STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

Opinion No. 2016-UP-193 (S.C. Ct. App. filed 5/11/2016)

13-GS-46-00214

THE STATE, RESPONDENT,

V.

JEFFREY DAVIS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 06/23/2016.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the trial court's failure to find that imposing the mandatory life without parole sentence on Petitioner Davis violated the Eighth Amendment's prohibition against cruel and unusual punishment because his three serious strikes were drug offenses?

STATEMENT OF THE CASE

In February 2013, the York County Grand Jury indicted Jeffrey Davis on the charge of distribution of crack cocaine. On June 4, 2013, a trial was held in Davis' absence before the Honorable Lee S. Alford and a jury. Davis was represented by Mark McKinnon and Creighton Hayes. The state was represented by Jennifer Colton and Matthew Shelton. The jury returned a verdict of guilty. R. 111, ll. 1 – 15. Judge Alford sealed the sentence. R. 127, ll. 18-20.

On December 4, 2013, Davis appeared before the Honorable Lee Alford for sentencing. Davis was represented by Mark McKinnon and the state was represented by Jennifer Colton. The state had served Davis with notice of life without parole on May 7, 2013 as this was a distribution third offense. R. 115, ll. 1 – R. 116, ll. 3. Judge Alford sentenced Davis to the mandatory life in prison without the chance of parole. R. 168, ll. 12 – 22. Davis' attorney filed a notice of appeal.

The Court of Appeals affirmed Petitioner Davis' sentence on May 11, 2016. State v. Davis, Op. No. 2016-UP-193 (Ct. App. Filed May 11, 2016). Appellate counsel filed a petition for rehearing which was denied on June 23, 2016. This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's failure to find that imposing the mandatory life without parole sentence on Petitioner Davis violated the Eighth Amendment's prohibition against cruel and unusual punishment because his three serious strikes were drug offenses.

On August 16, 2012, undercover officer Tanya Ervin was assigned to the Multi-Jurisdictional Drug Enforcement Unit which investigated drug activity in York County. Officer Ervin did undercover drug buys which utilized confidential informants (CI) with controlled buys. R. 44, ll. 19 – R. 45, ll. 25. On August 16, 2012, she took CI Shari Jennings, who was a paid informant, with her in an unmarked police car to the valley area of York which was known for a high incidence of drug activity. Officer Ervin drove while CI Jennings looked for drug dealers. Officer Ervin was to video the drug transaction. CI Jennings was given $40 to purchase crack cocaine. R. 46, ll. 10 – R. 47, ll. 23.

CI Jennings saw Jeff Davis, whom she knew when they both had lived in the valley, walking down the street. Davis called to her so they pulled the car over to talk to him. CI Jennings introduced Officer Ervin to Davis as her aunt. Jennings then asked Davis for $40 worth of crack. He told her to drive around the block and come back which they did. Davis then sold $40 worth of crack to CI Jennings. The transaction was videotaped by Officer Ervin. They returned to police headquarters and turned the crack into the evidence room. R. 58, ll. 20- R. 61, ll. 25; R. 48, ll. 1 – R. 54, ll. 18.

In October 2012, Davis was arrested and charged with distribution of crack. R. 86, ll. 1 – 23. The drugs were .25 grams of crack or cocaine base. R. 79, ll. 16 – R. 81, ll. 10; R. 82, ll. 24 – R. 83, ll. 6.

When the trial began on June 4, 2013, Davis did not appear although his trial attorney had spoken to Davis that morning about the trial. Defense counsel had met with Davis the Friday before trial and discussed the fact that his trial was the following week. R. 6, ll. 1 – R. 9, ll. 22. The judge found that Davis was put on notice through his bond form that he would be tried in his absence if he failed to appear. The judge said he did not like trials in absence but Davis waived his right to be present. The trial would proceed in Davis' absence. R. 27, ll. 9 – R. 29, ll. 1.

Following the verdict of guilty as charged, the solicitor told the court that the state had presented to Davis on May 7, 2013 before Judge Burch the notice to seek life without parole based on three serious offense or three strikes. The solicitor explained that Davis had a conviction for distribution of crack cocaine within the proximity of a school in 2000 (Indictment 2000-GS-46-2111); and a trafficking powder cocaine 7-25 grams in 1991 (Indictment 1989-GS-46-3256). These were two previous strikes, and the current conviction of distribution of crack was the third serious offense. R. 111, ll. 1 – R. 116, ll. 25; Court's Exhibit 8.

The trial judge sealed the sentence until Davis appeared. R. 127, ll. 11 – R. 128, ll. 16.

