

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

v.

SERRIA DAWSON,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the plea court erred in denying defense counsel's motion to sentence appellant under the newly enacted Omnibus Crime Reduction and Sentencing Reform Act of 2010?

STATEMENT OF THE CASE

On June 2, 2011, appellant appeared before the Honorable Roger M. Young in Charleston County and pled guilty to breach of trust between \$1,000 and \$5,000. She was sentenced under the Youthful Offender Act to a suspended sentence with five (5) years probation plus restitution.

This appeal follows.

ARGUMENT

The plea court erred in denying defense counsel's motion to sentence appellant under the newly enacted Omnibus Crime Reduction and Sentencing Reform Act of 2010.

Appellant was accused of taking from her employer, Wal-Mart, \$1,171.55 between the dates of October 9, 2009 to October 29, 2009. On June 2, 2010, the Breach of Trust law penalties changed in South Carolina under the "Omnibus Crime Reduction and Sentencing Reform Act of 2010" ("the Act").¹ Under the Act sentences were mitigated and appellant's dollar amount since it was under \$2,000 would only subject her up to a 30 day sentence. S.C. Code Ann. §16-13-230 (B) (1) (2010). Under the Act in effect at the time the crimes were committed she would face up to 5 years of incarceration. S.C. Code Ann §16-13-230 (B) (2) (2009). The question becomes is whether defendants with pending charges should receive the benefit of the mitigated penalty under the Act passed in 2010.

In State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000) the Court noted the following:

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

340 S. C. at 923, 531 S.E.2d at 342.

¹ The bulk of this argument comes from appellant's Memorandum that was submitted to the lower court prior to sentencing.

In that same case, the Court further noted that “penal statutes are to be strictly construed against the State and in favor of the defendant. 340 S.C. at 344, 531 S.E.2d at 924, citing, State v. Blackmon, 304 S.C. 270, 273, 403 S.E. 2d 660, 662 (1991).

Legislative intent in this case is not difficult to determine. The Act notes its purpose in Section 1 as follows:

This bill may be cited as the “Omnibus Crime Reduction and Sentencing Reform Act of 2010.” It is the intent of the General Assembly to preserve public safety, reduce crime, and use correctional resources most effectively. Currently, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. It is, therefore, the purpose of this act to reduce recidivism, provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding, and improve public safety.

It is clear that the legislative intent is to reduce the amount of time some prisoners are incarcerated when less serious crimes are involved.

The Act in this case does have a savings clause in Section 65 which reads as follows:

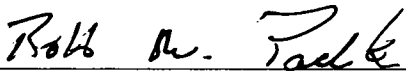
The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

It is not clear from the savings clause if it applies to an amendment that only substitutes one penalty for another as that is not a substantive change. Also, as stated previously the legislature's clear intent behind the Act is to save money in the criminal justice system with respect to sentencing alternatives and reductions. A change in sentencing does not impair the State's power to prosecute. In fact, when a new statute changes punishment a savings clause is not necessary. State v. Gilliam, 208 S.C. 126, 37 S.E. 2d 299 (1946). Case law is in accord with the view that appellant should be sentenced under the Act's less onerous sentencing scheme. In State v. Varner, 310 S.C. 264, 423 S.E. 2d 133 (1992) the Court held that "a criminal defendant receives the benefit of punishment mitigated by legislative amendment... when the amendment becomes effective before sentence is pronounced." (emphasis supplied). The Act in this case became effective a full year before appellant was sentenced. The Act also became effective before appellant was even indicted.

CONCLUSION

In light of the legislature's clear intent, the maxim that criminal laws are to be construed in favor of defendant, and prior case law, appellant should have the benefit of sentencing under the Act.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

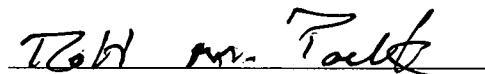
ATTORNEY FOR APPELLANT

This 15th day of May, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 15, 2012


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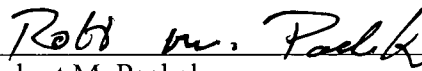
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CERTIFICATE OF SERVICE

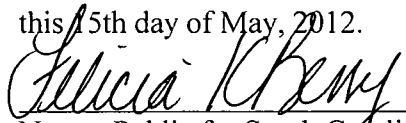
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; 15th day of May, 2012.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of May, 2012.



(L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020 .