

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5856 (S.C. Ct. App. filed September 1, 2021)
Appellate Case No. 2018-000511

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

v.

Michael MurrayRespondent.

**REPLY TO RESPONDENT’S RETURN TO PETITIONER’S PETITION FOR
WRIT OF CERTIORARI**

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TABLE OF CONTENTS

Table of Authorities iii

Reply Argument.....1

I. **The characterization of Respondent’s conviction as a conviction for violation of the Town’s interpretation of the ordinance requiring that no dock impede navigation is unsupported by the record—he was convicted of violating a permit condition that he accepted and understood.**1

II. **Respondent’s argument that the Court of Appeals properly found the Town’s ordinances are void for vagueness ignores that it was undisputed at trial that Respondent was on notice of the Town’s ordinances, he understood them, and he violated them.**.....3

III. **The Court of Appeal’s decision is based upon an issue that was not raised and ruled upon by the lower court.**5

Conclusion5

TABLE OF AUTHORITIES

STATUTES

S.C. Code § 6-29-800 (A)(1)4

REPLY ARGUMENT

I. The characterization of Respondent’s conviction as a conviction for violation of the Town’s interpretation of the ordinance requiring that no dock impede navigation is unsupported by the record—he was convicted of violating a permit condition that he accepted and understood.

Respondent Michael Murray’s (“Respondent”) Return to the Petition for Certiorari mischaracterizes his conviction as a conviction for building a dock that the Town interprets as interfering with navigation. **(Return, 6 & 10-11).**¹ The Court of Appeals similarly mischaracterized his conviction. **(Opinion, 4)** (framing the issue on appeal as whether “TOSI’s interpretation that a dock cannot extend past adjacent docks was an unpromulgated and noncodified requirement that did not provide fair warning of criminal liability.”). That is simply not what happened. Respondent was convicted of violating Town ordinances that require a dock builder to obtain and comply with a building permit. **(R. p. 1-2, 3, 28, 52-55).** As explained in detail in the Petition, Respondent agreed that the condition of the permit that the dock could not be built seaward of the adjacent docks was part and parcel of the building permit; that a building permit is required to build a dock on Sullivan’s Island; that Murray understood the permit requirement; and that the dock he constructed violated the permit. **(Pet., 3-18); (R. at pp. 244, l. 18-p. 245, l. 8); (R. at p. 265, ll. 9-14); (R. at p. 242, ll. 1-5); (R. at p. 245, ll. 13-18); (R. at pp. 54-55); (R. at p. 217, ll. 3-8); (R. at p. 217, ll. 9-25); (R. at p. 175, ll. 11-15); (R. at p. 243, l.10-p. 244, l.8); (R. at pp. 88); (R. at pp. 23-25)** (surveys showing violation) **(R. at p. 49)** (same).

The contortion of the record by the Court of Appeals and Respondent (i.e., the mischaracterization of the conviction) to avoid binding precedent, should not be endorsed by this Court. Further, the impact on local governments’ ability to enforce permitting requirements is

¹ Respondent’s Return to the Petition for Certiorari is referred to herein as the “Return.” The Petition for Certiorari is referred to herein as the “Petition.”

substantially erased by the Court of Appeals' decision, which allows a clever builder to obtain a permit, agree to all the conditions associated with the permit, build a structure that indisputably violates that permit, admit at trial he violated permit, and *then* question whether the permit conditions that he agreed to should have been different.

At a time when much of South Carolina is being rapidly developed and redeveloped, the Court of Appeal's decision creates an incentive for builders and developers to obtain a permit for something they know will be approved and then construct whatever structure they (or their client) desire regardless of the permit. Under the Court of Appeal's decision, they can deal with the municipal zoning requirements once they complete construction.

