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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2021-001260

Town of Sullivan's Island ..... Petitioner,

v.

Michael Murray ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent, pursuant to Rule 242(f), SCACR, submits this Return in Opposition to Petitioner's Petition for Writ of Certiorari. The Petition should be denied.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Ellison v. State, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009). In determining whether special reasons for review exist, the Court considers the following five criteria: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Haggins v. State, 377 S.C. 135, 659 S.E.2d 170 (2008); State v. Lyles, 381 SC 442, 445, 673 S.E.2d 811, 813 (2009); Rule 242(b), SCACR.

Furthermore, on certiorari, the Supreme Court will only review errors of law, and factual findings will not be reviewed "unless wholly unsupported by the evidence." Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009); Lewis v. Lewis, 392 S.C. 381, 400, 709 S.E.2d 650, 660 (2011) (Pleicones, J., dissenting); City of Columbia v. S.C. Pub. Serv. Comm'n, 242 S.C. 528, 532, 131 S.E.2d 705, 707 (1963) "The Superior Court, in considering the record of the inferior tribunal, must confine its review to the correction of errors of law only and not review findings of fact except when such findings are wholly unsupported by the evidence."

In an effort to meet the required standard for seeking a certiorari, Petitioner has framed its questions for review with the assertion that the Court of Appeals' decision conflicts with numerous prior decisions of this Court. However, this amounts to nothing more than a pretext for mere re-

argument of the same points from (a) Petitioner's Petition for Rehearing, and (b) Petitioner's original appellate brief, (Brief of Respondent, Town of Sullivan's Island). None of the criteria under Rule 242(b) for special review are met by the Petitioner.

In its prior briefs and in the current Petition, Petitioner has ignored the primary, overriding point asserted by Respondent in its case – that the ordinance upon which the Town based the arrest and conviction at issue did not expressly identify or describe the actual activity alleged by the Town to be prohibited, so as to give proper, specific, and fair notice of criminal activity. Rather than acknowledging this problem, created by the Town's practice of relying on an alleged "long-standing interpretation" of the Ordinance, R. p. 190, the Town attempts to broaden the definition of proper notice. The Court of Appeals fully comprehended Mr. Murray's position that the Town was treating its un-promulgated and non-codified interpretation, which did not provide fair warning of criminal liability, as an enforceable legal requirement.

The Opinion of the Court of Appeals does not contain any error of law or include any unsupportable evidence. There was no dissent at the Court of Appeals and no conflict with a prior decision of the Supreme Court. The entire Petition is merely a re-argument of the same points raised before the Court of Appeals, and the Supreme Court has not been presented with any grounds that would justify a decision to grant the Petition. The Court of Appeals made a proper ruling in this case and that ruling should be left undisturbed.

COUNTER-STATEMENT OF THE FACTS OF THE CASE

This appeal arises from the conviction of Respondent, Michael Murray ("Mr. Murray"), for the alleged violation of certain Municipal Ordinances of the Town of Sullivan's Island ("Petitioner" or "The Town" or "TOSI"). On June 29, 2016, Petitioner's Police Department issued Mr. Murray's son, Erich Murray, a "Department of Police Official Summons and Arrest Record

City of Sullivan's Island, S.C." which noted a $1,040.00 bond requirement. The Arrest Citation charged Erich Murray with "violation of Z.O. 21-75 Dock Construction"[1] and also referenced "TOSI Code 5-10." Erich Murray is employed by American Dock and Marine Construction, Inc., owned by Mr. Murray. By agreement between Town officials and Michael Murray, as acknowledged by the Town's Judge, the Honorable Frank Cornely, who presided over the trial, Michael Murray took responsibility for the issued ticket. R. p. 133.

Later the same day, a second Arrest Citation was issued to Jason Tompkins ("Mr. Tompkins") for the same offenses. Mr. Tompkins is a member of the entity "C and B Beach House, LLC ("C&B"), which owns property on Sullivan's Island identified as 1102 Osceola Avenue. On May 15, 2015, C&B was issued a Critical Area Permit and Coastal Zone Consistency Certificate by OCRM ("the OCRM Dock Permit") authorizing construction of a dock on C&B's property. Subsequently, Mr. Murray applied to the Town for a Building Permit to construct the dock sought by C&B. It is undisputed that the Building Permit contained a condition that the dock "must not exceed adjacent docks." It is also undisputed that Mr. Murray accepted the Building Permit with the stated condition.

