

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of General Sessions
Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-000995

RECEIVED

JUL 26 2016

SC Court of Appeals
RESPONDENT,

THE STATE,

v.

ALBERT EDWARD SIDERS.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly sentenced Appellant to life without parole because: (1) Appellant failed to timely object to any alleged deficiencies in the notice of life without parole; (2) the solicitor actually provided written notice of its intent to seek the sentence pursuant to the requirements of S.C. Code Ann. § 17-25-45; and (3) regardless of any deficiencies in the written notice, Appellant and his attorney received actual notice of the State's intention to seek the sentence.

STATEMENT OF THE CASE

On February 27, 2014, Appellant was indicted for kidnapping (2014-GS-15-00245), armed robbery (2014-GS-15-00244), and possession of a weapon during the commission of a violent crime (2014-GS-15-00242). On April 20–22, 2015, Appellant proceeded to a jury trial before the Honorable Thomas W. Cooper, Jr. David Mathews represented Appellant; Assistant Solicitors Steve Knight and Reed Evans represented the State. The jury found Appellant guilty of all charges as indicted. The trial judge sentenced Appellant to concurrent terms of life without parole (LWOP) on the kidnapping and armed robbery charges; due to those sentences, the trial judge did not impose a sentence on the weapons offense.¹

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

¹ Pursuant to S.C. Code Ann. § 16-23-490(A) (2015), the five-year mandatory sentence for the possession of a weapon charge does not apply in cases in which a defendant is sentenced to LWOP.

STATEMENT OF FACTS

The State adopts Appellant's version of the facts, with the exception of the opinions and arguments stated within.²

Additionally, the State seeks to clarify the facts surrounding Appellant's pretrial motion to relieve Counsel. The reason Appellant moved to relieve Mathews (Counsel) and filed a civil suit against him is because Appellant was frustrated with the progression of his case. He sought to privately submit evidence that he was coerced into committing the crime by two men³ who found out he was an informant for the police. He feared that by revealing the evidence in open court, the same people who forced him to commit the armed robbery would kill him. Counsel had informed Appellant that he would likely have to testify to provide evidence of the coercion. However, Counsel had subpoenaed Celestra Rivers and Sharonda Mitchell, witnesses who would testify that Appellant was known as a "snitch" on the street. Moreover, Rivers could, according to Appellant, testify to speaking to Appellant and the "two men" on the night of the robbery. Based on the lack of any actual issue with Counsel's representation of Appellant, the trial judge denied the motion to relieve Counsel. (Tr.Vol.I.p.3, line 1-p.7, line 12; Tr.Vol.I.p.21, line 4-p.23, line 11).

² Notably, Appellant argues in his fact section Counsel's statement at the pretrial hearing that he "believe[d]" he had received notice of the State's intention to seek LWOP should not be treated as a stipulation that notice was properly served because of "the context and generality" of the statement along with the vast number of cases Counsel handled as a public defender. This allegation is addressed below.

³ According to Appellant's testimony, he was unaware of the identities of the two men. He knew the one man was called "Dread," but was unaware of the name or nickname of the second man. (Tr.Vol.IV.p.169, line 22-p.172, line 13).

ARGUMENT

The trial court properly sentenced Appellant to life without parole because: (1) Appellant failed to timely object to any alleged deficiencies in the notice of life without parole; (2) the solicitor actually provided written notice of its intent to seek the sentence pursuant to the requirements of S.C. Code Ann. § 17-25-45; and (3) regardless of any deficiencies in the written notice, Appellant and his attorney received actual notice of the State's intention to seek the sentence.

Appellant argues the trial judge erred in sentencing Appellant to LWOP because the solicitor failed to provide written notice of his intent to seek LWOP as required by S.C. Code Ann. § 17-25-45(H) (Supp. 2015), and that this Court should overturn the South Carolina Supreme Court's prior rulings holding that actual notice is all that's required to satisfy that statute.

