

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

MARIE ASSA'AD-FALTAS,

RESPONDENT

v.

RECEIVED

APR 07 2020

STATE OF SOUTH CAROLINA,

S.C. SUPREME COURT
PETITIONER

APPELLATE CASE NO 2018-001290

Appeal from Richland County

Honorable Jean H. Toal, Circuit Court Judge

Opinion No. 2020-MO-004

PETITION FOR REHEARING

Respondent requests rehearing pursuant to Rule 221(a), SCACR, because this Court overlooked or misapprehended certain points in reaching its decision. Respectfully, this Court misapprehended certain facts regarding the property at issue, overlooked the evidence in the record that supported the PCR court's findings and overlooked the additional sustaining grounds submitted by Respondent pursuant to I'on, L.L.C. v. Town of Mt. Pleasant, 388 S.C. 406, 526 S.E.2d 716 (2000) (holding that the prevailing party in the lower court may raise on appeal any additional reasons the court should affirm the lower court rulings regardless of whether those reasons were presented to or ruled on by the lower court).

There is evidence in the record to support the PCR Court's findings

The PCR court made a factual determination that trial counsel should have raised the issue of preemption at the trial level. It was the failure to raise the issue of preemption, without articulating a valid strategy for not presenting that specific argument, that formed the basis of the grant of relief. Notably, the PCR court did not make any legal findings regarding preemption or how the issue of preemption might come into play in Respondent's case. The PCR court very simply found that "[a] motion to dismiss based on this issue could have changed the outcome of the case," therefore trial counsel was deficient, and Respondent was prejudiced.

Respondent raised the issue of preemption on direct appeal in the Richland County Circuit Court. However, the Circuit Court found that the only time the preemption was mentioned during the trial was when Respondents made a motion for a new trial. As there was never a motion prior to or during trial regarding preemption, or any objection made regarding the definitions used by the City, the Circuit Court found the matter not preserved. App. 758.

It is well settled that failure to preserve an issue for review can be the basis of a claim of ineffective assistance of counsel. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999). Counsel can be found deficient for failing to object, failing to place an argument on the record, failing to obtain a final ruling, or failing to proffer testimony. See Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018); Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Stone v. State, 419 S.C. 370, 798 S.E.2d 561 (2017). In a PCR case, this Court will review questions of law de novo, without deference to the PCR court but will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. See Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Based on the “any evidence” standard set forth in Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1984), this Court should uphold the PCR court’s grant of relief. The record shows that Respondent had a valid, legal argument that was not raised at trial. Trial counsel offered no valid strategy for not raising the preemption issue and, as seen below, when addressing the merits of the case it can be logically reasoned that Respondent’s trial would have had a different outcome had the issue been properly raised. A fair reading of the record shows that there is probative evidence to support the ruling of the PCR court.

Respectfully, this Court’s opinion goes beyond the “any evidence” standard to the merits of the preemption question. Importantly, the property at the center of this matter has been repeatedly mischaracterized as “residential property.” A review of city records shows that the property at issue, 324 Byron Road, is in fact zoned as “*neighborhood commercial*.”¹ Thus, if considering the case on the merits, the ultimate question would be whether the DHEC regulations or definitions preempt the field of *commercial* property maintenance, particularly when the property in question is an undeveloped vacant lot.

While Petitioner was correct in asserting in its petition for writ of certiorari that state law empowers municipalities to create ordinances generally regulating proper maintenance of real property, Petitioner was in incorrect that the ordinances at issue in this matter were in accord with state law and the Constitution. “In determining the validity of a local ordinance, the inquiry is twofold: did the local government have the power to enact the ordinance; and, if so, is the ordinance consistent with the Constitution and general law of this State.” Beachfront Entertainment, Inc. v. Town of Sullivan’s Island, 379 S.C. 602, 666 S.E.2d 912 (2008).