American Dock and Marine then proceeded to build a dock at C&B's property. An "as-built" survey prepared following construction shows the final location of the dock landward from its depiction in the OCRM Dock Permit so that most of the dock is located behind the Mean Low Water mark. At the hearing, Mr. Murray explained that the difference in location between the dock as constructed and as depicted in the permit drawing resulted from an effort to comply with the condition stated in the Building Permit for the seaward extension of C&B's dock to not exceed adjacent docks. R.p.21-2.

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[1] TOSI Municipal Zoning Ordinance § 21-75.

Moreover, the as-built survey confirms that at the current location, C&B's dock does not extend into the channel. R.p.24-25, 99-100. TOSI Municipal Zoning Ordinance § 21-75 expressly states a prohibition that "[n]o dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation." R.p.66. As acknowledged in the Order in Response to Defendant/Appellant's Motion to Alter and Amend in Accordance with Rule 59 from the Circuit Court, "[t]here is no express requirement in the Town of Sullivan's Island's ordinances, including Chapter 21-75 which would prohibit docks from extending any further than adjacent docks. R.p.2.

While it was admitted at the hearing that C&B's dock exceeded the adjoining docks, Petitioner produced no evidence demonstrating interference with navigation by C&B's dock. In fact, evidence presented by Mr. Murray established the channel as being 367 feet wide at the location of C&B's dock, meaning the edge of the channel boundary is a significant distance from the dock. R.p.23-25, 93-94, 98-100. More importantly, the evidence also showed C&B's dock, like the adjacent docks, located on a mud flat that is dry at low tide. R.p.237, l. 17-22. In other words, Respondent established the lack of any ability for boats to navigate anywhere close to the docks at issue in the channel at low tide, and also that the channel is sufficiently wide that no single dock in the area, including C&B's dock, has interfered with navigation. R.p.238, l. 1–p. 239, l. 15. Mr. Murray and Mr. Tompkins confirmed that no one has ever complained about the location of C&B's dock interfering with navigation in the channel. R.p.242, l. 15-20 and p. 270, l. 3-13.[2]

[2] As pointed out in the Final Brief of the Appellant, Michael Murray, the mud flat has been created by siltation in the channel. R.p. 237 (Final Brief p. 23) Had the dock been built where the Town thinks, it would interfere with Mr. Tompkins' ability to navigate the channel since the end of the dock would be behind the low tide mark. Id. In short, Mr. Tompkins would be prevented from launching from his dock until the tide came up to the end of the dock, as other property owners in the area already experience. Id. There is nothing protective about this current situation and the Town should adjust its policies accordingly.

Per the testimony given by Joseph Henderson, the Town's Zoning Administrator, at the hearing, the Arrest Citations issued to Mr. Murray and Mr. Tompkins were based on a "long standing *interpretation*" of TOSI Municipal Zoning Ordinance 21-75 by the Town that "not extending so far as to interfere with navigation" means that no docks subject to a permit can extend beyond adjacent [docks]." R.p.190 (italicized emphasis added). In other words, Mr. Henderson established that the Town interprets the Ordinance as including the limitation on dock extension, even though no such limitation is expressly stated. And, Mr. Henderson confirmed this despite the fact that the Ordinance clearly and expressly states several other very specific standards regarding dock length and creek width. R.p.190-191.

This was the very issue that Mr. Murray raised at the hearing in the Municipal Court, in the Circuit Court, in the Motion to Alter and Amend and to the Court of Appeals: that the Town improperly enforced an unwritten, un-promulgated, non-existent and non-codified "requirement" that was confirmed, candidly, as merely an interpretation by the Town of its authority, against him through criminal prosecution. R.p.1-3. Mr. Murray also raised issue with his conviction under TOSI Municipal Code Article III, § 5-10 because it also turned on Mr. Murray's implied "acknowledgement" of the Town's interpretation. R.p.66-67. That is, even if Mr. Murray impliedly "accepted" the unwritten and non-codified additional requirement as a condition of the building permit and attempted to implement it accordingly, that does not convey authority to the Town to enforce it through criminal prosecution.

