STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2018-001290

Marie Assa'ad-Faltas,

Respondent,

v.

State of South Carolina,

Petitioner.

AMENDED PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding trial ineffective for failing to raise at trial the issue of whether the local City of Columbia rubbish ordinance was preempted by state law and Department of Health and Environmental Control regulations where the City had the power to enact its ordinance, where the ordinance is consistent with the Constitution and the general law of the state, and where there is nothing to indicate the intention of the legislature to preempt the ability of local municipalities to regulate property maintenance?

STATEMENT OF THE CASE

Marie Assa'ad-Faltas ("Faltas") is not incarcerated. Faltas was cited by the City of Columbia on October 20, 2011, for violating Sections 8-32 and 8-41 of the Code of Ordinances for the City of Columbia, as well as Section 307.1 of the International Property Maintenance Code—collectively charged and tried as unlawful acts.[1] Orin G. Briggs, Esq. represented Petitioner, and David A. Fernandez, Esq., for the City of Columbia, prosecuted the case. On April 11, 2013, Faltas proceeded to trial before the Honorable Carl L. Solomon, municipal court judge, and a jury. (Appx. 201-474). The jury found Faltas guilty as cited the same day. (Appx. 464). After deferring sentencing until April 25, 2013, Judge Solomon sentenced Faltas to be jailed for a term of thirty days. (Appx. 590-91).

Faltas filed a timely notice of appeal to the Richland County Court of Common Pleas (2013-CP-40-03525). The parties appeared for oral arguments before the Honorable Alison Renee Lee, circuit court judge, on December 13, 2013. (Appx. 647-755). Faltas proceeded *pro se*[2] and the City was again represented by Fernandez. By Order filed August 19, 2014, Judge Lee affirmed Faltas' conviction. (Appx. 756-71). Faltas timely filed for reconsideration, which was denied by Order filed October 24, 2014. (Appx. 773-76).

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[1] "The underlying nature of the charge relates to sanitary condition and that includes basically garbage, leaves, trash, debris, et cetera, scattered about. It also relates to outdoor placement of items that are prohibited and there's a list of items that are prohibited which the city would allege are on the Defendant's property. I think that's the basis of it, right? Two of them. And then there's a couple – what we provided them were a couple of definition sections to describe what exactly qualifies as garbage or rubbish or debris or whatever." (Appx. 52-53).

[2] Attorney Tristan M. Shaffer, Esq., who was appointed after the filing of the notice of appeal, was present for the duration of the proceedings, notwithstanding the grant of his motion to be relieved as counsel.

Faltas filed a timely notice of appeal to the South Carolina Court of Appeals on October 31, 2014. (Appx. 778). By Order dated January 9, 2015, the Court of Appeals dismissed the appeal due to Faltas' failure to obtain counsel. (Appx. 779). Faltas petitioned the Court of Appeals for rehearing on January 16, 2015. (Appx. 780-81). Faltas additionally petitioned for certiorari and moved for appointment of counsel in the South Carolina Supreme Court on January 26, 2015. (Appx. 782). The South Carolina Supreme Court dismissed the petition and motion by Order filed May 6, 2015, due to the petition for rehearing still pending in the Court of Appeals. (Appx. 783). The Court of Appeals issued the remittitur on June 4, 2015. (Appx. 784).

Faltas filed her application for post-conviction relief on March 3, 2016 (2016-CP-40-01444). (Appx. 785-89). She alleged the following grounds for relief in her application:

1. "The conviction has severe collateral consequences on me."
    a. "The conviction can be pulled under my name and prevented me from getting housing, loans, and can be an obstacle to citizenship."
2. "I was forced to have counsel and he was stunningly ineffective and harmful."
    a. "Please see the federal habeas case for more details of how ineffective and harmful Orin Briggs was"
3. "The very existence of Columbia's Municipal Court violates the federal Constitution."
    a. "Please see transcript of 13 December 2013 hearing before Judge Lee"
4. "the ordinance(s) under which I was falsely convicted violate(s) both the federal and SC Constitutions in many ways which my forced counsel was too ineffective to raise"