On December 4, 2013, Davis appeared before Judge Alford for sentencing. The solicitor repeated to the court that Davis had been served with the notice of LWOP based on the two prior strikes of a 1991 trafficking powder cocaine and a 2000 conviction of crack cocaine within the proximity of a school. R. 132, ll. 1 – R. 133, ll. 17.

The trial judge unsealed the sentence and his sentence was life without parole as he said it was the only sentence he could give. R. 141, ll. 1 – 11.

Defense counsel then objected to the mandatory LWOP as follows:

> Your honor, I object to the imposition of mandatory life without parole on the grounds that it would be in violation of the U.S. Constitution Eighth Amendment under cruel and unusual punishment.

R. 141, ll. 5 – 16.

Trial counsel had presented to the judge material on his argument. The judge had read it and said none of it really applied. Counsel argued that there were cases saying that proportionality was proper. The judge responded that it depended on the facts but Justice Scalia held in his opinion that proportionality did not apply in non-death penalty cases. It was proper in death penalty cases. The judge cited State v. Harrison, 402 S.C. 288, 741 S.E.2d 727 (2013), where he said that Justice Toal cited numerous federal opinions. The judge quoted her writing: "South Carolina said that it was not subject to proportionality ruling citing these federal cases." Defense counsel argued that Solem v. Helm, 463 U.S. 277 (1983) was the similar case that applied. The judge said that Justice Scalia's case overruled Solem. The judge sentenced Davis to LWOP. R. 141, ll.5 – R. 168, ll. 22.

The Court of Appeals affirmed Davis' conviction and sentence citing Harmelin v. Michigan, 501 U.S. 957 (1991), for the proposition that the Eighth Amendment does not require strict proportionality between the crime and sentence. The Court also cited State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008) which held that the South Carolina courts have determined that stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment. The Court of Appeals also cited Williams: "The United States Supreme Court has also held that a state is justified in punishing a recidivist more severely than it does a first offender."

Respectfully, the Court of Appeals misapprehended this issue.

The Eighth Amendment to the United States provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. XIII. In State v. Harrison, 402 S.C. 288, 741 S.E.2d 727 (2013), the South Carolina Supreme Court

outlined the procedure to follow in analyzing proportionality under the Eighth Amendment outside the capital context. The Court relied on the articulation of proportionality as discussed in Solem v. Helm, 463 U.S. 277 (1983) and in Harmelin v. Michigan, 501 U.S. 957 (1991).

In Solem v. Helm, Id., the United States Supreme Court designated three "objective" factors to "guide courts in reviewing the proportionality of sentences under the Eighth Amendment." The courts should first consider the gravity of the offense and the harshness of the offense. Second, the courts should compare the sentence to sentences imposed on other criminals in the same jurisdiction. If more serious crimes carry the same sentence, or less serious sentences, that would be "some indication" that the punishment may be excessive. As the third factor, courts should compare the sentences imposed for the same crime in other jurisdictions.

In Harmelin v. Michigan, *supra,* the United States Supreme Court held that the Eighth Amendment contained no proportionality review. The defendant in Harmelin was convicted of possession of more than 650 grams of cocaine and was sentenced to LWOP. However, in his concurrence in Hamelin v. Michigan, *supra,* Justice Kennedy wrote:

> The Eighth Amendment does not require strict proportionality between the crime and sentence. Rather it forbids only extreme sentences that are "grossly disproportionate" to the crime.

In State v. Harrison, *supra,* the South Carolina Supreme Court held that Justice Kennedy's concurrence was the controlling law of Harmelin v. Michigan, *supra.* The Court then provided the three factor test to analyze proportionality under the Eighth Amendment in non-capital cases. First, the court shall determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality. If not, the analysis ends. If such an inference does occur, then the court looks to whether more serious crimes carry the same penalty or more serious penalties. Then the court looks at the sentences for the same crime in other jurisdictions. The

court cited Harmelin, 501 U.S. at 1005, which read: "The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither eviscerates Solem nor abandons the second and third factors."

In applying these three factors to Davis' case, his sentence was grossly disproportionate to the crime. Davis, who was forty-five at the time of trial, had been a drug addict since he was a teenager as he was a lifetime resident of the valley area in York. Davis told the court that he had never physically hurt anyone as he was not a drug dealer. His attorney said Davis had nothing violent on his record other than the drug offenses. Davis could not hold a job because of his addiction. He obtained the .25 grams of crack for the CI Jennings because they had done drugs together for a year, and she was a friend. He was not a big time dealer as he had none of the nice things a real drug dealer possessed. His convictions for which he was being sentenced to life were selling near a school a dozen years before the instant offense; trafficking powder cocaine-not crack twenty-one years ago; and selling a small amount to a friend, Shari Jennings. The .25 Davis sold is not the 650 grams of Harmelin. R. 21, ll. 19 - R. 37, ll. 21.

