STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001419

THE STATE, ...APPELLANT

v.

JAMES A. SUMMERSETT, ...RESPONDENT.

INITIAL REPLY BRIEF OF APPELLANT

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR APPELLANT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the lower court err in determining that a conviction obtained as a result of a *nolo contendere* plea cannot be considered as a prior conviction of a most serious crime for purposes S.C. Code Ann. § 17-25-45 and in vacating the life without parole sentence in this case in that the findings and conclusion of the lower court were based upon errors of law and constitute an abuse of discretion?

ARGUMENT

The lower court erred in determining that a conviction obtained as a result of a *nolo contendere* plea cannot be considered as a prior conviction of a most serious crime for purposes S.C. Code Ann. § 17-25-45 and in vacating the life without parole sentence in this case in that the findings and conclusion of the lower court were based upon errors of law and constitute an abuse of discretion.

Respondent Summerset contends that the trial court properly vacated his sentence of life without parole arguing that his prior conviction for assault and battery with intent to kill (ABWIK) obtained by a "no contest" plea in 1994 cannot serve as a strike requiring a sentence of life without parole pursuant to S.C. Code § 17-25-45 (2014). Summerset makes this argument in support of the trial court's decision despite the plain, unambiguous language of the legislative mandate requiring a sentence of life without parole for convictions obtained by "*nolo contendere*" pleas. Summerset acknowledges that the language of the applicable statute defines "conviction" to include convictions obtained by *nolo contendere* pleas, but asserts that this portion of the statute is unconstitutional because *nolo contendere* pleas to felony offenses are invalid as being "subject to denial of acceptance." (Brief of Respondent, p. 10). Summersett specifically contends that use of his prior ABWIK conviction results in a due process violation because the plea does not constitute an admission of guilt of the underlying facts supporting the charge. Summersett maintains that a *nolo contendere* plea may not be accepted for a felony offense such as the ABWIK offense for which he entered a plea of "no contest." Relying on the discussion in United States v. Alston, 611 F.3d 219 (4th Cir. 2010), the trial court in this case agreed with these arguments advanced by Summersett below and determined that the portion of the statute permitting use of prior felony convictions obtained by *nolo contendere* plea as a predicate or strike for purposes of

sentencing violated Summersett's due process rights because there was no confirmed factual basis for the plea. (R. ___[Order, p. 8]).

"The United States Supreme Court has explicitly recognized that the legislature has the power to define criminal punishments without giving the courts any sentencing discretion." Id. at 303, 741 S.E.2d at 735; see also Chapman v United States, 500 U.S.. 453 (1991); Harmelin v. Michigan, 501 U.S. 957 (1991). Our supreme court has recognized that bond forfeiture is the equivalent to a conviction when the Legislature has defined it as such by statute. Scott v. State, 334 S.C. 248, 254, 513 S.E.2d 100, 103 (1999), citing State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981); State v. Langford, 223 S.C. 20, 25, 73 S.E.2d 854, 856 (1953).The State submits that "the penalty assessed for a particular offense is, except in the rarest of cases, purely a matter of legislative prerogative, and the legislature's judgment will not be disturbed." State v. De La Cruz, 302 S.C. 13, 15, 393 S.E.2d 184, 186 (1990). "[I]f a defendant is convicted of one of the triggering offenses, the matter of sentencing becomes the province of the legislature. Id. The trial court's failure in this case to apply the plain, clear and unambiguous terms of § 17-25-45 according to their literal meaning was error and this Court is not bound by the trial court's findings or reasoning. State v. Benjamin, 341 S.C. 160,163, 533 S.E.2d 606, 607 (2000) ("When the language of the statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted . . . [and] the terms, therefore, must be applied according to their literal meaning. . . . [T]his Court simply lacks the authority to look for or impose another meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope."). "Statutory interpretation is a question of law subject to de

novo review." State v. Smith, __ S.E.2d ___, 2015 WL 2222248 (Ct. App. 2015), citing Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010). Questions of statutory construction present questions of law, which our appellate courts are free to decide without any deference to the court below. Id., citing Grier v. AMISUB of A.C., Inc., 397 S.C. 532, 535-36, 725 S.E.2d 693, 695 (2012).

