

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2013-001221

OCTAVIUS LIVINGSTON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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JUN - 5 2014

S.C. Supreme Court

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED.....	3
STATEMENT OF THE CASE.....	4
STANDARD OF REVIEW	6
ARGUMENT	7
CONCLUSION.....	10

ISSUE PRESENTED

Did the post-conviction relief court err in determining that Petitioner was not entitled to a resentencing hearing based on the Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts No. 273, which reduced the mandatory minimum sentence for Petitioner's conviction from fifteen to ten years, where the crime, conviction, and sentence all occurred prior to the Act and Petitioner's sentence was within the discretionary range of the trial court?

STATEMENT OF THE CASE

Petitioner was indicted during the April 2008 term of the Richland County Grand Jury for Distribution of Cocaine – Third Offense or Above (2008-GS-40-1666). Marcus Whitlark, Esquire, represented Petitioner. On September 11, 2008, Petitioner proceeded to a jury trial before the Honorable James R. Barber, III, where he was convicted as indicted. Judge Barber sentenced Petitioner to fifteen years imprisonment. The State *nolle prossed* two additional charges (another Distribution of Cocaine – Third Offense or Above and Trafficking in Cocaine – Third or Above).

A notice of appeal was filed and an appeal was perfected on Petitioner's behalf. Following the submission of an Anders¹ brief by Appellate Defender Kathrine Hudgins, the South Carolina Court of Appeals dismissed the appeal. State v. Octavius Livingston, 2011-UP-019 (Ct. App. filed Jan. 25, 2011). The Remittitur followed thereafter.

Petitioner filed an application for post-conviction relief on July 7, 2011, alleging that he was being held in custody unlawfully based on allegations of ineffective assistance of trial counsel for failing to object based on confrontation grounds and ineffective assistance of appellate counsel for failing to submit a merits brief. Respondent made its Return on September 15, 2011, requesting an evidentiary hearing be held. An "Amendment to the Application for Post-Conviction Relief" was filed by Petitioner, through his counsel, on August 8, 2012, alleging that Petitioner was entitled to a resentencing hearing based on the Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts No. 273 (hereinafter "the Act"), which reduced the mandatory minimum sentence for his conviction from fifteen years to ten years imprisonment. An evidentiary hearing was convened on August 17, 2012, at the Richland County Courthouse

¹ Anders v. California, 386 U.S. 738 (1967).

before the Honorable R. Knox McMahon. Petitioner was present and represented by William C. Wood, Jr., Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney of the South Carolina Attorney General's Office. At the start of the evidentiary hearing, Petitioner expressly withdrew and abandoned all previous grounds set forth in his *pro se* application and proceeded solely on the issue of whether he was entitled to resentencing under the sentencing range for a Distribution of Cocaine – Third Offense or Above as amended by the 2010 Omnibus Crime Reduction and Sentencing Reform Act. No testimony was taken or evidence presented, but arguments were presented from both parties. Following the submission of proposed orders from both parties, Judge McMahon denied and dismissed Petitioner's application by written order signed April 12, 2013 and filed May 7, 2013.

Petitioner filed a Petition for Writ of Certiorari on February 18, 2014. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘*any evidence*’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court’s decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

ARGUMENT

The post-conviction relief court correctly discerned that Petitioner was not entitled to a resentencing hearing based on the Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts No. 273, which reduced the mandatory minimum sentence for Petitioner's conviction from fifteen to ten years, where the crime, conviction, and sentence all occurred prior to the Act and Petitioner's sentence was within the discretionary range of the trial court.

Petitioner asserts that he is entitled to a resentencing hearing because the Omnibus Crime Reduction and Sentencing Reform Act of 2010 lowered the mandatory minimum for Distribution of Cocaine – Third Offense of Above from fifteen years to ten years and became effective during the pendency of his appeal. Petitioner argues that an express mandate attached to the Act nullified its savings clause provision and entitles Petitioner to be sentenced based on the reduced sentencing range.

In its Order of Dismissal, the post-conviction relief court determined that Petitioner was not entitled to resentencing pursuant to the Act, noting that Applicant was arrested on February 18, 2008, charged on February 26, 2008, and was convicted and sentenced on September 11, 2008, all well before the Act took effect on June 2, 2010. The court cited State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992) and State v. Dawson, 402, S.C. 160, 740 S.E.2d 501 (2013) in support of its ruling.

In Varner, this Court held that “[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed.” State v. Varner, 310 S.C. 264, 265, 423 S.E.2d 133, 134 (1992) (internal citations omitted). The Varner court elaborated that “[t]he correct penalty is the one in effect at the time of sentencing, even if the penalty is repealed while appeal is pending. Thus, a criminal defendant receives the benefit

of punishment mitigated by legislative amendment only when the amendment becomes effective before sentence is pronounced.” Id. (internal citations omitted).

In Dawson, this Court further clarified whether a defendant is entitled to a reduced sentencing range within the context of the Act. Dawson, supra. The Dawson Court determined the defendant was not entitled to be sentenced under the Act, which became effective after the defendant committed the crime but before she was sentenced, in a situation with an identical savings clause. The Court held that “the Act unambiguously states its sentencing amendments do not apply to actions arising under the amended laws. Specifically, the Act’s savings clause states the Act ‘does not affect pending actions’ founded on an amended or repealed law ‘or alter, discharge, release, or extinguish any penalty ... incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide.’” Dawson, 402 S.C. at 165, 740 S.E.2d at 503.

Recently, this Court also held similarly in State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013), determining that the defendant was not entitled to reduced sentencing ranges pursuant to the Act for an offense that occurred prior to the enactment of the Act and that the Act did not apply retroactively.

Petitioner, acknowledging the rulings in Varner, Dawson, and Brown, asserts that his case is distinguishable because the savings clause was nullified by the “time effective” language of the Act. Petitioner asserts that since his case was pending on appeal when the Act was signed into law by the Governor on June 2, 2010, he is entitled to the benefits of the Act. However, Petitioner cites to no authority to support this position, merely stating that any ambiguity in construction must be resolved in favor of the defendant.

Applying Varner, Dawson, and Brown to the present case, it is clear that Petitioner is not entitled to a resentencing hearing based on the revised sentencing ranges as set forth in the Act. He committed the offense, was charged with the offense, was convicted of the offense, and was sentenced for the offense all well before the Act took effect. Furthermore, Petitioner was sentenced within the statutory guidelines for Distribution of Cocaine – Third Offense or Above based on the prior sentencing guidelines in place at the time of sentencing or the later enacted Act under which Petitioner wishes to be sentenced.

The post-conviction relief court did not err in determining that Petitioner was not entitled to a resentencing hearing. This Petition should be denied.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: Megan E. Harrigan
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June 5, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable R. Knox McMahon, Circuit Court Judge
Case No. 2011-CP-40-4375
Appellate Case No. 2013-001221

OCTAVIUS LIVINGSTON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

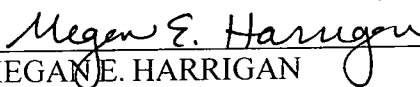
PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

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

This 5th day of June, 2014.


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ALAN WILSON
ATTORNEY GENERAL

June 5, 2014

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S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Octavius Livingston v. The State of South Carolina
Appellate Case No. 2013-001221

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH/ko
Enclosures

cc: Wanda H. Carter, Esquire, Appellate Defense
Trisha Allen, Victim's Services