

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ABDUL FURQUAN,

APPELLANT

APPELLATE CASE NO. 2013-002075

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge violate the Eighth Amendment's bar against cruel and unusual punishments by imposing a sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute where the offense used to enhance the sentence occurred two decades before the instant crime?

STATEMENT OF THE CASE

An Horry County grand jury indicted Appellant for burglary in the first degree (2012-GS-23-2057), attempted murder (2012-GS-26-2058), and unlawful possession of a firearm by a person convicted of a violent offense (2012-GS-26-2059) on May 24, 2012. R. 187-188; R. 190-191; R. 193-194. The state, represented by Joshua Holford, called the case for trial before the Honorable Larry B. Hyman, Jr. and a jury on September 18, 2013. R. 1. Ryan Stampfle represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 177, lines 7-17. Judge Hyman sentenced Appellant to life imprisonment for burglary in the first degree and attempted murder. He also sentenced Appellant to five years' imprisonment for the firearm. R. 183, line 9 – R. 184, line 7; R. 189; R. 192; R. 195.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge violate the Eighth Amendment's bar against cruel and unusual punishments by imposing a sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute where the offense used to enhance the sentence occurred two decades before the instant crime.

Relevant facts

On October 16, 2011, Taylor Smith picked up Appellant, Jeremy Fleming, Tyler Topolski, and Samantha Topolski. R. 21, line 19 – R. 22, line 7; R. 32, line 20 – R. 33, line 14; R. 50, lines 7-18. The group drove to the Ivystone Apartments. R. 22, lines 8-10; R. 33, lines 23-25; R. 52, lines 1-3; R. 54, lines 6-8. Some testified the purpose of the trip was for Jeremy to get money that was owed to him while others testified the purpose of the trip was for the purchase of marijuana. R. 22, lines 2-3; R. 32, lines 24-25; R. 33, line 6; R. 34, lines 19-22; R. 44, lines 13-20; R. 52, lines 4-6; R. 56, line 24 – R. 57, line 8; R. 110, lines 19-22; R. 114, lines 23-24. Tyler, Samantha, and Taylor stayed in the car while Appellant and Jeremy went into the apartment complex. R. 22, lines 10-22; R. 34, lines 6-18; R. 35, lines 5-7; R. 42, lines 17-22; R. 52, lines 9-11; R. 54, lines 9-14; R. 58, lines 16-25. Jeremy was wearing gloves with skulls on them. R. 23, lines 3-7; R. 29, lines 10-22; R. 45, lines 14-21; R. 115, lines 11-14.

Eric Collins and David Moran shared an apartment at Ivystone. R. 126, lines 8-11; R. 13, lines 16-20. On the evening of October 16, 2011, Eric was in his room taking a nap. R. 13, line 21 – R. 14, lines 4. Moran heard a knock at his door. R. 127, lines 5-13. Unable to see through his peephole because the lights in the hallway were not functioning, Moran opened his door to determine who had knocked. R. 127, lines 14-23. He saw two men

wearing bandanas standing outside his door. R. 127, lines 23-25; R. 128, lines 19-20; R. 130, lines 14-17; R. 130, lines 22-23. He tried to shut the door, but one of the men got his foot inside the door and prevented the closure. While Moran tried to shut the door, one of the men punched him. R. 128, lines 1-7; R. 129, lines 6-7. Moran stumbled backward. R. 128, line 7. When Moran opened his eyes he saw a man standing over him with a silver revolver. He heard a pop. R. 128, lines 7-11. Moran's next memory was of sitting in the emergency room. R. 129, lines 9-22. Moran had been shot in the head. R. 128, lines 12-13; R. 130, lines 2-7.

Eric heard a "sound [like] a light bulb makes when it pops," only "four times louder." R. 14, lines 4-6. He woke up, grabbed his rifle, and walked toward the living room. R. 14, lines 6-11. Eric saw two males standing in the doorway. R. 14, lines 11-12. He saw one of the men had a gun pointing in the general direction of Moran. R. 14, lines 23-17. When the two males saw Eric, they ran. R. 14, lines 20-22. Eric was unable to identify the men because they wore hoodies and bandanas. R. 14, lines 18-19; R. 15, lines 3-6; R. 17, line 23 – R. 18, line 5; R. 18, lines 18-23. Because Eric arrived after the shot was fired, he could not say the individuals he saw in his home had fired the shot at Moran. R. 20, lines 3-9.

