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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenwood County
Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2023-UP-311 (S.C. Ct. App. Filed September 20, 2023)

THE STATE,

APPELLANT,

V.

JOEY CORVELL REID,

RESPONDENT.

APPELLATE CASE NO. 2023-001910

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

1.

Did the Court of Appeals err by determining the circuit court's order that vacated another judge's sentence an interlocutory order and not a matter that is immediately appealable within S.C. Code Section 14-3-330?

2.

Did the circuit court overseeing a probation violation hearing err when it vacated the previous sentence and ordered a new sentencing of the underlying conviction?

RESPONDENT'S COUNTERSTATEMENT OF THE QUESTION

Did the Court of Appeals reach the right result in dismissing the State's appeal because the undisputedly illegal sentence is a problem of the State's own making?

STATEMENT OF THE CASE

On January 27, 2014, respondent Joey Reid pled guilty before the Honorable Doyet Early pursuant to a negotiated plea to one count of first-degree assault and battery and one count of attempted murder. Accepting the plea and following the negotiation for sentencing, Judge Early sentenced Reid to ten years' imprisonment on the assault charge and a consecutive twenty years' imprisonment suspended to five years' probation for attempted murder. No appeal was taken.

Reid began serving his probationary sentence and the State issued warrants seeking to revoke his probation. On October 28, 2021, a hearing on the probation warrants was held before the Honorable Frank R. Addy, Jr. R. 1. David Stumbo represented the State, Agent Wright appeared for DPPPS, and Tristan Shaffer represented Reid. R. 1. On December 31, 2021, Judge Addy issued a written order refusing to revoke Reid's probation, vacating Reid's attempted murder sentence, and granting Reid leave to move to withdraw his guilty plea to attempted murder. R. 26. DPPPS' appeal to the Court of Appeals was dismissed and the State now seeks certiorari.

STANDARD OF REVIEW

Questions of law are reviewed de novo. State v. Frasier, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022) (explaining standard of review in search and seizure case that factual determinations are reviewed for evidentiary support, but legal conclusions are not given deference).

ARGUMENT

The Court of Appeals reached the right result in dismissing the State's appeal because the undisputedly illegal sentence is a problem of the State's own making.

Introduction

The State seeks review in this Court of an unpublished remand to correct an undisputedly illegal sentence. Both parties agree the negotiated plea resulted in an illegal sentence. Both Judge Addy and the Court of Appeals refused the State's entreaty to enforce this illegal sentence. The Court of Appeals realized that Judge Addy reached the right result in a singular legal dilemma that is unlikely to recur. The court also left the door open for another appeal by the State if respondent is resentenced. Denying certiorari leaves this result in place and allows the parties to work this issue out in the circuit court, which is where this dispute belongs.

Procedural Background and the Illegal Sentence

No dispute exists that the sentence given to respondent Joey Reid ("Reid") for attempted murder is illegal. The State admits the sentence is illegal in its petition. Pet. Cert. at 7 ("...in that it involved a sentence suspended to probation when the statute clearly prohibited just that."). Respondent agrees the sentence is illegal. No other conclusion can be drawn from the plain language of the statute.

In 2014, before the Honorable Doyet A. Early, III, respondent Reid pled guilty under a negotiated plea to first-degree assault and battery and to attempted murder. R. 52-53. R. 11, l. 4 – 17. Judge Early sentenced Reid to ten years' imprisonment for the assault and battery conviction. R. 52-53. R. 11, l. 4 – 12, l. 24. Judge Early also sentenced Reid to a consecutive twenty years' imprisonment for attempted murder, suspended to five years' probation. R. 52-53. R. 11, l. 4 – 12, l. 24.

Reid's attempted murder sentence is illegal because it cannot be suspended and probation cannot be imposed. See S.C. Code Ann. § 16-3-29. The attempted murder statute provides:

> A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

S.C. Code Ann. § 16-3-29 (emphasis added). The plain language of the statute makes Reid's sentence illegal.

Reid served his active sentence for assault and battery and began serving his probation. When the probation department brought Reid before Judge Addy on a probation violation warrant, the parties agreed that the sentence was illegal. R. 5, l. 1 – 21. R. 13, l. 5 – 15, l. 21. Reid argued that the probation warrant should be dismissed because the sentence was illegal. R. 7, l. 4 – 7. The probation department argued that because no one appealed the sentence, the department was required to enforce the sentence as given and sought a ten-year revocation. R. 13, l. 5 – 15, l. 21. R. 27, n. 6.