Respondent does not directly address one of Petitioner's primary arguments in the Petition, that the Court of Appeals ignored the factual findings of the trial court and made its own factual findings on appeal, without any deference to the trial court's findings. Compare (Opinion, 6) (" . . . [the Town's] ordinances . . . did not provide Murray with sufficient fair notice that violation [of the Ordinances] could result in criminal liability.") and **(Opinion, 6-7)** with **(R. at pp. 53-55)** (Return of the trial court judge stating that Murray acknowledged at trial he knew he was prohibited by the Town from building the dock out any further than the adjacent docks, he was aware of that condition at the time of construction and that he violated that condition of the permit). Instead, Respondent brushes aside the precedent prohibiting the Court of Appeals from making its own factual findings in a criminal appeal without any deference or consideration of the lower court's factual findings. **(Return, 10-11)** (Respondent asserting that because one of the findings of the circuit court below was considered, that the Court of Appeal's decision finding its own facts completely inconsistent with the record and findings below should be ignored). As discussed in the Petition, the primary factual finding of the Court of Appeals—that Murray did not have notice

that a violation of the Town’s Ordinances would subject him to criminal liability—is completely unsupported by the record and inconsistent with the findings below. (Pet., 9-11).

For these reasons, Petitioner asks this Court grant certiorari and issue an opinion reversing the Court of Appeals and affirming the circuit court.

II. Respondent’s argument that the Court of Appeals properly found the Town’s ordinances are void for vagueness ignores that it was undisputed at trial that Respondent was on notice of the Town’s ordinances, he understood them, and he violated them.

Respondent’s argument in section II of its Return suffers from the same flaw as the argument discussed above. Plaintiff was convicted of violating a permit condition that he accepted and understood. Respondent defends the Court of Appeals’ decision by continuing to mischaracterize the conviction as being a conviction for violating an interpretation of a Town ordinance. Respondent argues that because no ordinance specifically states that a dock cannot extend past adjacent docks that anyone “would have to guess to get to the Town’s position.” (Return, 12). No so! Most importantly, Petitioner did not have to guess. He has acknowledged that the permit he was issued only allowed a dock to be constructed that did not extend past adjacent docks and that he understood that at the time he accepted the benefit of the permit. He did not violate the permit because of a misunderstanding or any uncertainty as to the structure the permit allowed. As reflected by his own testimony, he was not left to guess as to anything:

Q: And you acknowledged that the building permit application, which has been initialed by both Mr. Henderson, the zoning administrator and Mr. Robinson, the building official, specifically say ‘Approved as noted;’ correct?

A: Yes, sir.

Q: And those notations being the two notes, ‘must not exceed adjacent docks,’ and then the other issue with regard to ten feet from the adjoining property line; correct?

A: That is correct.

Q: And would you agree that those specific notations became a part and parcel of the building permit that was issued to your company relative to the construction of the dock [at the Property]?

A: As far as I know, yes, sir.

(**R. at pp. 244, l. 18-p. 245, l. 8**); see also: (**R. at p. 265, ll. 9-14**) (Respondent acknowledging that he was required to comply with the terms and conditions of the building permit). Even though he understood the permit requirements, he violated it. (**R. at pp. 23-25**); (**R. at p. 49**); (**R. at p. 242, ll. 1-5**); (**R. at p. 245, ll. 13-18**) (Appellant admitting that the dock he built exceeded the adjoining docks by at least nine feet). He was convicted of that. As applied to him, the Town required him to obtain a permit and not violate it. The Court of Appeals' ruling that his violation of the permit should be excused because the condition in the permit was based upon a Town official's interpretation of an ordinance must be overturned. The permitting process oftentimes involves a municipality's interpretation of its ordinances. The permit appeals process affords an applicant the right to challenge any interpretation. Respondent could have appealed the permit condition in this instance, but he didn't. See S.C. Code § 6-29-800 (A)(1); (**R. at p 184, l.10–p. 185, l.6**); (**R. at p. 213, ll. 2-5**) (“... after its was issued, we didn't hear from them. For all we knew, they were going to comply with the terms and conditions of the permit.”); (**R. at p. 220, ll. 3-7**) (no appeal of building permit that was issued); (**Pet., 5, n.2**).

