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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WARDARIOUS DONQUIESE BROWN,

APPELLANT

APPELLATE CASE NO. 2025-000501

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by denying appellant's improper notice motion concerning his eligibility for an enhanced sentence under S.C. Code Ann. § 17-25-45 and thus determining that he received proper notice that conviction of the instant most serious offenses would result in a sentence of life without the possibility of parole?

STATEMENT OF THE CASE

Appellant was indicted at the May 9, 2022, term of the Cherokee County grand jury for the offenses of burglary first-degree, armed robbery, attempted murder and possession of a weapon during commission of a violent crime, two counts of pointing a firearm, and possession of a firearm by a person convicted of a violent crime. R. 388-399. Appellant's case was called for trial on March 4, 2025, before the Honorable Mark Hayes, II and a jury. R. 1. Michael David Morin represented appellant, and Kimberly Lewis Leskanic and George Matthew Kendall represented the state.

On March 6, 2025, the jury returned a guilty verdict as to each count. R. 351, l. 1 – 352, l. 4. Judge Hayes sentenced appellant to life without the possibility of parole for burglary first-degree, armed robbery, and attempted murder, and five years concurrent for two counts of pointing a firearm and possession of a firearm by a person convicted of a violent crime. R. 358, l. 20 – 359, l. 23.

This appeal follows.

STANDARD OF REVIEW

“In criminal cases, appellate courts sit to review errors of law only.” *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (citing *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). “A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law.” *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

ARGUMENT

The trial court erred by denying appellant's motion and thereby determining that he received proper notice that conviction of the instant most serious offenses would result in a sentence of life without the possibility of parole.

Relevant facts

Improper notice motion

Prior to trial, the trial court heard argument concerning appellant's motion as to improper notice for his eligibility for an enhanced sentence. R. 40, l. 18 – 43, l. 11; R. 45, l. 19 – 46, l. 1. The state provided that it filed the appropriate paperwork to notify appellant that, if convicted of the most serious offenses, the court would be required to impose a life sentence due to his prior most serious offense for attempted armed robbery. R. 39, l. 22 – 40, l. 17.¹ However, defense counsel argued that appellant did not receive proper notice of his eligibility to receive an enhanced sentence, and thus, he should not have faced a life without possibility of parole sentence if convicted of the instant offenses. R. 40, l. 18 – 42, l. 21. Defense counsel provided the plea transcript and sentencing sheet related to his prior 2020 attempted armed robbery conviction as Court's Exhibits 1 and 2. R. 40; *see also* R. 363-385; 386.

Particularly, defense counsel argued that appellant received the wrong notice because the sentencing sheet checked the box for a violent and serious offense, rather than a most serious offense, and the plea court advised that attempted armed robbery was a violent and serious offense. R. 41, l. 19 – 42, l. 21; *see also* R. 368, ll. 2-4; 386. Defense counsel highlighted that appellant did not sign the sentencing sheet, his lawyer did not sign the form, and he orally

¹ Defense counsel did not assert that the state failed to provide proper written notice, prior to trial, concerning its intention to seek a life without possibility of parole sentence if appellant was convicted of the instant offenses. The state provided that it gave the required notice on September 13, 2022. R. 45, ll. 4-7.

waived presentment to the grand jury. R. 42, ll. 10-13. He argued that the court's instructions in combination with the defective sentencing sheet resulted in improper notice that the attempted armed robbery was a most serious strike, and thus, appellant should not have faced a life without possibility of parole sentence. R. 42, l. 22 – 43, l. 11. The state responded that S.C. Code Ann. § 17-25-45 (Supp. 2015), required only that it must give notice of its intention to seek an enhanced sentence when a review of a prior record showed that an individual had two prior serious offenses or one most serious offense. R. 43, l. 13 – 45, l. 18.

The court ultimately denied appellant's improper notice motion. R. 70, ll. 17-19. The court explained that it interpreted the statute as a decision of whether to proceed to seek life and that "to issue the notice is within the discretion of the solicitor," relying on § 17-25-45(G). R. 70, ll. 4-6. Although the court recognized that defense counsel made "a good point" about the ramifications of the prior plea, it nonetheless determined that the language of the statute did not allow the court to tell the state that it could not proceed. R. 70, ll. 8-14.

Trial

During trial, the state called several witnesses and entered numerous exhibits, none of which were entered over defense objection, during its case-in-chief, including: the 9-1-1 operator; both complainants, Vintarian Thompson and Taylor Turner; Chief Brian Mullinax; Ziadavia Hayes; Tiffani McConnell; Crystal Horne; and South Carolina Law Enforcement Division forensic scientist Megan Fletcher. R. 97-269. After the state's case, the court read the following stipulation: "Ladies and gentlemen, the defendant, Wardarious Brown, has been convicted of a violent crime as defined by South Carolina Law 16-1-60 that is classified as a felony offense." R. 269, ll. 21-24; *see also* R. 386. Neither party objected to the stipulation. R. 255, ll. 1-2. The state then rested its case. R. 270, ll. 1-2.