The trial judge first refused to revoke Reid's probation because of the illegal sentence. R. R. 33. Judge Addy then crafted a result not sought by either party. R. 34, n.18. The judge vacated Reid's sentence and ordered resentencing. R. 34. Judge Addy granted Reid leave to move to withdraw his plea to attempted murder at the resentencing. R. 34-35.

The State's Appeal and the Court of Appeals' Decision

The State sought review of Judge Addy's Order at the Court of Appeals. The State argued that Judge Addy had no authority to vacate Reid's sentence because it "is well-settled that one circuit judge may not reverse an order of another circuit judge." Br. App. at 4. Judge Addy

recognized this principle and stated he was "not attempting to overrule another judge." R. 34, n. 18. The State also argued that the illegal sentence was the "law of the case."

The Court of Appeals issued an unpublished per curiam Opinion dismissing the State's appeal. The Opinion described the procedural posture and determined Judge Addy's Order was not immediately appealable. The unpublished and un-citable Opinion did not address the merits of the State's arguments and obviously creates no precedent. See Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value. . . ."); Rule 220(a), SCACR (". . . memorandum opinions shall not be published in the official reports and shall be of no precedential value.").

The court cited Ex Parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005) and section 14-3-330 of the South Carolina Code as authority for finding the circuit court's order not immediately appealable. The court held, "Because the order is not final until after Reid has been resentenced and no subsection of section 14-3-330 . . . is applicable, we dismiss the order as not immediately appealable." State v. Reid, No. 2023-UP-311 (S.C. Ct. App. Sept. 20, 2023).

The Court of Appeals Reached the Right Result

No new sentence has been imposed. Criminal defendants generally may not appeal until sentence is imposed. See State v. Rearick, 417 S.C. 391, 400-01, 790 S.E.2d 192, 196-97 (2016). Rearick dismissed as interlocutory a defendant's appeal from an order refusing to apply the Double Jeopardy Clause. This Court also refused to hear a criminal defendant's appeal from an order denying immunity until after sentencing. State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013). Reid likely would not be able to appeal Judge Addy's Order under these precedents and it would be inequitable to allow the State an appeal that a defendant could not also take. The parties may reach an agreement on resentencing. They may reach an agreement if the court

allows Reid to withdraw his plea. The Court of Appeals rightly sent this case back to the circuit court for further proceedings.

Furthermore, Judge Addy's Order also reached the right result—a "do over." The judge was rightly concerned that instead of being asked to overrule another circuit judge, he was being asked to enforce an illegal sentence. Faced with this dilemma, Judge Addy made the right decision. The court correctly started from the fact that Reid's sentence came from a negotiated plea. Plea bargaining and negotiated sentences are interpreted using principles from contract law. See Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999). In State v. Thrift, the Court cited with approval a Fourth Circuit case holding that while contract law applies, "a plea agreement analysis must be more stringent than a contract because the rights involved are fundamental and constitutionally based." 312 S.C. 282, 293, 440 S.E.2d 341, 347 (1994) citing United States v. Ringling, 988 F.2d 504 (4th Cir. 1993).

The trial court then correctly stated it lacked the power to enforce an illegal contract. See Hinnant v. Southern Ry. Co., 113 S.C. 19, 100 S.E. 709 (1919). In Hinnant, the plaintiff hitched a ride on a train and then sued for injuries sustained when it crashed. Id. State and federal statutes prohibited the plaintiff's presence on the train. Id. The plaintiff claimed he was legally on the train pursuant to a contract with the conductor and engineer. Id. The Court held, "Neither the conductor, the engineer, nor the defendant itself can make a contract in violation of law, or waive the requirements of the law." Id.

Similar to the conductor and the plaintiff in Hinnant, the contract between Reid and the solicitor violated the law. Judge Addy correctly concluded that such a contract was void and refused to enforce it. Refusing to enforce an illegal contract does not contravene the general rule that one circuit judge may not overrule another circuit judge. Judge Addy correctly refused to

violate Reid's probation. Reid properly raised the illegality of the sentence as a defense to the probation violation warrant. See State v. Lee, 350 S.C. 125, 132-33, 564 S.E.2d 372, 376 (Ct. App. 2002) ("the statutory authority of the sentencing court to issue the underlying sentence could have been challenged in a motion to reconsider the sentence, on direct appeal, or as a defense to the probation revocation proceedings.")

