STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Lee S. Alford, Circuit Court Judge

Appellate Case No. 2013-002617

THE STATE,

Respondent,

vs.

JEFFREY DAVIS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. The trial court properly sentenced Appellant to life imprisonment without parole pursuant S.C. Code Ann. § 17-25-45 after Appellant was convicted of a third "serious" offense during his lifetime, and the enhancement of Appellant's sentence based on his two prior drug convictions for "serious" offenses did not render his life without parole sentence unconstitutional in any way.

STATEMENT OF THE CASE

Appellant was indicted during the February 2013 term of the York County Grand Jury for distribution of crack cocaine – third offense (2013-GS-46-0214) in violation of S.C. Code Ann. § 44-53-375(B)(3). Appellant was represented by Mark McKinnon Esquire, and Creighton Hayes, Esquire. The State was represented by Assistant Solicitors Jennifer Colton and Matthew Shelton. On May 6, 2013, the State served Appellant with its notice of intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 based on his two prior "serious" convictions for trafficking in crack cocaine and distribution of crack cocaine within proximity of a school.

On June 4, Appellant was tried in his absence before the Honorable Lee S. Alford and a jury. On June 5, 2014, the jury convicted Appellant as indicted. Judge Alford imposed a sealed sentence to be handed down when Appellant was apprehended.

On December 4, 2013, Appellant appeared before Judge Alford for the unsealing of his sentence. Judge Alford unsealed his sentence and imposed a mandatory life without parole term of imprisonment pursuant to S.C. Code Ann. § 17-25-45. Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

The York County Multi-Jurisdictional Drug Enforcement Unit (hereinafter "DEU") was created to combat the prevalence of illicit drugs throughout the county. (Tr. pp. 110, 183). Commander Rayford Ervin oversees the unit and the various members of law enforcement from agencies across the county assigned to it. (Tr. pp. 183-84, 187). Tanya Ervin, an eleven year veteran of the Fort Mill Police Department, is an officer assigned to the DEU. (Tr. pp. 109-11).

In August 2012, Tanya was assigned to the Rock Hill DEU office and was asked to assist in an operation targeting drug sales in the valley area of the City of York. (Tr. p. 112, 187). She was selected for this particular assignment because she had not previously worked in the area and would be unknown to the drug dealers and community residing in the valley area. (Tr. p. 187). Tanya was to assist in making controlled buys of narcotics by driving an unmarked police vehicle accompanied by a confidential informant and record the transactions with a hidden camera she would be wearing. (Tr. p. 113).

On August 16, 2012, Tanya was assigned to work with Shari Jennings, a paid confidential informant. (Tr. pp. 112-14, 135). Shari, a recovered crack addict, had previously lived in the valley area and was a former participant in the area's drug scene. (Tr. pp. 133-34, 138-139). Shari was on probation for third degree burglary and became an informant to help pay her probation costs. (Tr. pp. 139, 146, 147). She had no pending charges and no other convictions for which she was on probation. (Tr. pp. 140-41, 144). She was not promised any assistance with completing her probation, but was paid eighty dollars per buy. (Tr. pp. 133, 140-41).

Shari and Tanya met at the DEU office located within the Moss Justice Center. (Tr. p. 114). Before leaving the office, both the unmarked police vehicle and Shari were

searched; neither yielded any contraband. (Tr. pp. 131, 136, 158-59). Shari was then given forty dollars in marked bills to use in the controlled buy. (Tr. pp. 118, 129, 153). Tanya was equipped with surveillance gear so that any transaction could be recorded. (Tr. pp. 113, 115-16, 136). The pair left the DEU office in the early evening and headed towards the valley area. (Tr. pp. 114, 135).

Once in the valley, Shari saw Appellant, whom she had known for approximately two years. (Tr. pp. 114, 135). Shari and Appellant had previously used crack together daily during the year that she resided in the valley. (Tr. pp. 138, 145). Appellant recognized Shari in the unmarked car and called out to her, using her nickname, "Cricket." (Tr. pp. 135-36). Appellant approached the car and Shari introduced Tanya as her aunt. (Tr. pp. 114, 117, 136-37). Shari asked Appellant if she could purchase forty dollars' worth of crack from him. (Tr. pp. 114, 117, 135, 137). Appellant instructed Shari to drive around the block and when she came back, he would have the crack for her. (Tr. pp. 137). Shari and Tanya complied and shortly thereafter, Appellant returned with the drugs. (Tr. p. 137). Shari argued to Appellant that it looked like only twenty dollars' worth of crack, not the forty dollars' worth for which she had paid (Tr. pp. 118, 137-38). Appellant responded that the crack he provided was "fire," meaning very high quality, so it was worth the purchase price. (Tr. pp. 118, 138). Shari gave Appellant the forty dollars provided by the DEU. (Tr. p. 138). When Appellant left, Shari gave the bag of crack to Tanya, who sealed it into an evidence bag. (Tr. pp. 118, 119-20, 128, 143). The entire transaction was recorded by the camera Tanya was operating. (Tr. pp. 114-15).

