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Aug 14 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Honorable H. Steven DeBerry, IV, Circuit Court Judge

Unpublished Opinion No. 2024-UP-286 (filed July 31, 2024)

The State,

Respondent,

v.

Sebastian Dominic Kaisk,

Appellant

Appellate Case No. 2022-000181

PETITION FOR REHEARING

On July 31, 2024, this Court issued an unpublished opinion that affirmed Appellant Sebastian Dominic Kaisk’s conviction and 43-year sentence for murder but remanded for resentencing on the firearm charge conviction.¹ (*See Slip Opinion*, at 4). Pursuant to Rule 221(a), SCACR, the State respectfully requests rehearing based on legal error in the Court’s grant of relief on a procedurally unavailable claim. The State submits that the sentence on the firearm conviction was not illegal, rather, at most, there may have been an abuse of discretion for failure to exercise discretion *in one part of sentencing*.² That does not fall under the “illegal sentence”

¹ Kaisk was indicted for murder and possession of a weapon during the commission of a violent crime. (R. 236-239). This petition follows the opinion’s designation of the possession of a weapon charge as the “firearm charge.”

² The trial judge also ordered the murder sentence to run consecutive to the firearms charge, (R. 232 and 240), which moots out any possibility of prejudice. This is addressed more fully below. Appellant has not contested that portion of the sentence for murder, (*see FBOA*, at 16-17), nor has it been modified by this Court, (*see Slip Opinion*, at 4).

exception in *State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023), as relied upon by this Court. (Slip Opinion, at 3-4). Therefore, the sentencing issue was not properly preserved for this Court to reach on direct appeal and should not have been ruled upon. In light of this error, the State submits that rehearing is warranted on this narrow issue.

ARGUMENT FOR REHEARING

“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). *See also State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (“Our courts have ‘consistently refused to apply the plain error rule.’”) (quoting *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997)). Consequently, in most circumstances, “a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.” *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999).

An exception to the general preservation rule exists to allow for the swift addressing of a sentencing issue where “there is the real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue” post-conviction relief. *Johnston*, 333 S.C. at 464, 510 S.E.2d at 425. Our Supreme Court has clarified *Johnston* to expressly provide that if an illegal sentence is imposed, and the State concedes the sentence in question is actually illegal, then an “appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence.” *State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023). An illegal sentence, in such context, is “a sentence in excess of that permitted by law, even if there is no real threat of incarceration beyond the legal sentence.” *Id.*, at 350, 887 S.E.2d at 137 n. 1. In *State v. Davis-Kocsis*, our

Supreme Court underscored that preservation rules apply unless the sentence is illegal. *Id.*, 903 S.E.2d 491, 495 (S.C. 2024) (“the issue-preservation standard for *illegal sentences* is the standard set forth in *Plumer*”) (emphasis added).

Here, Kaisk did not object. On this there is no disagreement. Critically, though, the sentence was not illegal so *Plumer* cannot apply. Moreover, the trial judge also imposed the murder sentence of 43-years and directed that to be served consecutive to the firearm sentence. Kaisk cannot show any prejudice. Therefore, this Court improperly applied *Plumer* to reach the issue on appeal, vacate the sentence, and remand for resentencing.

The Statutory Provision

S.C. Code Ann. § 16-23-490 provides for a 5-year sentence “in addition to the punishment provided for the principal [violent] crime,” when “a person” has been convicted of being “in possession of a firearm ... during the commission of [that] violent crime....” Section (A) prohibits imposition of the sentence “where the death penalty or a life sentence without parole is imposed for the violent crime.” Section (B) provides, where that is not the case, that “[s]ervice of the five-year sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime,” and also provides that “[t]he court may impose this mandatory five-year sentence to run consecutively or concurrently.”

The Sentence Imposed is Not Illegal and No Exception is Available to Excuse the Failure to Object

Kaisk was sentenced to 43 years imprisonment for murder. (R. 232). Because Kaisk was not sentenced to death or life without parole, Section (A) does not prohibit a sentence. As such, the sentence imposed is not illegal because it is not “in excess of law.” *See Plumer*, at 350, 887 S.E.2d at 137 n. 1. Therefore, based on our issue preservation rules, Appellant was required to object, and failing to do so bars review on appeal. *State v. Shumate*, 276 S.C. 46, 47, 275 S.E.2d

288, 288 (1981) (“A defendant’s failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal.”).

