STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALBERT EDWARD SIDERS,

APPELLANT

APPELLATE CASE NO 2015-000995

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

A solicitor has discretion as to whether to seek a sentence of mandatory life without parole ("LWOP") pursuant to S.C. CODE ANN. § 17-25-45 based on a defendant's prior convictions for certain crimes. S.C. CODE ANN. § 17-25-45 (G). If a solicitor decides to seek such a sentence, "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. In the present case, the solicitors office allegedly attempted to effectuate service of such written notices upon Appellant Siders and his defense attorney. However, when the solicitor presented the affidavits of service at the sentencing hearing, it was discovered that neither affidavit was notarized and that the affidavit as to defense counsel was undated. Trial Tr. 277, l. 8 – 279, l. 15; R. * (Affidavits of Service). Defense counsel argued that due to the defects in the service of the notice, the Court should exercise its discretion in sentencing Siders and not impose the mandatory life sentence requested by the State. Trial Tr. 280, l. 18 – 281, l. 13. The trial judge said that if he had discretion in sentencing, he would exercise it. Trial Tr. 281, l. 20 – 282, l. 1. However, he ruled that "lack of notice has never been an issue in this particular case, in any event and is not now," such that he was left with no discretion. Trial Tr. 282, ll. 1-14. Thus, Siders was sentenced to LWOP. Trial Tr. 282, ll. 15-19.

It is undisputed that this Court is bound by the precedent of 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), which held that a defendant and his counsel need only possess actual notice of the State's intention to seek LWOP in order for the requirements of the recidivist statute to be met. See S.C. Const. art. V, § 9. Siders made the case for overturning the precedent of Washington and James in his Brief of Appellant, explaining our Supreme Court's misplaced reliance on cases interpreting the death

penalty statute,[1] the impact of the subsequent passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 that made the solicitor's decision to seek recidivist sentencing discretionary, and matters of fairness to the defendant. Brief of Appellant, pp. 11-15; 2010 Act No. 273, § 20, eff. June 2, 2010. Respondent argues that in light of the existing precedent, this Court must affirm Siders' sentence. However, recognizing that this Court is bound by precedent, Siders also explained how his case is distinguishable from Washington and James because the solicitor here was unable to prove notice and notice was not conceded, as it had been in Washington and James. Brief of Appellant, pp. 15-18.

Respondent argues that defense counsel's statements during his summary of the case at the hearing on Siders' motion to relieve him as counsel was an admission to receiving notice of the State's intent to seek LWOP. Brief of Respondent, p. 11. Specifically, defense counsel said:

> He [Siders] can either just accept – he's got a prior armed robbery, so this would be -- and I **believe** we've been LWOP'd noticed -- so he'd get life without parole if he's convicted of that. So he can either take -- I think Mr. Knight offered 30 years or something like that [or go to trial].

Trial Tr. 5, l. 24 – 6, l. 9 (emphasis added). The solicitor corrected defense counsel's recollection of the plea offer, which was twenty years. Trial Tr. 6, l. 6. Defense counsel then said, "Twenty years, something less -- yeah, 20, something less than that, which I had passed along to Mr. Siders." Trial Tr. 6, ll. 7-9. Respectfully, given the context and generality of this

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[1] Respondent argues that the idea that the legislature would enact more stringent notice requirements for seeking life without parole than for seeking the death penalty "strains credulity" and is "illogical" and "absurd." Brief of Respondent, p. 10. What Respondent ignores is the various other indicia that the State is seeking the death penalty beyond the notice, including appointment of a death penalty certified attorney, use of a clinical social worker and mitigation investigator, special voir dire of the jury, and the bifurcation of the trial into separate and distinct phases of guilt and sentencing. A case in which the State seeks a mandatory LWOP sentence requires no specialized defense attorney and proceeds identical to any other trial such that the legislature's more stringent notice requirements are logical.

statement, along with the vast number of cases Mathews handles as a public defender, this statement did not constitute an admission or stipulation that the solicitor had given proper and timely notice of its intent seek LWOP.[2]

Respondent further mischaracterizes Siders statement – "Well, basically he covered it" – as "confirm[ing] the accuracy of the summary [of defense counsel] to the trial judge." Brief of Respondent, p. 11; Trial Tr. 7, ll. 8-9. However, what Siders went on to discuss at length was how he became a confidential informant ("CI"), the sloppy police work that compromised his identity as a CI, and the events that led to the robbery of the convenient store under duress from men who knew he was responsible for the arrest of a drug dealer named Celestra Rivers, a.k.a. "Cornbread." Trial Tr. 7, l. 8 – 20, l. 15. Thus, as was discussed more fully in Appellant's Brief, neither Siders nor his attorney conceded that proper LWOP notice was made. Brief of Appellant, pp. 15-17.