Appellant and Jeremy ran back to the car where Tyler, Samantha, and Taylor sat waiting.¹ R. 23, lines 17-21; R. 24, lines 17-21; R. 36, lines 3-6; R. 36, line 22 – R. 37, line

¹ Jeremy Fleming, who had been convicted of attempted murder and burglary arising out of this incident, testified at Appellant's trial. R. 110, lines 13-16. He claimed that when he and Appellant approached the apartment door, he, Jeremy, ran as soon as the door was opened. R. 110, line 22; R. 111, line 9; R. 115, lines 3-4. Jeremy had a prior conviction for assault and battery of a high and aggravated nature involving his entering a man's home and cutting off a man's fingers. R. 121, line 20 – R. 122, line 19.

2; R. 52, lines 15-16. The group then returned to the home shared² by Appellant and Jeremy where Jeremy threatened to kill anyone who spoke about the events of that evening. R. 24, line 22 – R. 25, line 3; R. 37, line 9 – R. 38, line 2; R. 54, lines 22-24; R. 55, lines 18-21; R. 112, lines 3-13. Jeremy also told Samantha, his girlfriend at the time, that he had “shot a dude in the head.” R. 43, lines 16-19. Several days later, Samantha and Taylor went to the police and gave statements incriminating Appellant and Jeremy in the shooting of Moran. R. 40, lines 4-20; R. 57, lines 19-23; R. 60, lines 15-24.

During the investigation, the police found a revolver at the home shared by Appellant and Jeremy. R. 76, lines 2-18; R. 77, lines 2-9. Additionally, the police found a pair of gloves with a skeleton design on them hidden behind the couch in the residence. R. 74, lines 10-16; R. 85, lines 17-23. Forensic testing on the gloves revealed the presence of gunshot residue. R. 108, lines 3-23

Sentencing

On July 23, 2013, the state served Appellant with notice of its intent to seek a sentence of life without parole if Appellant were convicted of burglary in the first degree and/or attempted murder. According to the state’s notice, Appellant had been convicted of criminal sexual conduct with a minor in the second degree, which would serve as a triggering offense of the recidivist statute. R. 178, line 3 – R. 179, line 7; R. 185.

Prior to the start of trial, Appellant moved to dismiss the state’s notice based on several theories, including separation of powers and the Eighth Amendment’s ban on cruel and unusual punishment in light of the remoteness of the prior offense. R. 3, line 15 – R. 4,

² Jeremy Fleming denied living in the residence. R. 109, line 24 – R. 110, line 2; R. 115, lines 15-17.

line 19. Specifically, Appellant objected to the prior conviction being used because “this matter is twenty years old” and occurred when Appellant was only seventeen-years old. R. 6, lines 20-21. The judge reserved ruling on the motion at that time. R. 6, lines 22-24.

At the conclusion of the presentation of evidence, the judge returned to Appellant’s argument regarding the constitutionality of the recidivist statute as applied in his case. The judge found the prior conviction was not “too remote to be included considering the legislative intent.” Thus, he permitted the state’s notice of intent to seek life imprisonment without the possibility of parole to stand. R. 137, line 6 – R. 138, line 2. Appellant renewed his motion after the state rested its case. R. 143, line 23 – R. 144, line 11. The judge again overruled the motion. R. 144, line 12 – Supp. R. 1, line 1.

During sentencing, Appellant again renewed his motion to prohibit the imposition of a sentence of life imprisonment without the possibility of parole; however, the judge overruled the motion again. R. 182, lines 15-25. The prosecutor provided the judge with a certified copy of a sentence sheet showing Appellant had been convicted on May 12, 1992 of criminal sexual conduct with a minor in the second degree. R. 179, lines 14-24; R. 186. Thereafter, the judge sentenced Appellant to life imprisonment for attempted murder and burglary in the first degree. R. 183, line 25 – R. 184, line 7; R. 189; R. 192; R. 195.

Discussion

The recidivist statute under which Appellant was sentenced requires a sentence of life imprisonment without the possibility of parole if the person has one or more prior convictions for a most serious offense. S.C. Code Ann. § 17-25-45(A)(1)(a). Attempted murder, burglary first degree, and criminal sexual conduct with a minor are “most serious

offenses” pursuant to S.C. Code Ann. § 17-25-45(C)(1). Further, the statutory scheme invests discretionary authority in invoking the recidivist statute solely in the solicitor. S.C. Code Ann. § 17-25-45(G). Finally, the statute defines “a prior or previous conviction” to mean “the defendant has been convicted of a most serious ... offense ... on a separate occasion, prior to the instant adjudication.” S.C. Code Ann. § 17-25-45(F).

