

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY S.C. SUPREME COURT
Court of General Sessions

Maité D. Murphy, Circuit Court Judge

Appellate Case No. 2018-002035

State of South Carolina, Petitioner,

v.

Archie More Hardin, Respondent.

PETITION FOR REHEARING

On January 29, 2020, this Court issued its opinion in State v. Hardin, Opinion No. 27938 (S.C. Sup. Ct. filed Jan. 29, 2020), dismissing certiorari as improvidently granted on the ground that the State is not an aggrieved party and has no right to appeal the Court of Appeals' decision. The State respectfully submits that the Court overlooked or misapprehended significant points of law in reaching its decision, to wit: 1) The appellate court rules do not require that a petitioner to this court be an aggrieved party in order to seek a writ of certiorari to the Court of Appeals; 2) The State is an aggrieved party. The State asks the Court to reconsider its opinion, remove the section discussing its reasoning for dismissing certiorari as improvidently granted, vacate the Court of Appeals' opinion, and issue a decision affirming Hardin's conviction in result only.

Statement of the Case

Respondent Archie Hardin was convicted in the Orangeburg County Court of General Sessions of armed robbery, assault and battery of a high and aggravated nature, possession of a firearm during the commission of a violent offense, and three counts of kidnapping. He appealed his convictions, arguing the trial court erred by admitting witness identifications, thereby denying him due process. The Court of Appeals affirmed his convictions and sentence, but issued a published opinion finding error in the trial court's admission of both the out-of-court and in-court identifications by all three victims. The State filed a petition for rehearing seeking rescission of the portions of the opinion finding error in the admission of the identifications. The petition was denied. The State sought certiorari. Hardin did not. This Court granted the State's petition on May 30, 2019. Following oral argument, the Court filed a published opinion on January 29, 2020, dismissing the writ as improvidently granted on the ground that the State was not an aggrieved party.

Argument

I. The appellate court rules do not require that a petitioner to this Court be an aggrieved party in order to seek certiorari.

Petitioner respectfully submits that this Court misapprehended or overlooked the applicable rule of appellate procedure when it held Rule 201 of the appellate court rules limits the availability of certiorari to "aggrieved parties." Rule 201 is found, along with Rules 202–223, in Section A of the Rules of Appellate Practice, styled "Appeals." These rules lay out the proper procedure for appeals of right from the final judgments of trial courts. See, e.g., Rule 203(b), SCACR (providing the time for service for appeals from the various trial courts). By contrast, Rule 242, entitled "Certiorari to the Court of Appeals," delineates the scope of discretionary review by the Supreme Court. Rule 242, SCACR ("The Supreme Court, or any

two (2) justices thereof, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals.”). It is found within Section B, along with rules 240–247, styled “Petitions and Motions.” Rule 242, not Rule 201, dictates who make seek a writ of certiorari.

Rule 242 provides that certiorari may be granted “upon motion of any party to a case.” Rule 242(a), SCACR (emphasis added). Contrary to the Court’s holding in this case, the rule does not limit petitions for certiorari to “aggrieved parties.” The federal court system has a nearly identical rule, providing that certiorari may be granted “upon the petition of any party.” 28 USCA § 1254 (emphasis added). The United States Supreme Court has held that this rule allows a prevailing party to seek certiorari:

The relevant provision confers unqualified power on this Court to grant certiorari “upon the petition of any party.” 28 U.S.C. § 1254(1) (emphasis added). That language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below.

Camreta v. Greene, 563 U.S. 692, 700–01 (2011) (citing E. Gressman et al., Supreme Court Practice 87 (9th ed.2007)). Whatever prudential merit there may be in refraining from entertaining petitions from prevailing parties, it is not required by the rules.¹

There is no other statute or case prohibiting prevailing parties from petitioning for certiorari. There are dozens of appellate opinions interpreting the “aggrieved party” rule,

¹ The State previously made this argument in a petition for rehearing in Way v. State, 410 S.C. 377, 764 S.E.2d 701 (2014). Appellate records for In the Matter of the Care and Treatment of Vincent Neal Way v. State, South Carolina Appellate Court Public Index, <https://ctrack.sccourts.org/public/document/view.do?documentID=216163>.

and each has concerned a direct appeal from a trial court.² None have limited the right of a party prevailing in result to seek a writ of certiorari in this Court.

As a matter of policy, the opinion sets a troubling precedent. There may be cases where prevailing parties bring to this Court's attention serious errors in published opinions of the intermediate appellate court that require correction.³ The Court's interest in these cases is not necessarily tied to the outcome of the case, but to the proper administration of justice and the integrity of the law. This policy rationale is absent in appeals from trial courts, whose orders have no binding precedential value. This distinguishes certiorari from appeals of right. This Court may exercise its discretion to grant certiorari in order to correct an erroneous opinion, regardless of which party brings it to the Court's attention.⁴

Finally, there is no reason to believe there will be a flood of petitions from prevailing parties. Experience shows these are rare occurrences, and this case will not change that. If the Court believes the intermediate appellate court's decision does not compel its review, it can simply exercise its discretion and deny the petition. There is no good reason for the Court to limit its authority as it has in this opinion.

