ORIGINAL

STATE OF SOUTH CAROLINA
In The 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.

FINAL BRIEF OF APPELLANT

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APPELLANT'S STATEMENT OF ISSUES 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?

STATEMENT OF THE CASE

James A. Summersett was indicted in Charleston County for murder (2002-GS-10-5115) and possession of a firearm during the commission of a violent crime (2002-GS-10-5116). He proceeded to trial before the Honorable Daniel Pieper, and a jury, and was convicted as charged. He was sentenced to imprisonment for life. The convictions and sentences were affirmed by the South Carolina Court of Appeals, (Op. No. 2005-UP-373) but reversed by the South Carolina Supreme Court. State v. Summersett, Op. No. 2008-MO-202 (S.C.Sup.Ct. filed July 28, 2008).

Summersett thereafter proceeded to a bench trial before the Honorable J.C. Nicholson, Jr., and was found guilty of voluntary manslaughter as the lesser-included offense of murder. He was sentenced on January 26, 2010, to life without parole pursuant to S.C. Code Ann. Section 17-25-45 (Rev.2014). Summersett filed a motion to reconsider the sentence on January 29, 2010. On November 13, 2013, a hearing was convened before Judge Nicholson on the motion for reconsideration. Judge Nicholson issued an order filed June 20, 2014, vacating Summersett's sentence of life without possibility of parole and granting a new sentencing proceeding. The State filed and served notice of appeal and this brief of the State follows.

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.

At the conclusion of the bench trial in this case, Respondent James A. Summersett was found guilty of voluntary manslaughter. (R. pp. 32-36; R. p. 38). Prior to sentencing the trial court stated "Solicitor, I understand that Mr. Summersett was convicted of a most serious charge previously; is that correct?" The trial court had documentation reflecting a prior conviction for assault and battery with intent to kill after a "no contest" plea in 1994. The prosecutor and Summersett confirmed the prior conviction for a "most serious" offense as outlined by the trial judge. (R.pp. 39- 40; p. 42; p.83). Summersett received a sentence of twenty (20 years suspended upon the service of five (5) years and probation for five (5) years for the prior conviction for assault and battery with intent to kill (ABWIK). Summersett then renewed his motion for directed verdict and moved for "JNOV," stating that he was asking the trial court to reconsider its verdict and find him guilty of involuntary manslaughter "to take him away from the statute." (R. pp 40 – 41). The trial court denied both motions and thereafter stated, "I understand that you have served him with notice to seek a life sentence." The trial court noted that life was sought at Summersett's previous trial and sentencing and asked if notice of intent to seek life without parole had been recently submitted. The prosecutor acknowledged that notice was submitted and presented the certified conviction for ABWIK and indictment. (R. p. 41; pp.80, 83). The trial court informed Summersett that under the statute, a life sentence was mandatory but would hear from Summersett on the issue of sentencing. Summersett

had no response. (R. p. 42). The trial judge expressed disagreement with the recidivist sentencing statute but noted he was obligated to follow it. (R. p. 42). Summersett was sentenced to imprisonment for life. (R. p. 44).

Summersett thereafter filed a motion for reconsideration specifically asking the trial court to reconsider the sentence on the ground that the sentence was unnecessarily severe under the circumstances and upon such other and further grounds as may be presented. The ground advanced in the motion to reconsider was limited to reconsideration of the sentence and did not include a request to reconsider his earlier motion for a new trial. (Motion to Reconsider Sentence). See State v Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct.App. 2011) (stating that the trial court did not have jurisdiction to consider an alternative ground in support of a post-verdict motion when the alternative ground advanced a completely different request for relief and was not timely offered).