In State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004), this Court addressed a defendant’s allegation that permitting remote convictions to serve as triggering offenses violated the federal constitution’s ban against cruel and unusual punishment. Specifically, this Court held that Rogers’ conviction nineteen years before the case in which the state sought to impose a life sentence did not violate the Eighth Amendment. Id. at 188, 603 S.E.2d at 915. In arriving at this conclusion, this Court relied upon State v. Burdette, 335 S.C. 34, 515 S.E.2d (1999) in which the Supreme Court affirmed a defendant’s life without parole sentence. Rogers, 361 S.C. at 188, 603 S.E.2d at 915. Notably, this Court explained the Supreme Court affirmed the sentence where the prior offense occurred seventeen years before the triggering offense. Id. However, the Burdette Court did not address whether the sentence imposed violated the Eighth Amendment based on the remoteness of the prior conviction; rather, the Court addressed whether the defendant received adequate notice of the charges against him and whether the recidivist statute violated the separation of powers doctrine. Burdette, 335 S.C. 37-38, 515 S.E.2d at 527. Thus, the premise of Rogers is flawed, and it is necessary to analyze whether using a remote prior conviction to enhance a sentence violates the Eighth Amendment.

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

inflicted.” U.S. Const. amend. VIII. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. Robinson v. United States, 370 U.S. 660 (1962).

“[W]hat constitutes cruel and unusual punishment, and thus, what violates the Eighth Amendment, is determined by ‘evolving standards of decency that mark the progress of a maturing society.’” State v. Pittman, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007). Likewise, the “‘proportionality’ bedrock of the Eighth Amendment jurisprudence” is equally as important. Id. at 564-565, 647 S.E.2d at 163. “It is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” Atkins v. Virginia, 536 U.S. 304, 311 (2002). “The Eighth Amendment’s prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subjected to excessive sanctions.’” Miller v. Alabama, 132 S.Ct. 2455, 2463 (2012)(quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)). The Miller Court emphasized that “proportionality is central to the Eighth Amendment.” Id. (quoting Graham v. Florida, 560 U.S. 48(2010)).

The United States Supreme Court has held a state may punish a recidivist more severely than it punishes a first offender. Witte v. United States, 515 U.S. 389, 400 (1995). However, in order to pass constitutional muster, “the enhanced punishment imposed for the [present] offense ‘is not to be viewed as ... [an] additional penalty for the earlier crimes,’ but instead as ‘a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.’” Id. (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)); see also Moore v. Missouri, 159 U.S. 673, 677 (1895)(explaining that under a recidivist statute, the punishment for the last offense is “‘rendered more severe in consequence of the situation into which the party had previously brought himself’”).

Legislation aimed at recidivism attempts to encourage offenders to stay out of trouble by punishing those who refuse to be deterred even after a conviction. Commonwealth v. Eyster, 585 A.2d 1027 (Pa. Super. Ct. 1991). A recidivist is a person who continues to commit criminal acts after incarceration for an earlier offense, and recidivist statutes punish those who show they are incorrigible. Shannon Thorne, One Strike and You're Out: Double Counting and Dual Use Undermines the Purpose of California's Three-Strikes Law, 34 U.S.F.L. Rev. 99 (1999).

Using a conviction that is very old does nothing to fulfill the deterrent purpose of recidivist statutes. Here, the conviction used to enhance Appellant's sentence was two decades old and involved criminal conduct completely unlike the conduct for which he was being sentenced. If the legislature sought to deter continued criminal conduct through enactment of the recidivist statute, then the scenario presented in the instant matter could not have come within the realm of contemplation. Appellant was convicted of attempted murder and burglary, but his sentence for those offenses was enhanced by his conviction for criminal sexual conduct with a minor when he was only seventeen-years old. The alleged criminal conduct was quite dissimilar. Further, Appellant had been deterred from engaging in serious criminal activity for over twenty years. His subsequent conviction for attempted murder and burglary twenty years later could not be construed as the actions of a man who was incorrigible. Rather, Appellant had learned from his prior conduct as exemplified by his not engaging in serious criminal activity during that period. South Carolina imposes time restrictions when considering recidivism in other contexts and should do so in the two strikes and three strikes arena as well. See S.C. Code Ann. § 56-1-1020 (defining a habitual offender as one who has accumulated the enumerated convictions during a three-year

period); S.C. Code Ann. § 44-53-470 (imposing time limits for “second or subsequent” offenses for the drug laws); S.C. Code Ann. § 56-5-2930(E)(restricting enhanced sentences for driving under the influence to those convictions occurring within a period of ten years).

CONCLUSION

Appellant respectfully requests this Court vacate his sentences for attempted murder and burglary in the first degree and remand for a new sentencing proceeding on those convictions.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

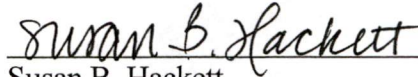
ATTORNEY FOR APPELLANT

This 25th day of April, 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."

April 25, 2016



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STATE OF SOUTH CAROLINA
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Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

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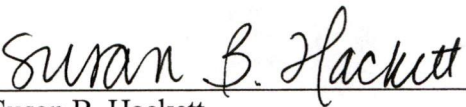
V.

ABDUL FURQUAN,

APPELLANT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of April, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of April, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.