

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Dillon County

Thomas A. Russo, Circuit Court Judge

RECEIVED

THE STATE,

AUG 19 2013

v.

RESPONDENT
SC Court of Appeals

LARENZO JERMAINE INMAN,

APPELLANT

APPELLATE CASE NO. 2010-179106

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
P. O. Box 11549
Columbia, SC 29211-1549
(803) 734-3605

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit
Post Office Box 616
Bennettsville, S.C. 29512
(843) 479-6516

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the circuit court err in sentencing Inman to thirty years imprisonment for kidnapping in light of section 16-3-910 of the South Carolina Code (2003), State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999), and State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct.App. 2012)?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Lorenzo Inman is presently in custody in South Carolina pursuant to orders of commitment from the Clerk of Court for Dillon County. The Appellant was indicted at the January 25, 2010 term of the Dillon County Court of General Sessions Grand Jury for murder, possession of a weapon during the commission of a violent crime, failure to stop for a blue light and siren, burglary first degree, kidnapping, armed robbery, grand larceny, and criminal conspiracy indictments 2009-GS-17-1198, 1199, 1203, 1204, 1205, 1206, 1207, 1209. On November 1, 2010, Inman proceeded to jury trial before the Honorable Thomas A. Russo. Attorneys Michael Stephens and Emily Crayton of the Public Defenders' Office represented Inman at trial. The prosecution was handled by Assistant Solicitors Shipp Daniel and Kernard Redmond of the Fourth Circuit Solicitors Office. The jury returned verdicts of guilty on all charges.

The Appellant was sentenced to life imprisonment for murder; five years for possession of a weapon during the commission of a violent crime; life imprisonment for burglary in the first degree; thirty years for armed robbery; thirty years for kidnapping; ten years for grand larceny; five years for criminal conspiracy; and three years for failure to stop for a blue light. ROA 613, 1. 2-19. No objection was made to the sentences. ROA 613.

A timely notice of appeal was filed on November 15, 2010. On March 8, 2012, counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). In the Final Anders Brief of Appellant, counsel asserted as the sole arguable ground: "[D]id the trial judge err in refusing to exclude prejudicial and cumulative photographs of the deceased?" Final Anders Brief of Appellant, p. 3.

On June 19, 2013, the Court of Appeals entered an order directing the parties to brief the following issue:

Did the circuit court err in sentencing Inman to thirty years imprisonment for kidnapping in light of section 16-3-910 of the South Carolina Code (2003), State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999), and State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct.App. 2012)?

The Appellant, through counsel Hudgins, made his Brief of Appellant on July 17, 2013. The Respondent's brief follows.

ARGUMENT

- I. **Appellant's conclusion that the sentence on the kidnapping conviction on 2009-GS-17-1205 should be vacated is not preserved for appeal as that issue was never raised before the trial judge. Even so, while it appears that the sentence should not have been imposed in light of the murder conviction and sentence, the kidnapping conviction still stands pursuant to S.C. Code § 16-3-910.**

In his conclusion to the Brief of Appellant, Inman asserts that in the interest of judicial economy the sentence for Appellant's kidnapping conviction should be vacated. As set forth below, only the additional sentence on Indictment 2009-GS-17-1205 is at issue because it relates to the kidnapping of Mary Stutts and the murder conviction on Indictment 2009-GS-17-1198 concerned the murder of Mary Stutts. As set forth below, the sentencing proviso in S.C. Code Ann. § 16-3-910 does not preclude a conviction for kidnapping - only additional sentencing when the defendant is sentence for murder of the same person kidnapped.

HOW THE ISSUE WAS NOT RAISED BELOW.

The Appellant was sentenced to life imprisonment for murder; five years for possession of a weapon during the commission of a violent crime; life imprisonment for burglary in the first degree; thirty years for armed robbery; thirty years for kidnapping; ten years for grand larceny; five years for criminal conspiracy; and three years for failure to stop for a blue light. ROA 613, 1. 2-19. No objection was made to the sentences. ROA 613.

Respondent will address the issue as one of whether the sentence should be vacated. Respondent would note that even if the sentence is vacated, in any proceeding, pursuant to S.C. Code Ann. § 16-3-910, the conviction itself still stands. State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983).