A review of the clear and unambiguous terms of the legislative mandate in § 17-25-45 (2014) clearly establish that the trial court erred in vacating the sentence of life without parole. The clear and unambiguous language of § 17-25-45 (A) (2014) provides that "upon conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without possibility of parole if that person has . . . one or more prior convictions for . . . a most serious offense." Assault and battery with intent to kill (ABWIK) is classified by our legislature as a most serious offense. S.C. Code Ann. § 17-25-45 (C)(1) (2014). Also, as expressly defined by our General Assembly in the plain and unambiguous words of the statute and as recognized by this Court, "[u]nder th [is] recidivist statute, a conviction 'means any conviction, guilty plea, or plea of nolo contendere." State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015); see also § 17-25-45 (C)(3) (2014). "[A] prior or previous conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable on a separate occasion, prior to the instant adjudication." Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009); see also State v. Benjamin, at 163, 533 S.E.2d at 607 ("The language of section 17-45-25 (F) is clear. Where a defendant has been convicted for a most serious offense on an earlier, separate occasion, it is a 'prior conviction' as defined by the statute's terms."); see also § 17-25-45 (F)(2014) ("For purposes of

determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.").

Our General Assembly also stated that with only one limited and delineated exception, the terms of § 17-25-45 must be applied notwithstanding any other provision of law. See § 17-25-45 (A). The language of the statute is plain and unambiguous and clearly and definitely includes a prior **conviction** for a most serious offense obtained by a *nolo contendere* plea for purposes of this recidivist statute. See State v. Johnson, 410 S.C. 10, 24, 763 S.E.2d 36, 44 (Ct. App. 2014), citing State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); State v. Benjamin, 341 S.C. 160, 162, 533 S.E.2d 606, 607 (Ct. App. 2000) ("When the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted). By the clear terms of the statute, it is necessary to look to the existence of a prior conviction and not the underlying substantive facts supporting that conviction. The General Assembly expressed in its "[n]otwithstanding any other provision of law" language, that § 17-23-40 (2014) and the caselaw relied upon by the trial court are inapplicable to the operation of this recidivist statute. When the words of a statute are plain and unambiguous, our courts must abide by the plain meaning of the words in the statute without resort to subtle or forced construction to limit or expand the operation of the statute. Id.

The rules of statutory interpretation beyond the plain meaning of the statute are not needed in this instance because the words of § 17-25-45 are clear and definite. Id.

Through selection of the term "conviction," our legislature determined that the type of plea and proof of the underlying facts leading to the conviction are not relevant for purposes of the sentence enhancement. Rather, "[i]t is the *conviction* which controls, not the *plea* interposed." State v. Evans, 508 S.E.2d 606 (W.Va. 1998). The trial court was required to give effect to the express terms of the statute and erred in imposing and interjecting another meaning to limit the operation of the terms of the statute respecting prior convictions. Because Respondent Summersett's 1994 conviction for ABWIK is considered a most serious offense for purposes of sentence enhancement under the statute, the trial court was required to sentence him to life without parole after Sumersett was convicted of voluntary manslaughter. The subsequent order vacating the sentence of life without parole constituted error and must be overturned by this Court.

As to Summersett's argument to this Court and as to the trial court's finding that *nolo contendere* pleas are distinguishable and must be exempt for application of the statute, the State submits that "[o]nce convicted, whether as a result of a plea of guilty, nolo contendere, or . . . [trial], convictions stand on the same footing" and a conviction derived from a plea of *nolo contendere* must be used for purposes of this recidivist statute. State v. Evans, at 610.

