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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JAMEL BRISBON,

APPELLANT

APPELLATE CASE NO. 2022-000478

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in sentencing Appellant to consecutive terms of imprisonment based upon his mistaken belief that his discretion was restricted in such a way that he was required to order consecutive sentences where neither statute nor case law restricted the judge's discretion in sentencing?

STATEMENT OF THE CASE

A Lexington County jury indicted Appellant for murder, burglary in the second degree, criminal conspiracy, and possession of a weapon during the commission of a violent crime. Supp. R. 1, l. 21 – Supp. R. 2, l. 6; R. 665-670. After the state presented its case-in-chief, the trial judge granted a directed verdict of acquittal regarding the criminal conspiracy charge. R. 589, ll. 2-6; R. 590, ll. 7-12. The trial judge found the state failed to produce "substantial circumstantial evidence … that reasonably tend[ed] to prove he's guilty of conspiracy." R. 590, ll. 7-12. Ultimately, the jury found Appellant guilty as charged. R. 645, l. 19 – R. 646, l. 3. The judge then sentenced Appellant to forty years for murder, fifteen years for burglary, and to five years for the weapon. R. 661, ll. 12-20; R. 671-676. He ordered the sentences for murder and burglary to be served concurrently, but he ordered the sentence for the weapon to be served consecutively to the sentence for murder. R. 661.

On March 3, 2022, Appellant moved for a new trial. R. 662. By an order dated April 8, 2022, the trial judge denied the motion. R. 663-664.[1] On April 11, 2022, Appellant served his notice of appeal. This brief follows.

[1] There are two identical copies of the order denying the motion for new trial (both are captioned order denying motion to reconsider) within the Clerk of Court's file. One was clocked on April 8, 2022, and one was clocked on April 12, 2022. R. 663-664.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009)(quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

ARGUMENT

The trial judge erred in sentencing Appellant to consecutive terms of imprisonment based upon his mistaken belief that his discretion was restricted in such a way that he was required to order consecutive sentences where neither statute nor case law restricted the judge's discretion in sentencing.

Relevant facts

When the jury returned with its verdicts, the judge moved into the sentencing portion of the trial. The judge stated that it was his understanding that "weapons charge requires a consecutive five years." R. 660, ll. 22-24. Defense counsel responded, "I never thought it would be, but let's just make ---." R. 660, l. 25 – R. 661, l. 1. The judge reiterated his belief that he was required to order consecutive sentencing for a possession of a weapon during the commission of a violent crime offense. R. 661, l. 2. Thereafter, the judge sentenced Appellant to forty years imprisonment for murder. R. 661, ll. 12-15; R. 671-672. He then sentenced Appellant to five years imprisonment for possession of a weapon during the commission of a violent crime. R. 661, ll. 16-18; R. 675. The judge ordered this five-year sentence to be served consecutively to the forty-year sentence for murder. R. 661, ll. 16-17; R. 675-676.

Discussion

The trial judge erred in determining that he was required to sentence Appellant to a term of years to be served *consecutively* to the sentence for the principal crime. Pursuant to statute, a person who was in possession of a firearm during the commission of a violent crime and is convicted of a violent crime "must be imprisoned five years, in addition to the punishment for the principal crime." S.C. Code Ann. § 16-23-490(A). Further, the statute provides that "[t]he court may impose this

mandatory five-year sentence to run consecutively or concurrently." S.C. Code Ann. § 16-23-490(B).

Certainly, "[j]udicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction." State v. De La Cruz, 302 S.C. 13, 15, 393 S.E.2d 184, 186 (1990); see also Major v. South Carolina Dept. of Probation, Parole, and Pardon Services, 384 S.C. 457, 465-466, 682 S.E.2d 795, 799-800 (2009). However, the legislature created no restriction on a sentencing judge's ability to order a sentence for violation of section 16-23-490(A) to run consecutively or concurrently. This is clear from the text of section 16-23-490(B). See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (providing that "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature"); In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (explaining that under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995) (holding that where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning); State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993) (explaining the rules of statutory construction, courts must strictly construe the criminal statutes against the state); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) (noting the cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature).

Further, the South Carolina Supreme Court made clear that judges retain this discretionary power as it pertains to this charge through case law. See Major, 384 S.C. at 466, 682 S.E.2d 795,

799 (stating a sentencing court has the ability to order whether a sentence is consecutive or concurrent and citing section 16-23-490(B)).

The judge clearly believed his sentencing discretion was restricted in such a way as to require him to order consecutive sentencing. However, a review of the clear and unambiguous language of the statute coupled with controlling case law on the subject reveal no restrictions on the judge's ability to order the sentences to be served consecutively or concurrently. As such, the judge erred in sentencing Appellant to a consecutive term of five years where the sentencing structure was based upon the judge's mistake of law.

To the extent the state attempts to argue that this error is not preserved, Appellant respectfully disagrees. Defense counsel informed the judge that it was *not* his understanding that consecutive sentences were required. R. 660, l. 25 – R. 661, l. 1. Appellant acknowledges there was no explicit objection to the sentence at the time of imposition. However, counsel was not required to use the exact words of a legal doctrine in order to preserve the error for appellate review. See State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.").

If this Court determines that defense counsel's statement opposing the judge's belief regarding consecutively sentencing did not preserve the error for review, Appellant respectfully requests this Court address the issue presented in the interest of judicial economy.[2] See State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009); State v. Bonner, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012). Based upon the clear statutory language and the abundance of

[2] If the case were affirmed on procedural basis, defense counsel could not articulate any strategic reason for failing to object at a post-conviction relief proceeding, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) and the prejudice is manifest.

case law on the matter presented, the judge based his sentencing structure on a mistake of law. Thus, judicial economy weighs heavily in favor of this Court addressing the merits of the claim at this time. Appellant respectfully requests this Court address the merits of the issue and vacate his sentence for possession of a weapon during the commission of a violent crime and remand for re-sentencing.

CONCLUSION

Appellant respectfully requests this Court vacate his sentence for possession of a weapon during the commission of a violent crime and remand for new sentencing.

Breen R. Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of August, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 16, 2023

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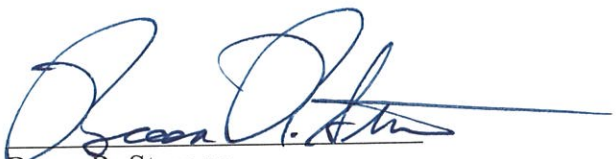
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the final brief of appellant and in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 16th day of August, 2023.



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