THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2015-000980

The State, ...Respondent,

v.

Tavarious Settles, ...Appellant.

REPLY TO STATE'S RETURN TO MOTION TO STRIKE

In this appeal, Appellant Tavarious Settles challenges the legitimacy of the sentence imposed in this case based on the trial court's disregard of and failure to conduct the appropriate sentencing procedure required by the United States Supreme Court and the South Carolina Supreme Court for youths under the age of 18. Init. Br. of Appellant at 10-18 (citing *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) (applying *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012)). In response to this challenge, the State contends in its Initial Respondent's Brief that the deficiencies related to the sentencing in this case should be excused as harmless because, almost five months after the notice of appeal was filed in this case, the State filed a motion to have Settles' 45-year sentence reduced by five years pursuant to South Carolina Code Section 17-25-65 for "substantial assistance" Settles provided in another wholly-unrelated case, which the circuit court granted. In support of this contention, the State cites to and includes in its Designation of

Matter the State's September 18, 2015 "Motion for Reduction of Sentence for Substantial Assistance;" the circuit court's September 18, 2015 "Order for Sentence Reduction;" and the transcript of the September 18, 2015 hearing held primarily for Settles' plea in the unrelated case but that also included the circuit court's consideration of the State's "substantial assistance" motion.

In his Motion to Strike, Settles requests that the Court strike these materials from the State's Designation of Matter as well as any argument in the State's Brief based on these materials. The grounds to have these materials and argument stricken are that the subsequent reduction of Settles' sentence upon the State's motion pursuant to Section 17-25-65 is completely irrelevant to the legal errors committed by the trial court in imposing the sentence in this case—the issue on appeal—and that these materials, which relate to actions and proceedings conducted over five months after the trial and sentencing in this case, were never presented to the trial court and therefore are not part of the record in this case.

In its Return to the Motion to Strike, the State disputes these grounds and even goes as far to say that the fact that Settles' sentence was reduced upon motion by the State pursuant to the "substantial assistance" statute now renders Settles' appeal of the trial court's illegal sentence "moot." State's Return at 1. However, the State's entire argument is based on the false premise that, by the State moving for and the circuit court granting a reduction of Settles' sentence pursuant to the "substantial assistance" statute, Settles already has been "resentenced." *Id.* And unless the Court accepts this remarkable and erroneous contention, which it should not, it must reject the State's arguments and strike the offending portions of the State's Brief and Designation of Matter.

Simply put, Settles was not "resentenced" when the State moved pursuant to Section 17-25-65 to reduce his sentence for "substantial assistance" in another matter and the circuit court granted this motion. Section 17-25-65 is titled, "**Reduction** of sentence for substantial assistance to the State," and provides that "[u]pon the state's motion within one year of sentencing, the court may **reduce a sentence** if the defendant, **after sentencing**, provided . . . substantial assistance in investigating or prosecuting another person." S.C. Code Ann. § 17-25-65 (Emphasis added). The statute is not titled, "**Resentencing** for substantial assistance to the State," and it does not provide that the State may move for or that the circuit court may conduct a "resentencing" hearing. Rather, the plain language of the statute contemplates that a proper sentence has been imposed and provides only the limited option to the State to seek a reduction of this sentence and the circuit court the limited discretion to grant such reduction.

Section 17-25-65 does not permit the circuit court to reconsider the sentence imposed or give the circuit court the ability to review and reverse a prior sentencing decision. And the assigned circuit court judge in this case did not reconsider Settles' sentence, nor did he attempt to step into the shoes of this Court and review and reverse the trial court's sentencing decision. Instead, the assigned circuit court judge only granted the State's motion to reduce the sentence without any consideration of the propriety of the trial court's sentencing decision. Accordingly, the State's argument that Settles has been "resentenced"—and therefore is not entitled to a review by this Court of the trial court's sentencing decision—is erroneous and, quite frankly, disingenuous.

