

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

R. Knox McMahon, Circuit Court Judge

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FEB 18 2014

S.C. Supreme Court

OCTAVIUS LIVINGSTON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001221

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR judge erred in denying petitioner's request for a resentencing hearing on his cocaine distribution conviction because the 2010 Omnibus Crime Reduction and Sentencing Reform Act lowered the sentence for this offense and became effective during the pendency of petitioner's appeal via an express mandate attached to the Act that nullified its savings clause provision.

STATEMENT

Petitioner Octavius Livingston was convicted of distribution of cocaine (third offense) per jury trial held during the September 2008 term of the Richland County General Sessions Court before Judge James R. Barber. Marcus Whitlark represented petitioner at trial and Assistant Solicitor Theodore Lupton appeared on behalf of the state. App. p. 1- 187. Petitioner was sentenced to imprisonment for a period of fifteen years. Petitioner appealed, but his conviction and sentence were affirmed by the Court of Appeals. See State v. Livingston, Unpublished Opinion No. 2011-UP-2011. App. 201. Petitioner was represented on direct appeal by Kathrine H. Hudgins.

On July 7, 2011, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 202 – 207. The respondent filed a return dated September 19, 2011, requesting that a hearing be held in response to petitioner’s PCR action. App. 208 – 213. An amended PCR application was filed on August 8, 2012. App. 214-217.

A PCR hearing was convened on August 17, 2012, at the Richland County Courthouse before Judge R. Knox McMahon. App. 218 – 232. Petitioner was present at the hearing and represented by William C. Wood, Jr., at that time. Assistant Attorney General Robert Corney appeared on behalf of the state at the PCR hearing.

On April 12, 2013, Judge McMahon issued an order of dismissal denying petitioner’s PCR action filed in the case. App. 232 – 239. Petitioner appealed. This petition follows.

ARGUMENT

The PCR judge erred in denying petitioner's request for a resentencing hearing on his cocaine distribution conviction because the 2010 Omnibus Crime Reduction and Sentencing Reform Act lowered the sentence for this offense and became effective during the pendency of petitioner's appeal via an express mandate attached to the Act that nullified its savings clause provision.

At trial, Officer Jason Williams testified that he made an undercover controlled cocaine buy from petitioner on January 23, 2007, at a Lowe's Store located on Two Notch Road in Columbia, South Carolina. Officer Williams stated that the buy was set up by the assistance of a confidential informant in the case. App. p. 43, l. 22- p. 65, l. 24.

No testimony was taken during the PCR hearing held in the case. Rather, PCR counsel advanced legal arguments on a matter of law that included a request for a resentencing hearing for petitioner on his 2008 sentence for his distribution conviction under 44-53-370 per the new 2010 Omnibus Crime Bill. PCR counsel argued that although petitioner was sentenced under the mandatory minimum of fifteen years imprisonment for his distribution of cocaine conviction in 2008, the 2010 Act signed on June 2, 2010, reduced the mandatory minimum sentencing on a distribution conviction to ten years and became effective while petitioner's case was pending on appeal via express language in the Act mandating that the same take effect immediately. Petitioner was convicted and sentenced on September 11, 2008, but his appeal was not concluded until January 25, 2011. Therefore, petitioner became a candidate on June 2, 2010, to receive the benefit of the five-year prison sentence reduction on his distribution conviction.

The PCR judge ruled that the savings clause in the Act in question meant that the Act did not apply to petitioner's case because he was charged and tried under the old law before the

amended law took effect, and that since petitioner was sentenced on September 11, 2008, i.e., “21 months before June 2, 2010, [when the Act became effective, then petitioner] was correctly sentenced under the distribution statute in effect at the time of sentencing (under 44-53-370 (b)(1)(2003).”

The PCR judge’s ruling was based on the premise that a savings clause saves the right of solicitors to prosecute under the law in effect at the time the crime was committed. Clearly, petitioner’s case is distinguishable from the savings clause cases where rights are saved (see State v. Dawson, 402 S.C. 160, 740 S.E.2d. 501 (2013); State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013); State v. Hilton, 2013 WL5819439 (S.C. App.); and State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013)), because in this instance there was an express mandate under the Act that nullified the savings clause provision and allowed the amendment in question to become effective immediately upon the date the Governor signed the Act, which was on June 2, 2010. A savings clause is nullified if “the repealed or amended provision so expressly provide” that an amendment would take immediate application. State v. Dawson, supra. Therefore, petitioner became a candidate to receive the benefit of the five-year prison sentence reduction in his case.

In Dawson, the defendant was arrested on January 22, 2010, for an October 2009 act of breach of trust with fraudulent intent (valued at less than \$5000) and was convicted and sentenced to a YOA sentence and five years probation on June 2, 2011. However, on June 2, 2010, the Omnibus Crime Reduction Act reduced the maximum sentence for defendant Dawson’s offense to thirty days because the goods involved were valued under \$2,000.00, which spawned Dawson’s request for sentencing under the Act on the ground that she was convicted and sentenced after the Act was passed. The Dawson Court held that since there was a savings clause in existence for that

offense, then the case would operate based on the statute in effect at the time the crime was committed as new legislation generally applied prospectively rather than retroactively.

