STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE,

APPELLANT,

v.

JOSIE DEAN JONES,

RESPONDENT

APPELLATE CASE NO. 2016-000273

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

The trial court erred in suspending Jones' prison sentence below the three year minimum and granting probation for Jones' conviction for trafficking in methamphetamine where the statute expressly requires a minimum three year prison sentence and prohibits suspending any part of the sentence or granting probation. State v. Taub, 336 S.C. 310, 519 S.E.2d 797 (Ct. App. 1999) controls the result.

## COUNTER-STATEMENT OF ISSUES ON APPEAL

I. The solicitor's objection was not made with specificity and did not include any reference to the propriety of home detention under S.C. CODE ANN. § 24-13-1530 such that Appellant's arguments on appeal are not properly preserved.

II. The sentencing judge imposed a lawful sentence pursuant to S.C. CODE ANN. § 24-13-1530, which allows home detention to be used as an alternative to incarceration for low, risk, nonviolent adult offenders "notwithstanding another provision of law which requires mandatory incarceration."

## STATEMENT OF THE CASE

On June 5, 2015, the Greenwood County Grand Jury indicted Respondent Josie Jones for possession of a controlled substance and trafficking in methamphetamine (10 to 28 grams). R. 37.

On February 3, 2016, Jones appeared *pro se* before the Honorable Eugene C. Griffith. The State was represented by assistant solicitor William Maxey. R. 1. The solicitor said that Jones was there "to be warned of the dangers [of] proceeding *pro se*." R. 2, ll. 2-6. Jones requested until the end of the week to finish gathering the money she needed for a private attorney. R. 2, l. 7 – 10, l. 18.

Jones previously appeared before Judge Griffith, at the hearing where she fired her public defender. Jones was before Judge Frank Addy in January, who admonished her to get an attorney and be prepared for trial.

At the February 3, 2016 hearing, Jones admitted that she had not applied for the public defender or hired a private attorney in the intervening period, so Judge Griffith held her in contempt for failing to follow Judge Addy's direction. He ordered that she be taken into custody until she hired an attorney or applied for representation by the public defender's office. He said that he spoke with Jones' former public defender, who was still familiar with Jones' case. He suggested that they may be able to work together since they did not have any serious problems communicating. R. 10, l. 22 – 12, l. 21; R. 13, l. – 15, l. 2.

Jones' father explained that Jones misunderstood the State's original plea offer and thought she was "going to have to do three years." R. 12, ll. 22-25; see also R. 6, ll. 22-24. Judge Griffith said that the solicitor's initial offer was for "something that probation was perhaps available for," bearing in mind that Jones "has no prior record, she has never done anything wrong, never broken the law and . . . never been in trouble before." R. 13, ll. 1-19. But, the solicitor was now ready for

trial and the only offer he would make is "as charged." R. 13, ll. 19-24. Judge Griffith answered Jones' questions about how to purge the contempt. R. 13, l. 25 – 15, l. 2. Jones was then taken into custody, where she remained overnight. R. 15, l. 3; R. 17, ll. 11-19.

The following day, February 4, 2016, Jones pled guilty to the above offenses before Judge Griffith. Jones was represented by Patricia Bolen. The State was again represented by assistant solicitor William Maxey, who made no recommendation. R. 1; R. 15; R. 25, ll. 21-22. On the trafficking charge, Judge Griffith sentenced Jones to five years, suspended upon the service of eighteen months of house arrest, followed by three years of probation and substance abuse counseling. On the possession charge, Judge Griffith sentenced Jones to six months, suspended upon the service of time-served, and three years of probation. R. 26, ll. 2-25; R. 35. The solicitor objected "to that sentence" as not complying with S.C. CODE ANN. § 44-53-375(C)(1)(a). R. 27, ll. 1-9.

The State appealed and filed its Brief of Appellant. This Brief of Respondent follows.

## STATEMENT OF THE FACTS

Respondent Jones has no prior criminal history. She was only eighteen when she was riding in a vehicle with two men, one of whom was her boyfriend. When the police pulled over the vehicle, one of the men handed Jones some drugs and told her to hide them. When the officer determined that the car was stolen, he arrested the driver and both passengers. Jones admitted to the arresting officer that she had a Suboxone strip[1] in her purse. Officers also found approximately 13.5 grams of methamphetamine, contained in two baggies, when Jones was searched at the detention center. R. 13, ll. 10-17; R. 19, ll. 4-21; R. 22, l. 9 – 24, l. 18.