(Appx. 786). Faltas supplemented her application by *pro se* filings on March 18, 2016, March 25, 2016, and February 21, 2017. (Appx. 790-860). The Richland County Clerk of Court's Office appointed Leah Moody, Esq., to represent Faltas on July 12, 2016. (Appx. 862). Respondent made its return on October 21, 2016, and thereafter amended it by filing made on November 14, 2016. (Appx. 863-876). Faltas, by and through PCR counsel, amended her

application by amendment made December 4, 2016, which provided the five allegations upon which she ultimately went forward:

1. "Trial counsel was ineffective by failing to object to/or raise prior to or during trial the following issues:"
    a. "Preemption regarding the definition of rubbish prior to or contemporaneous to any discussions at trial;"
    b. "the City of Columbia's Municipal Court System violates the doctrine of Separation of Powers because the City's executive branch is the same as the judicial branch;"
    c. "the City's actions constituted a taking of the Applicant's land;"
    d. "Applicant's right to a trial by jury of her peers of immigrants and the statutory violation as to the number of jurors required in the venire;"
    e. "Prejudice based on the Applicant's right to make the final argument to the jury[.]"

(Appx. 877-78). An evidentiary hearing into the matter was convened on December 7, 2016, before the Honorable Jean H. Toal. (Appx. 880-975). Petitioner was present at the hearing and represented by Moody. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent.

The parties again appeared before Judge Toal on June 14, 2017, to complete the evidentiary hearing initiated the previous December. (Appx. 976-1055). Judge Toal orally granted relief on a single issue: "that is the ineffectiveness of counsel in not putting forth the argument of preemption with respect to the state law with regard to the definition of rubbish and the definition of sanitary conditions." (Appx. 1049, ll. 18-23). Judge Toal denied all other grounds. (Appx. 1049, ll. 16-18). Judge Toal found Counsel failed to raise and adequately preserve the issue for appeal, and noted she did not know how the higher court would consider the issue, but that she considered it "a very valid argument[.]" (Appx. 1049-51). Judge Toal formalized her ruling by written order dated and filed June 14, 2018. (Appx. 1059-60). The State moved to reconsider the ruling by written motion filed June 25, 2018. (Appx. 1064-68).

Judge Toal denied the State's motion by written order dated and filed June 29, 2018. (Appx. 1070).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

THE PCR COURT ERRED IN GRANTING PCR BECAUSE THE ORDINANCES WERE VALIDLY ADOPTED PURSUANT TO STATE LAW AND ARE NOT PREEMPTED BY DHEC REGULATIONS

The PCR court erred in finding Counsel ineffective for failing to argue the City of Columbia ordinances defining "rubbish" were preempted by Department of Health and Environmental Control ("DHEC") regulations which also define "rubbish." The facts of the underlying case are not in meaningful dispute: the City of Columbia cited Faltas for the accumulation of rubbish on her property, which she did not thereafter clean up. Concededly, Counsel did not raise the issue at trial, and Faltas raised it for the first time on appeal to the circuit court. Nonetheless, the issue is without merit as a matter of law, such that Briggs was not ineffective. State law empowers local municipalities to promulgate ordinances regulating the proper maintenance of real property, the ordinances issued are in accord with State law and the Constitution, and there is *nothing* to indicate the legislature intended to empower DHEC to preempt the entire field of what constitutes "rubbish." This Court should grant certiorari to vacate and reverse the PCR court's grant of relief because it is an error of law that threatens to frustrate and undermine the ability of the City of Columbia—or any other municipality for that matter—to enforce its most basic and legitimate codes aimed to preserve and promote the health, safety, and welfare of citizens in the city by forbidding the accumulation of rubbish on private property.