Similarly, in State v Brown, 402 S.C. 119, 740 S.E.2d 493 (2013), the act of grand larceny occurred on April 29, 2010, and the Act passed an amended grand larceny statute on June 2, 2010, but Brown's trial and sentencing in the case occurred on May 12, 2011. The Brown the Court held that the larceny statute that triggered grand larceny based on goods stolen valued over \$1,000.00 was the old statute under which the defendant was indicted, and that he could not invoke the benefit of the amended statute requiring the stolen goods to total \$2,000.00 before a grand larceny indictment could be issued. Likewise, in State v. Hilton, 406 S.C. 580, 752 S.E.2d 549 (2013), the Court held the amended breathalyzer statute 56-5-2950 (A) that became effective after the defendant's DUI arrest could not be applied retroactively because the savings clause required the new statute to be applied prospectively. An identical holding was announced in State v. Isaac, 405 S.C. 177, 747 S.E. 2d 677 (2013), where the Court held that the immunity under the Protection of Persons and Property Act must apply prospectively rather than retroactively.

In the case at bar, the argument was that even though petitioner was convicted of cocaine distribution on September 11, 2008, under the old statute, his appeal did not end until January 25, 2011, and that during the pendency of his appeal there was an amendment to the distribution statute signed on June 2, 2010, that reduced the sentence for cocaine distribution by five years and expressly referred to the effective applicability date to begin on June 2, 2010. Hence, petitioner's request for a resentencing hearing to gain the benefit of the reduced sentence for his distribution conviction under the amended statute.

Note that petitioner's case is unique in that although there was a savings clause within the Act in question, that savings clause was nullified by the express language contained under the "time

effective” section of the Act. The Act was comprised of two parts: Part I and Part II. Part I encompassed the amendment in reference to the distribution of cocaine law under S.C. Code Ann. §44-53-370. Under §66 of the Act, which was the “time effective” paragraph of the Act, the final sentence declared that “cases and appeals arising or pending under the law as it existed prior to the effective date of this Act are saved.” However, the second sentence under §66 of the Act declared that “the remaining provisions of Part I (which was the distribution amendment that affected petitioner) of the Act become effective upon signature of the Governor.” The Governor signed the Act into law on June 2, 2010. Section 66 reads as follows:

The provisions of Section 15 for implementation of a driver’s license reinstatement payment plan and the provisions of Section 18 for implementation of route restricted licenses shall become effective January 1, 2011, or six months after the signature of the Governor, whichever event occurs later in time. The remaining provisions of Part I become effective upon signature of the Governor. The provisions of Part II take effect on January 1, 2011, for offenses occurring on or after the date. Regulations required pursuant to this act shall be submitted to the General Assembly no later than January 11, 2011, or six months after enactment, whichever event occurs later in time. All other provisions become effective upon signature of the Governor. Cases and appeals arising or pending under the law as it existed prior to the effective date of this act are saved.

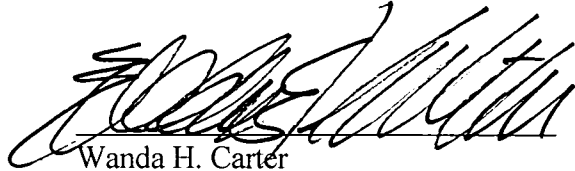
Therefore, since the amended statute was expressly authorized to become effective during petitioner’s case on appeal, then he should have received the benefit of a reduced sentence based on that express statutory provision. The intent of the legislature via the second sentence under §66 of the Act was obvious. Statutes as such are to be resolved in favor of the defendant. State v. Blackmon, 304 S.C. 270, 403 S.E. 2d 600 (1991), State v. DeAngeles, 257 S.C. 44, 183 S.E.2d 906 (1971).

The PCR judge erred in denying petitioner’s request for a resentencing hearing on his cocaine distribution conviction under the Omnibus Crime Reduction and Sentencing Reform Act that became effective immediately (on June 2, 2010) while his appeal was still pending.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

R. Knox McMahon, Circuit Court Judge

OCTAVIUS LIVINGSTON

PETITIONER,

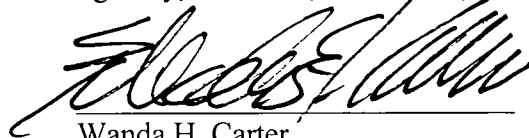
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

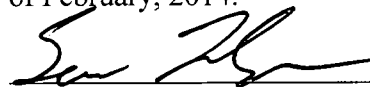
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Octavius Livingston 330587, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 18th day of February, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.