The solicitor initially made an offer for Jones to plead to a "lesser offense," which would have allowed for a sentence of three years suspended to two years of probation. She misunderstood that offer, did not accept it, and ultimately took her boyfriend's bad advice to fire her public defender. R. 6, ll. 18 – 7, l. 19; R. 12, ll. 22-25. The solicitor would not extend any additional plea offers, such that Jones' only choice other than trial was to plead guilty to the charged offenses. R. 12, l. 22 – 13, l. 24; R. 15, ll. 6-13.

On February 4, 2016, when the parties appeared before Judge Griffith for the guilty plea hearing, the solicitor said that Jones was pleading "straight up without recommendation." R. 15, ll. 4-13. Judge Griffith questioned Jones about any recent use of drugs and she confessed that she used methamphetamine in the past forty-eight hours but that she felt okay. R. 16, l. 21 – 17, l. 10. Jones was advised of the charges against her, her right to a jury trial, and that she may face more severe penalties if she is ever convicted of a second offense. R. 15, l. 17 – 16, l. 6; R. 17, l. 23 – 18, l. 20; R. 20, ll. 10-20. Judge Griffith also advised Jones that because "the trafficking is considered a

[1] Suboxone is a prescription drug that was developed to treat drug addiction to opiates and opioids but is abused by some individuals. See NARCONON, www.narconon.org/drug-abuse/signs-symptoms-suboxone.

violent offense . . . ***if*** you are sent to the Department of Corrections, you are not qualified for all the programs that non-violent offenders are qualified for." R. 20, ll. 21-25 (emphasis added). The solicitor recited the facts that he intended to prove at trial, which Jones agreed were accurate R. 19, ll. 4-21; R. 21, ll. 17-24. Judge Griffith found that Jones' guilty plea was free, knowing and intelligent as to both offenses. R. 21, l. 25 – 22, l. 8. Notably, Jones was never advised on the record of any mandatory minimum sentence.

Defense counsel told the court that Jones turned nineteen years old the weekend before the hearing. Jones was eighteen at the time of the incident and "made the mistake of hanging out with some people who were a good bit older than her and who were engaged in activities that were not the right thing to do." R. 22, ll. 9-17.

While the weight of the drugs fell under the trafficking section of the statute, defense counsel said that Jones did not know the weight of the drugs that were thrust at her and was not engaged in the conduct that ordinarily connotes "drug trafficking." R. 23, ll. 16-25. Jones has never made or sold drugs. R. 22, l. 17 – 23, l. 2.

Jones had since distanced herself from those individuals and broken up with her boyfriend. Jones had also been applying for jobs and admission to a G.E.D. program. Jones further recognized her need for treatment for her own drug use. R. 23, ll. 2-16. Defense counsel said that Jones spent the night in jail when she was arrested and then again the night before the hearing. Counsel observed the noticeable impact that being in jail, even for such a short time, had on Jones. She asked the judge to consider a sentence of **house arrest or probation**, which would allow Jones an opportunity "to get her life together." R. 24, ll. 1-18.

The solicitor asked to be heard. He then produced a print out from Jones' Facebook page, which still reflected that she was "in a relationship" with "Trey," the boyfriend she told the

court that she was no longer dating. Defense counsel noted that the page did not reflect any recent activity by Jones. R. 24, l. 19 – 25, l. 12. The following exchange occurred between Judge Griffith and the solicitor.

JUDGE: She is pleading to what she is charged to.

SOLICITOR: I just wanted you to know she may be less than forthcoming with the Court.

JUDGE: I think she is forthcoming this morning by her admission to me about the last 48 hours [referencing Jones' admission that she took methamphetamine].

SOLICITOR: Okay, that is true, yes.

JUDGE: What else you got, anything else?