Judge Addy also was correct to vacate the sentence and grant Reid leave to withdraw his plea. The court recognized that continuing Reid on a probationary sentence that it was impossible for him to violate deprived the State of the benefit of its bargain. This ruling does not violate the doctrine of "law of the case" and was, as the trial judge recognized, the only way out of this dilemma. Judge Addy could not violate Reid without enforcing an illegal sentence. And as stated above, Lee allows a probationer to challenge the legality of the sentence as a defense to revocation. Therefore, the State's "law of the case" argument fails.

Additionally, placing the parties back in the position before the illegal contract was made comports with the duties of solicitors and the Rule of Lenity. "Prosecutors are ministers of justice and not merely advocates." State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). South Carolina places "unfettered discretion" to prosecute in the hands of solicitors. Thrift at 291-92, 440 S.E.2d at 346-47. While this case involves a mistake by the solicitor (and defense counsel and the court) and not the egregious conduct condemned in Quattlebaum, holding the State to a higher standard with respect to sentencing errors complies with the duties that run with their vast power.

The State should bear the minimal costs of the mistake in this plea bargain, not Reid. The trial judge citied the legal maxim that when parties are of equal fault, the defendant's position is the stronger (In pari delicto potior est conditio defendentis). R. 34. Another rule that

also could have been applied is the Rule of Lenity. See State v. Miles, 421 S.C. 154, 805 S.E.2d 204 (Ct. App. 2017). The Rule of Lenity is a canon of statutory construction and holds that any doubt about a statute's scope should be interpreted in the defendant's favor. Id. While this rule does not technically apply because the court interpreted an illegal contract instead of a statute, the logic of the rule applies here.

Furthermore, the State should be viewed as the drafter of the contract, and terms of a contract are strictly enforced against the drafter. Maybank v. BB&T Corp., 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016). While Reid is not seeking enforcement of the terms of the illegal contract, this maxim together with the logic of the Rule of Lenity shows that the State was in the best position to avoid requesting an illegal sentence and cannot now complain when the trial judge undoes the agreement.

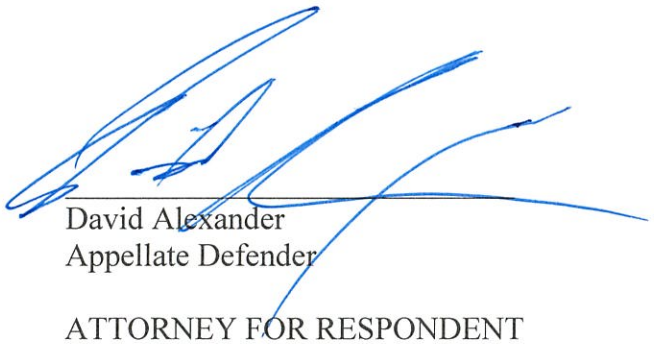
The problems about which the State complains—that a resentencing "puts the State in the worst possible position"—apply equally to Reid. Pet. Cert. at 4. The State worries about bringing a ten-year-old case to trial. If the concern here is stale evidence and stale witnesses, the same problems apply to Reid for any defense he could mount. Perhaps the real fear for the State is that its case against Reid was never strong to begin with as shown by its willingness to agree to the illegal suspended sentence.

Ten-year-old cases coming to trial are nothing new for criminal defendants or the State. A criminal defendant who exhausts a direct appeal and then prevails in PCR (either at the PCR court or on appeal) will likely be nearing or past the ten-year mark when his new trial occurs. A criminal defendant who prevails on a motion for a new trial based on after-discovered evidence could be retried after decades have passed. Criminal defendants in "cold cases" may find themselves attempting to defend against twenty-year-old allegations.

The State also uses hyperbole when it argues the effect of this ruling is "devastating" for the finality of probationary sentences. Pet. Cert. at 5-6. Judges have no appetite for undoing other judges' sentences at probationary revocations. Making this fear even more overblown is that illegal sentences are extremely rare. Judge Addy did not issue this Order because he "dislike[d] the amount of time" Reid was given. Pet. Cert. at 5-6. Judge Addy issued this Order because of the illegal sentence. The trial judge exercised restraint and thoughtfulness, not judicial activism as suggested by the State. No reason exists to grant certiorari on the circuit court's Order. This Court should deny the State's petition.

CONCLUSION

Both the trial judge and the Court of Appeals reached the right result and certiorari should be denied.



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This 25th day of January, 2024.