STATE OF SOUTH CAROLINA
In the Supreme Court

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APR 14 2017

S.C. SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr. Circuit Court Judge

Order (S.C. Ct. Appeals, February 5, 2016
Appellate Case № 2015-002315

State of South Carolina ..... Petitioner,

v.

David Z. Ledford, ... Respondent.

Brief of Respondent

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Statement of Issues Presented on Appeal

Did the Court of Appeals err in summarily dismissing the State's Appeal before briefing as "not immediately appealable" because it failed to consider the unusual circumstances presented by the action of the trial court, the patently erroneous ruling of the trial court, and the novel question of law presented by the pursuit of this interlocutory appeal?

Statement of the Case

The Respondent agrees with the Statement of the Case and Statement of the Facts as set forth by the Petitioner.

Argument

Did the Court of Appeals err in summarily dismissing the State's Appeal before briefing as "not immediately appealable" because it failed to consider the unusual circumstances presented by the action of the trial court, the patently erroneous ruling of the trial court, and the novel question of law presented by the pursuit of this interlocutory appeal?[1]

The Respondent contends that the decision by the trial judge to charge the jury the definition of "willfully" as alleged in the indictment is not "an order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action" as required by S. C. Code § 14-3-330. The State has represented to the trial court, to the South Carolina Court of Appeals and this Court, that by filing this appeal, the charge to the jury giving the definition of "willfully" as alleged in the indictment, "determines the action" as required by S. C. Code § 14-3-330. By so doing, the State has acknowledged that the evidence in this case is insufficient to sustain a conviction for a willful violation of S. C. Code § 16-3-95.

The trial judge in this matter has not suppressed any evidence that is the subject of this appeal. He has not quashed their indictment. All he has done is tell the State they must prove what they alleged in the indictment. While the charge as to mens rea may make proving the case more difficult for the State, the charge hardly prevents the State

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[1] While the Respondent does not agree with the wording of the statement of issues, Respondent adopts it for the purpose of clarity for the reader.

from winning, unless the State has acknowledged that the evidence does not establish willfulness. In that case, the State should dismiss the case in the event this appeal is denied.

Under S. C. Code § 17–19–90 Mr. Ledford would have been required to file a motion to quash the indictment if he believed the indictment to be vague or the statute to be over broad. If the indictment and the statute failed to contain a mens rea, Mr. Ledford would have been required to file a pre-trial motion to determine what mens rea the State contended was required to convict Mr. Ledford. By including the mens rea of "willfully" in the indictment, the State corrected any ambiguity in the statute as to the required mens rea and therefore a motion to quash the indictment would not have been successful. The State apparently had no problem telling the grand jury they were going to prove Mr. Ledford acted willfully.

The South Carolina Supreme Court has held "The indictment is a notice document." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). As such this indictment notified Mr. Ledford that the State intended to prove he willfully inflicted great bodily injury on the minor child. The State did not notify him they intended to prove he was negligent, grossly negligent or reckless in inflicting such injury. They did not tell him the statute did not require them to prove any intent.

The court in *Gentry* further stated the indictment must make sure "the offense is stated with sufficient certainty and particularity to enable . . . the defendant to know what he is called upon to answer . . . ." *Id.* at 102, 610 S.E.2d at 500. The State told Mr. Ledford he was called upon to answer an allegation that he willfully inflicted great bodily

injury upon his child. Mr. Ledford took the State at its word. Trial preparation, theory of defense, direct and cross examination were all premised upon the State alleging and proving that Mr. Ledford wilfully inflicted great bodily harm on his child. Once he had completed his defense, the State now wishes to renege and tell the jury they do not have to prove Mr. Ledford acted wilfully. By contending, immediately before closing argument, that the State was not required to prove what they alleged, they simply pulled an old "bait and switch." Had such an act been done in a business transaction, the perpetrator of the act would have been subject to damages. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010). Here, they should be simply held to their word.