SOLICITOR: **Nothing, Your Honor. Just no recommendation.**

R. 25, ll. 13-22 (emphasis added).

Judge Griffith then issued his sentence, which he fashioned "all things considered, her lack of prior record and her age." R. 25, l. 25 – 26, l. 2. On the trafficking charge, which is the subject of the State's appeal, Jones was sentenced to "5 years, that is suspended upon the service of 18 months, cost and assessments imposed, probation for 36 months also." R. 26, ll. 2-5. Judge Griffith said "the 18 months can be served under the home incarceration program which is essentially house arrest," for which Jones would have to qualify and another Order be signed. R. 26, ll. 5-8; R. 27, l. 11 – 28, l. 15. He also ordered that she undergo substance abuse counseling either during house arrest or while on probation. R. 26, ll. 8-12. Judge Griffith explained that because there is no "good time credit" on home detention, Jones will serve the equivalent time that she would if she were incarcerated for three years. R. 26, ll. 12-19. He said that this would give Jones an opportunity to "get this behind her" but that if she does not take advantage of it, they will deal with it at that time. R. 26, ll. 19-23. The solicitor objected to the sentence, stating

that it did not comply with S.C. CODE ANN. § 44-53-375(C)(1)(a). R. 27, ll. 1-9. Judge Griffith responded: "Okay, noted." R. 27, ll. 10.

## ARGUMENT

**I. The solicitor's objection was not made with specificity and did not include any reference to the propriety of home detention under S.C. CODE ANN. § 24-13-1530 such that Appellant's arguments on appeal are not properly preserved.**

An issue which is not properly preserved cannot be raised for the first time on appeal. State v. Vanderbilt, 287 S.C. 597, 598, 340 S.E.2d 543 (1986). In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground. State v. Holliday, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1998). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. A trial judge commits no error in overruling a general objection. State v. Bailey, 253 S.C. 304, 310, 170 S.E.2d 376, 379 (1969). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996).

Defense counsel requested that the trial judge consider home detention and probation in her argument to the court. R. 24, ll. 1-18. The solicitor made no objection or argument against either of those in response and said that the State had no recommendation. See R. 24, l. 19 – 25, l. 22. However, once the trial judge imposed the sentence of five years, suspended upon the service of eighteen months of home detention and followed by three years of probation, the solicitor objected. R. 25, l. 25 – 27, l. 9. He said:

> Your Honor, the State objects to that sentence pursuant to [S.C. CODE ANN. §] 44-53-375 (c) (1) (a); provides that for someone convicted of trafficking of 10 grams or more but less than 28 grams, for a first offense a term of, imprisonment of not less than 3 years, no more than 10 years, no part of which may be suspended nor probation granted and a fine of $25,000.00 dollars. **I just wanted to note the State's objection to that sentence is not complying with the statute for the record.**

R. 27, ll. 1-9 (emphasis added). The solicitor failed to articulate how the sentence imposed purportedly did not comply with the statute.

In Appellant's Brief, the State now argues that "[t]he trial court committed an error of law by suspending the sentence and granting probation." Brief of Appellant, p. 4. As will be discussed more fully in Issue II, this argument is without merit because S.C. CODE ANN. § 24-13-1530 allows the court to use home detention as an alternative to incarceration "notwithstanding another provision of law which requires mandatory incarceration." In a footnote, the State argues that "the trial court further erred because home detention is not available in lieu of incarceration for violent offenses." Brief of Appellant, p. 4 n.1. Not only does Appellant misinterpret the provisions of S.C. CODE ANN. § 24-13-1530, the solicitor made **no objection to the use of home detention at the sentencing hearing** such that Appellant's argument is not preserved. The State cannot argue the first time on appeal that the imposition of home detention was improper.[2] See Rosamond Enterprises, Inc. v. McGranahan, 278 S.C. 512, 299 S.E.2d 337 (1983) (appellant may not argue a different ground on appeal than he argued in his objection at trial); White v. Livingston, 231 S.C. 301, 98 S.E.2d 534 (1957) (party may not argue one ground at trial and an alternate ground on appeal).

Therefore, the State's arguments were not properly preserved below and Respondent's sentence should be affirmed.

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[2] Despite the solicitor's failure to object to the use of home incarceration rather than imprisonment, a discussion of S.C. CODE ANN. § 24-13-1530(A) is necessary to defend against Appellant's argument that Jones' sentence is unlawful. See discussion of Issue II, *infra*.

## II. The sentencing judge imposed a lawful sentence pursuant to S.C. CODE ANN. § 24-13-1530, which allows home detention to be used as an alternative to incarceration for low, risk, nonviolent adult offenders "notwithstanding another provision of law which requires mandatory incarceration."

