

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Roger M. Young, Circuit Court Judge

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OCT 14 2015

S.C. Supreme Court

Opinion No. 2015-UP-372 (S.C. Ct. App. filed 7/29/2015)

2012-GS-10-06929

THE STATE,

RESPONDENT,

V.

SHELDON LAMAR KELLY,

PETITIONER

APPELLATE CASE NO. 2014-000918

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 9/17/2015.

QUESTION PRESENTED

Whether the United States and South Carolina constitutions forbid sentencing an adult defendant to mandatory life without parole when one of his prior “strikes” was a crime committed when he was fourteen years old?

STATEMENT OF THE CASE

Petitioner was indicted by a Charleston County grand jury for carjacking, possession of a knife during the commission of a violent crime, and kidnapping. R. 5, l. 20 – 6, l. 25. On April 7, 2014, petitioner was tried before the Honorable Roger M. Young, Sr., and a jury. R. 1. Jessica Baldwin and Stephanie Linder represented the State. R. 1. Andrew Grimes and Christina Parnall represented petitioner. R. 1. The jury acquitted petitioner of carjacking and the knife charge. R. 256, ll. 2 – 10. The jury convicted petitioner of kidnapping. R. 256, ll. 2 – 10. Judge Young sentenced petitioner to mandatory life imprisonment without the possibility of parole based on South Carolina's recidivist statute. R. 261, l. 8 – 263, l. 15.

The Court of Appeals decided petitioner's case without oral argument on July 29, 2015. App. 1. State v. Kelly, Op. No. 2015-UP-372 (Ct. App. July 29, 2015). The *per curiam* decision was issued by Judges Thomas, Konduros, and Geathers. App. 2. On September 17, 2015, the Court of Appeals denied petitioner's petition for rehearing. App. 6. This petition follows.

ARGUMENT

The United States and South Carolina constitutions forbid sentencing an adult defendant to mandatory life without parole when one of his prior “strikes” was a crime committed when he was fourteen years old.

Introduction

Petitioner Sheldon Kelly (“Kelly”) was fourteen years old when the incident occurred that led to his conviction for voluntary manslaughter. R. 262, ll. 10 – 17. The date from the indictment was December 16, 1996. R. 262, ll. 5 – 8. He was convicted when he was fifteen years old. R. 262, ll. 10 - 17. Nearly twenty years later, this prior conviction was used to sentence Kelly to mandatory life imprisonment without the possibility of parole after the jury **acquitted** Kelly of carjacking and possession of a knife, but convicted him of kidnapping. R. 256, ll. 2 – 10. R. 261, l. 8 – 263, l. 15. In a case where the jury clearly disbelieved some of the complainant’s story, robbing the trial judge of discretion to consider a sentence less than LWOP violates the United States and South Carolina constitutions.

Relevant Facts

As shown by its decision to acquit petitioner Kelly of carjacking and possession of a knife during the commission of a violent crime, the jury did not believe all of the alleged victim’s story. R. 256, ll. 2 – 10. Veronica Frutchey (“Frutchey”) claimed that when she was getting into her car after work, a black male she did not know appeared next to her car and said, “Move over, bitch.” R. 16, ll. 1 – 23. Frutchey claimed she had already started her car and that her driver’s side door was still open. R. 16, ll. 14 – 19. The man forced his way into the car, put a knife to her stomach, and said, “Don’t do anything stupid.” R. 17, ll. 1 – 10.

Frutchey tried to jump out of the car. R. 18, ll. 3 – 11. The man grabbed her by her hair and pulled her back into the car. R. 18, ll. 3 – 11. Frutchey screamed for help and honked the horn and struggled with the man when he tried to put the car into gear. R. 18, ll. 3 – 18. She “scratched him to make sure I had his skin under my fingers...” R. 19, ll. 22 – 25. The man fled after two of her co-workers came to her assistance. R. 19; ll. 5 – 17. Frutchey’s co-workers largely corroborated her account of the struggle and saw the man flee. R. 35, l. 24 – 37, l. 21. R. 42, l. 10 – 46; l. 14.