This Court apparently agreed that the sentence could have been structured as it was, finding that “[t]he parties here do not dispute that the trial court was not aware *both types of sentences were allowed.*” (Slip Opinion, at 3) (emphasis added). However, no party challenged Judge DeBerry on the point, and it is simply unclear how the 5 years factored into the sentencing consideration as to the set term of years to be served. Notably, the murder sentence imposed was 43-years imprisonment, the minimum term was 30 years and the maximum up to life. Judge DeBerry could have imposed less or more in the set term of years for murder to adjust for the 5-year sentence. Moreover, Judge DeBerry expressly made *both sentences consecutive* to ensure a 48-year sentence (with credit for time served) would be the sentence of the court:

THE COURT: All right. Sentence of the Court on Indictment 2019-GS-26-04610, possession of a firearm during the commission of a violent crime, the defendant is committed to the State Department of Corrections for a term of five years; credit for any time served. That is to run consecutive by statute with Indictment 2019-GS-26-04608 for the crime of murder. The defendant is committed to the State Department of Corrections for a term of 43 years; credit for any time served. That will run consecutive with the possession of a weapon during a violent crime charge.

(R. 231-232).

This is also consistent with the sentencing sheet noting the murder sentence runs “consecutive to sentence on 2019-GS-26-04610,” which is the firearm indictment. (R. 240 and 238). Not only has Kask not challenged the murder sentence, (*see* FBOA, at 16-17), there is nothing that prevents the murder sentence from running consecutively to the firearms charge. This moots out any possibility of prejudice from the assumed abuse of discretion regarding the statutory provision. The very fact that the sentence is structured as such shows a clear indication

in the record on decision of the set term to be served, no matter the route taken. Even so, there is an absence of objection, so the record was not fully developed on this point.

Any ambiguity that follows the failure to explore the sentencing structure on the record rests with Kaisk as it was his responsibility to challenge any perceived ambiguity at sentencing and provide a sufficient record for this Court to review. Thus, applying a procedural bar in these circumstances actually fosters the two primary goals for the court's preservation requirements – to underscore the need to allow the trial judge a fair opportunity to consider the matter in the first instance, and to better develop the record for an appellate court's review. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006)). An objection, or even a request for clarification, would have resulted in a better record for this Court. The failure to make that record rests on Kaisk. That failure is cause to apply the procedural bar, not suspend it.

And again, as explained above, the sentence is not illegal. Therefore, unlike *Plumer*, there is not a “fix it now, or fix it later” concept at issue. Consider this observation in *Plumer* that brings the point into sharp focus: “it is inefficient and a waste of judicial resources *to delay the inevitable* by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus.” 439 S.C. at 351, 887 S.E.2d at 137 (emphasis added). Vastly different from *Plumer*, if vacated and remanded, the same sentence here could still be imposed as nothing prevents the imposition of either a concurrent or consecutive sentence as to the firearm conviction. The “inevitable” result referenced in *Plumer* does not exist here. *Accord State v.*

Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (kidnapping sentence not possible under “§ 16–3–910 because the defendant received a concurrent sentence under the murder statute”); *State v. Bonner*, 400 S.C. 561, 565, 735 S.E.2d 525, 527 (Ct.App. 2012) (trial court prohibited from sentencing juvenile defendant to LWOP for non-homicide conviction). Consequently, there is no basis to excuse the failure to preserve the issue.

CONCLUSION

The State requests the Court reconsider the relief granted in light of the foregoing and find the sentencing issue unpreserved for review on the merits.³

Respectfully submitted,

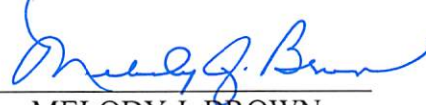
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August 14, 2024

³ This does not prevent exploration of any perceived ambiguity in the sentence during normal post-conviction relief proceedings through an ineffective assistance of counsel claim.

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CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Lara M. Caudy, Esquire via email today, August 14, 2024 to Lcaudy@sccid.sc.gov, and to her assistant Sara McInnis, at Smcinnis@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 14th day of August, 2024.

s/ Angela Brown

Angela Brown
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General

From: [Angela Brown](#)
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Cc: [Melody Brown](#); [Brandy Rankin](#)
Subject: The State v. Sebastian Kaisk
Date: Wednesday, August 14, 2024 4:00:00 PM
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[image001.png](#)

Ms. Caudy, please find attached the State's Petition for Rehearing in reference to the above appeal. The petition will be electronically filed with the Court of Appeals on today's date.

Thank you,
Angela Bennett Brown, Administrative Coordinator II
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