1. THIS SENTENCING ISSUED IS NOT PRESERVED FOR APPEAL BY THE FAILURE OF AN OBJECTION.

It is well settled that “[i]ssues not raised and ruled upon in the trial court will not be considered on appeal.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003). Thus, “a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.” Johnston, 333 S.C., 462. State v. Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 282 - 283 (Ct. App. 2005).¹ There was no challenge to the sentence at all; therefore, the instant issue is not preserved for review, and should not be addressed in this direct appeal. *Id.* Even so, Respondent notes that the issue will, most likely, be addressed in another forum.

S.C. Code Ann. § 16-3-910 provides:

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code Ann. § 16-3-910(emphasis added).

“Generally, when a defendant is convicted for murder, any sentence for the kidnapping of the victim would be vacated.” State v. Vazsquez, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005) abrogated by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006), citing Owens v. State, 331 S.C.

¹ The Supreme Court of South Carolina, while specifically noting that the relief granted was “not intended to disrupt our settled rules on issue preservation,” nonetheless granted relief by way of remand for resentencing where it appeared that the appellant would be held in custody “beyond the legal sentence due to the additional time” for a proper PCR action to resolve the issue. Johnston, 333 S.C. at 464 n. 3, 510 S.E.2d at 425, n. 3. Such a situation is not present in the instant case where appellant was sentenced to life imprisonment for murder and burglary in the first degree, and thirty (30) years imprisonment for armed robbery, in addition to a life sentence for kidnapping. (ROA 613). See State v. Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 282 - 283 (Ct.App. 2005)(Johnson not applicable where no “threat of continuing incarceration beyond the legal sentence”).

582, 585, 503 S.E.2d 462, 463 (1998)(holding that a sentence for kidnapping should be vacated when the defendant received concurrent sentence under the murder statute). It is error to sentence a defendant for kidnapping of the victim when he is also convicted of the murder of the victim. *Id.* If imposed, however, the sentence is considered “ineffective.” State v. Council, 335 S.C. 1, 6 n. 2, 515 S.E.2d 508, 510 n.2 (1999).Cf. State v. Elders, 386 S.C. 474, 483 n. 6, 688 S.E.2d 857, 862 n. 6 (Ct. App. 2010) Thus, while appellant suffers no harm from the instant sentencing error, it is error, and likely will be addressed in a separate PCR proceeding. Here, however, the issue is procedurally barred from review, and may not be addressed. Appellant’s argument to the contrary should be rejected.

2. THIS COURT HAS PREVIOUSLY VACATED SIMILAR KIDNAPPING SENTENCES WHERE THE ISSUE WAS NOT PRESERVED.

This Court addressed a similar unpreserved kidnapping sentencing issue in State v. Vick, 384 S.C. 189, 201-203, 682 S.E.2d 275, 281 - 282 (Ct. App. 2009). In its pertinent part, the Court stated:

Vick next contends his thirty-year kidnapping sentence should be vacated inasmuch as he was sentenced for murder and the kidnapping sentence was therefore improper pursuant to S.C. Code Ann. § 16-3-910. We agree.

The State acknowledges it is error to sentence a defendant for the kidnapping of a victim whom he is also convicted of murdering, and that when a defendant is convicted of murder, any sentence for kidnapping of the victim should be vacated. However, the State maintains Vick failed to object to the sentence when imposed, and the law requires a challenge to sentencing must be raised at trial in order to be preserved for appellate review. Accordingly, the State maintains, though the kidnapping sentence was error and likely will be addressed in a separate proceeding, the issue is procedurally barred from review and may not be addressed in a direct appeal before this court.

S.C. Code Ann. § 16-3-910 provides as follows:

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever

without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code Ann. § 16-3-910 (2003)(emphasis added). Our courts have long held, where an appellant has been sentenced for murder of a victim, this code section precludes a sentence for kidnapping of that victim, and any such sentence should be vacated. Owens, 331 S.C., 584-85; State v. McCall, 304 S.C. 465, 470, 405 S.E.2d 414, 416-17 (Ct.App.1991), overruled on other grounds by Brightman v. State, 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999); State v. Livingston, 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984); State v. Perry, 278 S.C. 490, 495, 299 S.E.2d 324, 327 (1983); State v. Copeland, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982).

