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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2022-000621
Court of Appeals Unpublished Opinion No. 2022-UP-097

Brandon Moore, ... Petitioner.

v.

State of South Carolina, ... Respondent.

Reply to the State's Return to Petition for Writ of Certiorari

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Introduction to Arguments

Brandon Moore raised three questions in his petition for a writ of certiorari ("Petition"). For some unstated reason, the State's return to the petition for writ of certiorari ("Return") did not respond to the individual arguments raised by the Petition, but rather responded under the guise of one counter statement of the questions presented, merely arguing Mr. Moore's sentence for first-offense simple possession of methamphetamine "fell within the permissible statutory sentencing limits for Moore's crime, supporting this argument with caselaw, which for the most part was decided over forty-five years ago. *See, e.g., State v. Franklin,* 267 S.C. 240, 226 S.E.2d 896 (1976); *State v. Sidell,* 262 S.C. 397, 205 S.E.2d 2 (1974); *State v. Scates,* 212 S.C. 150, 46 S.E.2d 693 (1948); *and State v. Davis,* 88 S.C. 229, 70 S.E. 811 (1911). Since those cases were decided, this Court expressed its concern about "the disparate sentences" imposed on "co-defendants" by the same circuit judge." *Edwards v. State*, 392 S.C. 449, n. 1, 454, 710 S.E.2d 60, 63, n. 1 (2011).[1] Since those cases were decided, this Court also issued decisions regarding trial courts' "inherent power" to hear and decide cases. *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012).

By responding under one courter statement of the questions presented, the State neglected to address many of the arguments raised by Mr. Moore's petition. For example, Mr. Moore pointed out the Supreme Court of the United States recognizes "retribution, deterrence, incapacitation, and rehabilitation" as "penological justifications" for sentencing

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[1] The same trial judge sentenced Terrance Edwards to 55 years imprisonment sentence following a jury trial, while sentencing Sergio Marshall to 35 years following a guilty plea.

and argued, "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." Petition at 15 (citing *Graham v. Florida*, 560 U.S. 48, 71 (2010)). Mr. Moore also presented evidence that the same trial judge, during the same term of court, imposed disparate sentences for possession of methamphetamine. Petition at 16; R. 14-141. The State did not address this evidence except for one sentence. Return at 13 ("[A] sentencing judge is not precluded from imposing a sentence for one defendant convicted of a certain offense that is higher than the sentence imposed on another defendant convicted of the same offense so long as the decision to do so is not arbitrary or unreasonable."). This evidence presented by Mr. Moore, however, is circumstantial evidence that the trial judge imposed a "trial tax" in this case. *See, e.g., State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) ("Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact."

This Court and the Court of Appeals already provided some guidance regarding the imitations on sentencing discretion. *See, e.g.*, *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016), *Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999), *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995), *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010), *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001). The bench and bar would benefit from the Court's additional guidance on the application of the penological justifications for sentencing. For example, federal courts must "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing and "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C.A. § 3553.

Question I

Did the Court of Appeals err, in contravention of Rule 220(b), SCACR, by not considering the Solicitor's request for the trial court to sentence Brandon Moore as "a trafficker of methamphetamine," the trial judge sentencing based on the "testimony in this case" without distinguishing the evidence of trafficking verses simple possession, and documents from the Public Index documenting the sentences imposed by the same trial judge during the same term of court?

As seen, Mr. Moore presented evidence that the same trial judge, during the same term of court, imposed disparate sentences for possession of methamphetamine. R. 14-141. At sentencing, despite the jurors' verdict, the Solicitor argued, "[I]t's pretty clear that Mr. Moore is a trafficker of methamphetamine." R. 561. The trial judge sentenced based on the "testimony in this case" without distinguishing the evidence of trafficking verses simple possession. R. 562. The State did not address this evidence except for one sentence arguing disparate sentences are not prohibited. Return at 13. In order to justify the disparate sentence, the State argues:

> In the case at bar, the trial judge was presented with extensive testimony and evidence in regard to Moore's misdeeds, and, as recognized by both the trial judge and the solicitor, Moore engaged in his criminal behavior while a young child was present at the scene and in close proximity to a large quantity of methamphetamine, multiple firearms, and a variety of drug paraphernalia. As a result, the facts and circumstances of Moore's case certainly could have led the trial judge to conclude a more substantial sentence was warranted than would have been warranted for a less culpable offender who committed the same offense without exposing a child to it in the manner Moore did, and that decision was ultimately one for the trial judge alone to make.

Return at 16. This argument has two flaws. First, the trial judge did not articulate this rationale for the sentence imposed. If this Court adopted a rule requiring the trial judge to state the reasons for implementing a particular sentence, then this Court would not have to speculate about the rationale for a particular sentence. Second, the State's reference to a "large quantity of methamphetamine," despite the jurors acquitting on this charge, supports

Mr. Moore's argument that the trial judge considered the original charge as part of the sentence.

Question II

Did the trial judge punish Brandon Moore, who does not have a prior criminal record, for exercising his constitutional right to a jury trial, by imposing what is commonly referred to as a "trial tax," when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore's jury trial, at least one of which had a record for a prior drug offences?

That the trial judge imposed a "trial tax" is the only explanation for the maximum sentence the trial court imposed on Brandon Moore. *See* S.C. Code Ann. § 44-53-375(A); *see also* Sentencing Sheet, R. 3. As the trial judge sentenced throughout the week, a person sentenced for first offense possession of methamphetamine, without any other criminal record, ordinarily receives a suspended sentence with appropriate conditions of probation. *See* S.C. Code Ann. § 24-21-410 (power to suspend sentence and impose probation).

The State's reliance on *Alabama v. Smith*, 490 U.S. 794 (1989) is misplaced for two reasons. First, *Alabama v. Smith* involved the trial court sentencing a defendant after a guilty plea, a vacation of that guilty plea, and a subsequent sentence following a jury trial. In this case, there is no prior guilty plea or sentence. Second, there is no evidence in this record that "the factors that may have indicated lenience as a consideration for the guilty plea are no longer present." Return at 17 (quoting *Smith*, at 801).

Here, the sentence imposed on Mr. Moore is inconsistent with sentences normally imposed for simple possession of methamphetamine with the defendant has no prior criminal record.

Question III

Did the trial judge impermissibly consider that the State initially charged Brandon Moore, who does not have a prior criminal record, with trafficking 28 to 100 grams of methamphetamine, by imposing what is commonly referred to as a "trial tax," after a jury acquitted Mr. Moore of this charge, when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore's jury trial, at least one of which had a records for a prior drug offences?

As argued in Mr. Moore's Petition, at 21-22, the trial court impermissibly considered the fact that Mr. Moore was originally charged with trafficking. The State concedes this argument when contends the sentence was justified by the "large quantity of methamphetamine." Return at 16.

CONCLUSION

For the reasons set forth in the petition for writ of certiorari and this reply, this Court should grant the writ and consider the questions.

Respectfully Submitted,

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