"A plea of nolo contendere literally interpreted means 'I do not wish to contend.' For all practical purposes it is a plea of guilty in so far as the consequences in the particular case in which it is pled." Brown v. Theos, 35 S.C. 626, 550 S.E.2d 304 (2001) citing Kibler v. State, 267 S.C. 250, 254, 227 S.E.2d 199, 201 (1976). Our supreme court has stated one of the collateral benefits to a "no contest" plea is that it may not be used as substantive evidence of guilt against a defendant in civil litigation. Id. citing Kibler, at

250, 227 S.E.2d at 199. However, the court also recognized that a "no contest" plea is the equivalent to a conviction. Id. citing State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); see also 1972 S.C. Op. Atty. Gen. 283 (stating that a *nolo contendere* plea followed by pronouncement of a sentence constitutes a conviction); 1977 S.C. Op. Atty. Gen.137 (same); 1978 S.C. Op. Atty. Gen. 80 (same); In Brown, our supreme court determined that a civil plaintiff's earlier "no contest" plea to a criminal offense operated as a bar to a legal malpractice action against the attorney who represented the plaintiff for the criminal charges. Id.

In a collateral civil case where the issue is one of the defendant's guilt, the *nolo contendere* plea cannot be used to summarily establish liability for the same facts and the defendant is not precluded from denying guilt. However in this case, when the issue is whether Summersett has been convicted of a crime, there is simply no distinction between a plea of *nolo contendere*, a guilty plea or a conviction after trial in that all result in the entry of a judgment of conviction and a sentence. After entry of the judgment of conviction and sentence, a person is convicted even though there may be differences in the general purpose of a guilty plea and *a nolo contendere* plea. The existence of the conviction obtained pursuant to a *nolo contendere* plea cannot be treated any differently than conviction after a guilty plea, Alford plea or trial. To find otherwise is illogical and would thwart the clear intent of the legislature in enacting § 17-25-45. See Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Deal v. State, 338 S.C. 455, 527 S.E.2d 112 (2000); State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985); Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976); Kravis v. Hock, 54 A.2d 778 (N.J. 1947).

Also as to Summersett's argument and the trial court's finding that our legislature has not authorized the use of *nolo contendere* pleas to felony offenses, the State reiterates that the Legislature clearly authorized use of convictions obtained by *nolo contendere* pleas for felony offenses by expressly defining "conviction" for purposes of the statute to include convictions obtained by *nolo contendere* plea to the list of felony offenses contained in the specific statute. Our Legislature has also acknowledged the use of *nolo contendere* pleas for felony offenses in numerous other contexts. See S.C. Code §§ 12-6-3385; 16-3-655; 33-56-110; 34-11-90;37-11-30; 37-22-140; 37-22-200; 40-1-110; 40-2-570; 40-10-110; 40-11-110; 40-11-130; 40-15-190; 40-23-110; 40-30-230; 40-35-110; 40-36-110; 40-37-110; 40-38-110; 40-47-110; 40-47-720; 40-55-150; 40-57-145; 40-58-50; 40-58-80; 40-60-110; 40-61-90; 40-67-110; 40-69-110; 40-75-110; 40-81-350; 56-1-1105; 56-5-2780; 56-5-2910; 59-104-20; 59-113-20; 59-142-10; 59-149-90; 23-3-430.

Additionally, in vacating the sentence of life without parole, the trial court determined that the portion of the statute mandating a sentence of life without parole for *nolo contendere* pleas violated Summersett's due process rights because a *nolo contendere* plea lacks the defendant's confirmation of the "factual basis for the plea." (R. ___[Order, p. 8]). In essence, the trial court predicated the due process violation on Summersett's failure to admit guilt of the underlying facts. Summersett's argument to this Court in support of this conclusion and the trial court's order are contrary to the law and constitute error.

The State submits that "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid." State v. Harrison, 402 S.C. 288, 292, 741 S.E.2d 727, 729 (2013). "A legislative act will not be declared unconstitutional

unless its repugnance to the constitution is clear beyond a reasonable doubt." Id. Due process challenges to the statute have not been previously successful, State v. Standard, 351 S.C. 199, 206, 569 S.E.2d 325, 330 (2002), and must be overturned in this case. Summersett's due process rights are not violated by the statutory requirement of § 17-25-45 respecting convictions obtained by *nolo contendere* plea. The order vacating Summersett's sentence of life without parole and finding this portion of the statute unconstitutional must be overturned, leaving the original sentence in place.

