THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

RECEIVED

FEB 21 2017

SC Court of Appeals

Opinion No. 2016-UP-448 (S.C. Ct. App. filed Nov. 2, 2016)
Appellate Case No. 2016-002547

State of South Carolina, ... Respondent,

v.

Corey Jamal Williams, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675-1A York Highway
York, SC 29512
(843) 479-6516

ATTORNEYS FOR RESPONDENT

Other Counsel of Record:
David Alexander
South Carolina Commission on Indigent Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343
Attorney for Petitioner

INDEX

INDEX 1

QUESTIONS PRESENTED...2

STATEMENT OF THE CASE..3

ARGUMENT

The Court of Appeals properly reversed the plea judge's sentence of home detention and remanded for resentencing because the plea judge erred in interpreting the Home Detention Act, sections 24-13-1510 to -1590, to allow home detention for a violent offense when the plain language of the statute states it only applies to nonviolent offenders 8

CONCLUSION 13

QUESTION PRESENTED

Did the Court of Appeals properly reverse the plea judge's sentence of home detention and remand for resentencing when the plea judge erred in interpreting the Home Detention Act, sections 24-13-1510 to -1590, to allow home detention for a violent offense when the plain language of the statute states it only applies to nonviolent offenders?

STATEMENT OF THE CASE

Procedural History

A York County Grand Jury indicted Petitioner for trafficking in marijuana, ten to one hundred pounds, first offense, pursuant to section 44-53-370(e)(1)(a)(1) of the South Carolina Code. On August 28, 2014, Petitioner pled guilty before the Honorable Brian Gibbons. Todd Rutherford, Esquire, represented Petitioner, and Assistant Solicitor Matthew Shelton, Esquire, represented Respondent (the State). Judge Gibbons accepted Petitioner's guilty plea and sentenced him to ten years' imprisonment "provided upon the service of one year of house arrest," the balance is suspended upon two years' probation, the first year of which consists of house arrest with electronic monitoring.

On September 2, 2014, the State filed a Notice of Appeal and subsequently filed a Brief of Appellant. On August 5, 2015, Petitioner filed a Motion to Dismiss Appeal as Moot, which this Court denied. On September 9, 2016, the Court of Appeals heard oral argument, and on November 2, 2016, the Court reversed Petitioner's sentence and remanded the case for resentencing in an unpublished opinion. *State v. Corey Jamal Williams*, Op. No. 2016-UP-484 (S.C. Ct. App. filed Nov. 2, 2016) (App.1–3). Petitioner filed a petition for rehearing, to which the State filed a return requesting the petition be denied but the opinion be published. (App.4–12). The Court of Appeals denied both the petition for rehearing and the request to publish. (App.14). A Petition for Writ of Certiorari to the Court of Appeals was submitted to this Court on January 18, 2017, and this Return follows.

Factual Background

The following facts were recited by the State and agreed to by Petitioner at his plea hearing. On Friday, August 2, 2013, officers from the York County Multi-jurisdictional Drug Unit observed Petitioner driving his vehicle in and out of parking lots in a suspicious manner.

After Petitioner parked, the officers approached and knocked on the window of the vehicle. When he opened the door, the officers smelled a strong odor of marijuana. The officers observed that Petitioner was very nervous and sweating heavily. Based on the smell of marijuana and his nervous behavior, the officers detained Petitioner. They saw a large box in plain view in the cargo area of the vehicle. A K-9 drug dog that was in the vicinity alerted to the presence of drugs inside the box. The officers could also smell marijuana coming from the area. (R. 8, lines 2-25.)

Officers found over ten pounds of marijuana inside the box. Petitioner told officers he planned to make money off the drugs in the box. At the time of arrest, he had over $600 on his person. Officers found pictures of a large box of marijuana on Petitioner's cell phone. Additionally, officers found pictures of other bags of marijuana and pictures of large amounts of cash in a brief case, as well as multiple phones. (R. 9, lines 1-20.)