¹ The City of Columbia provides a public web search with information about a piece of property based on the address. This information can be accessed at <https://gis.columbiasc.gov/>

“Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area.” South Carolina Ports Authority v. Jasper County, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006). In creating DHEC the state legislature invested the department with *all the rights and duties* pertaining to organizations of like character and made the department the *sole* advisor of the state in all questions involving the protection of *public health* within its limits. S.C. Code § 44-1-110 (emphasis added). In this grant of authority, the legislature gave DHEC the ability to promulgate and enforce rules and regulations for public health. S.C. Code § 44-1-140. In exercising this duty DHEC has fully and completely defined rubbish and sanitary conditions in both state-wide regulatory acts and statutes. *See*, S.C. Code of Regulations R. 61-62.1 § I; S.C. Code § 48-1-10 et. seq., the Pollution Control Act; S.C. Code § 44-96-10 et. seq., South Carolina Solid Waste Policy and Management Act.

One of the Department’s central interest is in regulating solid waste and maintaining sanitary conditions throughout the state. It follows then that the definitions put forth by DHEC are the ones to be followed, statewide, when defining and dealing with solid waste, which includes rubbish, and sanitary conditions. The intention of the legislature to set a controlling regulatory standard is shown by the clear and express definitions of what constitutes rubbish and sanitary conditions that are repeatedly relied on. It is not that DHEC, in its regulatory capacity, preempts the field of property maintenance but that the definitions promulgated by the Department preempt any other definition by counties and municipalities in ordinance that deals with rubbish and sanitary conditions, to include ordinances regulating property maintenance.

Failure to challenge the applicability of the ordinances to the property

The City tried Respondent for three alleged violations under three different code sections. With a minimal amount of effort, trial counsel could have seen that the code sections cited did not apply to vacant lots but only to lots where there were structures or on-going construction. Failure to make the argument that, as a threshold matter, the ordinances did not apply to Respondent's property was ineffective assistance of counsel. Had counsel effectively made the arguments the case would have been dismissed. Counsel was deficient for failing to investigate and research the law as it applied to Respondent's property.

Section 307.1 of the IMPC

Counsel was ineffective for not arguing that the IPMC as a whole did not apply to the vacant lot owned by Respondent. The City, at the time of this case, had adopted the IPMC only in Chapter 5 of the Code, which dealt specifically with buildings and building regulations. There was no adoption of the IMPC in Chapter Eight, which is where the alleged violations arose from. In its certiorari petition the state cites City of Columbia Code Section 8-32(b) to support the application of the IMPC to Respondent's property but section 8-32(b) is the *current law* and was not in effect at the time of this case.

At the time this matter was charged and went to trial the only mention of IPMC in Chapter Eight of the City Code is that multiple violations of the IPMC will be declared a public nuisance. Nothing in then Chapter Eight purports to adopt the definitions of the IPMC either explicitly or by reference. The adoption of IPMC is restricted to Chapter Five of the Code. This is supported by fact that Chapter Nineteen of the City Code has a wholly different definition of "rubbish" that is used solely within that section.

Further, the state relied on S.C. Code § 6-9-60 to argue the IMPC was properly adopted and applied to Respondent's property. However, S.C. Code § 6-9-60 specifically states that,

“Municipalities and counties may adopt by reference only the latest editions of the following nationally recognized codes and the standards referenced in those codes *for regulation of construction* within their respective jurisdictions: property maintenance, performance codes for buildings and facilities, existing building, and swimming pool codes as promulgated, published, or made available by the International Code Council, Inc.” (emphasis added)

Thus, in accord with state law municipalities cannot adopt the IPMC to regulate vacant lots. The IPMC may only be used for the regulation of construction. It was well established at trial that no construction was occurring on Respondent's property.

Since the IMPC does not properly apply to Respondent's lot the definition of “rubbish” used by the City was invalid. In the absence of a definition it would be logical to default to the state regulatory agency on such matters and adopt the DHEC definition. Here again trial counsel's failure to research and investigate the case resulted in deficient performance that prejudiced Respondent.