With the State unable to prove that it provided the request notice, the trial court was not required to sentence Siders to LWOP and should have exercised its discretion in sentencing. "A failure to exercise discretion amounts to an abuse of that discretion." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). In State v. Smith, 276 S.C. 494, 497, 280 S.E.2d 200, 201 (1981), our Supreme Court found that the trial judge erred in ruling he could not change the defendant's sentence because he did not have

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[2] Respondent averred that Appellant's citation to the well-known fact that South Carolina public defenders work heavy caseloads and thus may not be able to recall every detail of every case as an "affront to public defenders statewide," rather than understanding its intended purpose of providing a logical and common sense explanation of defense counsel's expressed uncertainty regarding whether an LWOP notice was provided. Brief of Respondent, p. 11.

jurisdiction. The Smith Court ruled: "It is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." 276 S.C. at 498, 280 S.E.2d at 202. Smith's case was remanded for consideration of Smith's motion to alter or amend his sentence. Id. Likewise, the trial judge here erroneously determined that he had no discretion to exercise in sentencing Siders. Trial Tr. 281, l. 20 – 282, ll. 1-14. His failure to exercise his discretion was an error of law.

Respondent argues that, regardless, Siders' objection to the LWOP notice was not timely, averring that like an indictment, any objection to the notice requirements under the LWOP statute must be made prior to the swearing of the jury. Respondent provides no relevant authority for this proposition. See Brief of Respondent, pp. 5-6. Respondent further argues that there is no requirement that the solicitor provide an affidavit service, again attempting to analogize the statutes related to indictments. See Brief of Respondent, pp. 6-8.

S.C. CODE ANN. § 17-19-10, provides that "no person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury" unless prosecution by information is expressly authorized by statute or the proceedings are before a police court, magistrate, or courts martial. See also S.C. Const. art. I, § 11. An indictment is a notice document, the primary purpose of which is "to put the defendant on notice of what he is called upon to answer, *i.e.,* to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007). S.C. CODE ANN. § 17-19-80, provides:

> Whoever shall be accused and indicted for any capital offense whatsoever shall have a true copy of the whole indictment, but not the names of the witnesses, **delivered to him, three days at least before he shall be tried** for such offense, whereby to enable him to advise with counsel thereupon, his attorney, agent or any of them requiring the copy, paying the officer his usual fees for the copy of every such indictment.

(emphasis added). There are no similar provisions regarding provision of a copy of the indictment for non-capital offenses. See S.C. CODE ANN. § 17-19-10, et seq.

In State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005), our Supreme Court conclusively held that "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." See also S.C. CODE ANN. § 17-19-90 ("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."). This requirement makes sense because the defendant or his attorney has ordinarily received a copy of the indictment, the defendant has been arraigned, the solicitor lists the indictments generally when he or she calls the case, see Trial Tr. 28, ll. 8-15, and the judge reads the complete indictments prior to the voir dire of the jury, see Trial Tr. 28, l. 19 – 29, l. 23.

A solicitor's discretionary decision to seek a mandatory LWOP sentence pursuant to S.C. CODE ANN. § 17-25-45 is inapposite. S.C. CODE ANN. § 17-25-45(H) provides: "Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, **written notice must be given by the solicitor** to the defendant and defendant's counsel **not less than ten days before trial.**" (emphasis added). The statute specifies that the timing, manner, and entity responsible for ensuring proper notice is given to defendant. Unlike a defective indictment, which may be amended pursuant to S.C. CODE ANN. § 17-19-100, there is no statutory provision allowing for the solicitor to cure any defects in its LWOP notice. Thus, the logical consequence of a failure to comply with the statutory requirements is that the solicitor

will not be able pursue sentencing under the recidivist statute. Further, an LWOP notice relates only to sentencing and has no bearing on the validity of an underlying conviction.

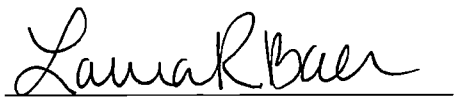
Importantly, the responsibility of proving that the statute was complied with falls unto the solicitor, not defense counsel. While an affidavit of service could provide sufficient evidence of the solicitor's provision of written notice of their intent to seek LWOP, a solicitor could certainly call witnesses to testify regarding the notice. However, they would not be entitled to call defense counsel or the defendant to evidence their allegation of notice. As such, Respondent's contention that any objection to the LWOP notice must be made prior to the swearing of the jury is not rooted in any statute or law and is unreasonable in light of the fact that the solicitors' proof of notice is not provided until the time of sentencing. See Trial Tr. 277, l. 8 – 279, l. 15

In conclusion, the solicitor's job was simple – provide the requisite written notice and be prepared to prove compliance with the statutory notice requirements. He failed to do so such that Siders was not subject to sentencing under S.C. CODE ANN. § 17-25-45. It was the trial judge's failure to exercise his discretionary authority in sentencing, mistakenly thinking that he had none, that constituted reversible error in this case. Siders was prejudiced because LWOP sentencing is not mandatory unless the solicitor exercises his or her discretion to seek such sentencing and follows the statutory mandate to provide written notice to defense counsel and the defendant at least ten days prior to trial. The trial judge explicitly stated that if he had discretion, he would exercise it in Siders' favor. Trial Tr. 281, l. 20 – 282, l. 1. The armed robbery statute, which should have applied in Siders' case, provides for a sentence of ten to thirty years. S.C. CODE ANN. § 16-11-330. Far from being speculative, if the trial judge had not erroneously found that the State complied with the notice requirements such that he was bound to impose a LWOP sentence, Siders would have received a lesser sentence.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Albert Siders respectfully requests that this Court remand his case for resentencing.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of September, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Albert E. Siders, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 6th day of September, 2016.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of September, 2016.

(L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.

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Laura R. Baer
Appellate Defender
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