At the plea proceeding, the court conducted a standard colloquy establishing Petitioner was freely, intelligently, and voluntarily pleading guilty to trafficking in marijuana, ten to one hundred pounds, first offense, pursuant to section 44-53-370(e)(1)(a)(1). (R. 5, line 17-R. 7, lines 13; R.* Indictment.) Petitioner acknowledged the minimum sentence was one year. (R. 6, lines 3-5.) Petitioner agreed with the recitation of facts given by the State, and the plea court accepted his plea. (R. 10, lines 18-23.) Defense counsel then requested Petitioner be sentenced to ten years' imprisonment suspended to one year of house arrest. (R. 12, lines 2-21.) He explained to the plea judge that other counties had used the "Home Incarceration Program" (HIP) in imposing sentences for trafficking.[1] (R. 13, lines 5-19.) The State responded by arguing that

[1] S.C. Code Ann. § 24-13-1530 (2007). While the imposition of home detention under section 24-13-1530 is called HIP in certain local jurisdictions, the statute uses the term "home detention" rather than "home incarceration" or "house arrest."

the HIP statute, section 24-13-1530, specifically applies only to nonviolent and juvenile offenders. (R. 14, lines 5-7.) The State pointed out that trafficking is a violent crime as defined by statute under section 16-1-60. (R. 14, lines 7-9.) The solicitor argued:

> Considering that on [its] face coupled with the fact that [Petitioner] has a prior weapon conviction, a felony weapon conviction, also the fact that most of our recent murders have involved drugs, and there is a known nexus between drugs and violence, this is clearly a – something that is not envisioned by the sentence as far as – by the statute as far as the Solicitor's office is concerned.

(R. 14, lines 9-16.) The plea court ruled:

> I will just say from a practical standpoint this Court along with numerous other Circuit judges-I can't state all their names-has interpreted the Home Detention or the Home Incarceration Program, whatever you want to call it it[']s referred to [as] HIP in other counties to allow the Court leeway to sentence a situation such as this to house arrest.
>
> Now I can't cite the specific reasoning for that. I just know I've done it, I know many other judges who have done it, it's regularly done in Greenville, Pickens or that[] the Thirteenth Circuit has regularly done it. The Fifth Circuit has regularly done it, the Seventh Circuit. It will be unless I am instructed otherwise regularly done in the Sixth Circuit. And so I know you all's policy here in the Sixteenth Circuit is not to do it and that's fine.
>
> But of course I'm the judge, I'm the one who passes the sentence not the solicitor's office but I certainly think it[']s appropriate in this case to enact and order a sentence such as your lawyer has suggested . . . . So while I certainly understand the State's position as to the Court's ability to do this, I'm gonna fashion this sentence this way.

(R. 15, line 18-R. 17, line 1.) The plea judge sentenced Petitioner as follows: "[Y]ou're on probation for two years. So the first year of your probation you're on house arrest with electronic monitoring. The second year of your probation you're just on probation." (R. 17, lines 5-8.) The State then argued:

> It[']s come to my attention that-I'm not familiar with the other circuits, but it's come to my attention that there were specific administrative orders in place in these other circuits that account for these possible sentences under the HIP Program and that the Probation Pardon and Parole Officer[]s there are equipped to deal within their normal course. We do not have such an administrative order in the Sixteenth Circuit. I'm not aware of whether or not our probation office is capable of enforcing this and that is certainly a factor that is outlined in the statute that I cited earlier.
>
> You know part of why we were discussing it earlier you know it's not just a matter of policy, there is no administrative order in place that creates a mechanism for this-for a court sentence to be carried out.

(R. 17, line 20-R. 18, line 9.)

At that point, the State asked the plea judge to reconsider Petitioner's sentence. (R. 18, lines 12-15.) The courtroom representative from the S.C. Department of Probation, Parole and Pardon Services (the Department) told the court she had not dealt with this issue much but her understanding, based on a case years ago in Greenville, was that the Department did not get involved until after the person finished house arrest and began probation. (R. 19, lines 12-20.) Defense counsel explained the parameters of the house arrest and indicated that Ned Polk, a private operator, would monitor the house arrest and report any violation to the Solicitor. (R. 12, lines 21-23; R. 19, line 21-R. 20, line 8.) The plea judge then stated that he had written on the sentencing sheet that any violation during the year of house arrest would be reported to the Department.[2] (R. 20, lines 9-14.) After the State requested the plea judge issue an order

[2] Because the HIP contemplates using home detetention as "an alternative to incarceration" but does not actually place the person on probation, the Department would have no jurisdiction to monitor or enforce the terms of the HIP.

requiring the monitoring company to have certain parameters, the plea judge requested defense counsel prepare one and indicated he would sign it.[3] (R. 21, lines 4-22.)

[3] It appears no order setting the terms and conditions of the private HIP was ever prepared by counsel despite the request.