At that time, defense counsel moved for a directed verdict, arguing that the evidence presented would require the jury to speculate as to appellant's guilt. R. 270, l. 22 – 271, l. 2. Following an overview of the evidence presented by the state, the court denied the motion for a directed verdict. R. 271, l. 4 – 274, l. 13. Appellant renewed his improper notice motion, which the court denied stating that its prior ruling was correct and that it could not find an abuse of discretion based on what was presented. R. 273, ll. 10 – 274, l. 13. Appellant also renewed his improper notice motion after jury charges, and the court denied it based on its previous ruling. R. 295, l. 21 – 296, l. 7. After deliberations, the jury returned a verdict of guilty as to each count. R. 351, l. 4 – 352, l. 4.

Sentencing

The court then proceeded to sentencing. R. 354, ll. 1-2. The state reiterated that, based on its filing of the notice of intent to seek life, a life sentence was appropriate as to the burglary first-degree, armed robbery, and attempted murder charges. R. 355, ll. 6-10. Defense counsel renewed his motion in regard to appellant's eligibility for life without the possibility of parole. R. 356, ll. 8-9. Appellant provided an allocution. R. 356, l. 14 – 358, l. 17. The court imposed a life sentence as to the burglary first-degree, armed robbery, and attempted murder, and imposed concurrent five-year sentences for possession of a firearm by a person convicted of a violent crime and both counts of pointing and presenting. R. 358, l. 20 – 359, l. 13.²

² The court initially imposed a concurrent five-year sentence as to the possession of a weapon during commission of a violent crime charge but voided that sentence since a sentence should not have been issued. R. 359, ll. 18-23.

Discussion

Here, appellant did not receive proper notice that conviction of the instant most serious offenses would allow the state to seek a life without possibility of parole sentence. Because appellant failed to receive proper notice, he should not have been eligible to receive the life sentences that the court ultimately imposed.

The text of S.C. Code Ann. § 17-25-45 provides that:

(A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:

(1) one or more prior convictions for:

(a) a most serious offense;³ or

(b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or

(2) two or more prior convictions for:

(a) a serious offense; or

(b) a federal or out-of-state conviction for an offense that would be classified as a serious offense under this section.

See S.C. Code Ann. § 17-25-45(A). In addition, the statute notes that the decision to invoke sentencing under this section “is in the discretion of the solicitor,” and that “[w]here the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial.” *See id.* § 17-25-45(G), (H).

³ As relevant, attempted armed robbery, armed robbery, burglary first-degree, and attempted murder are enumerated as “most serious offenses.” *See* S.C. Code Ann. § 17-25-45(A)(1).

At the outset, it should be noted that although appellant did not contest at trial or during sentencing that he received written notice of the of the state’s intention to seek a life without the possibility of parole sentence, *see* R. 41, l. 6 – 43, 1. 11, this fails to contemplate the improper notice that he was given by the plea court that attempted armed robbery was a serious offense. That error was two-fold. First, the plea court for appellant’s prior attempted armed robbery charge improperly advised him during his plea colloquy that “Attempted Armed Robbery is both a violent and serious offense under South Carolina law,” and explained that “[t]he fact this is a serious offense” meant that if he received three serious convictions or two most serious convictions, he would be eligible for life without parole. R. 368, ll. 2-20. The court then reiterated that the “attempted armed robbery conviction [was] a serious offense.” R 368, ll. 18-19. Second, the court memorialized its error by checking the box for “violent” and “serious” on the corresponding sentencing sheet.⁴ R. 386. Further, it cannot be said that these errors were merely scrivener’s errors. *But see State v. Bultron*, 318 S.C 323, 329-30, 457 S.E. 2d 616, 620 (Ct. App. 1995) (explaining that the lack of a stamp saying an indictment was true billed was “merely a scrivener’s error.”); *State v. Sosbee*, 371 S.C. 104, 113, 637 S.E. 2d 571, 575 (Ct. App. 2006) (stating that the erroneous listing of charges and CDR codes on the sentencing sheet were scrivener’s errors because the sentencing sheet did not affect the nature of the offense charged.). Taken together, the plea court’s erroneous advisement and defective sentencing sheet were plainly contrary to the applicable statute. *See* S.C. Code Ann. § 17-25-45(A)(1); *see also* R. 368, ll. 2-20; 386.

