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APR 24 2023

SC Court of Appeals

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Active counsel of record: _____

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Date 4/13/2023

State of South Carolina
In The Court of Appeals

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Appeal From Charleston County
Honorable Robert M. Young, Sr., Circuit Court Judge

APR 24 2023

SC Court of Appeals

David Smith,

Appellant,

vs.

State of South Carolina,

Respondent.

Case # 2022-00141D

Appellant response to motion to Dismiss
Appeal

Appellant Pro Se files this response, to respondent motion to remand and reconstruct and motion to dismiss appeal, hereby states following:

- 1) All Parties agree, that counsel motion filed to reconsider sentence was timely filed by counsel, and a hearing was held on motion November 17th, 2014. The only dispute is whether, Pro action filed by appellant waives his right to appeal oral order by Judge Young.

For purposes of this action, appellant avers that South Carolina Appellate Rule 203(b)(2) states clearly, that a timely filed Post trial motion, starts the time to file notice of appeal as herein. Under *Camp v. Camp*, 386 S.C. 571 (2010) our appellate courts hold an appeal can not be filed until Parties receive a written order.

Thus, since this written order was not signed until July of 2022, Respondent asks court to dismiss appeal, because appellant filed Pro action, Respondent argument

While the Guilty Plea is unchallengeable on appeal, this timely motion is appealable and Flores-Ortega is misplaced by respondents. Warren, Camp, id. For this reason, Flores-Ortega affords appellant protections in a break-down in adversarial process, such as herein, no matter what label we place on this "clerical error or excusable neglect" it is clear the appellant was not afforded right to appeal reconsideration motion, due to delay in issuing written order.

Respondent says the Per filed finalizes this order (Resp. Mo. PG 3) if respondent deems Per as waiver, then it is clear why these cases do not Campbell, Warren, id make any such rulings. In fact, both Warren and Campbell have both ruled that "timely filed motions stays appeal" moreover, a Per is a "collateral challenge" under civil proceedings challenging criminal "conviction and sentence" South Carolina Code Ann. Sec. 17-27-20 A 1-6 (cum. sup. 22)

Then this is not a waiver, but constitutes as multiple adversarial proceedings challenging criminal proceedings constitutionality, something courts have avoided with procedural mechanisms.

- 2) Pursuant to South Carolina Code Ann. Sec. 16-3-600 (1)(2) (cum. sup. 22) the sentence imposed under statute is excessive, and violates State/Federal constitution. As such, the facts at hearing for reconsideration of sentence presented do not rise to level warranting sentence.

Under Section 16-3-600, the legislature defined what is deemed (1) Serious bodily injury; (2) Moderate bodily injury. Therefore, the trial Judge was required to follow the sentencing guidelines under section 16-3-600 (A-E) based on injuries of victim.

In State v. Johnston, 333 S.C. 459 (1999) the South Carolina Supreme Court established the appellate court's authority in "exceptional circumstances" to consider an improper sentence even though the sentencing issue was not properly preserved. First, there is an exceptional circumstance when "the state has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence". Second,

an exceptional circumstance exist when there is a "real threat that defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to Pursue Per" Johnston, id. at 463-64.

This court addressed a similar situation in State v. Vick, 384 S.C. 189 (2009). The defendant appealed a thirty-year sentence for kidnapping in a case in which he was also convicted of murdering victim. Vick, id. at 201. However, the Vick court considered the sentencing issue, irrespective of the Preservation rule, because it was in the interest of judicial economy.

Clearly as noted, that trial Judge failed to give serious consideration to the extent of any departure from the Guidelines and did not explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate herein. These Guidelines are mandatory not advisory. Appellant asks this court, to review the reasonableness of this sentence outside guideline range, appellate court may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines.

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. Court has authority to ensure that lower court committed no significant procedural error, such as failing to calculate or improperly calculating the Guidelines range, treating Guidelines as mandatory, failing to consider section 16-3-600(A-E) factors, selecting a sentence based on clearly erroneous facts, failing to adequately explain the chosen sentence, including reasons for deviating from Guidelines.

The cruel and unusual Punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of crime. See, Solem v. Helm, 463 U.S. 277 (1983) Pursuant to Solem, this court reviews three factors in assessing proportionality: (1) the Gravity of the offense compared to the harshness of the Penalty; (2) sentences imposed on other criminals in the same Jurisdiction; and (3) sentences for the same crime in other Jurisdictions. See, State v. Jones, 344 S.C. 48 (2001)

Victim herein, injuries fall under section 16-3-600(a) as moderate and thus, do not call for the twenty (20) year sentence, and victim injuries mandate non-violent sentence and not a violent sentence.

lacks merit.

Respondent contends any appeal should have been filed before 2015 Per action and the oral order was final by Per action filed by appellant. Such argument lacks merit for two reasons (1) Respondent argument totally disregards state precedents, ruling timely filed motions (post-trial) as well as fact that both cases the respondent cites support argument. See, State v. Warren, 392 S.C. 235 (2011) State v. Campbell, 376 S.C. 212 (2008)

As such, since appellant motion is undisputably timely filed. Then no other action could be filed challenging this case; (2) Per action filed challenges counsel failure to file notice of appeal, which court denied. Holding that: "trial counsel is not ineffective for not filing an appeal for a Plea of Guilt" (Resp. Exhibit E)

Since oral order is not appealable and written order was not issued, counsel is required to file notice of appeal upon receipt of written order. In case at bar, these proceedings decision counsel was not ineffective, based on the facts presented as well as state stare decisis warrants this court granting appeal

Appellant has shown due diligence in pursuing his rights, and while respondent deems my filing Per action as a waiver of motion, is not tenable because an action under section 17-27-20 (Cum. Sup 22) which challenges criminal conviction. Does not waive appeal of written not oral order, moreover, respondent was aware of motion for reconsideration of sentence was still pending.

However, respondent failed to inform court that motion filed was orally denied but no written order was filed and thus, appellant could not file Per until court issued order denying motion, as well as, filing notice of appeal based on written order. See, State v. Stewart, 2013 WL 8481958; Campbell, id, Warren, id. When respondent obtained court records and reviewed files, respondent was on notice Judge Young did not issue a written order.

This court should not penalize appellant for Judge Young delay in issuing order, when respondent throughout state collateral proceedings "knew the record" and the state does not get the benefit to claim excusable neglect. As noted, state addressed whether counsel was ineffective for not filing notice of appeal, and argued counsel was not ineffective.

To the extent that a state believes its Procedural rules are in Jeopardy, numerous courses remain open. For example, a state may certainly enforce a vital Procedural rule by imposing sanctions (PCR) against both counsel, rather than against appellant. Such a course of action is more effective than the alternative of refusing to decide merits of appeal and will reduce the possibility that appellant was powerless to obey the rules, will serve a term of years in Prison on an unlawful sentence.

If instead a state court chooses to dismiss an appeal when an incompetent attorney have failed to follow local rules, it may do so if such action does not intrude on the appellant's due Process rights

Wherefore, it is Prayed Court Grant appeal

Date: 4 day of 13, 2023.

Respectfully Submitted:

sl David Smith

David Smith / Pro Se

DAVID SMITH 360603

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