

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2012-UP-267 (S.C. Ct. App. filed 5/2/2012)

10-GS-32-01711, 01712, 01723, 01714

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JAMES CRAIG WHITE,

PETITIONER

Appellate Case No. 2010-170069

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX.....	1
CERTIFICATE OF COUNSEL	2
QUESTION PRESENTED.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT	5
CONCLUSION	11

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 20, 2012.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in concluding Petitioner's claim was not preserved for review in light of Petitioner's request that he be sentenced according to the Omnibus Crime and Sentencing Reform Act of 2010 and the trial judge's ruling that the new law was inapplicable?

II. Did the Court of Appeals err in concluding the "savings clause" of the Omnibus Crime and Sentencing Reform Act of 2010 precluded the sentencing court from suspending Petitioner's sentence as permitted under the provisions of the 2010 Act?

STATEMENT OF THE CASE

In June 2010, the Lexington County Grand Jury indicted Petitioner for two counts of distribution of crack cocaine, third offense and two counts of distribution of crack cocaine within proximity of a school. The incidents were alleged to have occurred in 2009. R. 26-27; R. 29-30; R. 32-33; R. 35-36. Subsequently, Petitioner entered into a plea agreement with the Lexington County Solicitor's Office. The agreement reduced the distribution charges to second offenses. On August 10, 2010, Petitioner pled guilty to two counts of distribution of crack cocaine, second offense and the two proximity charges before the Honorable Alexander Macauley. R. 1. Petitioner was represented by Matthew Buchanan, and the State was represented by Alton Eargle. R. 1. Judge Macauley sentenced Petitioner to ten years concurrent for all charges. R. 18, ll. 3-17; R. 21, ll. 8-23.

Petitioner filed a timely notice of appeal and an explanation as required under Rule 203(B), SCACR. R. 24-25. On May 2, 2012, the Court of Appeals affirmed Petitioner's sentences for two counts of distribution of crack cocaine, second offense in an unpublished opinion. State v. White, 2012-UP-267 (Ct. App. filed May 2, 2012); App. 1-2. Petitioner filed a petition for rehearing on May 16, 2012. App. 3-8. By order dated June 20, 2012, the Court of Appeals denied the petition. App. 9.

This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals erred in concluding Petitioner's claim was not preserved for appellate review in light of Petitioner's request that he be sentenced according to the Omnibus Crime and Sentencing Reform Act of 2010 and the trial judge's ruling that the new law was inapplicable.

In October of 2009, Petitioner was a divorced fifty-five year-old Vietnam veteran who was romantically pursuing a young lady. On October 6, 2009, the young lady called Petitioner and asked him if he could get her some crack cocaine. R. 12, ll. 6-12; R. 18, ll. 18-24. Trying to woo the young lady, Petitioner purchased 0.16 grams and gave it to her. R. 12, ll. 9-12. Two days later she called again requesting crack, and this time Petitioner gave her 0.15 grams of crack cocaine. The young lady was actually working as a confidential informant for the Lexington Town Police Department. R. 16, ll. 1-9. Petitioner was arrested and charged with two counts of distribution of crack cocaine, third offense and two counts of distribution within proximity to a school.

During this time Petitioner was a recovering crack cocaine addict, and he had three prior drug possession convictions. R. 16, ll. 14-25. However, the Lexington County Solicitor's Office agreed to allow Petitioner to plead guilty to the two distribution charges as second offenses. R. 13, ll. 17-19. On August 10, 2010, Petitioner pled guilty to the lesser offenses and the proximity charges before the Honorable Alexander Macaulay. During his guilty plea hearing, Petitioner argued that he should be sentenced pursuant to the provisions of the then newly enacted Omnibus Crime Reduction and Sentencing Reform Act of 2010. R. 4, l. 21 – R. 5, l. 14. The plea court denied Petitioner's request and sentenced him to ten years concurrent for all charges. R. 18, ll. 3-17; R. 21, ll. 8-23. Petitioner raised this issue on appeal.

The Court of Appeals erred in holding that Petitioner's issue was not preserved. The Court of Appeals cited three cases to support its ruling. Citing State v. Wise, 359 S.C. 14, 21, 596 S.E.2d

474, 478 (2004), the Court noted that an issue must be raised to and ruled on by the trial judge to be preserved for appellate review. Additionally, the Court cited State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) for the legal proposition that a challenge to a sentence must be raised at trial in order to preserve the issue for appellate review. Finally, the Court, citing State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978), noted that a defendant who fails to object timely to his sentence in the circuit court is precluded from seeking review. Although the law cited by the Court of Appeals is proper, the Court erred in applying the law to the facts presented.

During the plea colloquy, the judge inquired as to the minimum and maximum sentences permitted by law for the charged offenses. R. 4, ll. 11-20. When discussing whether the law permitted suspended sentences for the charged offenses, Petitioner informed the judge of the change in the law. R. 4, ll. 21-22. Petitioner read a portion of Section 44-53-375(B) of the South Carolina Code as amended by the new law. R. 4, l. 24 – R. 5, l. 4. When the judge asked to review what Petitioner was reading, Petitioner complied. R. 5, ll. 5-11. Additionally, the judge engaged in an off-the-record bench conference with the attorneys as well. R. 5, ll. 10-11. Thereafter, the judge informed the parties he would consider Petitioner's argument over lunch. R. 5, ll. 12-14. The statute, as explained by Petitioner, provides as follows:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first offense or a second offense may have their sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

S.C. Code § 44-53-375(B)(emphasis added).