Aside from some basic rules, the State has virtually unfettered discretion as to how it words its indictments. The State elects what facts, allegations and mens rea to put in the indictment. If a defendant disagrees with the wording of the indictment, the only recourse is to file a motion to quash to clarify any ambiguity or improper allegation. In this case there were none.

At the trial conference Mr. Ledford and the trial court both agreed with the wording of the indictment as prepared by the State. Only the State, at that point, disagreed with the wording of the indictment it had prepared and had presented to the grand jury. If the indictment as a notice document is to have any meaning, it cannot mean the State can tell Mr. Ledofrd one thing at the start of the trial and then renege on what they said at the end. This is not a case where discovery may supply the information missing or different from the indictment. Mr. Ledford should be entitled to rely upon the

indictment as prepared by the State. He can claim prejudice when the State wanted to significantly change their indictment.

A ruling by the trial judge on a jury charge is not appealable by the State

In the only case counsel for Mr. Ledford has been able to find, the Vermont Supreme Court has held an interlocutory appeal is not proper in a dispute over jury charges. *State v. Premo,* 168 Vt. 600, 719 A.2d 398 (1998). Counsel has found no case in South Carolina which permits an interlocutory appeal that did not involve the suppression of evidence that was critical to the prosecution of the case or the quashing of an indictment. Counsel has also not found any reported case in South Carolina that permits an interlocutory appeal by the State after the jury is sworn. The State has cited *State v. Bouknight*, 55 S.C. 353, 33 S.E. 451 (1899) for the position that an appeal by the State can be taken after a jury is sworn. A reading of the case does not support such a proposition. In *Bouknight* this Court said "Before the jury was sworn, defendant moved that the solicitor be required to elect upon which of the two counts for house-breaking (the first and the third) he would go to trial." *Id.* at ___, 33 S.E. at 451. Nothing in the opinion after that comment suggests that a jury was sworn before the trial court granted the motion to quash the indictment. South Carolina Code § 17-19-90, which requires that a motion to quash be filed before the jury is sworn, has been part of our code since at least 1887. In 1902 the wording of the statute was the same as today. *State v. Ross*, 83 S.C. 434, 65 S.E. 443 (1909).

While granted the State will not be able to review an error on this charge on appeal, the same is true for any objection the State may have to any proposed jury charge.

Virtually any charge to the jury favorable to the defendant would make the prosecution of the case more difficult. While the State argued below, and apparently has on this appeal, that the proposed jury charge defining willfulness determines the action, the State could make a similar argument in virtually any interlocutory appeal involving a jury charge. Unless this Court desires to micro-manage trials by permitting the State to appeal rulings on jury charges, this Court should summarily dismiss this appeal and remand the case back to the trial court. This is especially true when the charge to which the State complains is one they suggested by indicting Mr. Ledford for a willful violation of the Statute.

The State has contended that the allegation of a wilful violation of the law is mere surplusage. The simple answer to this is the inclusion of a mens rea in an indictment is never surplusage. A mens rea is required. The United States Supreme Court has said "While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it." *United State v. Balint*, 258 U.S. 250, 251–52 (1922). *See, also*, *Henderson v. Hames*, 287 Ga. 534, 539, 697 S.E.2d 798, 802, (2010)(holding indictment is defective if no men rea is alleged.)

The charge to the jury was proper under South Carolina law

In *State v. Freeland*, 106 S.C. 220, 91 S.E. 3, 3 (1916) this Court, when faced with a statute that had no mens rea, said "[T]he statute must be read in the light of the fundamental principle of the common law, which is of general, though, perhaps, not of universal, application, that an evil intent must concur with an act to make it a crime." *Id.*

at ___, 91 S.E. at 3. This Court further noted the trial judge gave a charge that provided "if defendant did not know that she had cocaine in her possession, she should be acquitted." *Id.* at ___, 91 S.E. at 4. The Court held this charge as to mens rea was proper except that it was too favorable. The Court said the lower court should have given a charge as to what is now called "wilful blindness." Under the facts of this case, "wilful blindness" would not have been a correct charge as the facts did not support such a charge.[2] Concerning "wilful blindness" the Fifth Circuit Court of Appeals said "[A] deliberate ignorance instruction should be given only when the government presents evidence of the defendant's '(1) subjective awareness of a high probability of the existence of illegal conduct and (2) purposeful contrivance to avoid learning of the illegal conduct.'" *United States v. Threadgill*, 172 F.3d 357, 368 (5th Cir. 1999).