In looking at other crimes in South Carolina as the second factor, murder carries a sentence of thirty years to life in prison. This a more serious crime for which a person could get less or the same as Davis. S.C. Code Section 16-3-20. The crime of voluntary manslaughter, where a person is killed, carries a maximum sentence of thirty years. S.C. Code Section 16-3-50. Homicide by child abuse has a sentence of twenty years to life. S.C. Code Section 16-3-85. Burglary first degree which involves entering the sanctuary of a person's home at night or armed with a deadly weapon has a sentence of fifteen years to life in prison without parole. S.C. Code Section 16-11-311.

These crimes indicate that more serious crimes where a life is taken or a person's home is invaded in a dangerous manner can carry a significantly lesser sentence or the same sentence as Davis' drug crimes which are not large trafficking cases.

In considering the third factor for the same crime in other jurisdictions, the first study of people serving LWOP for nonviolent offenses in the United States by the American Civil Liberties Union (ACLU) was reviewed. The results of this study were that seventy-nine percent of the 3278 prisoners identified were convicted of drug crimes such as distribution or possession. Twenty percent were for property crimes as theft. Sixty-three percent of the 3278 prisoners were convicted of federal crimes. However, nine states were found to have prisoners serving LWOP for nonviolent crimes mostly drug offenses. These were as follows: Louisana (429); Florida (270); Alabama (244); Mississippi (93); South Carolina (88); Oklahoma (49); Georgia (20); Illinois (10); and Missouri(1). Only nine states of the fifty have LWOP for lesser drug offenses. See More than 3200 Serving Life Without Parole for Nonviolent Offenses, at www.aclu.org/criminal law.

In Robinson v. California, 370 U.S. 660 (1962), Robinson violated a California statute which made it an offense for a person to be addicted to the use of narcotics, and was sentenced to ninety days imprisonment. The United States Supreme Court held that the this state law which required a sentence of ninety days inflicted cruel and unusual punishment in violation of the Fourteenth Amendment. The Court wrote that they were not "unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government." The Court continued that "there were countless fronts on which those evils may be legitimately attacked."

The trial judge in the instant case also relied on the case of State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008), where the Court of Appeals held that the sentence of LWOP was not cruel and unusual punishment for Williams' three drug offenses. R. 146, ll. 1 – 25. The Court of

Appeals wrote that what constituted cruel and unusual punishment as a violation of the Eighth Amendment was determined by "evolving standards of decency that mark the progress of a maturing society." The Court of Appeals relied on State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002) where the South Carolina Supreme Court held that lengthy sentences as LWOP imposed upon juveniles did not violate the contemporary standards of decency so as to constitute cruel and unusual punishment.

However, Williams, *supra,* is distinguished because of Graham v. Florida, 560 U.S. 49 (2010) which was decided two years after Williams. The United States Supreme Court held in Graham v. Florida, *supra,* that the Eighth Amendment prohibited the imposition of LWOP on a juvenile offender who did not commit homicide.

This ruling in Graham would indicate that society is maturing and the law is evolving. In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court held that mandatory imposition of life without parole sentences on juveniles constituted cruel and unusual punishment. The South Carolina Supreme Court held in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), that Miller v. Alabama, *supra,* announced a new substantive constitutional rule, and therefore could be applied retroactively.

These evolving standards of society would indicate that true drug addicts may now be punished/treated in a different manner than LWOP as in cases like Davis. Based on this apparent evolving standard of decency and law, and the fact that the LWOP sentence in Davis' case was grossly disproportionate to the drug offenses Davis had, his case should be remanded for resentencing.

South Carolina Code Section 17-25-45 (G) provides that the decision to invoke sentencing under this section is in the discretion of the solicitor. This makes LWOP a very subjective decision

by one person over which trial courts have no discretion. As indicated above, more severe offense such as murder can have a lesser sentence than Davis. LWOP for Davis' drug convictions was "grossly disproportionate" to the crimes. For a recidivist to be more severely punished is already built into the legal system with harsher sentences such as twenty-five or thirty years for enhancement crimes. However, LWOP for just drug offenses is cruel and unusual punishment in violation of the Eighth Amendment.

For these above reasons, the Court of Appeals erred in affirming Petitioner Davis' life sentence for the particular drug offenses for which he had convictions.

CONCLUSION

Based on the above, certiorari should be granted, the Court of Appeals' decision should be reversed, the sentence should be reversed, and the case remanded for resentencing.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of July, 2016