Acceptance of the State's argument also would establish a dangerous and absurd precedent. It would mean, as the State now expressly contends, that a criminal defendant

is forever deprived of their right to appeal an illegal sentence if (and solely because) **the State** later moves for a **partial** reduction of their sentence under the "substantial assistance" statute. *See* State's Return at 1 ("The undersigned is further of the opinion that as a result of the [sentence reduction for substantial assistance pursuant to Section 17-25-65], any request by Appellant for an additional resentencing is now moot."). For example, under the State's theory, an individual could receive an illegal 50-year sentence but would be robbed of any appeal or review of this sentence based solely on the State later moving for, and the circuit court granting, a three-month sentence reduction under Section 17-25-65. This is illogical and, if accepted, would raise a host of constitutional and legal issues. Accordingly, the State's argument that the "substantial assistance" materials are relevant to the issues on appeal must be rejected.

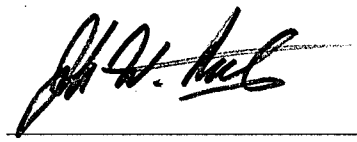
Despite the absurdity that would result from acceptance of the State's argument, the State asserts that the "substantial assistance" materials nevertheless should be included in the record on appeal based on its "metered belief," whatever that means, that these matters "bear[ ] relevance to its position" because they relate to the "proportionality of the sentence imposed in relation to the crime." State's Return at 6. However, this appeal is about the erroneous sentencing procedure employed by the trial court in violation of Supreme Court precedent and has nothing to do with the "proportionality" of the sentence. This is perfectly demonstrated by the fact that the State does not actually make any argument in its Brief that the "substantial assistance" materials relate to the "proportionality" of the sentence. Rather, the State's sole argument with respect to these materials in its Brief is that the reversible errors committed by the trial court in sentencing Settles are harmless because Settles already "has received the benefit of a second

sentencing decision" and a "second review by the trial judge." Init. Br. of Resp't at 39 n.10. The State's "proportionality" argument presented for the first time in its Return to the Motion to Strike simply is a newly-created and unsupported justification for its improper inclusion of the "substantial assistance" materials in its Designation of Matter and Brief and should be flatly rejected by the Court.

Finally, the State posits that the "substantial assistance" materials and any argument based on these materials are properly included in this appeal because the State is permitted to "raise on appeal any additional reasons the appellate court should affirm the lower court's ruling." State's Return at 6. However, as the State recognizes, these "additional reasons" must "appear in the record on appeal." *Id.* The "substantial assistance" matter was not before the trial court when it issued the sentencing decision that is at issue on this appeal. *See* Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."); Rule 209(b), SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal."); *see also* Motion to Strike at ¶15 (citing cases). Accordingly, the State is improperly attempting to expand the record on appeal to include irrelevant matters that occurred five months after the notice of appeal was served and then base its arguments on this expanded record. This too should be rejected by the Court.

The State has presented no legitimate reason—because there is none—to support or justify its inclusion of the "substantial assistance" materials and its arguments based on those materials in its Brief and Designation of Matter. Therefore, Settles respectfully requests that the Court grant his Motion to Strike and order the State to submit an Amended Initial Brief and Amended Designation of Matter without the offending portions.

Respectfully submitted,



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July 25, 2016

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Certificate of Service

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of **Appellant's Reply to Return to Appellant's Motion to Strike** via first class mail to the following:

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Columbia, South Carolina
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VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1220 Senate Street
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Re: *The State v. Tavarious Settles*;
Appellate Case No. 2015-000980

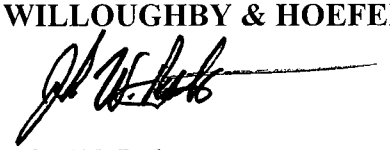
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Appellant's Reply to Return to Appellant's Motion to Strike** in the above-referenced matter. I would appreciate your acknowledging receipt of this document by file-stamping the extra copy and returning it to me via my courier.

By copy of this letter, I am serving counsel of record and enclose a Certificate of Service to that effect. If you have any questions or if you need any additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



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Enclosures

cc: Robert M. Dudek, Esquire
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