STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Calhoun County
Court of General Sessions
Maité Murphy, Circuit Court Judge

The State of South Carolina,

Respondent,

v.

Bryant McKnight,

Appellant,

Appellate Case No.: 2015-000569.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar No. 5758
*Counsel of Record

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit
P.O. Box 1525
Orangeburg, South Carolina 29116-1525
(843) 871-2640

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Calhoun County
Court of General Sessions
Maité Murphy, Circuit Court Judge

The State of South Carolina,

Respondent,

v.

Bryant McKnight,

Appellant,

Appellate Case No.: 2015-000569.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar No. 5758
*Counsel of Record

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit
P.O. Box 1525
Orangeburg, South Carolina 29116-1525
(843) 871-2640

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Statutes

COURT'S ISSUE PRESENTED ON APPEAL

I. Whether Bryant McKnight's kidnapping sentence must be vacated pursuant to section 16-3-910 of the South Carolina Code (2015) and State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009).

RESPONDENT'S STATEMENT OF THE CASE

A Calhoun County grand jury indicted Appellant, Bryant McKnight, ("Appellant"), on January 5, 2015, charging him with the murder of Kymmarrah Randolph (2014-GS-09-0059); and, kidnapping (2014-GS-09-0060). (R. pp. 837 -840 [indictments]). The Appellant was represented by Martin Banks, Esquire of the South Carolina Bar. The State was represented by Solicitor David Pascoe, Deputy Solicitor Donald Sorenson and Assistant Solicitor Kyle Ward. Appellant stood trial with his brother and co-defendant, Jerry McKnight, Sr., who was represented by Mark A. Leiendecker, Esq.. The trial occurred on March 2-6, 2015, before the Honorable Maite Murphy and a jury. The jury convicted Appellant as charged. (ROA p. 826, lines 1-6).[1] Judge Murphy sentenced Appellant to life imprisonment for murder and thirty (30) years for kidnapping. (ROA p. 835, lines 10-15).

The Appellant made a timely notice of appeal. In the appeal, he is represented by David Miller, Esquire. On March 28, 2016, counsel made an Initial Anders Brief of Appellant asserting as the sole arguable ground the following issue:

> I. DID THE COURT ERR IN DENYING THE DIRECTED VERDICT MOTION OF DEFENDANT WHEN THE CASE WAS BASED ALMOST ENTIRELY ON CIRCUMSTANTIAL EVIDENCE AND THE PROSECUTION DID NOT PRESENT DIRECT OR SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE SUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT, BUT RATHER ONLY RAISED A MERE SUSPICION OF DEFENDANT'S GUILT?

Initial Anders Brief of Appellant, p. 4.

---

[1] Jerry McKnight was convicted of murder, possession of a weapon during a violent crime, and kidnapping for his part in the crime. (ROA p. 826, lines 7-15). Judge Murphy sentenced him to life for murder; five years for possession of a weapon during a violent crime and thirty (30) years for kidnapping. (ROA p. 835, lines 10-15). Jerry McKnight also appealed to this Court. His appeal is pending before the Court. (Appellate Case No. 2015-000559).

On December 30, 2016, the South Carolina Court of Appeals entered the following order:

> Counsel has submitted a brief pursuant to Anders v. California , 386 U.S. 738 (1967), and a motion to be relieved as counsel. We deny the motion to be relieved as counsel and direct the parties to brief the following issue and any other issue of arguable merit:
>
> > Whether Bryant McKnight's kidnapping sentence must be vacated pursuant to section 16-3-910 of the South Carolina Code (2015) and State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009).

State v. Bryant McKnight, Appellate Case No.: 2015-000569. Order (S.C.Ct.App. December 30, 2016).

Appellant, through counsel Miller made his Brief of Appellant on March 28, 2017. This briefing follows.

RESPONDENT'S STATEMENT OF FACTS

The victim, Kymmarra Randolph ("Randolph") was kidnapped, shot and killed on the night of February 13, 2015. At the time of her murder, Randolph had been romantically linked with Bryant McKnight ("Bryant"). Bryant lured Randolph to accompany him that evening which eventually led to Randolph being taken to an isolated area where Appellant's brother Jerry McKnight ("Jerry") and Bryant repeatedly shot her in the face and chest.

Trial testimony showed Bryant and Jerry had at some point become suspicious of Randolph as having been involved in a home invasion at their mother's home. The home invasion occurred approximately two weeks prior to the murder. Bryant told friend Stephon Green ("Green") that money and drugs were taken during the robbery. (ROA p. 289, lines 6-22). Jerry and Bryant both indicated they would kill whomever had committed the home invasion. (ROA p. 229, lines 15-25; p. 290, lines 2-5; p. 332, lines 6-19). Bryant reasoned that Randolph, who had been at the home before the robbery and "probably knew where everything was" in the home, had played some role in the home invasion. (ROA p. 229, lines 8-12; p. 290, lines 6-17). Randolph's mother testified that, though she did not believe it to be true, there were rumors in the community that implicated her son, the victim's brother. (ROA p. 103, line 9 – p. 104, line 21).

