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety; or caused to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child was endangered or was likely to be endangered; or willfully abandoned the said child, in violation of the provisions of Section 63-5-70 of the South Carolina Code of Laws, 1976, as amended.

At the guilty plea, the plea judge stated that the indictment did not exactly say what appellate did. Appellate explained that her child passed away due to an accident as she fell asleep while she was breastfeeding. She said the toxicology reports later said there was a trace of methamphetamine in her babies system. Plea counsel explained that appellant admitted she was the guardian of the baby and she was responsible for him but she did not know how the meth got in his system. (Tr. p. 2, line 24 – p. 3, line 15).

The assistant solicitor's recitation of the facts was as follows:

MR. MORROW: Yes, Your Honor. On December the 12th of 2012 Ms. Nina Bates at 139 Kathwood Drive in Greenwood, South Carolina did willfully and unlawfully commit an unlawful conduct toward a child by exposing a

five week old child, Timothy Bates, to methamphetamine. An officer with the City of Greenwood responded to Self Regional Hospital in reference to an infant's death and found that the child had, the coroner's report found that the child had allegedly died from unsafe sleeping habits however the child's toxicology report tested positive for methamphetamine. Ms. Bates was breastfeeding the child while using methamphetamine. And then on February 4th of 2013 Ms. Bates knowingly and intentionally manufactured meth at that same 139 Kathwood Drive, Greenwood, South Carolina address. Agents located meth lab residue and waste outside the residence, asked consent to search the residence and did find a meth lab inside.

(Tr. p. 5; lines 7 – 23).

The following exchange occurred between plea counsel and the court:

MS. FLANNERY: Thank you, Your Honor, I just wanted to respond and make sure it was very clear that the coroner's report specifically said that it was ruled as accidental as a result of a sleeping habit and nothing more.

THE COURT: That is contrary to the plea.

MS. FLANNERY: She is not charged with his death, with in relation to the death, she is charged with him testing positive for methamphetamine.

THE COURT: I understand that this is really a reduction from what the charge could have been as far as I see it anyway. But the fact that she apparently ingested, took, whatever shape, form or fashion, methamphetamine while she was breastfeeding the child and the child was harmed.

MS. FLANNERY: Your Honor, the reason we did the no contest is because Ms. Bates says that she was not using methamphetamines at the time.

(Tr. p. 6, lines 8 – 25).

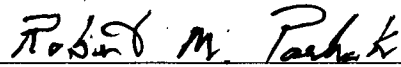
Plea counsel explained that appellant did not start manufacturing meth until after her son died to deal with the grief of his passing. (Tr. p. 8, lines 4 – 15). Appellant said she did not start doing meth until a week after her boy died. She said she had a boy in her house who was doing meth and that was her fault. That is why she was taking blame for it. (Tr. p. 9, line 21 – p. 10, line 2):

When it came time to sentence appellant, the plea court said it was going to punish her for several reasons. One, was for a general deterrence to speak to the community at large. Two, was a specific deterrence to keep her from accessing meth. And, the third was for a moral justification for punishing her. (Tr. p. 12, lines 1 – 18). Because the plea court punished appellant for her son's death, it violated due process of law. There has to be an understanding of the law in relation to the facts. McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969).

CONCLUSION

Appellant's case should be remanded for resentencing.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of December, 2013.

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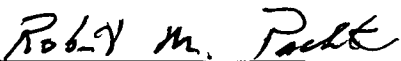
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nina Bates states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Thomas L. Hughston, Jr., which was held on June 13, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Nina Bates.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of December, 2013.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire Guilty Plea Hearing Transcript (June 13, 2013)
- (3) Notice of Appeal Explanation

I certify that this designation contains no matter which is irrelevant to this appeal.

December 20th, 2013



Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 20, 2013

Robert M. Pachak

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Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
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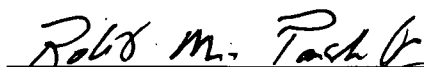
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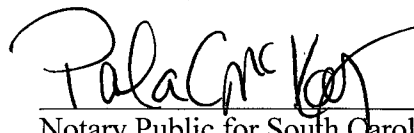
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Nina Bates, 355873 at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 20th day of December, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of December, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022