ARGUMENT

The Court of Appeals properly reversed the plea judge's sentence of home detention and remanded for resentencing because the plea judge erred in interpreting the home detention statute, section 24-13-1530, to allow home detention for a violent offense when the plain language of the statute states it only applies to nonviolent offenders.

On appeal to the Court of Appeals, the State argued the plea court erred in suspending Petitioner's ten-year sentence to one year of house arrest and one year of probation based on section 24-13-1530 of the South Carolina Code. The statute provides: "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." S.C. Code Ann. § 24-13-1530(A) (2007) (emphasis added). Because trafficking is a violent crime, as defined in section 16-1-60, the State argued the plea judge erred in sentencing Petitioner to house arrest for this crime. The Court of Appeals agreed and reversed and remanded the case for resentencing.

Oddly, Petitioner argues the Court of Appeals ignored a concession from the State when it found the State's argument on appeal was preserved. However, a close look at the Court's opinion shows the Court found "[t]he State concedes that its argument **regarding section 44-53-370(c)(1)(a)(1)** was not raised before the plea court and, thus, is not preserved for our review. . . . However, we find the State's objection to the applicability of the home detention statute to Williams' conviction for trafficking in marijuana was sufficiently specific to preserve the issue of sentencing for this court's review." (App.2) (emphasis added). It appears what Petitioner frames as a concession of the entire issue actually only pertained to a small subsection of the argument, which was neither raised to nor ruled upon by the plea court. Notably, although not

preserved, the plea judge's act of suspending all or any part of Petitioner's ten-year sentence was clearly improper. *See State v. Jacobs*, 393 S.C. 584, 713 S.E.2d 621 (2011) (finding that numerous penal statutes include explicit language prohibiting suspension of sentences); *State v. Thomas*, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007) (declining to extend the general power to suspend sentences derived from S.C. Code Ann. § 24-21-410 to offenses where the legislature specifically mandated that no part of a sentence may be suspended); S.C. Code Ann. § 44-53-370(e)(1)(a)(1) (2002 & Supp. 2013) (emphasis added) (providing that anyone convicted of trafficking in marijuana between ten pounds and a hundred pounds must be punished "for a first offense, [to] a term of imprisonment of not less than one year nor more than ten years, <u>no part of which may be suspended nor probation granted</u>, and a fine of ten thousand dollars").

In regard to the Home Detention Act itself, Petitioner argues the language of the statute shows that the Legislature intended to allow judges to decide whether an offender is violent because of the words "as selected by the court," which follow the words "low risk, nonviolent adult and juvenile offenders." Yet, rather than "as selected by the court" indicating the trial judge has the discretion to determine whether the offender is low risk and nonviolent, the State submits a plain reading of the statute shows the "home detention programs" themselves are what are "selected by the court." This is indicated by the further language "if there is a home detention program available." Nothing in the statute gives discretion to a judge to determine whether an offender is violent or nonviolent. Our code of laws already addresses the types of crimes that are classified as violent and nonviolent. *See* S.C. Code Ann. § 16-1-60 to -70 (2003 & Supp. 2014). There is no need for a judge to have to determine whether an offender meets that definition when he or she must simply look at the list of offenses already provided in the statutes

by the Legislature—the same Legislature that chose to limit home detention to nonviolent offenses.

Petitioner also contends section 24-13-1590(1) allows a sentence of home detention for his offense—trafficking in marijuana, ten to one hundred pounds. However, Petitioner misconstrues the referenced portion of the statute as one of inclusion rather than exclusion. That portion of the statute actually refers to additional crimes— beyond those that are violent—that are also excluded. Indeed, there are certain crimes classified as "nonviolent" crimes,[4] such as possession with intent to distribute cocaine third offense,[5] a "Class A" felony,[6] which are excluded by section 24-13-1590(1) in addition to the "violent" crimes excluded by section 24-13-1530(A). It does not mean, as Petitioner claims, that the Act applies to his crime simply because it is not listed in section 24-13-1590(1). Indeed, section 24-13-1590(1) does not list most violent crimes, including murder, criminal sexual conduct with minors, and homicide by child abuse. Under Petitioner's logic, all of these violent crimes should also be eligible for home detention in the judge's discretion. Such a result is absurd.