Pursuant to the United States Constitution and the South Carolina Constitution, no person shall be deprived of life, liberty, or property without due process of law. See U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"); U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."). An individual is entitled to substantive and procedural due process through the constitutional guarantee of due process. County of Sacramento v. Lewis, 523 U.S. 833, 845 - 846 (1998). Substantive due process protects against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective [.]" Lewis, 523 U.S. at 846. Procedural due process protects against "a denial of fundamental procedural fairness."

Lewis, 523 U.S. at 845-846. "Courts must 'ensure [ ] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary . . . ." State v. Dykes, 403 S.C. 499, 507 744 S.E.2d 505, 511 (2013) citing In re Treatment of Luckabaugh, 351 S.C. 122, 139 – 40, 568 S.E.2d 338, 346 (2002); Nebbia v. N.Y., 291 U.S. 502, 525 (1934).

In the context of recidivist sentencing, "a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require notice be given prior to trial on the substantive offense." Oyler v. Boles, 368 U.S. 448, 452 (1962). Sentencing provisions may violate due process if they do not afford notice of the penalty that applies to the proscribed conduct. Thomas v. Davis, 192 F.3d 445 (4th Cir. 1999).

First as to the trial court's finding that use of a conviction obtained by a *nolo contendere* plea violates Summersett's due process rights because it lacked Summersett's confirmation of the facts supporting the *nolo contendere* plea, the State submits that a defendant's admission of guilt is not a constitutional requirement for entry of a plea. North Carolina v. Alford, 400 U.S. 25 (1970); see also James v. State, 377 S.C. 81, 659 S.E.2d 148 (2008); In the matter of English, 367 S.C. 297, 625 S.E.2d 919 (2006); In re Beckham, 365 S.C. 637, 620 S.E.2d 69 (2005); Rollison v. State, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001); State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (1993); Knight v. Johnson, 699 F.2d 162 (4th Cir. 1983). Moreover, as recognized by our supreme court in Munsch, a defendant waives the right to complain about the sufficiency of the evidence against him with his plea of *nolo contendere*. State v.Munsch, at 314, 338 S.E.2d at 330. The trial court's conclusion is based upon a clear error of law.

Second, no procedural due process rights were violated. The statute in its current form was in existence long before Summersett was convicted of manslaughter providing notice that his prior conviction for ABWIK is classified as "most serious" conviction and mandating a sentence of life without parole for a subsequent conviction of a most serious offense. Conviction is specifically defined by the statute to mean "any conviction, guilty plea, or plea of **nolo contendere.**" S.C. Code Ann. § 17-25-45 (C)(3) (2014) (emphasis added). The legislature clearly outlined the one death penaly exception to the statute and mandated that the terms of the statute applied notwithstanding any other provision of law. See S.C. Code Ann § 17-25-45 (A). Respondent's prior conviction qualifies notwithstanding any other provision of law and the sentence of life without parole was mandated. Notice is satisfied when words of a statute are given their fair meaning in accordance with the intent of the legislature. Thomas v. Davis, 192 F.3d 445 (4th Cir. 1999).

Additionally, Summersett acknowledged his prior ABWIK conviction at the sentencing proceeding. He also acknowledged prior notice of the State's intent to seek life without parole at the sentencing. Summersett was given the opportunity at sentencing to respond to the notice and imposition of the mandatory sentence of life without parole and did not object or seek additional time to respond. (Tr. pp. 146 – 149). The trial court then sentenced Summersett to life without parole pursuant to the mandatory terms of § 17-25-45 but, at Respondent's urging, later made a vague finding that application of section 17-25-45 to convictions obtained by a "no contest" plea results in a general denial of due process.