A hearing on Summersett's motion to reconsider the sentence was convened. Argument was presented at the motion hearing and in written memoranda. (R. pp. 46 – 79; R. pp.11; 17; 27). Thereafter the trial court issued an order vacating Summersett's sentence of life without possibility of parole and granting a new sentencing proceeding, finding that the court of general sessions improperly accepted Summersett's plea of *nolo contendere* to ABWIK and that the judgment could not be used as a predicate offense to support a sentence of life without parole pursuant to S.C. Code Ann. Section 17-25-45 (2014). Referencing State v. Kibler, 267 S.C. 250, 227 S.E.2d 199 (1976), the trial court specifically determined that a *nolo contendere* plea could only be accepted for misdemeanor and not felony offenses, that a *nolo contendere* plea does not admit the truth of the allegations against a defendant, and that a *nolo contendere* plea could not be

used for purposes beyond the case in which the plea was entered. The trial court determined that because the earlier felony ABWIK conviction was entered pursuant to *a nolo contendere* plea, it could not serve as the requisite predicate offense – or strike - to support a life without parole sentence pursuant to S.C. Code Ann. section 17-25-45. (R. p.1). The trial court vacated Summersett's sentence of life without possibility of parole and ordered resentencing pursuant to S.C. Code Ann. § 16-3-50.

The State submits that Summersett's conviction for ABWIK is a valid strike for purposes of 17-25-45 and that 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 of the statute. The lower court's finding that Summersetts' life without parole sentence must be vacated constitutes an abuse of discretion in that it is based upon an error of law. See State v. Dawson, 402 S.C. 160, 740 S.E.2d 501 (2013)(stating that the appellate court sits to review errors of law in criminal appeals and that a sentence will not be overturned absent an abuse of discretion). An abuse of occurs when the trial court's ruling is based upon an error of law or upon a factual conclusion that is without evidentiary support. Id. Appellate courts sit to review errors of law only in criminal cases. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006).

The primary and cardinal rule of statutory construction is to ascertain and effectuate the legislative intent. State v. Phillips, 400 S.C. 460, 734 S.E.2d 650 (2012), citing State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used." State v. Hudson, 336 S.C. 237, 246, 519

S.E.2d 577, 581 (Ct.App. 1999)(internal citation omitted). The language must be construed in the light of the intended purpose of the statute and the determination of legislative intent is a matter of law. Id. "Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). Words in a statute must be given their plain and ordinary meaning without resort to forced construction to limit or expand the operation of the statute. State v. Phillips, 400 S.C. 460, 734 S.E.2d 650, citing State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010). "Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. In interpreting a statute, the language of the statute must be read in a sense which harmonized with its subject matter and accords with its general purpose." State v. Hudson, at 246, 519 S.C.2d at 582 (internal citatations omitted). Where the language used in a statute is unambiguous, the court must apply the terms according to their literal meaning. Id.

Summersett was sentenced to life without parole pursuant to S.C. Code Ann. section 17-25-45 (A) (2014), which provides in pertinent part that **"[n]otwithstanding any other provision of law**, . . . 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 . . . one or more prior **conviction** for . . . a most serious offense or two or more convictions for a serious offense." S.C. Code Ann.

section 17-25-45 (A) (emphasis added). Assault and battery with intent to kill is defined as a "most serious offense" for purposes of the statute. See S.C. Code Ann. section 17-25-45 (C) (1) (2014). Also, for purposes of the statute, "conviction" is specifically defined by the legislature as "any conviction, guilty plea, or **plea of nolo contendere**." S.C. Code Ann. section 17-25-45 (C)(3) (emphasis added).

The State submits that the language of section 17-25-45 is plain and conveys a clear, definite meaning of the word "conviction" which triggers application of the requirements of the statute. After presentation by the State of a prior qualifying conviction, the sentencing judge must sentence a defendant to imprisonment for life without possibility of parole. Summersett's sentence as a recidivist was mandated based upon Summersett's prior ABWIK conviction. Our legislature specifically defined the term "conviction" for purposes of this statute to include a conviction obtained by a plea of *nolo contendere*. By using the term "conviction," the type of plea or proof of facts underlying the conviction are of no moment for application of the statute. It is the conviction that controls, not the type of plea that is entered to obtain the conviction. State v. Evans, 203 W.Va. 446, 508 S.E.2d 606 (1998). The trial court erred in ruling that Summerset was improperly sentenced of life without possibility of parole based upon a plea of *nolo contendere* to ABWIK and erred in vacating that sentence and ordering resentencing. In so ordering, the trial court improperly ignored the unambiguous terms of the statute and erred in finding the sentencing mandate of our legislature did not apply to Summersett. The trial court had no valid basis or right to impose a meaning other than the plain words employed by the statute. Summersett's *nolo contend*ere plea to ABWIK