To the extent this Court finds that the solicitor's objection to Jones' sentence was sufficiently specific, Appellant's arguments on appeal must fail because the sentencing judge issued a lawful sentence pursuant to S.C. CODE ANN. § 44-53-375(C)(1)(a) and S.C. CODE ANN. § 24-13-1530. S.C. CODE ANN. § 44-53-375(C)(1)(a) provides that following a conviction of trafficking ten grams or more, but less than twenty eight grams, of methamphetamine, first offense, the defendant must be sentenced to: "a term of imprisonment of not less than three years nor more than ten years, no part of which may be suspended nor probation granted, and a fine of twenty-five thousand dollars." However, S.C. CODE ANN. § 24-13-1530 provides, in pertinent part:

> **Notwithstanding another provision of law which requires mandatory incarceration**, electronic and nonelectronic home detention programs may be used as an **alternative to incarceration** for **low risk, nonviolent adult** and juvenile **offenders** as selected by the court if there is a home detention program available in the jurisdiction.

(emphasis added).

Appellant's averment that section 24-13-1530 provides "home incarceration for crimes *without mandatory incarceration*" is without merit.[3] See Brief of Appellant, p. 4 n. 1 (emphasis added). Rather, the plain language of the home incarceration statute indicates that it takes precedence over any statutes requiring mandatory incarceration. S.C. CODE ANN. § 24-13-1530; see Mosteller v. County of Lexington, 336 S.C. 360, 364, 520 S.E.2d 620, 622 (1999) (holding that by using the introductory phrase "notwithstanding any other provision of law," the legislature

[3] Additionally, Appellant's argument that the imposition of home detention was improper because of the mandatory minimum provisions of S.C. CODE ANN. § 44-53-375(C)(1)(a) is unpreserved. See discussion of Issue I, *supra.*

clearly intended that the statute be exclusive of and "trump" other provisions of law); Bolin v. S.C. Dep't of Corrections, 415 S.C. 276, 282-83, 781 S.E.2d 914, 917 (Ct. App. 2015) (holding that the legislature's use of the phrase "notwithstanding any other provision of law" expressed its intent to repeal a prior statute to the extent it conflicted with amended statutes); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994) ("When a statute is clear and unambiguous, the terms of the statute must be given their literal meaning.").

Appellant's argument that drug trafficking's classification as a violent offense under S.C. CODE ANN. § 16-1-60 rendered Jones ineligible for home incarceration is likewise without merit.[4] See Brief of Appellant, p. 4 n. 1. If the legislature intended that only those convicted of crimes classified as non-violent under S.C. CODE ANN. § 16-1-70 be eligible for home detention, it could have specified so, as it has done in other statutes. See, e.g., S.C. CODE ANN. § 63-19-2050 (providing for the expungement of juvenile records related to "a status offense **or a nonviolent crime, as defined in Section 16-1-70**" (emphasis added); S.C. CODE ANN. § 24-21-480 (providing that a judge may suspend the sentence of a defendant " convicted of **a nonviolent offense, as defined in Section 16-1-70,** for which imprisonment of more than ninety days may be imposed" and place the offender in a restitution center as condition of parole (emphasis added)); S.C. CODE ANN. § 16-1-130 (providing that persons' with a current charge or prior conviction **"for a violent offense as defined in Section 16-1-60"** are not eligible for certain diversion programs (emphasis added)); S.C. CODE ANN. § 17-24-40; S.C. CODE ANN. § 22-5-510; S.C. CODE ANN. § 24-13-650; see also Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (holding that if the legislature had wanted to exclude burglary in the second degree of a dwelling under S.C. CODE ANN. § 16-

[4] Additionally, Appellant's argument that the imposition of home detention was improper because drug trafficking is classified as violent offense under S.C. CODE ANN. § 16-1-60 is unpreserved. See discussion of Issue I, *supra.*

11-312(A) from the one-fourth parole eligibility classification provided in S.C. CODE ANN. § 24-21-610 (1989), it could have done so by classifying it as a violent offense subject to one-third parole eligibility in S.C. CODE ANN. § 16-1-60, as it did for burglary in the second degree of a building under S.C. CODE ANN. § 16-11-312(B)). Instead, the legislature left it up to the sentencing judge to determine who is a "low risk, nonviolent . . . **offend*er***," placing the court's focus **on the individual**, not necessarily the crime for which they were convicted. S.C. CODE ANN. § 24-13-1530 (emphasis added). "Furthermore, when a statute is penal in nature, it is construed strictly against the State and in favor of the defendant." State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980).