⁴ There were several other irregularities with appellant’s sentencing sheet concerning his prior 2020 attempted armed robbery conviction, including that: his attorney did not sign the form, appellant did not sign the form due to COVID-19, and he orally waived presentment due to COVID-19. R. 386.

Historically, South Carolina has not required a defendant to be informed, even in the indictment, if he was going to be punished more severely on the basis of previous convictions in his record. *State v. Washington*, 338 S.C. 392, 398, 526 S.E. 2d 709, 712 & n.4 (2000) (citing *State v. Parris*, 89 S.C. 140, 71 S.E. 2d 808 (1911)). Our Supreme Court has thus noted that “[t]here would be no duty to inform the Defendant about seeking the statute’s application if it were not for the statutory provision.” *See id.* However, when seeking an enhanced sentence under § 17-25-45, the state bears the burden to establish the defendant’s prior convictions for serious or most serious offenses. *State v. Phillips*, 393 S.C. 407, 414, 712 S.E. 2d 457, 461 (Ct. App. 2011). Once the state has proved that the prior conviction exists, the defendant has the burden of proving it is constitutionally defective or otherwise invalid by a preponderance of the evidence. *State v. Payne*, 332 S.C. 266, 272, 504 S.E. 2d 335, 338 (Ct. App. 1998).

Here, while it may be true that the plea court was not required to instruct appellant concerning the Strike System, this does not remove the effect of the plea court’s inaccurate advisement from appellant’s instant sentence. *Washington*, 338 S.C. at 398, 526 S.E. 2d at 712 & n.4. As the state advanced below,⁵ the plea court could have remained silent as to whether attempted armed robbery was a serious or most serious offense and omitted a discussion of the possibility of an enhanced sentence if another conviction was obtained. R. 44, ll. 4-8. But it did not. The plea court advised appellant that attempted armed robbery was a serious offense. *See* R. 363-385; 386. Twice. To ignore the court’s misadvisement is an error. A life without possibility of parole sentence is of the most severe sentences that an individual may receive, and

⁵ The state also argued during the pretrial motion hearing that it was “difficult to believe that these crimes would not have been committed . . . if [appellant] knew this was a most serious offense rather than a serious offense.” *See* R. 44, ll. 16-20. The state’s contention that proper advisement would not have changed the ultimate result is mere speculation. To the contrary, it cannot be said what impact proper advisement *might* have had, because the plea court for appellant’s attempted armed robbery did not accurately advise him.

it is thus necessary to ensure that a defendant receive accurate and proper notice about his eligibility to receive such a significant sentence, including any notice given by the court.

In addition, it is not unusual for the court to consider facts underlying prior convictions for the purpose of sentencing. *See e.g., Koon v. State*, 372 S.C. 531, 534, 643 S.E. 2d 680, 682 (2007) (determining that a burglary committed on March 28th at a different location and building clearly constituted a separate offense from the March 13th and March 14th burglaries.); *see also State v. Spratt*, 383 S.C. 212, 214, 678 S.E. 2d 266, 267 (Ct. App. 2009) (reversing and remanding to allow the trial court to consider evidence as to whether Spratt waived his right to counsel during his prior uncounseled guilty plea hearing.). Thus, considering the circumstances underlying appellant's triggering prior conviction for attempted armed robbery, the record supports that the plea court put appellant on the wrong notice. Even further, to determine that such an erroneous advisement does not matter is inapposite and can result in weighty consequences, as here.

In sum, the trial court erred by denying appellant's improper notice motion as he demonstrated that the plea court for his triggering attempted armed robbery conviction twice misadvised him, and thus, he should not have been eligible for the ultimately imposed life sentence pursuant to S.C. Code. Ann. § 17-25-45.

CONCLUSION

Based on the foregoing, appellant's sentence should be vacated, and this case should be remanded for resentencing without application of S.C. Code. Ann § 17-25-45.



Molly M. Keegan
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 2025.

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APPELLATE CASE NO. 2025-000501

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Wardarious Brown 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 trial before Judge J. Mark Hayes, which was held on March 4-6, 2025, 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 Wardarious Brown.

Respectfully Submitted,



Molly M. Keegan
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 2025.

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APPELLATE CASE NO. 2025-000501

**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: 2022-GS-11-00488, 2022-GS-11-00489, 2022-GS-11-00490, 2022-GS-11-00491, 2022-GS-11-00492, and 2022-GS-11-00493;
- (2) Entire trial transcript dated March 4-6, 2025;
- (3) Court's Exhibit 1 (Transcript), Court's Exhibit 2 (Sentence Sheet), and Court's Exhibit 3 (Stipulation);
- (4) Sentencing sheets.

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



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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 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.”



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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 *Anders* Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Wardarious Brown, #371428, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 31st day of July, 2025.



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