was a qualifying event invoking the mandatory life without possibility of parole provisions of the statute.

Summersett made a conclusory argument below that application of section 17-25-45 based upon his "no contest" plea violated his constitutional rights but failed to identify or offer a specific ground in support of the claim. (R. p.17). Despite acknowledging clear case law establishing that a *nolo contendere* plea has the same **consequences** as a guilty plea respecting the charge for which it was entered, the trial court also suggested in its order that the use of the *nolo contendere* plea violated Summersett's due process rights because Summersett did not admit guilt of allegations supporting the ABWIK charge.

It must be noted that "[t]he 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." Judicial discretion in sentencing is subject to statutory restriction. State v. De La Cruz, 302 S.C. 13, 15, 393 S.E.2d 184, 186 (1990); see also State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002(stating claim that use of prior plea as a strike deprives the defendant of due process is a challenge to the voluntariness of the plea and is a matter for post-conviction relief); State v. Kizer, 288 S.C. 441, 343 S.E.2d 292 (1986) (stating that a mandatory minimum sentence for trafficking marijuana does not violate substantive due process, equal protection or the cruel and unusual punishment clause). The State submits that Section 17-25-45(A) has withstood repeated constitutional challenges. Sate v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct.App. 2000); State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (2004); State v. Johnson, 350 S.C. 543, 567 S.E.2d 486 (Ct. App. 2002). To the extent the order of the trial court

determined that S.C. Code Ann. section 17-25-45 is unconstitutional, the finding is erroneous and without legal or factual support.

A plea of "no contest" –or *nolo contendere* – literally means "I do not wish to contend" and has long been recognized. See Kibler v. State, 267 S.C. 250, 254, 227 S.E.2d 199, 201 (1976); Brown v. Theos, 345 S.C. 626, 550 S.E.2d 304 (2001); Hudson v. U.S., 272 U.S. 451 (1926); S.C. Code Ann. section 17-23-40 (Rev. 2014). It is "for all practical purposes treated as a guilty plea" in the case in which it is pled. Deal v. State, 338 S.C. 455, 527 S.E.2d 112 (2000), citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976); State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985); see also Hudson v. U. S., 272 U.S. 451 (1926). A plea of *nolo contendere* in South Carolina is equivalent to a conviction and may be used for impeachment purposes in a subsequent proceedings. State v. Lynn, 277 S.C. 222, 228, 284 S.E.2d 786, 790 (1981); Rule 609, SCRE; State v. Evans, 203 W.Va. 446, 508 S.E.2d 606 (1998).

However, unlike a guilty or an Alford plea, evidentiary standards preclude the use of a *nolo contendere* plea as dispositive or as proof of the underlying facts supporting the offense in a subsequent proceeding. Zurcher v. Bilton, 379 S.C. 132, 666 S.E.2d 224 (2008); see also Carpenter v. Burr, 381 S.C. 494, 673 S.E.2d 818 (Ct.App. 2009)(same); Rules 410(2), SCRE (a *nolo contendere* plea is inadmissible in any civil or criminal proceeding); Rule 803 (22), SCRE (*nolo contendere* pleas are excluded from the hearsay exception for judgments of previous conviction after trial or upon a plea). This means that Summersett would be able to deny guilt and require proof of the facts underlying ABWIK but cannot litigate the existence of the conviction. In the case before this Court, the "no contest" plea was not used in a preclusive manner to establish the facts

underlying ABWIK; rather, the "no contest" plea resulted in a conviction and the existence of that conviction is the matter in question. While a defendant does not admit guilt of the allegations of the offense when entering a *nolo contendere* plea, he does waive the right to a jury trial and asks the plea court to treat him as guilty and enter a judgment of conviction. Once the judgment of conviction is entered, the fact of the prior conviction/judgment is admissible and may be used for sentencing purposes.