The State correctly notes that our courts have held a challenge to sentencing must be raised at trial to be preserved for appellate review. See State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (noting our supreme court “has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review”). However, the State concedes that it is error to sentence a defendant for the kidnapping of a victim whom he is also convicted of murdering, and any such sentence for kidnapping should be vacated. The State further recognizes that the issue, if determined to be unreviewable on direct appeal, will in all likelihood be addressed in a post-conviction relief proceeding. In Johnston, the court noted that case presented an exceptional circumstance wherein the State conceded that the trial court committed error by imposing an excessive sentence. The State nevertheless maintained that appellant's appropriate remedy was through the Post Conviction Relief Act. The Johnston court recognized that if it unyieldingly enforced PCR as the only avenue of relief, there was a real threat that appellant would remain incarcerated beyond the legal sentence due to the additional time it would take to pursue such a remedy. Accordingly, the court determined that exceptional circumstances warranted a remand for resentencing. *Id.* at 463-64, 510 S.E.2d at 425.

While the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston, our courts have, in the past, “summarily vacated” sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute. See Owens, 331 S.C. at 585, 503 S.E.2d at 463; McCall, 304 S.C. at 470, 405 S.E.2d at 417 (noting the appellate courts have “summarily vacated” sentences for kidnapping when the defendant received a concurrent sentence under the murder statute). Additionally, our courts have at times considered an issue in the interest of judicial economy. See S. Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (holding, where a party

argued that the trial court erred in rendering judgment on a constitutional issue inasmuch as such an analysis was “purely advisory,” because the issue would be raised to the court at some future time and since both parties had fully briefed the issue, it was proper for the appellate court to decide the matter in the interest of judicial economy); Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006) (holding, regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy).

Vick, 384 S.C., 201-203.

The Court of Appeals order referred to State v. Bonner, *supra*. In Bonner, this Court vacated a sentence of life without parole sentence on a burglary in the first degree conviction on a 17 year old based upon the intervening decision in Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Like Johnston and Vick, the Court concluded that where it was conceded that the appellant was a juvenile at the time of the crime and a sentence of life without parole would not be proper under Graham, the fact that no objection was made to preserve the issue should not preclude relief in this unique setting. As the Court stated: “applying this court's precedent in Vick, we find vacating Bonner's LWOP sentence is appropriate. Both parties have fully briefed the issue and acknowledge that Bonner could raise the sentencing issue to the court at some future time by filing an application for PCR. Furthermore, this case presents an exceptional circumstance because the State concedes in its brief that the trial court committed error by imposing an improper sentence. . . .” State v. Bonner.

Therefore, applying this Court’s precedent in State v. Vick, and State v. Bonner vacation of the sentence for kidnapping on the particular indictment related to Mary Stutts would be appropriate in this limited exception to the preservation rules for kidnapping sentences. State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (S.C. App. 2009); State v. Livingston. 282 S.C. 1, 317 S.E.2d 129 (1984).

CONCLUSION

For all the foregoing reasons, Respondent asserts that the judgment of convictions must be upheld and affirmed related to all of Mr. Inman's murder, armed robbery, burglary, armed robbery, conspiracy, possession of a weapon and kidnapping convictions. Respondent further assert that the challenge to kidnapping indictment 2009-GS-17-1205 concerning the kidnapping of Mary Stutts, the murder victim, is not preserved for this court's appellate consideration because there was no objection to the sentence. However, Respondent must recognize that under the precedent of Vick and Bonner a vacation of that particular concurrent life sentence on that indictment is appropriate. However, all remaining sentences should be undisturbed

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit
110 Liberty Street
P. O. Box 616
Bennettsville, SC 29512
(843) 479-3333

By:


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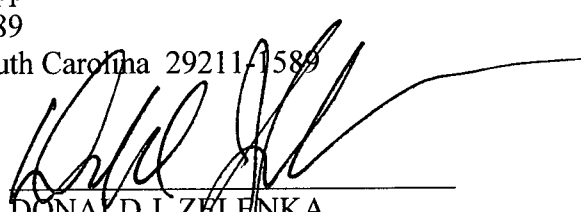
APPELLATE CASE NO. 2010-179106

PROOF OF SERVICE

I, Donald J. Zelenka, certify that I have served the *Brief of Respondent* on Appellant by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Kathrine H. Hudgins, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

This 16th day of August, 2013.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305