STATE OF SOUTH CAROLINA

SOUTH CAROLINA COURT OF APPEALS

CLIFTON LYLES,#294075, APPELLANT,	)STATE OF SOUTH CAROLINA)ADMINISTRATIVE LAW COURT
VS.	)DOCKET NO.16-ALJ-15-0667-AP
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, RESPONDENT.	)MEMORANDUM AND BRIEF IN SUPPORT MOTION AND NOTICE OF APPEAL FROM THE ORDER OF DISMISSAL OF THE HONORABLE S. PHILIP LENSKI

ISSUES ON APPEAL

ISSUE ONE: Whether Appellant's sentence should be modified based on the statutory changes to the "Omnibus Crime and Reduction and Sentencing Reform Act of 2010", Act 154(H-3545); and

ISUUE TWO: WHETHER THE TRIAL JUDGE HAD SUBJECT MATTER JURISDICTION TO SENTENCE APPELLANT TO A TRAFFICKING CRACK COCAINE 3RD OFFENSE BASED ON PRIOR OFFENSES THAT EXCEEDED THE 10 YEAR TIME LIMIT?

RELEVANT FACTS

The Honorable Administrative Law Judge, S. Philip Lenski, has wrongly interpreted Appellant's argument on appeal. He mistakingly states that "Appellant was challenging the offense level of his conviction...He argues that recent statutory law changes indicate that he should not have been convicted of a 3rd offense trafficking charge".See EXHIBIT A, ORDER OF DISMISSAL DATED MAY 12,2017, PAGE 1,LINE 9-11.[1] Appellant argues that because of the recent statutory changes, that his sentence should be modified to in accords with the amendment's stated purpose, which was to release low level drug offenders by doing away with unfair sentencing practices.

FOOTNOTE: 1: EVEN THOUGH THAT ARGUMENT WAS NOT RAISED BEFORE THE ADMINISTRATIVE LAW COURT, IT WILL BE RAISED IN THIS APPEAL AS ISSUE TWO UNDER SUBJECT MATTER JURISDICTION.

ISSUE ONE: WHETHER APPELLANT'S SENTENCE SHOULD BE MODIFIED BASED ON THE STATUTORY CHANGES TO THE "Omnibus Crime and Reduction and Sentencing Reform Act of 2010", Act 154(H-3545)?

RELEVANT FACTS

On April 8,2004, Appellant (Clifton Lyles) was found guilty of trafficking Crack Cocaine, third offense and sentenced to 30 years. On April 21,2016, the General Assembly amended the 2010 Omnibus Crime Reduction and Sentencing Reform Act, by adding Act 154. In act 154, Section 44-53-470, the following language was added:

> IN ADDITION TO THE ABOVE PROVISIONS, A CONVICTION OF TRAFFICKING IN MARIJUANA OR TRAFFICKING IN ANY OTHER CONTROLLED SUBSTANCE IN VIOLATION OF THIS ARTICLE OR OF ANOTHER STATE OR FEDERAL STATUE RELATING TO TRAFFICKING IN CONTROLLED SUBSTANCES MUST BE CONSIDERED A PRIOR OFFENSE FOR PURPOSES OF ANY PROSECUTION PURSUANT TO THIS ARTICLE.

DISCUSSION

Plaintiff contends that the additions that was made to the drug enhancement statue was done as a means to effectuate the main purpose of the Omnibus Crime Bill. That purpose is to save taxpayer funds by shortening sentences for less serious offenses. See 2009-2010 Bill 1154: Omnibus Crime Reduction and Resentencing Reform Act, General Assemby"s intent, Section 44:

> IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT THE PROVISIONS IN PART II OF THIS ACT SHALL PROVIDE COST-EFFECTIVE PRISON RELEASE AND COMMUNITY SUPERVISION MECHANISMS AND COST-EFFECTIVE AND INCENTIVE-BASED STRATEGIES FOR ALTERNATIVES TO INCARCERATION IN ORDER TO REDUCE RECIDIVISION AND IMPROVE PUBLIC SAFETY.

In order to effectuate that purpose, the General Assembly amended the drug statues to shorten non-violent drug offenders sentences.Bolin v. South Carolina Dept. of Corrections,781 S.E.2D 914(CT.App.2015)(Hence, one of the act's objectives is to conserve taxpayer dollars by allowing earlier release dates for inmates

convicted of less serious offenses). Because the Crime Bill accomplished the General Assembly's intended purpose, it further amended the law by adding Act 154(H-3545), effective April 21,-2016.

This added language specifically talks about trafficking offenses and methods to use when sentencing an offender under this statue. It clearly mandates that in order to sentence a person with a second or subsequent offense, that person must have had a prior trafficking offense on his record. In other words, a court can no longer use a possession or distribution offense as a means to enhance a trafficking offense to a second or third offense.

What's more, is that this additional language that was added to Sections 8,9 and 10 of Act 154 is remedial and procedural in-that they: (1) create new remedies for existing rights; and (2) provide the courts with a method for enforcing those rights. State v. Hilton,753 S.E.2D 549(S.C.2013)(A statue is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability).