As an initial matter, the State notes that the Court of Appeals does not have the authority to overturn the South Carolina Supreme Court's established precedent on this issue. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Thus, this Court is constrained to affirm Appellant's sentence based on the precedent set forth in State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000), and James v. State, 372 S.C. 287, 641 S.E.2d 899 (2007).⁴

On the merits, the State disagrees with Appellant's allegation of error for several reasons: (1) Appellant failed to timely object to any alleged deficiencies in the State's failure to provide written notice of LWOP; (2) the State did, in fact, provide Appellant and Counsel with written notice of its intent to seek LWOP; and (3) even if the State failed to provide Appellant with written notice of its intent to seek LWOP, Appellant had actual notice of LWOP which is all that's required under South Carolina Law.

⁴ Both cases are analyzed in depth below.

Preservation

Appellant requests this Court remand his case for resentencing despite the fact that he, indisputably, met the requirements for LWOP set forth in § 17-25-45 (Supp. 2015). Appellant's issue is not preserved for appellate review.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Supreme Court of South Carolina found the challenges to the sufficiency of an indictment must be made before the jury is sworn. See also S.C. Code Ann. § 17-19-90 (2014) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.").

Appellant failed to timely object to any of the alleged deficiencies in the notice of LWOP. LWOP notices, like indictments, are notice documents. While the primary purpose of an indictment is to put a defendant on notice of what he is called to answer, a LWOP notice sole purpose is to apprise a defendant that the State intends to seek a LWOP sentence at trial. Thus, while deficiencies in an indictment may impair a defendant's ability to defend himself, a notice for LWOP will not impact a defendant's ability to prepare for trial. Accordingly, it is inconceivable that the window for objecting to defects in a LWOP notice would be any broader than that for objecting to the sufficiency of an indictment. If, as Appellant alleges, there were deficiencies in the LWOP notice, it was incumbent upon him to object to the State's decision to pursue LWOP prior to trial. See Oyler v. Boles, 368 U.S. 448, 454 (1962) (finding defendants waived claims of inadequate notice of recidivist sentencing because both defendants, personally and through their lawyers, conceded the applicability of the sentencing law to the circumstances of their case); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating it is incumbent upon a losing party to have timely challenged all issues raised on

appeal, noting such a requirement is a "keen incentive" for a party to prepare a case thoroughly, and prevents a party from keeping an "ace card" up his sleeve, either intentionally or accidentally, in the hope that an appellate court will grant a reversal and give the losing party another opportunity to prove his case); cf. Gentry, 363 S.C. at 102–03, 610 S.E.2d at 499–500 (stating challenges to the sufficiency of an indictment must be made before the jury is sworn).

Moreover, Appellant's assertion that Counsel objected to the deficiencies in the LWOP notice at the earliest available opportunity is false. During the pretrial hearing, Appellant was aware, or at least communicated to the Court that he was aware, the State was seeking LWOP. LWOP was again referenced at the close of the State's case, when the solicitor made two motions for Appellant to be precluded from making any reference to LWOP during his testimony because the State feared it would be unable to obtain a guilty verdict if the jurors knew Appellant faced LWOP. This was a clear indication to Appellant and Counsel that the State was pursuing LWOP, yet, no objection was made. At this point, even if Counsel did not possess the notice of LWOP, he should have been completely aware the State was seeking LWOP. Thus, he should have objected based on either the lack of receiving written notice, or to the alleged deficiencies in the written notice. Yet, he failed to make any contemporaneous objection. (Tr.Vol.I.p.5, line 24–p.6, line 9; Tr.Vol.III.p.129, line 8–p.130, line 16).

Accordingly, any issue with the LWOP notice is unpreserved for review.

Written Notice

Appellant argues the trial judge erred in sentencing him to LWOP because the State failed to prove that it provided written notice of its intent to seek LWOP pursuant to § 17-25-45. As an initial matter, the State calls attention to the fact that Appellant fails to claim he did not receive written notice of the State's intention to pursue LWOP or that he was prejudiced by said

failure; instead, Appellant contends that the State's failure to obtain properly-executed affidavits of service for the LWOP notice is, in it of itself, enough evidence that Appellant and Counsel did not receive the LWOP notices. Accordingly, because Appellant fails to dispute that he received written notice of LWOP, the State submits that Appellant's issue is not a cognizable claim.