Summersett's substantive due process rights were not violated by the contested provision of the statute. The terms of the statute are clear and reasonably related to its purpose. The General Assembly expressed in the Act amending the statute in 1995 that it intended to "provide that a person must be sentenced to life imprisonment upon conviction of certain crimes or a combination of certain crimes, to provide definitions of certain offenses whose punishment is life imprisonment, to define 'conviction,' . . . to provide a definition for 'prior conviction,' to provide that certain provisions are mandatory, and to require the solicitor to give notice of his decision to invoke sentencing under this provision before trial . . . ." 1995 South Carolina Laws Act 83. "Recidivist legislation attempts to encourage offenders to stay out of trouble and punishes those who refuse to be deterred even after a conviction." State v. Gordon, 356 S.C. 143, 154, 588 S.E.2d 105, 110 (2003). The purpose of the recidivist statute is to punish individuals "who continue to commit criminal, antisocial behavior . . . ." State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). Our supreme court opined that "the recidivist statute is aimed at career criminals, those who have been previously sentenced and then commit another crime . . . ." State v. Gordon, at 154, 588 S.E.2d at 111. Imposition of the mandatory sentence of life without parole was proper under the recidivist statute and is rationally related to the purpose of the statute. In Harmelin v. Michigan, 501 U.S. 957, 1002 - 03 (1991), the United States Supreme Court determined that a state was justified in punishing a recidivist more severely that a first time offender. See also Riggs v. California, 525 U.S. 1114 (1999). The Court has also concluded that the constitutionality of punishing repeat offenders more severely is not in question. Oyler, Boles, 368 U.S.

448 (1962) citing Moore v. Missouri, 159 U.S. 673 (1895); Graham v. West Virginia, 224 U.S. 616 (1912).

Moreover, the trial court's reliance on United States v. Alston, 611 F.3d 219 (4th Cir. 2010), in its Order vacating the sentence of life without parole is misplaced. Alston pertains to interpretation of federal sentencing provisions, presents a different issue, and has been found inapplicable by our Fourth Circuit when faced with a question similar to the one presented in this case. See United States v. King, 673 F.3d 274, 282 (4th Cir. 2012); United States v. Mouzone, 687 F.3d 207 (4th Cir. 2102); see also Barrentine v. United States, 2013 WL 2635730 (D.S.C. 2013).

In this case, Summersett, in effect, is seeking to challenge the validity of his ABWIK conviction long after the time for properly doing so has passed. State v. Johnson, 333 S.C. 459, 510 S.E.2d 423 (1999). The language of the applicable statute mandating a sentence of life without parole specifically speaks to the issue of use of convictions obtained by a *nolo contendere* plea for a felony offense and the trial court erred when it failed to utilize the clear meaning provided by our legislature. See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). This Court must reject the trial court's limiting interpretation of the stature as it leads to an absurd result clearly not intended by the legislature and which defeats the purpose of the statute. State v. Sweat, 386 S.C. 339, 31 S.E.2d 569 (2010). The trial court erred in ignoring the plain language of the statute and in granting resentencing when application of the statutory sentencing terms is mandatory and is not violative of Summersett's due process rights.

CONCLUSION

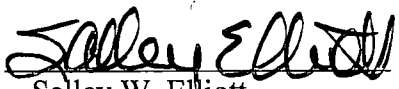
For all of the foregoing reasons, the State respectfully requests that the order of the trial judge granting resentencing be reversed and the original sentence restored.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
Salley W. Elliott
S.C. Bar No. 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR APPELLANT

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THE STATE, ...APPELLANT

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JAMES A. SUMMERSETT, ...RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Reply Brief of Appellant* and *Designation of Matter* , both dated June 25, 2015, on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Tara D. Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204

I further certified that all parties required by Rule to be served have been served. This 25th, day of June 2015.

Angela Bennett
Adminisrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

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JUN 25 2015
SC Court of Appeals

June 25, 2015

Tara D. Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204

Re: The State v. James A. Summersett
Appellate Case No. 2014-001419

Dear Counsel:

I am enclosing two (2) copies of the Initial Reply Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

SWE/ab
Enclosures

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