The police found a knife in the floorboard of Frutchey’s car, but it did not test positive for Kelly’s DNA. R. 63, ll. 11 – 18. R. 133, ll. 12 – 17. Also found in the car was a black toboggan. R. 63, ll. 10 – 15. DNA collected from the hat matched Kelly. R. 126, ll. 6 – 16. DNA collected from Frutchey’s fingernails matched Kelly. R. 125, ll. 16 – 126, l. 5.

Kelly testified in his own defense and denied carjacking or trying to kidnap Frutchey. R. 145, l. 22 – 146, l. 7. Kelly also denied having a knife. R. 153, ll. 6 – 12. Kelly described his altercation with Frutchey as “a drug deal that went bad.” R. 146, ll. 8 – 12.

Kelly lived in the neighborhood behind Frutchey’s employer. R. 147, l. 9 – 148, l. 9. The police testified that this neighborhood was a high crime area with a lot of drug activity. R. 57, l. 19 – 58, l. 8. Kelly worked at a trucking company on the same road as Frutchey’s employer and often walked through the parking lot on his way to work. R. 147, ll. 12 – 148, l. 9. He first met Frutchey in August 2011. R. 148, ll. 18 – 22. Subsequently, Frutchey asked Kelly to buy cocaine for her. R. 149, ll. 7 – 21. Kelly bought small amounts of cocaine for Frutchey on “[n]umerous occasions.” R. 150, ll. 4 – 17.

On the day in question, Frutchey asked Kelly to buy a much larger amount of cocaine – seven grams for \$225.00. R. 150, l. 18 – 151, l. 5. Kelly admitted that he planned to “rip off”

Frutchey and got a fake bag of cocaine from his supplier in addition to a real bag of cocaine for her \$225.00. R. 153, l. 22 – 156, l. 7. When Kelly tried to give Frutchey the fake cocaine, she was not fooled and demanded her money. R. 156, l. 8 – 157, l. 3. Kelly described her as “belligerent,” and “wild and crazy about it.” R. 157, ll. 1 – 3. Frutchey began to hit Kelly in the face and held him in the car while he tried to escape. R. 157, l. 4 – 158, l. 25. He finally escaped from her car and went home. R. 159, ll. 1 – 6. The defense argued that Frutchey fabricated the carjacking to hide her drug use from her co-workers who witnessed her altercation with Kelly. R. 225, l. 19 – 229, l. 2. R. 232, ll. 1 – 11.

After the jury’s verdict acquitting Kelly of carjacking and possession of a knife, but convicting him of kidnapping, the State placed on the record that it had served its intent to seek life without parole based on Kelly’s December 16, 1996, conviction for voluntary manslaughter. R. 256, ll. 2 – 10. Kelly objected to the sentence of mandatory life without parole under both the South Carolina and federal constitutions. R. 262, l. 10 – 263, l. 5. The incident giving rise to the voluntary manslaughter conviction happened when Kelly was fourteen years old and he was convicted when he was fifteen years old. R. 262, ll. 14 – 17. The State did not contest these facts. Citing Miller v. Alabama, 132 S.Ct. 2455 (2012), and Graham v. Florida, 560 U.S. 48, 75 (2010), the defense argued that it was unconstitutional to use a conviction obtained against a person when he was a minor to sentence a defendant to mandatory life imprisonment without the possibility of parole. R. 262, l. 10 – 263, l. 5. The trial court rejected Kelly’s argument and sentenced him to life without parole. R. 263, ll. 6 – 15. Citing State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002), the Court of Appeals affirmed Kelly’s sentence in an unpublished decision.

Discussion

This Court should grant certiorari to recognize that the constitutional protections for juveniles have restored sentencing discretion to trial judges. Standard is no longer good law after Graham and Miller. Furthermore, with our national retreat from our former policy of mass incarceration, this Court should grant certiorari to consider whether the federal and South Carolina Constitutions require discretionary sentencing when a former strike was committed at the age of fourteen.

In Graham, the United States Supreme Court held “that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.” 560 U.S. 48, 75 (2010). The Supreme Court extended this holding in Miller, stating, “We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.” Miller, 132 S.Ct. at 2469. It logically follows from this rule that the Eighth Amendment forbids mandatory life sentencing based on a crime committed as a juvenile.