After the lunch break, the judge engaged in a colloquy with Petitioner concerning his waiver of constitutional rights. When Petitioner had an opportunity to address the trial court, trial counsel stated:

Your Honor, I suppose first just to clear the air and make sure that [Petitioner] is well informed, because I did inform him of the change in the law that we had discussed earlier before the recess and that was something of a hope that he had, but obviously per your ruling we know now that it's going to be handled under the old law, so he understands that and I wanted to make sure that he's aware and he's in front of Your Honor pleading under the old law, that he's aware of that.

R. 18, ll. 3-11. The trial judge responded that the old law was the "law in effect at the time of the alleged ... admitted criminal offenses." R. 18, ll. 12-15. Thus, the record is clear that Petitioner raised the issue of whether the statute prevails over the savings clause to the trial judge and the trial judge ruled upon the issue as evidenced by trial counsel's on-the-record discussion with the trial judge.

In addition, Rule 18(a) of the South Carolina Rules of Criminal Procedure provides that an attorney "shall not attempt to argue further any matter after he has been heard and the ruling of the court has been pronounced." The record is clear that (1) trial judge understood Petitioner's argument that the trial judge could suspend his sentence based upon the new law and (2) the trial judge ruled the new law was not applicable to Petitioner. Had trial counsel attempted to argue the matter further, he would have been in violation of the Rules.

Thus, the Court of Appeals erred in concluding Petitioner's issue was not preserved for appellate review in light of Petitioner's argument to the plea judge and the judge's denial of Petitioner's request.

II. The Court of Appeals err in concluding the “savings clause” of the Omnibus Crime and Sentencing Reform Act of 2010 precluded the sentencing court from suspending Petitioner’s sentence as permitted under the provisions of the 2010 Act?

The Court of Appeals held that Petitioner’s argument, if preserved, failed on the merits. The Court relied upon State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002) for the proposition that in construing statutes, courts give words their plain and ordinary meaning. The Court then quoted section sixty-five of the Omnibus Crime Reduction and Sentencing Reform Act stating that the Act’s amendments “[do] not affect pending actions ... or alter ... any penalty ... incurred under the repealed or amended law, unless the repealed or amended provision so expressly provide.” 2010 S.C. Acts No. 273, § 65. Thus, the Court affirmed the circuit court’s decision.

The specific section of the repealed or amended provision begins with the phrase “[n]otwithstanding any other provision of law.” S.C. Code § 44-53-375(B). The clear and unambiguous meaning of “notwithstanding” in S.C. Code § 44-53-375(B) [the statute] provides an exception to the omnibus crime bill’s “savings clause.” See S.C. Code § 44-53-375(B); see also 2010 Act No. 273, § 65 (amendments do not affect pending prosecutions “unless the repealed or amended provision shall so expressly provide”); cf. Binney v. State, 384 S.C. 539, 543, 683 S.E.2d 478, 480 (2009) (“[L]egislative intent should be found in the plain language of the statute itself. If a 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”). Notwithstanding is defined as “in spite of.” American Heritage Dictionary, www.ahdictionary.com (last visited May 15, 2012); Dictionary.com Online Dictionary, <http://dictionary.com> (last visited July 28, 2011); The Free Dictionary, www.thefreedictionary.com (last visited May 15, 2012); see also, Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited May 15, 2012)

(defining “notwithstanding” as “despite”); cf. MacMillian Dictionary, www.macmilliandictionary.com (last visited May 15, 2012) (defining “despite” as a preposition “used to say something happens even though there is something to prevent it”). In the statute, “notwithstanding” is being used to show that that part of the code takes priority over “any other provisions of law.” See Shomberg v. United States, 348 U.S. 540, 549 (1955) (providing that “[i]n using ‘notwithstanding’ language in [a statute], Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principles of the savings clause”).

Even if this Court were to find that “notwithstanding” is an ambiguous term, then it still must construe the new distribution statute to be retroactive under the rule of lenity. See State v. Blackmon, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991) (stating “when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant”). The rule of lenity both ensures that a person will not be punished for an ambiguous law and “keeps the courts from making criminal law” in the legislature’s stead. See United States v. Santos, 553 U.S. 507, 514 (2008).

In sum, when a statutory clause is prefaced by “notwithstanding any other provision of law,” that clause is put into an authoritative position over other provisions of law. The “notwithstanding” language does not mean the following clause does not withstand any other provision of law. Therefore, the plea court erred in finding that Petitioner could not be sentenced under the omnibus crime bill for distribution of crack cocaine, and the Court of Appeals erred in affirming the plea court’s holding. As a general rule a criminal defendant can always take advantage of changes in the law that reduce his sentencing exposure. See State v. Griffin, 315 S.C. 285, 287, 433 S.E.2d 862, 863-864 (1993) (noting changes in law that do not increase punishment are not *ex post facto*

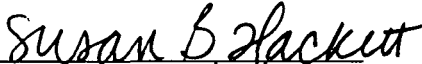
violations). The omnibus crime bill would allow Petitioner's sentence for distribution to be suspended. See S.C. Code § 44-53-375(B).

Therefore the plea court erred in finding that Petitioner could not be sentenced under the omnibus crime bill for distribution of crack cocaine, and the Court of Appeals erred in affirming the plea court's ruling.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari and allow full briefing on the issue presented.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of September, 2012

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THE STATE,

RESPONDENT,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari, in this case has been served on Mark R. Farthing, Esquire, Assistant General, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals this 21st day of September, 2012.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of September, 2012.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 2, 2013.