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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN BONNER,

APPELLANT

Appellate Case No. 2013-000281

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

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STATEMENT OF ISSUE ON APPEAL

The judge erred in sentencing Appellant to sixty years' imprisonment for burglary in the first degree, a non-homicide offense, because Appellant was seventeen-years old at the time of the offense; thus, his sentence is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution as it does not afford him a meaningful opportunity of release.

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand jury for the offenses of burglary in the first degree (2009-GS-11-824), kidnapping (2009-GS-11-827), armed robbery (2009-GS-11-828), assault and battery of a high and aggravated nature (ABHAN)(2009-GS-11-829), burglary in the second degree (2009-GS-11-0826), and grand larceny greater than \$5,000 (2009-GS-11-0825). R. 361. On November 17, 2009, Appellant's case was called to trial before the Honorable J. Derham Cole. The State was represented by Barry Barnette and Prina Tailor. Appellant was represented by Joshua Shultz. R. 1.

On November 18, 2009, the jury returned a verdict of guilty on all charges. R. 330, line 24 – R. 331, line 22. Regarding sentencing, Appellant's trial counsel asked the court to take into consideration his age. R. 335, lines 1-4. Appellant was sentenced to life imprisonment for burglary in the first degree. R. 336, lines 7-12. Additionally, Judge Cole sentenced Appellant to thirty years' imprisonment for kidnapping; thirty years' imprisonment for armed robbery, fifteen years' imprisonment for burglary in the second degree, ten years' imprisonment for ABHAN, and five years' imprisonment for grand larceny. Judge Cole ordered all sentences to run concurrently, except he ordered the sentence for ABHAN to run consecutively to the others. R. 336, line 7 – R. 337, line 12; R.363.

Appellant filed a timely notice of appeal. On November 12, 2010, Appellant filed his brief claiming his sentence for life imprisonment without the possibility of parole for a non-homicide offense violated his constitutional rights. This Court agreed, vacated his

sentence of life imprisonment, and remanded the matter for new sentencing. State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012).

On January 22, 2013, Appellant appeared before Judge Cole for re-sentencing. Barry Barnette appeared on behalf of the state, and Joshua Schultz represented Appellant. Sent. R. 339. Judge Cole sentenced Appellant to sixty years' imprisonment. Sent. R. 359, lines 14-17; R. 364.

ARGUMENT

The judge erred in sentencing Appellant to sixty years' imprisonment for burglary in the first degree, a non-homicide offense, because Appellant was seventeen-years old at the time of the offense; thus, his sentence is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution as it does not afford him a meaningful opportunity of release.

Relevant facts

At the time of the offenses for which Appellant was charged and ultimately convicted, Appellant was seventeen-years old. Bonner, 400 S.C. at 563 n. 1, 735 S.E.2d at 526 n.1. During the re-sentencing proceeding, the state argued that Appellant's age should be used as an aggravating factor to increase his penalty. Specifically, the state acknowledged the ruling of the United States Supreme Court and this Court, but argued against clear precedent. Rather than arguing Appellant deserved a particular penalty unique to the circumstances of the crime and unique to the characteristics of Appellant, the state argued Appellant deserved a severe penalty because other defendants who were seventeen-years old at the time of their alleged crimes with whom the prosecutor was acquainted in some way were "dangerous."

One thing, talking about juveniles, I know the court, our U.S. Supreme Court, as well as the Court of Appeals has ruled. But, however, some of the most dangerous individuals I have seen in court ha[ve] been seventeen-years old. I have dealt with Jonathan Vick; Calen Radwill, which is in Lexington County.

We also had Eric Morgan in front of Your Honor I believe on a death penalty case. In this situation - - of course, his sentence was commuted to life.

Sent. R. 346, lines 11-19. Although he recognized that all of the individuals he mentioned were defendants in murder cases, the solicitor argued, without any evidence to support his argument, that the victim of the alleged burglary would have been killed had the alarm not sounded. Sent. R. 346, line 20 – Sent. R. 347, line 8.

Appellant pleaded that he deserved “a second chance at life and a meaningful chance at rehabilitation.” Sent. R. 348, lines 4-6. Appellant lacked positive role models in his life – particularly male role models. Appellant’s father was in and out of jail for most of his life. Sent. R. 348, lines 7-15. When Appellant was twelve years old, his father was no longer in his life at all. Sent. R. 348, lines 24-25. Appellant had young children at the time of re-sentencing and sought “a meaningful chance at rehabilitation [so] he [could] develop some kind of relationship with these children.” Sent. R. 349, lines 3-10.

Appellant observed that juveniles, like him, have less culpability based upon a lack of maturity and an underdeveloped sense of responsibility. Sent. R. 349, lines 15-19. Appellant fit the description of a juvenile who was vulnerable and susceptible to negative influences and outside pressures. Sent. R. 349, line 24 – Sent. R. 350, line 2. Appellant sought the opportunity to reform and detailed his efforts to reform, including obtaining his GED and certifications in carpentry and electrician training while in prison for just over a year. Sent. R. 350, lines 11-22. Appellant expressed his desire to obtain a business degree and open a small business. He also explained his desire to marry and “lead a normal life.” Sent. R. 351, lines 12-18.