Tanya then drove immediately back to the DEU office located within the Moss Justice Center. (Tr. pp. 131, 142, 161-62). DEU officers again searched Shari and the car for contraband and none was found. (Tr. p. 162). Shari provided a statement to DEU

officers regarding the transaction. (Tr. p. 142). DEU officers watched the video of the transaction. (Tr. p. 188). Commander Ervin instantly recognized Appellant from numerous previous interactions with him in the valley. (Tr. pp. 188-89). DEU officers created a lineup of Appellant's picture and five others and Shari picked Appellant out of the lineup as the person who sold her crack. (Tr. pp. 142).

DEU officers sought and received a warrant for Appellant's arrest, but did not arrest him until October 2012. (Tr. pp. 189-90). This two month delay was in accordance with policies designed to avoid compromising the ongoing investigation or burning Shari as a confidential informant. (Tr. pp. 190-91). On May 6, 2013, the State served Appellant with its notice of intention to seek life without parole based on his two previous "serious" convictions pursuant to S.C. Code Ann. § 17-25-45. (Tr. pp. 6, 11). Appellant was also put on notice of his trial date at this hearing. (Tr. p. 6).

The State called Appellant's case for trial on June 4, 2013. (Tr. p. 6). Appellant was not present. (Tr. p. 6). His counsel informed the trial court that he had spoken to Appellant that morning and informed him the trial would begin that day, but subsequent attempts to reach him were unsuccessful. (Tr. pp. 8-9). The trial court found Appellant had sufficient notice of his trial date and allowed the trial to proceed in his absence. (Tr. pp. 27-29). Following pre-trial motions, the case advanced to trial, where the jury convicted Appellant as indicted. The trial court sealed Appellant's sentence. (Tr. pp. 229-42).

On December 4, 2013, Appellant appeared before the trial court for sentencing alongside defense counsel. The trial court unsealed Appellant's sentence and sentenced him to life without parole pursuant to S.C. Code Ann. § 17-25-45 over defense counsel's objection. Defense counsel argued Appellant's sentence was unconstitutional because his

two underlying "serious" offenses qualifying for mandatory life without parole were both drug offenses, rendering the punishment cruel and unusual. Defense counsel asserted that the trial court should undergo a proportionality analysis and determine that a life imprisonment sentence was inappropriate for Appellant because his underlying "serious" offenses were both drug related. (Dec. 4, 2013 Tr.). The trial court disagreed, citing South Carolina case law explicitly authorizing life imprisonment without parole based on drug offenses.

ARGUMENT

I. The trial court properly sentenced Appellant to life imprisonment without parole pursuant S.C. Code Ann. § 17-25-45 after Appellant was convicted of a third "serious" offense during his lifetime, and the enhancement of Appellant's sentence based on prior drug convictions for "serious" offenses did not render his life without parole sentence unconstitutional in any way.

Appellant asserts his sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution because the sentence was enhanced based exclusively on his two prior "serious" drug convictions. However, the trial court properly sentenced Appellant pursuant to S.C. Code Ann. § 17-25-45 because Appellant's two prior convictions for serious offenses constituted qualifying prior convictions for enhancement purposes under the statute. Furthermore, the enhancement of Appellant's sentence with the prior convictions did not offend modern standards of decency and did not constitute cruel and unusual punishment. Appellant's convictions and sentence should be affirmed.

A. Propriety of the Sentencing Enhancement

In criminal cases, the appellate court sits to review errors of law only. State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or is controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

Generally, the trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). "A judge or other sentencing authority is to be accorded very wide discretion in determining an

appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Appellate courts typically only interfere in a trial judge's discretionary sentencing decision in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952).

However, under S.C. Code Ann. § 17-25-45, once the State seeks life imprisonment without parole based on a prior conviction for either one "most serious" offense, two "serious" offenses, or a combination thereof, the trial court has no discretion in sentencing and must sentence a defendant to a term of imprisonment of life without the possibility of parole upon conviction of the charged offense. Trafficking in cocaine and distribution of crack cocaine within proximity of a school are both classified as serious offenses under the statute. S.C. Code Ann. § 17-25-45(C)(2)(b) (2003 & Supp. 2012). Distribution of crack cocaine – third offense carries a maximum penalty of thirty years, rendering it a qualifying offense for life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45(C)(2)(a). S.C. Code Ann. § 44-53-375(B)(3).