In addition to the flaws in Petitioner's statutory logic, the facts also do not support his claim. Petitioner's argument that the judge "determined he had the discretion to impose a sentence of home detention" is not supported by the record. (Pet. for Cert. p. 5). Petitioner implies the plea judge based his determination on a careful consideration of whether he was violent by viewing Petitioner, hearing the facts of the crime, and hearing about Petitioner's work, family, and criminal history. (Pet. for Cert. p. 10). On the contrary, the plea judge made no finding on the record regarding whether Petitioner was a "violent" offender. The only reason the

---

[4] S.C. Code Ann. § 16-1-70 (2015).
[5] S.C. Code Ann. § 44-53-370(b)(1) (2002 & Supp. 2015).
[6] S.C. Code Ann. § 16-1-90(A) (2015).

plea judge gave for sentencing Petitioner to house arrest was because he knew other judges had done it in other counties and circuits.[7] Indeed, the plea judge readily admitted he could not "cite the specific reasoning for" his decision other than "other counties [] allow the Court leeway to sentence a situation such as this to house arrest." (R. 15, line 25.) Ultimately, he passed the sentence in the manner he did because "of course I'm the judge." (R. 16, lines 8-11.)

Finally, the State would submit that even if Petitioner's argument that the term "violent **offense**" as used in § 16-1-60 is different from the way "nonviolent **offender**" is used in the HIP statute is found to have any merit, the nature of the crime itself is certainly sufficient to demonstrate to the sentencing judge that Petitioner was NOT a low-risk, nonviolent offender by any stretch of that definition. As the State pointed out at the plea:

> Considering that on [its] face coupled with the fact that [Petitioner] has a prior weapon conviction, a felony weapon conviction, also the fact that most of our recent murders have involved drugs, and there is a known nexus between drugs and violence, this is clearly a – something that is not envisioned by the sentence as far as – by the statute as far as the Solicitor's office is concerned.

(R. 14, lines 10-16.) (emphasis added.) Indeed, the prior weapon conviction involved a machine gun. (R. 10, lines 14-17). Additionally, our appellate courts have recognized the "indisputable nexus between drugs and guns" and drugs and violence. *State v. Banda*, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006); *State v. Williams*, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008).

> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence.

[7] It is worth noting the judge in this case was a visiting judge from the Sixth Circuit.

Id. at 348, 669 S.E.2d at 646-47 (quoting Harmelin v. Michigan, 501 U.S. 957, 1002-03 (1991) (emphasis added)).

For all of these reasons, the plea court abused its discretion in finding home detention was an appropriate sentence for the crime of trafficking pursuant to section 24-13-1530 because Petitioner simply could not be classified as a low-risk, nonviolent offender. Moreover, the plea judge made no findings on the record indicating he made a determination that Petitioner was not violent. Based on Petitioner's record and the known nexus between drugs and violence, he was not nonviolent. Thus, the Court of Appeals properly reversed and remanded for resentencing within the confines of the statute.

CONCLUSION

Under the particular circumstances of this case, the State agrees with Petitioner's request that this Court grant the Petition for Writ of Certiorari; however, the State respectfully requests that this Court affirm as modified the Court of Appeals' opinion remanding for resentencing by publishing its own opinion to provide guidance to the bench and bar on this significant issue. If this Court grants certiorari but declines the request to affirm as modified in a published opinion, the State asks permission under the rules to fully brief the issues.

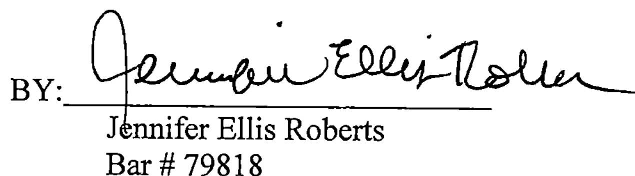
Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit

BY: 

Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 21, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

Opinion No. 2016-UP-448 (S.C. Ct. App. filed Nov. 2, 2016)
Appellate Case No. 2016-002547

State of South Carolina, ... Respondent,

v.

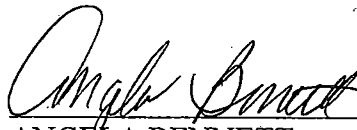
Corey Jamal Williams, ... Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 21st day of February, 2017.



ANGELA BENNETT
Administrative Coordinator

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 21 2017
SC Court of Appeals

February 21, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Corey Jamal Williams
Appellate Case No: 2016-002547

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
S.C. Bar No: 79818

JER/ab
Enclosures

cc: The Honorable Jenny A. Kitchings
David Alexander, Esquire
Ms. Trisha Allen