Section 8.41

Counsel was also ineffective for failing to argue that section 8.41, titled “outdoor placement of certain items prohibited” does not apply to vacant lots. The code section at the time of the alleged violation and trial read:

- (a) it shall be unlawful for the occupant or owner of any property within the city to allow any of the following items to **remain on the property outside a dwelling or other enclosed structure** for longer than 48 hours, in any location visible from the streets or sidewalks adjacent to the property: Appliances, bedding, bottles, glass, cans, cardboard, upholstered furniture manufactured for indoor use only, household appliances, jars, lumber and building supply materials not related to an active permit and not neatly stacked, machine parts, motor vehicle parts, pallets, paper, plumbing fixtures, scrap metal.

- (b) For purposes of this section, the phrase “**outside a dwelling or other enclosed structure**” shall mean **any location that is not within the interior of a dwelling or other enclosed structure**. Porches, balconies, decks, carports or other similar structures, unless completely enclosed, shall be deemed to be outside a dwelling or other enclosed structure. (emphasis added).

The plain language of the ordinance makes it clear that for section 8.41 to apply there must be a dwelling or enclosed structure on the property. The record reflects that Respondent’s property was a vacant lot. App. 263, ll. 12-14. There was also no construction occurring on the property and no permit to build anything at the time of the citation. App. 268, ll. 15-22.

Section 8.32

Trial counsel made an unspecific and incomplete argument about the constitutionality of the ordinances Respondent was charged under. App. 311-312. The focus of the argument should have been on the vagueness and overbreadth of section 8.32 specifically. Section 8.32, at the time of the case, read:

All premises shall be kept at all times in a sanitary condition and all garbage, leaves, trash, damp or low places, cans, vessels, broken bottles, or pieces of china or glass that may hold water shall be deemed unsanitary.

In determining whether a statute is unconstitutionally vague, this Court has held:

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971).

The broad and vague nature of this ordinance makes it impossible for a person to have reasonable notice of the prohibited conduct. Respondent was charged with having a “vessel”

that could hold water on her property, specifically buckets. However, a “vessel” is not defined in the ordinance and could be anything from a bird bath or child’s pool, to a bucket or trash can. The City is essentially banning any object that could hold water from ever being on a piece of property.

There is also no notice as to what qualifies as “unsanitary.” At trial the City alleges that the “unsanitary” condition on Respondent’s property is the possibility of mosquito’s breeding in stagnant water that sits for five or more days. App. 274, ll. 6-20. The City relies on information from DHEC that the water must be standing for five days at a minimum. App. 304. However, there was never any mosquito activity observed at Respondent’s property nor any evidence presented of stagnant water existing for a period of time exceeding five days. App. 303.

Further, the word “premises” indicated that the subject property would need to have some sort of building or structure on it for the ordinance to apply. As defined by Merriam-Webster dictionary, “premises” is defined as either “a tract of land with the buildings thereon” or “a building or part of a building usually with its appurtenances (such as grounds).²” Again, as stated above, the property at issue in this case was a vacant lot.

A plain reading of the ordinance shows that it is overbroad and vague. A review of the current City of Columbia Code shows *that this section has been abandoned in its entirety*. The Code section where 8.32 originally appeared has been rewritten with specificity and the notion of items holding water being banned as “unsanitary” has been removed. The ordinance at the time of the trial criminalized future possible outcomes. Again, trial counsel failed to fully and thoroughly argue that this ordinance did not apply to Respondent’s property.

² <https://www.merriam-webster.com/dictionary/premise>

As stated above this Court has held that failure of counsel to properly investigate and research the law is grounds for ineffective assistance of counsel. See, Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009); Stevens v. State, 365 S.C. 309, 617 S.E.2d 366 (2005). Counsel was derelict in failing to research the ordinances Respondent was charged under and challenge them as the applied to Respondent's property. The case turned on the definitions of "rubbish," "scrap metal," and "unsanitary conditions." It would have taken minimal effort on the part of trial counsel to research these issues and failure to do so resulted in prejudice to Respondent.

Failure to challenge the sufficiency of the jury pool

Counsel was also ineffective for failing to challenge the sufficiency of the jury pool at the time of selection. Prior to the start of jury selection, the court announced that there were *twenty-four* prospective jurors present. App. 222, ll. 21-23. Trial counsel failed to make any objection despite Respondent's insistence that the statute required forty jurors to be present for selection. App. 255, ll. 5-6. Trial counsel refused to make any argument and instead proceeded forward with jury selection with only twenty-four prospective jurors. App. 225, ll. 7-10.