A. The Ordinances at Issue were Adopted Pursuant to State Law

The "preemption" at issue is whether the DHEC definition of "rubbish" preempts the definition provided in municipal regulations. DHEC is empowered to promulgate and enforce reasonable rules and regulations for a variety of public health purposes. S.C. Code Ann. § 44-1-

140. It is true that DHEC regulations provide a general purpose definition of rubbish: "Means solid wastes from residences and dwellings, commercial establishments, and institutions." S.C. Code Ann. Regs. R. 61-62.1 § I, 79. However, that same section provides that the definitions apply only "when used in the Regulations and Standards" promulgated in the DHEC regulations, and as an augment to the South Carolina Pollution Control Act. Id.; see also S.C. Code Ann. §48-1-10, et. seq. (the "Pollution Control Act").

State law provides that municipalities and counties may adopt by reference nationally recognized codes and standards for property construction and maintenance. S.C. Code Ann. §6-9-60. The City of Columbia municipal ordinances incorporate by reference the International Property Maintenance Code, and provides that:

> Any other violation which is considered a public nuisance by any other violation of the International Property Maintenance Code or the municipal ordinances of the City of Columbia is hereby included in this section by general reference.

Columbia, S.C., Code § 8-32(b). The code defines rubbish as:

> Combustible and noncombustible waste materials, except garbage; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, paper, rags, cartons, boxes, wood excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metals, mineral matter, glass, crockery and dust and other similar materials.

Int'l Prop. Bldg. Code § 202 (2009). Garbage, above excluded, is defined as "[t]he animal or vegetable waste resulting from the handling, preparation, cooking and consumption of food." Id. The code thereafter prohibits the accumulation of rubbish or garbage, and establishes that "[a]ll exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage." Int'l Prop. Bldg. Code § 308.1 (2009) (emphasis omitted).

B. The Ordinances are not Preempted by DHEC Regulations

The city adoption of the IPBC definition of rubbish is valid under statute and not preempted by the DHEC definition. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature." Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). Whether a local ordinance is valid is determined by way of a two-step process:

> First, the Court must consider whether the municipality had power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the state.

Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008) (citations omitted). "To preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch on the subject in any way." Id. (quoting Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 94, 530 S.E.2d 890, 893 (2000)). "[F]or there to be a conflict between a state statute and a municipal ordinance both must contain either express or implied conditions which are inconsistent or irreconcilable with each other . . . . If either is silent where the other speaks, there can be not conflict between them. Where no conflict exists, both laws stand." Id. (quoting Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990)).

Neither the PCR court's order, nor Faltas' arguments, show any intent by the legislature to empower DHEC to regulate the retention of rubbish, garbage, trash, or detritus on private property to the exclusion of all municipalities. Nor can the State find any such intent. To the contrary, municipalities have the ability to adopt and enforce the model codes as explicitly permitted by S.C. Code Ann. § 6-9-90. That municipalities are afforded the ability to prosecute

the nuisance accumulation of rubbish stands to reason: municipalities contract for the collection of rubbish, garbage, trash, and other detritus, not the State government.

The PCR court erred—no court could reasonably conclude that a motion to dismiss the citation on preemption grounds would have had any chance of prevailing, let alone that Faltas met her burden of showing as much. Accordingly, the PCR court's order granting post-conviction relief should be vacated and reversed.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari, and vacate and reverse the order granting post-conviction relief. Should this Court deem it so necessary, the State will more fully brief the issues herein.

Respectfully submitted,

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7 May, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
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The Honorable Jean H. Toal, Circuit Court Judge

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MARIE ASSA'AD-FALTAS,

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STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Amended Petition for Writ of Certiorari**, and the **Amended Appendix Volumes** has been served upon opposing counsel by hand delivery of two (2) copies of the petition and one (1) copy of the appendix to:

Robert Michael Dudek, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 7th day of May, 2019

Johnny Ellis James, Jr.
Attorney for Petitioner

ALAN WILSON
ATTORNEY GENERAL

May 7, 2019

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Marie Assa'ad-Faltas v. State of South Carolina**
Appellate Case No. 2018-001290
Lower Court Case No. 2016-CP-40-1444

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Amended Petition for Writ of Certiorari** and two (2) copies of the **Amended Appendix Volumes**. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny Ellis James, Jr.
Assistant Attorney General
SC Bar No. 101260

JEJ/can
Enclosures

cc: Robert Dudek, Esquire (2 copies)