The Court stated “that children are constitutionally different from adults for purposes of sentencing.” Id. at 2464. Children have less moral culpability. Id. at 2464-65. The Miller Court emphasized the need for individualized sentencing for juveniles. Id. at 2467. The Court stated that the sentencer must “have the ability to consider the mitigating qualities of youth.” Id. South Carolina’s recidivist law took away the trial judge’s discretion and his ability to consider any possible range of sentences. The trial judge could not consider the jury’s decision to acquit Kelly on the carjacking charge, which indicated that it did not believe all of the victim’s story. It is possible that that the jury fully believed Kelly’s testimony about the fake drugs, but convicted him because he “inveigled” Frutchey to the drug dealer’s residence. Removing discretion from the trial judge to

consider these concerns and Kelly's youth when he committed the triggering offense violated Kelly's Eighth Amendment rights.

South Carolina already holds that a juvenile adjudication may not be used as a "strike." State v. Ellis 345 S.C. 175, 179-80, 547 S.E.2d 490, 492 (2001). In 2002, the South Carolina Supreme Court considered the exact question presented by this case. State v. Standard, 351 S.C. 199, 204-07, 569 S.E.2d 325, 328-30 (2002). In Standard, the Court held that if a juvenile had been tried and adjudicated as an adult, that conviction could be used as a strike. Id. Standard relied on now-invalid reasoning in older United States Supreme Court and federal appellate cases to reach that conclusion. Id. For example, Standard held that "lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment." Id. at 205, 569 S.E.2d at 329. This holding is no longer good law after Miller and Graham.

The same analysis applies to Kelly's claim under the South Carolina Constitution. S.C. Const. art. 1, § 15. State v. Jones, 344 S.C. 48, 56 n.8, 543 S.E.2d 541, 544-45 n.8 (2001) (interpreting a cruel and unusual punishment challenge under both the Eighth Amendment and the South Carolina Constitution); State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015) (reaffirming Standard only under an Eighth Amendment analysis) cert. denied Sept. 3, 2015. This Court need not wait on the United States Supreme Court to recognize the injustice done in this case. The federal government and many states have recognized the folly of incarcerating millions of our citizens and the damage this policy has done to our communities, especially minority communities. See, e.g., Matt Ford, *Freedom for 6,000 Federal Prisoners*, The Atlantic, October 6, 2015 (available at <http://www.theatlantic.com/politics/archive/2015/10/6000-inmates-sentencing-reform/409339/>); Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, The Atlantic, October 2015

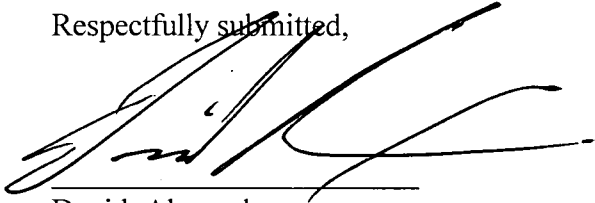
(available at <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>). Standards of decency have evolved quickly on this issue and mandatory, mass incarceration has been deemed a failure by libertarians and liberals alike.

Since Miller and Graham have overruled the principles underlying Standard, it is time to correct this practice in South Carolina. This Court should grant certiorari and restore sentencing discretion to trial judges when faced with possible LWOP sentences when the triggering crime was committed when the defendant was a juvenile.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th day of October, 2015

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IN THE SUPREME COURT

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Roger M. Young, Circuit Court Judge

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THE STATE,

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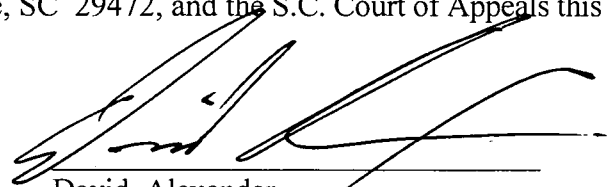
SHELDON LAMAR KELLY,

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APPELLATE CASE NO. 2014-000918

CERTIFICATE OF SERVICE

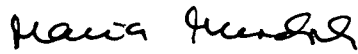
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Sheldon Lamar Kelly #237802, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, and the S.C. Court of Appeals this 14th day of October, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of October, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.