Prior to the underlying conviction subject to this appeal, Appellant had been convicted of two prior "serious" offenses – trafficking in cocaine and distribution of crack cocaine within proximity of a school. Despite Appellant's protestations that these prior offenses were merely drug related, and thus, should not give rise to life imprisonment without parole, both are nonetheless qualifying "serious" offenses as enumerated in S.C. Code Ann. § 17-25-45(c)(2)(b). Therefore, the trial court properly sentenced Appellant to a term of life imprisonment without the possibility of parole as was mandated by S.C. Code Ann. § 17-25-45(c)(2)(a) upon his conviction for distribution

of crack cocaine – third offense. The trial court committed no statutory error in enhancing Appellant's sentence under the clear and unambiguous requirements of S.C. Code Ann. § 17-25-45. Appellant's convictions and sentence should be affirmed.

B. Sentence Enhancement and Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution prohibits the imposition of cruel and unusual punishment. U.S. Const. amend. VIII. However, the Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). What constitutes cruel and unusual punishment is an evolving standard and involves looking at how society presently views a particular punishment. State v. Wilson, 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trops v. Dulles, 356 U.S. 86, 101 (1958).

The clearest and most reliable expression of society's contemporary values is derived from legislation enacted by this country's legislatures. State v. Pittman, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). However, a reviewing court's own judgment should also be employed by asking whether there is reason to disagree with the judgment reached by the citizenry and the legislature. Id. at 563, 647 S.E.2d at 163. In order to establish that evolving standards of decency preclude a particular punishment, the defendant bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. Id. at 565, 647 S.E.2d at 164. "It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish

a national consensus against it." State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008).

In State v. Williams, a case strikingly similar to the case at bar, this Court determined that enhancement of a sentence under S.C. Code Ann. § 17-25-45 based on prior "serious" drug convictions did not constitute cruel and unusual punishment and did not offend the Eighth Amendment's protections against cruel and unusual punishment. 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008). In Williams, the appellant was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school following an undercover narcotics buy using a confidential informant the appellate knew. Id. Based on two prior "serious" convictions, both of which were drug related, the State sought life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45. Id. Upon conviction, the trial court sentenced Williams to life imprisonment without the possibility of parole on both charges. Id. Williams' counsel objected, arguing that this sentence would constitute cruel and unusual punishment pursuant to the Eight Amendment because Williams' convictions were drug related and non-violent. Id. On appeal, this Court upheld Williams' life sentence, finding that he had failed to "meet his burden of establishing evolving standards of decency precluded punishment, or that his sentence is disproportionate to the crime." Id. at 349, 669 S.E.2d at 647. In support of the ruling, this Court recognized the longstanding precedent that "stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment." Id. 380 S.C. at 347-48, 669 S.E.2d at 646. The Williams court quoted the United States Supreme Court's consideration regarding the implications of drugs on current society:

> Possession, use, and distribution of illegal drugs represent "one of the greatest problems affecting the health and welfare of our population." Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.
>
> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence.

Id. at 348, 669 S.E.2d at 646-47 (quoting Harmelin v. Michigan, 501 U.S. 957, 1002-03, (1991) (internal citations omitted)). The Williams court went on to note that "a state is justified in punishing a recidivist more severely than it does a first offender." Id. at 348, 669 S.E.2d at 647 (citing Riggs v. California, 525 U.S. 1114 (1999)).

In the present case, the trial court cited Williams in its determination that Appellant's sentence did not violate the cruel and unusual punishment clause of the Eighth Amendment. (Dec. 4, 2013 Tr. p. 16). Defense counsel agreed and acknowledged that Williams was "on point." (Dec. 4, 2013 Tr. pp. 16-17).

Despite this concession, Appellant now attempts on appeal to distinguish Williams from his case. Appellant argues that Graham v. Florida, 560 U.S. 49 (2010), which was decided two years after Williams, "indicate[s] that society is maturing and the law is evolving" away from mandatory life without parole sentences. Appellant also cites to Miller v. Alabama, 132 S.Ct. 2455 (2012) to support this position. Appellant contends the recent holdings of the United States Supreme Court, including Graham and Miller, suggest a change in contemporary values and call into question the South Carolina

Supreme Court's holding in Williams. Appellant claims that "these evolving standard of society would indicate that true drug addicts may be punished/treated in a different manner than [life imprisonment without parole]," essentially arguing that drug addicts should be akin to juveniles for recidivist sentencing purposes. This argument is flawed for several reasons.