Here, Judge Griffith noted Jones' lack of criminal record and young age during the February 3, 2016 hearing. R. 13, ll. 11-17. The judge mentioned those again during the sentencing phase of the February 4, 2016 plea hearing, as well as her honesty and his desire to give her an opportunity for drug treatment and "to get this all behind her." R. 25, l. 17 – 26, l. 21. As such, he found her to be a "low risk, nonviolent offender." See S.C. CODE ANN. § 24-13-1530. Judge Griffith further explained the reasoning behind the length of home incarceration that he imposed. R. 26, ll. 2-21. He said "If I were to give her 3 years [incarceration], rough figures, would be parole eligible, it would be about fifty percent." R. 26, ll. 15-17. However, with home incarceration you serve "day-for-day" and do not get any good time credit. R. 26, ll. 14-19. Thus, the eighteen months that Jones will serve on home incarceration with keep her confined for approximately the same equivalent period as she would be confined in the Department of Corrections.

The principles of statutory construction support a finding that Judge Griffith's sentence achieved the intended legislative purposes of both S.C. CODE ANN. 44-53-375(C)(1)(a) and S.C. CODE ANN. § 24-13-1530. "All rules of statutory construction are subservient to the one that the

legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks omitted). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Id. "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." Id. at 351, 688 S.E.2d at 575. "In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute." State v. Johnson, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct.App. 2011). Here, the legislature could not possibly intend that low risk, non-violent offenders serve more time on home incarceration than their counter-parts serve in the Department of Corrections, as such a result would be absurd. Thus, the imposition of eighteen months of house arrest in this case was proper.

Appellant argues that this case is governed by State v. Taub, 336 S.C. 310, 519 S.E.2d 797 (Ct. App. 1999). Both the defendant in Taub and Jones were convicted of drug trafficking under statutory provisions that prescribed a punishment for a first offense of "a term of imprisonment of not less than three years nor more than ten years, no part of which may be suspended nor probation granted, and a fine of twenty-five thousand dollars." See S.C. CODE ANN. § 44-53-370(e)(2)(a)(1) (applicable in Taub); S.C. CODE ANN. § 44-53-375 (C)(1)(a). However, contrary to Appellant's contention, the sentence in Taub was not the same sentence imposed in the present case. See Brief of Appellant, p. 4. Taub was sentenced to five years, suspended upon five years of probation, and a fine of five thousand dollars. 336 S.C. at 312, 519 S.E.2d at 798. The trial court ordered that the probation could be terminated upon payment of the fine. Id. at 312, 519 S.E.2d at

798-99. The present case involves a split sentence, for which home incarceration was imposed rather than incarceration pursuant to S.C. CODE ANN. § 24-13-1530. R. 25, l. 25 – 26, l. 23; R. 27, l. 25 – 28, l. 3. Thus, unlike Taub, who would potentially never be confined, Jones' sentence requires that she serve the eighteen months of home detention prior to her probation.

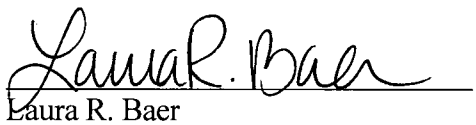
Additionally, the statutory construction argument made by the defense in Taub is distinct from the present case. In Taub, the defense argued that a judge's general discretionary power to suspend sentences in S.C. CODE ANN. § 24-21-410 allowed the judge to suspend the mandatory minimum sentence provided in S.C. CODE ANN. § 44-53-370(e)(2)(a)(1) for trafficking cocaine. 336 S.C. at 316-17, 519 S.E.2d at 801. The Court rejected that argument based on the principle of statutory construction that "a specific statute prevails over a more general one." Id. As discussed *supra*, the home incarceration statute, applicable in the present case, begins "[n]otwithstanding another provision of law which requires mandatory incarceration," expressing the legislature's intent that it take priority of over provisions regarding mandatory minimum incarceration. S.C. CODE ANN. § 24-13-1530; Mosteller, 336 S.C. at 364, 520 S.E.2d at 622.

Therefore, the sentencing judge's use of the alternative of eighteen months of home incarceration was proper in this case and Jones' sentence should be affirmed.

## CONCLUSION

Based on the foregoing, Respondent Josie Jones respectfully requests that this Court affirm her sentence.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 7th day of September, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 7th, 2016

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 on this 7th day of September, 2016.

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 7th day of September, 2016.

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