² See, e.g. Wilson v. S.Ry., Carolina Div., 123 S.C. 399, 115 S.E. 764 (1923); Bivens v. Knight, 254 S.C. 10, 173 S.E.2d 150 (1970); Dunson v. Dunson, 278 S.C. 210, 294 S.E.2d 39 (1982).

³ By way of an extreme example, if the Court of Appeals issued a published opinion holding it always improper to allow a victim to identify a defendant at trial, regardless of the circumstances, but found the testimony harmless in that particular case, the State would have no redress under the current opinion of this court. It would be at the mercy of the defendant to petition, or this Court to issue a writ on its own motion. If certiorari is not granted for one reason or another, the Court of Appeals opinion would bind our trial courts. Rule 220(a), SCACR.

⁴ Commentators have recognized that the federal rules allow a party to seek certiorari even when it has won on a particular issue below: "Seldom would a winning party want to seek Supreme Court review of a favorable decision. Yet there may be situations where, even though the losing party may not seek certiorari, the prevailing party below deems that the issue on which he or she prevailed is a recurring one and is presented in a strong factual and procedural posture; or prevailing government counsel may believe it appropriate to seek Supreme Court approval of the lower court's ruling on an important or vexatious issue." Gressman et al., Supreme Court Practice 87 (9th ed.2007).

II. The State is an aggrieved party.

The State is an aggrieved party in this case for two reasons. First, Hardin's conviction is not final until he exhausts his available collateral attacks. Second, the State will suffer prospective harm from the Court of Appeals' binding ruling on a constitutional issue.

a. Collateral attacks.

It is true that Hardin will remain incarcerated—for now. But he will almost certainly file an application for post-conviction relief, and a federal habeas corpus action if that fails. The Court of Appeals' opinion is now the law of the case. United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999). It will put the State at a disadvantage in these collateral proceedings. If Hardin is successful in winning a new trial, the trial court presiding over his retrial will be required to improperly exclude all three out-of-court witness identifications and prohibit the victims from identifying Hardin in court. The State's only opportunity to contest the ruling and prevent this result is now—by seeking certiorari to this court. Accordingly, the Court of Appeals opinion “bears directly upon [the] interest” of the State. Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). Because the State has a “substantial grievance,” it is an aggrieved party. Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589–90 (Ct. App. 2001).

b. Prospective harm.

Even beyond this case, the Court of Appeals' published opinion will have a negative effect on the State in its myriad components going forward. See Camreta v. Greene, 563 U.S. 692, 702 (2011) (recognizing adverse rulings on constitutional issues may have “prospective effect” on government officials notwithstanding disposition of individual case). The constitutional holding in this case was not “mere dictum.” Bunting v. Mellen, 541 U.S. 1019,

1023 (2004) (Scalia, J., dissenting). Because the court made its findings in a published opinion, future prosecutors, assistant attorneys general, and law enforcement officers will be bound by the opinion and will shape their official conduct accordingly. In the case of law enforcement officers, they may refrain from employing a similar identification procedure, even if the exigencies of the situation demand it, and let a guilty suspect go free. See Camreta, 563 U.S. at 704–05 (in §1983 context, recognizing constitutional rulings “have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong [T]hey are rulings designed this way with this Court’s permission, to promote clarity—and observance—of constitutional rules”). Prosecutors may decline prosecution of a case where a similar procedure was used, or offer an unduly lenient plea deal. Future assistant attorneys general may have to argue against binding precedent in a case where the same procedure is used. This is so despite the existence of Wyatt, which can be distinguished on its facts. The State, and the people of this state, could suffer the effects of this erroneous opinion for years to come.

Alternatively, this Court can issue an opinion eliminating the precedential value of the Court of Appeals’ opinion. To do so would be consistent with its constitutional duty to correct errors of law. S.C. Const. art. V, § 5 (“The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.”). Even a perfunctory opinion vacating the Court of Appeals’ opinion while affirming the result would suffice. The State agrees that Wyatt correctly explains the law, and that further explication is unnecessary. The State further recognizes that this Court has better things to do than to parse every Court of Appeals opinion to correct each dubious statement of law.

Nevertheless, because the Court of Appeals' opinion is binding precedent inconsistent with the principles of Wyatt, it causes the State prospective harm.

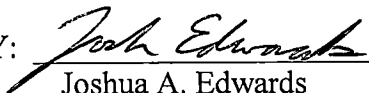
Conclusion

The State respectfully asks this court to reconsider its holding that Rule 201 prevents the State from seeking certiorari, vacate the Court of Appeals opinion, and issue a decision affirming the conviction in result only.

Respectfully submitted,

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Columbia, South Carolina
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PROOF OF SERVICE

I, Anne Mueller, Legal Assistant, hereby certify that I have served the within *Petition for Rehearing* dated January 31, 2020, on Respondent by depositing a copy in the United States mail, postage prepaid, addressed to each of his attorneys of record:

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I further certify that all parties required by Rule to be served have been served. This 31st day of January, 2020.


Anne A. Mueller
Legal Assistant

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