The State also notes Appellant should be estopped from any argument regarding the deficiencies in affidavit of service on Counsel, as the document indicates that the agent of service was Charles Horton, an investigator in Counsel's office. (Affidavit of Service on Mathews). Therefore, the failure to get the document notarized was not the fault of the State.

As to the merits of Appellant's claim, the State argues that the record clearly indicates the State provided Appellant with the requisite notice of LWOP. Under the South Carolina Code, “[w]here the solicitor is required to seek or determines to seek sentencing [under §17-25-45], written notice must be given by the solicitor to the defendant and defendant’s counsel not less than ten days before trial.” S.C. Code Ann. § 17-25-45(H). However, § 17-25-45 does not define what form the written notice must take. Notably, it also does not specify how a solicitor is to prove that written notice was given; in other words, the statute does not require an affidavit of service or other legal certification demonstrating that service of the written notice occurred.

Here, the State provided the trial judge with two affidavits of service indicating Appellant and Counsel were served with the notice of LWOP on July 10, 2014. (Affidavit of Service on Appellant; Affidavit of Service on Mathews). The trial judge noticed that both affidavits were not properly notarized. However, the State was not required to obtain affidavits of service for the notice. While affidavits of service are extraordinarily helpful in proving that proper notice was given, nothing under § 17-25-45 or any other provision of the South Carolina Code requires

affidavits of service or other certified means confirming service of LWOP notices.⁵ In fact, no proof of service is required by the statute. Thus, the signed and dated affidavits of service, along with Counsel's stipulation to have received notice of LWOP and discussed it with Appellant, were more than adequate evidence that Appellant received written notice of LWOP.

Actual Notice

Appellant argues the plain language of § 17-25-45 requires the State provide a defendant and his attorney written notice of its intent to seek LWOP, and that the Supreme Court of South Carolina's opinions in Washington and James erroneously held that only actual notice of LWOP was required to satisfy the statute. He further argues that even if this Court finds Washington and James accurately state the standard for LWOP notices, his case is distinguishable because Counsel never admitted to receiving notice of LWOP. The State disagrees with Appellant's allegation of error; the South Carolina Supreme Court has clearly ruled actual notice of LWOP is all that is required and the record indicates Appellant and Counsel knew of the State's intent to seek LWOP.

In Washington, the State indicted the defendant with first-degree burglary, and sent him notice of its intent to seek LWOP. Due to errors in the original indictment, the State re-indicted defendant, but neglected to send him a second LWOP notice. The Supreme Court of South Carolina, comparing the case to those involving the issuance of notice to seek the death penalty, found that only actual notice was required and that the State's original LWOP notice was adequate notice satisfying § 17-25-45. Washington, 338 S.C. at 398–99, 526 S.E.2d at 712.

⁵ The State contends that this assertion is supported by portions of the South Carolina Code relating to indictments, notice documents very comparable to notices of LWOP. S.C. Code Ann. § 17-19-20 (2014) states indictments "shall be deemed sufficient and good" provided they: (1) allege the time and place the crime occurred; and (2) charge a defendant with the alleged crime using the language of the common law, statute prohibiting the crime, or in plain language which clearly conveys the charged offense. Notably neither § 17-19-20 or any other provision of the South Carolina Code requires certified service of indictments.

In State v. Johnson, 347 S.C. 67, 552 S.E.2d 339 (Ct. App. 2001), cert. denied Mar. 6, 2002, overruled by James, this Court found that written notice sent to the defendant and filed with the clerk of court was not sufficient notice because it was not served on trial counsel. The Court found that defense counsel's actual notice of the State's intention to seek LWOP was not sufficient, and distinguished the case from Washington by noting: (1) Washington received the requisite written LWOP notice at least once, but Johnson's attorney never received any written notice; and (2) it believed the Washington Court did not intend to rely on cases involving death penalty notice to create a broad rule in which all notice requirements in criminal statutes are satisfied by the issuance of actual notice. Johnson, 347 S.C. at 71-72, 552 S.E.2d at 341.