As no "wilful blindness" charge was proper under the facts of this case, and none was requested by the State, the charge on wilfulness give by the trial court was in keeping with the *Freeland* case. The "criminal negligence" referred to in *State v. Ferguson*, 302 S.C. 269, 395 S.E.2d 182 (1990) is likewise "wilful blindness" as the case cited to *Freeland.* Nothing in the statute indicates an intent on the part of the legislature to impose a 20 year sentence simply because of a person being grossly negligent. Nor is *State v. Taylor*, 323 S.C. 162, 473 S.E.2d 817 (Ct. App. 1996) applicable. The Court in *Taylor* never said gross negligence or recklessness was the correct standard. They simply cited *Freeland* and stated that the statute required knowledge. Reckless homicide, which

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2 The government never urged the lower court to charge "wilful blindness" as an addition to the wilful charge the court was going to charge.

carries only a five year sentence, requires the State to prove gross negligence in causing a death. This Court should hold that wilful is the proper mens rea in a case under S. C. Code § 16-3-95.

The State has further argued that the requested charge on wilfulness is not a correct statement of the law. The Brief of Appellant argues the requested charge "sought to define that term to require not just that the act itself must be wilful, but that the result of the wilful act was in fact known to the actor." Br. of App. at 12. The United States Supreme Court has held this is the exact definition of a wilful violation of the law. The Court said "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991)

Further, the State has argued in its Brief that this could be a strict liability statute. Br. of App. at 10. Under such an interpretation, a medical doctor who performs an operation on a minor child could be subject to criminal prosecution if the result of the operation is to leave the child seriously injured. Did the legislature intent to make a doctor a criminal if the operation does not turn out well, even through no fault of the doctor? A parent playing with their child who through simple negligence causes great bodily harm would be subject to 20 years imprisonment. If the legislature had intended such results, they should have specifically said so. As this Court has said "[R]regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have

been intended by the General Assembly." *Duke Energy Corp. v. South Carolina Dept. of Revenue*,, 415 S.C. 351, 355, 782 S.E.2d 590, 592(,2016). To keep from achieving an absurd result, this Court should require a mens rea of wilfulness for such a serious crime.

The Court should remand the case to the trial court with instructions to dismiss the case

To comply with S.C. Code § 14-3-330, the State is required to establish that the ruling of the trial judge in this case "in effect determines the action." Simply put, the State is required to establish that the ruling of the trial judge below prevents the State from winning this case. By filing this appeal , and with the comments made below, the State has admitted it cannot prevail if the State is required to prove Mr. Ledford acted willfully. The comments at the trial below and the requirements of S.C. Code § 14-3-330 constitute an admission of a party opponent under S. C. Rules of Evidence 801 (2). Mr. Ledford requests that this Court dismiss the appeal and remand the matter to the trial court to determine if this admission by the State necessitates the dismissal of the case against Mr. Ledford.

CONCLUSION

For the foregoing reasons, this Court should hold that the indictment as written requires the State to prove David Z. Ledford acted wilfully, that the Statute requires that any defendant act wilfully and remand this matter to the lower court for further proceedings.

April 11th, 2017

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Respondent in the above entitled case. That on April 12, 2017, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Brief of Respondent in the above case addressed to J. Benjamin Aplin, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211,

SWORN to and Subscribed

Sandy Traynham

before me this 12th day

of April, 2017.

Michelle O Collins (L.S.)
Notary Public for South Carolina
My Commission expires: 12/13/2026