Discussion

The United States Supreme Court held life sentences for non-homicide crimes committed while the defendant was under the age of eighteen violated the Eighth

Amendment to the United States Constitution. Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010). The Graham Court found that the cruel and unusual punishment clause of the Eighth Amendment forbids the states from determining at sentencing that a juvenile non-homicide offender will never be fit to reenter society. The Court explained that a sentence of life imprisonment without parole “forswears altogether the rehabilitative ideal.” Such a sentence “is not appropriate in light of a juvenile non-homicide offender’s capacity for change and limited moral culpability.” Id. at ___, 130 S.Ct. at 2030. The United States Constitution forbids judges from making subjective determinations at sentencing that a juvenile non-homicide offender has demonstrated an “irretrievably depraved character.” Id. at ___, 130 S.Ct. at 2031. The Court was clear that states are “not required to guarantee eventual freedom to a juvenile offender of a non-homicide crime.” Instead, juvenile non-homicide offenders must be given a meaningful opportunity to obtain release. Id. at ___, 130 S.Ct. at 2033.

Other states examining sentencing schemes involving juveniles convicted of non-homicide offenses have concluded that certain terms-of-years sentences violate the Eighth Amendment’s ban on cruel and unusual punishment. Essentially, those Courts have found that the term of years failed to offer the juvenile offender an opportunity to obtain release before the end of his expected life span. Thus, those sentences were the functional equivalent of a sentence of life without the possibility of parole. See People v. Rainer, ___, P.3d ___, 2013 WL 1490107 (Colo. App. April 1, 2013)(holding the juvenile’s sentence unconstitutional where he would not even be eligible for parole until he reached the age of seventy-five and his life expectancy was only between sixty-four and seventy-two years of age); People v. Caballero, 282 P.3d 291 (Cal. 2012).

Our Supreme Court explained that when a judge exercises his discretion in sentencing a defendant following a jury's recommendation of mercy, the judge must sentence the defendant to a term of years that will not exceed the life expectancy of the defendant unless the record disclosed some reasonable basis for disregarding the jury's verdict. State v. Kimbrough, 212 S.C. 348, 356, 46 S.E.2d 273, 277 (1948). The jury's recommendation of mercy was a finding that the defendant should not receive the maximum punishment of life imprisonment; however, the judge's sentence of thirty years' imprisonment was for "all intents and purposes the equivalent of a life sentence." Id. at 357, 46 S.E.2d at 277. Where the record revealed nothing to justify the trial court's disregarding the jury's recommendation, the Supreme Court held the sentence was "manifestly too severe." Id.

Appellant's life sentence for burglary in the first degree should be vacated. Pursuant to Appellant's current sentences and his life expectancy, he would be imprisoned until his death without a meaningful opportunity for release. Appellant was only seventeen when he allegedly committed the burglary. Appellant's "sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character." See Graham, 560 U.S. at ___, 130 S.Ct. at 2033 (2010). Although Judge Cole sentenced Appellant to sixty years' imprisonment for the offense of burglary, such a sentence fails to afford Appellant a meaningful opportunity to obtain release. Not only must Appellant serve the sixty-year sentence, he must serve ten years in prison consecutive to the sixty-year sentence to satisfy Judge Cole's sentencing order regarding ABHAN. Thus, Judge Cole has sentenced Appellant to seventy years for non-homicide offenses. Therefore,

it is likely Appellant would be close to ninety-years old if he is released from the Department of Corrections. Appellant's life expectancy varies depending upon the specificity of the information provided. The Center of Disease Control provides a life expectancy for all Americans born in 2010 as 78.7 years. However, the life expectancy of black males born in 2010 is only 71.8 years. Even more startling is the data revealing the life expectancy for males born in 1991, as Appellant was, is only 64.6 years. Essentially, the sentence imposed by Judge Cole is a de facto life sentence. Therefore, the sentence violates the Constitution's ban on cruel and unusual punishment.

CONCLUSION

Appellant respectfully requests this Court vacate his sentence for burglary and remand the matter for re-sentencing.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of July, 2013.

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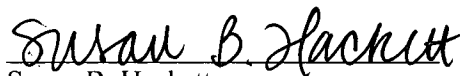
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Bonner states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's re-sentencing before Judge J. Derham Cole, which was held on January 22, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for John Bonner.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of July, 2013.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Sentence sheets (original);
- (3) Amended sentence sheet for burglary in the first degree;
- (4) Trial transcript dated November 17-18, 2009;
- (5) Sentencing transcript dated January 22, 2013.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 22nd, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 22, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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Appellate Case No. 2013-000281

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on John Bonner, #338030 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 22nd day of July, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO
before me this 22nd day of July, 2013.

[Signature] (L.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2022.