However, in James, the Supreme Court revisited the notice issue and found that actual notice of the State's intent to seek LWOP was all that was required to satisfy §17-25-45. In James, the defendant argued his trial counsel was ineffective in failing to object to the sufficiency of LWOP notice which had been served on defendant and his counsel prior to trial, but was not filed with the clerk of court's office. In addition to finding that trial counsel was not ineffective in stipulating that the defense received adequate notice of the State's intent to seek LWOP,⁶ the Supreme Court found the State was only required to give the defendant and his counsel actual notice of the State's intent to seek LWOP. The court specifically noted that no part in its holding in Washington was "equivocal," and it could discern no sufficient reason for adopting a rule contrary to the one established in that case. Accordingly, it found the requirements of § 17-25-45(H) are met provided a defendant and his counsel receive actual

⁶ The James Court noted that the "proper interpretation" of the defendant's PCR claim was that his trial counsel was ineffective in stipulating to receiving adequate notice of LWOP when the State had failed to file a copy of the written notice of LWOP with the clerk of court. However, the Court found the defendant failed to demonstrate he was prejudiced by trial counsel's concession because even if counsel had objected, the solicitor could have postponed the trial and served defendant and his counsel a new LWOP notice before the trial. James, 372 S.C. at 292, 641 S.E.2d at 901-02.

notice of The State's intent to seek LWOP at least ten days prior to trial and that this Court's decision in Johnson was overruled. James, 372 S.C. at 292-95, 641 S.E.2d at 901-03.

In the instant case, Appellant argues that Washington and James should be overturned based upon: (1) the plain language of § 17-25-45(H), which requires written notice LWOP be issued to both a defendant and his counsel; and (2) the Supreme Court's reliance on State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), and State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995), who death penalty cases in which that court found that the South Carolina death penalty notice statute requires only actual notice to the defense attorney of the State's intention to seek the sentence.

Additionally, Appellant's strained attempt to find a meaningful difference in the notice requirements under this state's death penalty and LWOP statutes strains credulity. His absurd interpretation implies that the legislature requires more stringent notice requirements for LWOP than the death penalty. Such a result is illogical. Accordingly, Appellant's interpretation cannot stand. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.").

Moreover, the absurdity of Appellant's proposed interpretation is easily demonstrated under the facts of the instant case. Appellant: (1) does not dispute that his crime fell squarely within the purview of § 17-25-45; and (2) fails to allege that he did not receive written notice of LWOP or that by failing to receive in any way impacted his ability to prepare for trial. Yet, Appellant contends that he is entitled to a new sentencing hearing without any evidence that he was in any way prejudiced by the State's failure to obtain a notarized affidavit of service.

Finally, Appellant argues that even if this Court believe his case falls within the purview of Washington and James, that his case is nonetheless distinguishable because Appellant and Counsel never conceded that they received notice of LWOP. However, this assertion is contradicted by the record. As noted previously, Counsel admitted to receiving notice of LWOP and making Appellant aware of the issue during their plea discussions. Appellant attempts to divest Counsel's admission of its importance by pointing out that Counsel only said he "believe[d]" he and Appellant had received LWOP notice, and a broad assertion that public defenders handle hundreds of cases, and thus cannot be trusted to know what goes on in their cases. Not only is this argument an affront to public defenders statewide, but it ignores the facts surrounding the communication; Counsel made this statement during his complete summary of Appellant's case to the trial judge, which included descriptions of the plea discussions and the overwhelming evidence possessed by the State. Notably, Appellant confirmed the accuracy of that summary to the trial judge. Thus, there is no reason for the Court to doubt the veracity of Counsel's statement or his knowledge of Appellant's case.

In conclusion, a defendant and his attorney must only receive actual notice of its intent to seek LWOP to Appellant and other defendants. The State wholeheartedly agrees that a defendant and his counsel need time to prepare for any challenge they may seek to make to the application of § 17-25-45 to his case, but Appellant has failed to set forth any reason how timely, written notice of LWOP would allow him to mount a more effective challenge to his sentence than timely, actual notice.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 25, 2016

STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 25th day of July, 2016.

Sally Ellison

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July 25, 2016

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RE: State v. Albert E. Siders
Appellate Case No. 2015-000995

Dear Ms. Baer:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

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Enclosures

cc: ~~H~~onorable Jenny A. Kitchings (original and one enclosed)
Victim Services