At the time of her death, Randolph lived with Tameka Williams ("Williams"). Williams testified that the afternoon of February 13, 2015, Randolph told Williams she was waiting for "B" to pick her up. Williams knew was Bryant was who she was referring to by the nickname "B." (ROA p. 111, lines 6-25).

Jamaal Pearce ("Pearce"), a friend to Bryant, testified that he and Bryant, along with another friend, James Keller ("Keller"), went to Williams' home around 4:30 pm, picked up

Randolph then went back to Keller's home. (ROA p. 154, line 10 – p. 156, line 24). Pearce testified they "smoked a blunt together." (ROA p. 157, lines 22-24). The group began to disperse around the time Keller's grandfather returned to the home. (ROA p. 158, line 15 – p. 159, line 3; p. 192, line 8 – p. 193, line 2; p. 202, lines 4-23). Bryant left with Randolph on foot. (ROA p. 159, lines 4-5). Bryant called his cousin Jonathan McKnight ("Jonathan McKnight") at approximately 6:00 pm to come give him a ride, since he did not have a car, which Jonathan McKnight did. (ROA p. 217, line 16 – p. 218, line 22).

Jonathan McKnight testified that after eventually picking up Bryant and Randolph about ten or fifteen minutes after the call, he drove to Bryant's grandmother's house (also Appellant's aunt) where he picked up Appellant. (ROA p. 219, lines 2-21).

At approximately 7:00 pm, Bryant sent a text to Green and indicated he was thinking of killing the girl he was with. (ROA p. 293, lines 5-23).

When in Jonathan McKnight's car, Jerry asked to be taken to a girlfriend's house. He then began giving directions to Jonathan McKnight which led the group down a rural stretch of South Carolina Highway 6 in Calhoun County. Jerry eventually asked Jonathan McKnight to stop so Jerry could urinate. (ROA p. 220, line 21 – p. 222, line 7). Jerry exited the car, but went to the back passenger door and asked Randolph to get out of the car. When Randolph refused, Jerry forcibly removed her, dragged her to the rear of the vehicle, "and opened fire." (ROA p. 222, line 16 – p. 223, line 1). After emptying his gun, Jerry handed the gun to Bryant. Jonathan McKnight testified, "Bryant unloaded and reloaded again and shot a couple of more times." (ROA p. 223, lines 14-17). Jerry then moved the body into the woods off of the highway. (ROA p. 224, lines 5-6). Jerry and Bryant returned to the car and Jonathan McKnight took them back into town to a convenience store. (ROA p. 224, lines 7-25). Bryant got out at the store, and

Jonathan McKnight saw Bryant place Randolph's personal belongings into a trash bag. (ROA p. 225, lines 9-13). Jonathan McKnight then drove Jerry back to Jonathan McKnight's grandmother's home. (ROA p. 225, lines 13-16). Jerry began to visit Jonathan McKnight regularly to ensure his silence. (ROA p. 226, line 22 – p. 227, line 18).

Bryant texted Green again, this time asking for a ride. It was Green that Bryant was meeting at the convenience store at approximately 7:30 pm that evening. Bryant also asked Green to take him to Pearce's home. (ROA p. 295, line 8 – p. 297, line 10).

Pearce testified Bryant called him after 8:00 pm and then showed up at Pearce's house. (ROA p. 160, line 22 – p. 161, line 8). Bryant told Pearce that he "had to smoke that girl." (ROA p. 161, lines 17-23). Pearce understood "smoked" to mean that Bryant had shot her. (ROA p. 162, lines 1-11). Pearce testified he knew Bryant had a gun the night of February 13, 2015, because he had shown the gun to Pearce as they were going to pick up Randolph. (ROA p. 165, line 22 – p. 166, line 9). (See also ROA p. 190, line 6 – p. 191, line 14).