Initially, the United States Supreme Court's holdings in Graham and Miller had no impact on this Court's holding in Williams. In a sharply divided decision, the Supreme Court in Graham determined the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit a homicide. Graham, 560 U.S. at 82. In reaching this holding, the Court concluded juveniles have lessened culpability compared to adult offenders, meaning their crimes are less morally reprehensible than those committed by adults. Id. at 68. Due to minors' potential to reform their character deficiencies, the Court found the sentencing practice to be unconstitutional because "[a] life without parole sentence improperly denies the **juvenile offender** a chance to demonstrate growth and maturity." Id. at 73 (emphasis added). However, the Court instructed: "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Id. at 75. The Court's reasoning here demonstrates that even juveniles are sometimes viewed as culpable enough to deserve the imposition of LWOP. In Miller, the Supreme Court held that the mandatory imposition of life without parole for juvenile offenders was unconstitutional. 132 S.Ct. 2455. The Miller Court held that a sentencer's ability to impose life imprisonment without parole on a juvenile is not foreclosed, but rather, the sentencer must take into account how children are different, and how those differences counsel against irrevocably sentencing juveniles to a lifetime in prison. Id. Neither

Graham nor Miller reference the applicability of life without parole for recidivist offenders who are drug addicts and nothing in either opinion supports such a conclusion. The holdings in Graham and Miller are simply not applicable or relevant to the situation in Appellant's case.

Appellant's argument that drug addicts should be treated like juveniles for recidivist sentencing is not supported by any case law or other authority. To the contrary, courts have consistently held that harsh penalties, including life without parole, are constitutional for repeat drug offenders. See e.g., Harmelin v. Michigan, 501 U.S. 957 (1991) (holding a mandatory life without parole sentence for possessing more than 650 grams of cocaine did not constitute cruel and unusual punishment); United States v. Hoffman, 710 F.3d 1228 (11th Cir. 2013) (holding a mandatory life without parole sentence for a defendant who was twice convicted for drug felonies based on previous drug offenses and then committed a third drug felony did not violate Eight Amendment protections against cruel and unusual punishment); United States v. Dock, 541 Fed.Appx. 241 (4th Cr. 2013) (sentence of 240 months imprisonment for conspiracy to distribute and possession with the intent to distribute five kilograms or more of cocaine base did not violate the Eighth Amendment); United States v. Jones, 270 F. App'x 268 (4th Cir. 2008) (sentence of life imprisonment without parole based on prior felony drug convictions was not constitutionally disproportionate and did not violate the Eighth Amendment); United States v. Taylor, 301 F. App'x 248 (4th Cir. 2008) (mandatory life sentence for drug convictions involving more than 50 grams of crack cocaine was not disproportionate to the crime, so as to violate the Eighth Amendment); State v. Brown, 303 S.C. 169, 172, 399 S.E.2d 593, 594 (1991) (holding sentence of 25 years without parole upon conviction of trafficking in cocaine was not cruel and unusual punishment); State v. Kiser, 288 S.C.

441, 443-44, 343 S.E.2d 292, 293 (1986) (holding mandatory minimum sentence of 25 years in prison for trafficking in marijuana was not grossly out of proportion with severity of crime and, therefore, complied with cruel and unusual punishment clause). In support of such positions, courts have repeatedly noted the insidious nature of illegal drugs and the inherent underlying violence that accompanies the illegal drug trade. Appellant's claims that his crimes were not violent and that he "had never physically hurt anyone" completely ignores the apparent and overtly violent nature of the illegal drug industry.

Appellant's attempt to paint himself as a docile and drug addled middle-aged man ignores his lengthy prior record of serious drug convictions spanning more than two decades, including trafficking cocaine and distribution of crack cocaine within proximity of a school. Additionally, it is important to note that Appellant faced a harsh sentence of up to thirty years imprisonment for the distribution of crack cocaine – third offense independent of South Carolina's recidivist offender statute. S.C. Code Ann. § 17-25-45 & § 44-53-375(B)(3).

Furthermore, Appellant's enhanced sentence is entirely consistent with the rationale behind recidivist offender statutes, which is to more severely punish offenders who continue to break the law time and time again. See United States v. Rodriquez, 553 U.S. 377, 385 (2008) ("[A]n offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit a greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation."). Appellant's sentence was properly enhanced based on the increased culpability inherent in his status as an offender who had previously been convicted of two

prior serious offenses. For all of these reasons, the Court should find Appellant's life imprisonment without parole sentence does not violate the Eighth Amendment ban on cruel and unusual punishment.

CONCLUSION

For all the foregoing reasons, Respondent respectfully submits that the sentence of the lower court be affirmed.

Respectfully submitted,

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April 20, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Lee S. Alford, Circuit Court Judge

Appellate Case No. 2013-002617

THE STATE,

Respondent,

vs.

JEFFREY DAVIS,

Appellant.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey Durant, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 20th day of April, 2015.

Megan Harrigan Jameson

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RE: State v. Jeffrey Davis – Appellate Case No. 2013-002617

Dear Mrs. Durant:

Enclosed please find two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Megan Harrigan Jameson

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Assistant Attorney General
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MHJ/

Enclosures

cc: The Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services