In State v. Johnson, 396 S.C. 424, 721 S.E.2d 786 (Ct. App. 2012), the petitioner argued that his case should have been continued because only thirty-three jurors were present at selection and the statute mandated that a minimum of forty jurors be present. The state argued that the statute only required a minimum of forty jurors be drawn for qualification and that the only requirement was that there be enough jurors present at selection for each side to be able to exercise all their peremptory challenges. Id. at 427. After a review of the relevant statutes the court ruled that the statute did not require a minimum number of forty jurors to be present at jury selection. Id. at 432. However, the court held that the statute did *mandate there be enough jurors present for each side to effectively exercise all their peremptory challenges and still seat a*

jury of six members with four alternates. Id. at 432-433 (emphasis added). Given that each party was entitled to six peremptory challenges to primary jurors and four peremptory challenges to alternative jurors for a combined twenty challenges, and the statute required a ten-member jury panel be sat, the court held that *thirty jurors was the minimum number required meet the statutory demands.* Id. at 433.

Comparing Johnson to the case at bar it is obvious the *statutory mandated* minimum number of jurors for municipal courts was not present at the time of jury selection. With only twenty-four prospective jurors present it would have proven impossible for both sides to exercise all their peremptory challenges and still seat a full jury. Further the record shows that the municipal judge only sat one alternative instead of the four alternative jurors required by S.C. Code Ann. § 14-25-165. App. 243, ll. 20-21.

A criminal defendant has a constitutional right to a trial by a jury that is randomly selected and representative of the community in which the defendant resides. To ensure that this right is fulfilled in municipal and magistrate courts, the legislature enacted S.C. Code Ann. § 14-25-125 through 14-25-185. The purpose of these statutes is to ensure that the jury pool provided during selection is representative of the community and sufficient in numbers to guarantee that each side would receive its maximum strikes while still being able to seat a full panel. A pool of twenty-four individuals does not meet the statutory mandated minimum required for a full and fair jury. More importantly, such a low number is too small a sample to be a representative cross section of the community. Taylor v. Louisiana, 419 U.S. 522, 526-27, 95 S. Ct. 692, 696, 42 L. Ed. 2d 690 (1975) (the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community).

Trial counsel was deficient for failing to challenge the sufficiency of the jury pool prior to selection. Had the challenge been made the case would have been continued and many of the other deficiencies with counsel's performance could have been cured, as counsel would have had more time to prepare. Even if the case had not been continued the challenge would have been reviewed on direct appeal and would have resulted on a reversal based on Johnson. Also, a challenge would have ensured that Respondent's right to be tried by a representative cross section of the community was protected. That a jury was sat is not relevant. The prejudice was in denying Respondent her right to a random and representative jury pool in which all strikes from each side could be exercised as guaranteed by the Constitution.

But for trial counsel's deficient performance, the case would have reached a different result. Failing to raise a valid legal argument, failing to properly argue the applicability of the ordinances, and failing to challenge the sufficiency of the jury pool were ineffective assistance of trial counsel which prejudiced Respondent. Based on the arguments presented above, Respondent respectfully requests rehearing. There is a wealth of evidence of ineffective assistance of counsel and the PCR court's ruling should be affirmed under the "any evidence" standard. See, Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

Respectfully Submitted,

s/Jessica M. Saxon
JESSICA M. SAXON
Appellate Defender

This 3rd day of April, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable Jean H. Toal, Circuit Court Judge

RECEIVED

APR 07 2020

S.C. SUPREME COURT

MARIE ASSA'AD-FALTAS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

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 Samuel Key, Esquire, via electronic mail; and Marie Assa'ad-Faltas, at P.O. Box 9115, Columbia, SC 29290, this 3rd day of April, 2020.

s/Jessica M. Saxon

Jessica M. Saxon

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE

ME this 3rd day of April, 2020.

Marcy Allgood (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.