Green testified that Bryant asked him to take Bryant to Derrick Sumter's ("Sumter") house. (ROA p. 298, line 8-18). Bryant had told Green he had "messed up and shot the girl." (ROA p. 298, lines 18-25). Bryant had also asked for help in disposing of the body, but Green refused. (ROA p. 301, line 21 – p. 302, line 4). Green, however, took Bryant to Sumter's home where Bryant gave Sumter the trash bag with Randolph's belongings. (ROA p. 300, lines 1-7). Bryant asked Sumter to dispose of these items. (ROA p. 334, line 4 – p. 335, line 2). Bryant put his gun inside the bag before handing it to Sumter. (ROA p. 335, lines 10-15). Sumter complied by dumping the revolver into the Congaree River then tossing the bag into a wooded area off of South Carolina Highway 48. (ROA p. 336, line 17 – p. 339, line 4). After having completed this task for Bryant, Bryant then asked Sumter to pick up Jerry and drive him back to the scene of the

murder. Sumter did as Bryant asked. He and Jerry recovered Randolph's body, and drove to a swampy area called "Four Holes" where Jerry left Randolph's body. (ROA p. 339, line 19 – p. 345, line 18).

The pathologist who conducted the autopsy testified that Randolph had been shot twelve times – six times in the head and six times in the chest. Randolph suffered damage to several major organs including her brain. (ROA p. 457, lines 19-23). Death would not have been immediate but Randolph would only have lived at the most several minutes before dying from the wounds. (ROA p. 462, line 5 – p. 465, line 3).

ARGUMENT

I. Appellant's conclusion that the sentence on the kidnapping conviction on 2014-GS-09-0060 should be vacated is not preserved for appeal as that issue was never raised before the trial judge. Even so, while it appears that the sentence should not have been imposed in light of the murder conviction and sentence, the kidnapping conviction still stands pursuant to S.C. Code § 16-3-910.

In his conclusion to the Brief of Appellant, McKnight asserts that in the interest of judicial economy the sentence for Appellant's kidnapping conviction should be vacated. As set forth below, only the additional sentence on Indictment 2014-GS-09-0060 is at issue.

HOW THE ISSUE WAS NOT RAISED BELOW.

The Appellant was sentenced to life imprisonment for murder and thirty years for kidnapping of Kymmarrah Randolph. ROA 835. No objection was made to the sentences by trial counsel Banks. ROA 835.

Respondent will address the issue as one of whether the sentence should be vacated. Respondent would note that even if the sentence is vacated, in any proceeding, pursuant to S.C. Code Ann. § 16-3-910, the conviction itself still stands. State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983).

THIS SENTENCING ISSUE IS NOT PRESERVED FOR APPEAL DUE TO BY THE FAILURE OF A TIMELY OBJECTION.

It is well settled that "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003). Thus, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 450, 462, 510 S.E.2d 423 (1999); State v.

Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 282 - 283 (Ct. App. 2005).[2] There was no challenge to the sentence at all; therefore, the instant issue is not preserved for review, and should not be addressed in this direct appeal. Id. Even so, Respondent notes that the issue will, most likely, be addressed in another forum.

S.C. Code Ann. § 16-3-910 provides:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code Ann. § 16-3-910(emphasis added).

"Generally, when a defendant is convicted for murder, any sentence for the kidnapping of the victim would be vacated." State v. Vazsquez, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005) abrogated by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006), citing Owens v. State, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998)(holding that a sentence for kidnapping should be vacated when the defendant received concurrent sentence under the murder statute). It is error to sentence a defendant for kidnapping of the victim when he is also convicted of the murder of the victim. Id. If imposed, however, the sentence is considered "ineffective." State v. Council, 335 S.C. 1, 6 n. 2, 515 S.E.2d 508, 510 n.2 (1999).Cf. State v. Elders, 386 S.C. 474, 483 n. 6, 688 S.E.2d 857, 862 n. 6 (Ct. App. 2010) Thus, while appellant suffers no harm from the instant

---

[2] The Supreme Court of South Carolina, while specifically noting that the relief granted was "not intended to disrupt our settled rules on issue preservation," nonetheless granted relief by way of remand for resentencing where it appeared that the appellant would be held in custody "beyond the legal sentence due to the additional time" for a proper PCR action to resolve the issue. Johnston, 333 S.C. at 464 n. 3, 510 S.E.2d at 425, n. 3. Such a situation is not present in the instant case where appellant was sentenced to life imprisonment for murder and and thirty (30) years imprisonment for armed robbery, in addition to a life sentence for kidnapping. See State v. Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 282 - 283 (Ct.App. 2005)(Johnston not applicable where no "threat of continuing incarceration beyond the legal sentence").

sentencing error, it is error, and likely will be addressed in a separate PCR proceeding. Here, however, the issue is procedurally barred from review, and may not be addressed. Appellant's argument to the contrary should be rejected.

THIS COURT HAS PREVIOUSLY VACATED SIMILAR KIDNAPPING SENTENCES WHERE THE ISSUE WAS NOT PRESERVED.