As pointed out in Mr. Murray's Final Appellate Brief, the Town's ordinances only contemplate the Town's enforcement of duly promulgated requirements, not unwritten and non-codified "interpretations" creating or imposing additional requirements and/or conditions that are supposed to be somehow understood to exist by the general population R.p.190, l. 15-23. It is a

very well-established and longstanding principle of constitutional law in South Carolina that when criminal prosecution and/or penalty is at stake, procedural due process requires fair notice of the conduct proscribed by the law at issue. It is well-established that "[c]riminal ordinances are, of course to be strictly construed and a defendant has a right to know just wherein he is charged with the commission of a crime." State v. McKnight, 352 S.C. 635, 650, 576 S.E.2d 168, 176 (2003) (*citing* State v. Edwards, 302 S.C. 492, 397 S.E.2d 88 (1990); State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980)). No defendant, including Respondent Mr. Murray, may be properly held to have notice of a legal requirement that is not expressly stated in any applicable law. As the Appellate Court recognized, the Town cannot sustain a successful criminal prosecution of Mr. Murray based upon an ostensible violation of the Town's admittedly and undisputedly unwritten and non-codified *interpretation* of TOSI Municipal Zoning Ordinance § 21-75. The Petition should be denied.

ARGUMENT BASED ON QUESTIONS PRESENTED

I. SINCE THE COURT OF APPEALS CONSIDERED THE FACTUAL FINDINGS OF THE TRIAL COURT, THERE IS NO CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner appears to be arguing that the Court of Appeals' reversal of the Circuit Court's conviction means that it ignored the lower court's findings. Petitioner fails to acknowledge, though, that this simply cannot be true, given the specific citation of the Circuit Court finding that TOSI's ordinances contained no express requirement prohibiting a dock from extending farther than adjacent docks. The Court of Appeals not only clearly considered this finding but also relied upon it in finding TOSI's ordinances vague as applied, since neither ordinance expressly stated a prohibition for extending a dock beyond the adjacent docks, and, therefore, failed to provide fair notice of the violation that could result in criminal liability. Town of Sullivan's Island v. Murray, 2021 WL 3890292.

Moreover, as the Court of Appeals also noted, there was no evidence presented by the Town of actual interference with navigation in the channel by the dock or that it in any way extended into the channel, which is the prohibition expressly stated in the Town's Ordinance 21-75. The only evidence presented by the Town regarding interference was through conclusory statements of a Town employee premised on the permit notation prohibiting the dock from extending any further into Cove Creek than adjacent docks. Town of Sullivan's Island v. Murray 2021 WL 3890292. This was also a finding stated in the Circuit Court's Order R.p.2. There was no evidence of actual interference and as a result, the Town failed to establish violation of the Ordinance.

II. SINCE THE TOWN'S ORDINANCES HAD TO BE INTERPRETED BY THE TOWN TO CHARGE RESPONDENT, THE ORDINANCES ARE UNCONSTITUTIONALLY VAGUE FOR FAILING TO PROVIDE NOTICE OF POTENTIALLY CRIMINAL ACTIVITY, IN AGREEMENT WITH PRIOR DECISIONS OF THIS COURT.

Respondent agrees with how Petitioner summarized the void-for-vagueness doctrine as in the first paragraph on page 12 of the Petition, and is in particular agreement with the final citation made in the paragraph that the legal test of statutory vagueness is one that is expressed essentially in terms of common sense. Here, that means a law can be held to provide notice only of what the law actually says and cannot provide notice of an interpretation. Oddly, Petitioner's argument continues on to accuse the Court of Appeals of conflating language from cases on the rule of lenity with cases discussing the void for vagueness doctrine, "resulting in an incorrect presumption of unconstitutionality." Petition for Writ of Certiorari, p. 12.

Petitioner fails to explain where exactly the alleged conflation occurred. Petitioner also fails to acknowledge the shared purpose behind the rule of lenity and the void-for-vagueness doctrine: ensuring defendants receive the fair notice of what is criminal activity. Fair notice has

been specifically identified by the Court of Appeals and this Court as a foundation of both of these concepts. *See* State v. Miles, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct.App.2017) and State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Town of Sullivan's Island v. Murray 2021 WL 3890292.