Notably, Respondent does not appear to contest the substantial evidence cited in the Petition that he had ample notice that he was required to obtain a building permit from the Town and comply with the conditions therein. Nor does Respondent suggest that the building permit requirement was impermissibly vague. For this additional reason, this Court should grant certiorari and issue an opinion reversing the Court of Appeals and reinstating the conviction.

III. The Court of Appeal's decision is based upon an issue that was not raised and ruled upon by the lower court.

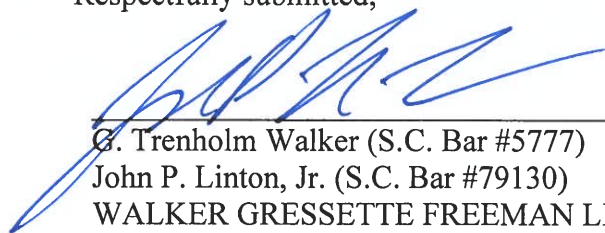
While not contesting that his motion to reconsider at the circuit court did not reference the void for vagueness doctrine, did not claim that the Town ordinances were vague, and did not claim that Respondent did not have notice of the Town's ordinances, Respondent asserts that the issue of whether the Town's ordinances were void for vagueness was preserved for appeal by Respondent claiming he disagreed with the Town's interpretation of its ordinances. Respondent argued below that no ordinance included a prohibition on building beyond other docks and that the Town's interpretation (at the time it issued the permit) of its ordinance prohibiting dock structures that impede navigation was an incorrect interpretation. That is a completely different substantive argument than claiming the ordinance is vague or unclear in its meaning. The most logical interpretation of Respondent's argument below is that the ordinance is clear and nowhere prohibits docks from extending out past adjacent docks. That is very different than an argument that an ordinance is unclear or vague.² For this additional reason, this Court should grant certiorari and issue an opinion reversing the Court of Appeals and reinstating the conviction.

CONCLUSION

Therefore, for these reasons, and the responses stated in the Petition, the Town respectfully requests that this Court grant its Petition.

² Respondent has argued that the dock that was constructed in violation of the permit does not interfere with navigation, though arguing on appeal that it is vague or uncertain whether a particular dock interferes with navigation. While not the issue that should have been decided by the Court of Appeals, it is worth noting that Respondent had ample notice that no dock on Sullivan's Island can be constructed so as to interfere with navigation. **(Pet., 16-18)**. Further, as explained in the Petition and shown by the evidence at trial, the Town's decision not to approve a dock that extended well past the other docks on the same small tidal creek was supported by logic and common sense. **(Pet., 16-18)**.

Respectfully submitted,



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December 13, 2021
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi Lea Harrington, Circuit Court Judge

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

v.

Michael Murray Respondent.

PROOF OF SERVICE

I certify that on **December 13, 2021**, I have served **REPLY TO RESPONDENT’S RETURN TO PETITIONER’S PETITION FOR CERTIORARI**, by electronic mail, in accordance with the August 25, 2021, order of the Supreme Court, Appellate Case No. 2020-000447) on counsel of record as follows:

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Subject: Appellate Case No. 2018-000511 Town of Sullivan's Isl. v. Murray
Date: Monday, December 13, 2021 4:39:50 PM
Attachments: [image351953.png](#)
[12-13-21 Petitioner's Return.pdf](#)

Attached please find Reply to Respondent's Return to Petitioner's Petition for Writ of Certiorari and Proof of Service by electronic mail only.

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December 13, 2021

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Appellate Case No. 2018-000511
WGFL File 6670.018

Dear Ms. Howard:

We are filing and serving Reply to Respondent's Return to Petitioner's Petition for Writ of Certiorari and Proof of Service by electronic mail only.

Thank you very much for your courtesies in this matter

Sincerely,

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