This Court addressed a similar unpreserved kidnapping sentencing issue in State v. Vick, 384 S.C. 189, 201-203, 682 S.E.2d 275, 281-282 (Ct. App. 2009). See State v. Bonner, 400 S.C. 561, 565, 567, 735 S.E.2d 525, 527–28 (Ct. App. 2012) (finding, although the issue was not preserved, an exceptional circumstance existed to vacate an erroneous sentence because "the State concede [d] in its brief that the trial court committed error by imposing an improper sentence").

In its pertinent part, the Court stated:

> Vick next contends his thirty-year kidnapping sentence should be vacated inasmuch as he was sentenced for murder and the kidnapping sentence was therefore improper pursuant to S.C. Code Ann. § 16-3-910. We agree.
>
> The State acknowledges it is error to sentence a defendant for the kidnapping of a victim whom he is also convicted of murdering, and that when a defendant is convicted of murder, any sentence for kidnapping of the victim should be vacated. However, the State maintains Vick failed to object to the sentence when imposed, and the law requires a challenge to sentencing must be raised at trial in order to be preserved for appellate review. Accordingly, the State maintains, though the kidnapping sentence was error and likely will be addressed in a separate proceeding, the issue is procedurally barred from review and may not be addressed in a direct appeal before this court.

S.C. Code Ann. § 16-3-910 provides as follows:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code Ann. § 16-3-910 (2003)(emphasis added). Our courts have long held, where an appellant has been sentenced for murder of a victim, this code section precludes a sentence for kidnapping of that victim, and any such sentence should be vacated. Owens, 331 S.C., 584-85; State v. McCall, 304 S.C. 465, 470, 405 S.E.2d 414, 416-17 (Ct.App.1991), overruled on other grounds by Brightman v. State, 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999); State v. Livingston, 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984); State v. Perry, 278 S.C. 490, 495, 299 S.E.2d 324, 327 (1983); State v. Copeland, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982).

The State correctly notes that our courts have held a challenge to sentencing must be raised at trial to be preserved for appellate review. See State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (noting our supreme court "has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review"). However, the State concedes that it is error to sentence a defendant for the kidnapping of a victim whom he is also convicted of murdering, and any such sentence for kidnapping should be vacated. The State further recognizes that the issue, if determined to be unreviewable on direct appeal, will in all likelihood be addressed in a post-conviction relief proceeding. In Johnston, the court noted that case presented an exceptional circumstance wherein the State conceded that the trial court committed error by imposing an excessive sentence. The State nevertheless maintained that appellant's appropriate remedy was through the Post Conviction Relief Act. The Johnston court recognized that if it unyieldingly enforced PCR as the only avenue of relief, there was a real threat that appellant would remain incarcerated beyond the legal sentence due to the additional time it would take to pursue such a remedy. Accordingly, the court determined that exceptional circumstances warranted a remand for resentencing. Id. at 463-64, 510 S.E.2d at 425.

While the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston, our courts have, in the past, "summarily vacated" sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute. See Owens, 331 S.C. at 585, 503 S.E.2d at 463; McCall, 304 S.C. at 470, 405 S.E.2d at 417 (noting the appellate courts have "summarily vacated" sentences for kidnapping when the defendant received a concurrent sentence under the murder statute). Additionally, our courts have at times considered an issue in the interest of judicial economy. See S. Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (holding, where a party argued that the trial court erred in rendering judgment on a constitutional issue inasmuch as such an analysis was "purely advisory," because the issue would be raised to the court at some future time and since both parties had fully briefed the issue, it was proper for the appellate court to decide the matter in the interest of judicial economy); Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n. 6, 633

S.E.2d 143, 147 n. 6 (2006) (holding, regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy).

Vick, 384 S.C., 201-203.

Therefore, applying this Court's precedent in State v. Vick, and State v. Bonner vacation of the sentence for kidnapping on the particular indictment would be appropriate in this limited exception to the preservation rules for kidnapping sentences. State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (S.C. App. 2009); State v. Livington. 282 S.C. 1, 317 S.E.2d 129 (1984).

CONCLUSION

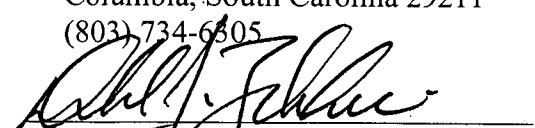
For all the foregoing reasons, Respondent asserts that the judgment of convictions must be upheld and affirmed.

Respondent further assert that the challenge to kidnapping indictment 2014-GS-09-0060 is not preserved for this court's appellate consideration because there was no objection to the sentence. **However, Respondent must recognize that under the precedent of Vick and Bonner a vacation of that particular concurrent thirty year sentence on that indictment is appropriate.** However, the remaining sentence of life for murder and the convictions themselves should be undisturbed

Respectfully submitted,

DONALD J. ZELENKA
Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 

DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT
May 16, 2017