Petitioner then attempts to gloss over is the Court of Appeals' overriding point that the Ordinances at issue were unconstitutionally vague *as applied.* The significant point appreciated by the Court of Appeals was not whether Mr. Murray had been told, somehow, somewhere, not to extend B&C's dock beyond any other dock but rather, that he did not get fair notice that he could be charged criminally for doing this since the Ordinances did **not** specifically say that no dock could extend beyond any adjacent dock **and** because Mr. Murray's conviction resulted from **interpretation** of the Ordinances by the Town. As noted by the Court of Appeals, testimony at trial showed there were different interpretations regarding what constituted a dock that interfered with navigation. Town of Sullivan's Island v. Murray, 2021 WL 3890292. In other words, anyone given notice of the Ordinances at issue would have to guess to get to the Town's position. It is the need for the guessing, arising out of the fact that the Ordinances did not expressly state the prohibition with which Mr. Murray was charged, that creates the vagueness.

Petitioner also misapprehends the meaning of Respondent's admission of awareness of the prohibition included in the permit as a condition. While Respondent clearly admitted understanding that a building permit was required for construction of C&B's dock and that the permit contained this condition, there was no admission, nor could there have been, to understanding that the Town would interpret the prohibition into the actual language of Ordinance 21-75. Simply put, Petitioner has ignored the fact recognized by the Court of Appeals - that no one could be found to get fair notice through the Ordinances at issue **because** interpretation has

apparently always been used by the Town, and was used in this case (according to the testimony at the hearing) to find a violation. And on top of that, the Town presented no evidence proving actual interference with navigation by the dock, which would have established violation of what the express language of Ordinance 21-75 actually does state as a prohibited activity. Mr. Murray was found guilty of constructing a dock farther into the waterway than adjacent docks. He had no way to understand doing this, particularly when the construction was done in an effort to comply with the building permit condition, might lead to a criminal charge because neither Ordinance under which he was charged actually stated this prohibition.

III. SINCE RESPONDENT SPECIFICALLY REQUESTED THE CIRCUIT COURT TO CONSIDER THE ISSUE OF WHETHER THE TOWN HAD ENFORCED AN UNWRITTEN AND NON-CODIFIED REQUIREMENT BASED ON AN INTERPRETATION OF STATUTORY LANGUAGE AND THE CIRCUIT COURT ISSUED AN ORDER AND RULING THEREAFTER, THE APPELLATE COURT'S DECISION DOES NOT CONFLICT WITH ANY PRIOR DECISION REGARDING ISSUE PRESERVATION FOR APPEAL.

Ultimately, Petitioner's argument is that Respondent did not raise the issue of vagueness to the Circuit Court, but the point is apparently based on the fact that Respondent did not mention that actual word in his argument. The irony of this position, in this particular context, is not lost on Respondent.

Whether or not the word "vagueness" was actually mentioned, the argument made in Respondent's Motion to Alter or Amend addressed the heart of the doctrine, as summarized in the Court of Appeals' Opinion, by reiterating the primary issue raised by Respondent Mr. Murray at the Circuit Court hearing – that the Town could not enforce a "requirement" that it had not promulgated in an Ordinance but rather, admitted was merely an interpretation of the Ordinance. The logical and common sense follow up to this statement, and what Respondent demonstrated through the evidence at the hearing, is that Mr. Murray received no notice *by the Town's laws* of

what the Town later charged him with as criminal activity. Notice was not provided because neither of the Ordinances expressly stated a limitation of dock length by prohibiting construction of docks longer than any adjacent dock. Again, as the Town admitted, the alleged criminal activity it charged Respondent with was based on the Town's "long-standing *interpretation*" of its Ordinances.

Petitioner asserts that Respondent failed to raise the absence of the express prohibition mentioned above from Ordinance 21-75 to the Circuit Court. Petition p. 20, FN 11. This is simply incorrect. "An issue is not preserved for review where the trial court does not explicitly rule on an argument and appellant does not make a Rule 59(e) motion to alter or amend the judgment." Doe v. Roe, 369 S.C. 351, 376, 31 S.E.2d 317, 339 (Ct.App.2006). Respondent filed such motion with the Circuit Court precisely because he believed that the Court had not addressed the primary issued raised at the hearing of the case. In the final paragraph of Respondent's Motion to Alter or Amend Judgment or for a New Trial in Accordance with SCRCP Rule 59, Respondent specifically explained the Motion was to address the position that the Town has no power or authority to enforce a requirement that a newly constructed dock not exceed the channelward extension of the docks on either side, when that requirement never properly promulgated as a law in the Town's very specific ordinance governing dock construction but instead, was admittedly Town policy. R.p.57. After considering Respondent's motion, the Circuit Court modified its Form 4 Order with four Findings of Fact, including the one reproduced in Petitioner's Petition:

> 1. There is no express requirement in the Town of Sullivan's Island's ordinances, including Chapter 21-75 which would prohibit docks from extending any further than adjacent docks.