While evidentiary standards prohibit using the fact of a *nolo contendere* plea as proof of the facts underlying the conviction to which a defendant entered the plea in subsequent proceedings, State v. Evans, 203 W.Va. 446, 508 S.E.2d 606 (1998); Rules 410(2); 803(22), SCRE, a "no contest" plea is a conviction. State v. Theos, 345 S.C. at 630, 550 S.E.2d at 306, citing State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981). It is the existence of a **conviction** as set forth in 17-25-45, and not proof of the underlying facts supporting the conviction that is applicable. Evidentiary rules do not proscribe the use of a conviction premised upon a *nolo contendere* plea. State v. Evans, 203 W.Va. at 446,508 S.E.2d at 606. The distinction between the use of the plea versus the permissible use of the conviction is critical. Once convicted, whether as a result of a plea of guilty, *nolo contendere*, or trial, convictions stand on the same footing and convictions derived from *nolo contendere* pleas may be used for purposes of state's recidivist sentencing laws. State ex rel. Webb v. McCarty, 208 W.Va. 549, 542 S.E.2d 63 (2000), citing U.S. v. Williams, 642 F.2d 136 (5th Cir. 1981).

The trial court's order confused the two concepts, resulting in an error of law. It is clear that use of the existence Summersett's **conviction** for ABWIK is authorized by the statute in question as well as evidentiary standards in South Carolina. S.C. Code Ann.

section 17-25-45; Rule 609(2), SCRE. Other jurisdictions have determined that convictions obtained from *nolo contendere* pleas may be used for recidivistic sentencing purposes. See State v. Evans, 203 W.Va. at 450, 508 S.E.2d at 610 and cases cited therein.

To the extent the trial court determined that Summersett's *nolo contendere* plea to a felony was not authorized and could not be used as a predicate for section 17-25-45, the State submits that Summersett waived any objection to the use of the "no contest" plea to a felony and the consequences of the conviction when he knowingly and voluntarily requested to enter the plea and obviously understood he could be sentenced as a result of the conviction. Welch v.State, 958 So.2d 1288 (Miss. 2007). Moreover, our supreme court recognized in State v. Kibler, 267 S.C. at 250, 227 S.E.2d at 199, that there was no statutory prohibition to acceptance of *nolo contendere* pleas for felony charges and, while cautioning against its use, did not prohibit it. See also State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985). Additionally, our legislature clearly authorized use of felony *nolo contendere* pleas by defining "convictions" for purposes of the statute in question to include *nolo contendere* pleas for the list of felony offenses that qualify as predicates for invoking the mandatory sentencing provisions.

The State also submits that the trial court's reliance on U.S. v. Davis, 679 F3d 177 (4th Cir 2012), is misplaced. The Davis decision is predicated upon North Carolina law and federal sentencing provisions.

In this case, Summersett is seeking to escape the collateral consequences of his decision to enter a "no contest" plea to ABWIK. However, through selection of the term "conviction" as used in section 17-25-45, our legislature resolved that the type of plea or

proof of facts underlying the prior conviction are not relevant for purposes of the sentencing provision. It is the conviction that is the triggering event and the nature of the plea is of no moment. The language of the statute makes clear that life without possibility of parole is mandated based upon Summersett's prior conviction for ABWIK. 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.

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,

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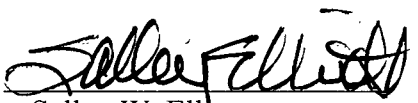
BY: 
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Appellant* dated July 1, 2015, on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 1st, day of July 2015.

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