(Petitioner's Petition p. 20, citing Harrington's modified order R.p.2). It does appear, therefore, that the Circuit Court actually did rule on what Ordinance 21-75 requires per the actual language

included in the Ordinance. Respondent's motion must be understood to have sufficiently raised the issue regarding the content and meaning of Ordinance 21-75 to the Circuit Court to elicit a Finding of Fact from the Court on it. Petitioner cited no cases explaining how an issue may be raised with "sufficient specificity." The case cited by Petitioner, Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007), included the quote from Justice Toal's treatise on Appellate Procedure but did not define sufficiency. This Court, in State v. Byers, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011), has expounded upon "sufficient specificity" with the qualification that the circuit court has only to be informed of the point being urged. Id. at 444, 710 S.E.2d at 58. Also, "[t]he issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Malloy v. Thompson, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014), *citing* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Judge Harrington's Order in Response to Respondent's Motion to Alter or Amend or for a New Trial makes no suggestion that Respondent's allegation of error was insufficient. Instead, the Order confirms that the Court reasonably understood but did not agree that Respondent's position effected the Court's initial ruling.

IV. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO ESTABLISH ANY CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND PRIOR DECISIONS OF THIS COURT, AND CANNOT ESTABLISH ANY OF THE REMAINING CRITERIA CONSIDERED BY THIS COURT TO WARRANT REVIEW OF THE CASE.

As demonstrated by the foregoing, Petitioner's arguments attempting to establish conflict between the Court of Appeals decision and prior decisions of this Court have failed. That fact notwithstanding, this Petition should be denied because no other special reason for review may be shown to exist. First, Petitioner has not argued that the case presents any novel question of law. The primary issue presented by the case is statutory construction of criminal laws. As Respondent has shown, it is well-settled and has been established by the case law that criminal laws must be

strictly construed, which means the express language of such laws must provide fair notice to the general public of prohibited conduct. There is nothing novel about this situation. In fact, it is very straightforward - the Town just cannot charge or convict anyone when it cannot show that its laws give fair notice of what the Town considers prohibited or criminal activity.

Second, Petitioner has not identified any substantial constitutional issue directly involved in these circumstances. Given the Town's admission that neither Ordinance at issue specifically included the activity for which Respondent was charged as a prohibited, potentially criminal action, Respondent is actually the party whose constitutional rights were potentially violated. The Court of Appeals' decision remedied this problem. Third, this case simply presents no federal question. Finally, Petitioner has not established that the Court of Appeals' decision conflicts with any decision of the United States Supreme Court. In short, Petitioner has not shown any "special or important reason" to justify review of this case by this Court. As such, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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Town of Sullivan's Island.....Petitioner,

v.

Michael Murray .....Respondent.

PROOF OF SERVICE

I, Mary D. Shahid, Esquire, hereby certify that on December 1, 2021, I served a copy of the Respondent's *Return to Petition for Writ of Certiorari* on counsel for the Petitioners, via electronic mail and U.S. mail addressed as follows:

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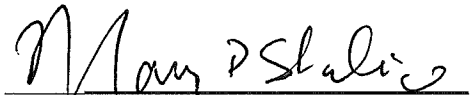

Mary D. Shahid, Esq.

Charleston, South Carolina
December 1, 2021

NEXSEN | PRUET

Mary D. Shahid
Member
Admitted in SC

December 1, 2021

VIA U.S. MAIL AND E-MAIL

Patricia A. Howard
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Town of Sullivan's Island v. Michael Murray
Appellate Case No. 2021-001260

Dear Ms. Howard:

Enclosed for filing please find the original and seven (7) copies of the Respondent's Return to Petition for Writ of Certiorari in the above-referenced matter. Please return a stamped copy in the prepaid envelope provided.

Thank you for your assistance.

Very truly yours,

Mary D. Shahid

Enclosures

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