Because these new additions to the statue are remedial and procedural, they must be given retroactive effect.Howard v.-Allen,368 F.Supp. 310(1973)(While it may be said that statues relating to remedies or procedures may be given a retroactive operation, a statement of the rule perhaps more accurate is that statues merely affecting the remedy or law of procedure apply to actions begun after their passage, whether the right of accrued before or after the change in the law, at least in the absence of a constitutional or statutory provision to the contrary).

But also, because this additional language that was added to Sections 8,9 and 10 did not change or take away any of the existing language or rights that was there prior to Act 154's passing, then they were neither amended nor repealed. And because the statutes were neither repealed or amended, then the "Savings Clause" that was put in the Act in Section 12 does not apply. State v. Bryant, 675 S.E.2D 816(ct.app.2009)(Statutory amendment providing for admission of video taped interviews of child sexual abuse victims was an addition to the existing statutory scheme, and therefore savings clause accompanying the enactment of amendment did not prohibit the application of amendment to defendant's pending sex offense prosecution; amendment did not repeal or amend existing law). Becaus those additions were Penal in stature, then they must be construed strictly against the state. Hair v. State, 406 S.E.2D 332(S.C.1991)(When statue is penal in nature, it is construed strictly against state and in favor of defendant) Therefore, the provision in Act 154 must be applied to all trafficking offenses.

APPLICATION TO APPELLANT

On April 8,2004, Appellant was found guilty of trafficking Crack Cocaine 3rd offense, Ten or more, but less than twenty-eight grams. At the time of the conviction, Appellant did not have a prior trafficking Crack cocaine first or second on his record. His record ony consisted of three possession of cocaine offenses that occurred in 1992, and one intent to distribute cocaine in 1991. All four of those offense were consolidated to one offense as part of a plea deal taken in 1992.

Also, Appellant had a 2002 marijuana conviction on his record. Under Act 154, §44-53-470's added language, none of Appellant's prior offenses qualify as a means to enhance a "trafficking offense" as they are not "trafficking offenses" themselves. This then, means that under Act 154's retroacted effect, Appellant's sentence must be modified to reflect a first offense trafficking ten or more, but less than twenty-eight grams. Under a first offense, Appellant could only be sentenced to 3 to 10 years, non-violent.See §44-53-375(C)(1)(A).

SUBJECT MATTER JURISDICTION TO EFFECT SENTENCE

Appellant contends that because the General Assembly did not specifically mention any mandate that to benefit from Act 154, that an inmate had to petition the court or a judge, then it must be inferred that the authority was given to the Department of Corrections to screen out the individuals whom are eligible to reap the benefits of the Act and modify there sentences.

CONCLUSION

Appellant's sentence should be modified to reflect 3 to 10 year non-violent sentence and he should be given his immediate release.

ISSUE TWO: WHETHER THE TRIAL JUDGE HAD SUBJECT MATTER JURISDICTION TO SENTENCE APPELLANT TO A TRAFFICKING CRACK COCAINE 3RD OFFENSE BASED ON PRIOR OFFENSES THAT EXCEEDED THE 10 YEAR TIME LIMITATION?

RELEVANT FACTS

On April 8,2004, Appellant was tried and found guilty of trafficking crack cocaine 3rd offense, 10 or more, but less than 28 grams. He was sentenced to 30 years. The Solicitor presented the judge with Appellant's prior criminal record which

consisted of one 1991, felony possession of cocaine; one 1992, possession with intent to sell or distribute cocaine; one 1992, felony possession of cocaine; and one 1992, possession with intent to sell or distribute cocaine, all of which occurred in North Carolina. All of those offenses were consolidated into one offense as part of a plea deal, in-which Appellant received an 8 year sentence. He was paroled in 1993 on those charges. His parole was revoked in 1994. he was paroled again later in 1994. As far as South Carolina, Appellant had two conviction for possession of marijuana, which was used for a third offense. See EXHIBIT B, TRIAL TRANSCRIPT, PAGE 412, LINE 21-PAGE 413 LINE 12.

DISCUSSION

Petitioner contends that the trial judge was without "Subject Matter Jurisdiction" to sentence to a trafficking crack cocaine 3rd offense, 10 or more, but less than 28 grams, with prior offenses that were all over 10 years old.

Under S.C. Code §44-53-470, any prior convictions used to enhance a first to a second or subsequent offense, must not exceed a ten year time limit.§44-53-470(A)(3), states in pertinent part "...for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has been convicted within previous ten years of a first violation of a controlled substance offense provision...".

Appellant's prior convictions took place in 1992 and he was released from confinement in 1993, thereby disqualifying them from being used to enhance the 2004 trafficking convictions.§44-53-470(B): If a person is sentenced to confinement as the result

of a conviction pursuant to this article, the time period specified in this section begins on the date of the conviction or on the date the person is released from confinement imposed for the conviction, which-ever is later.

In 20004, §44-53-470 did not specify what it meant by release from confinement, which is why in Act 154, the General Assembly at that time identified it to mean when a person has completed "...parole...". So, because the 2004 version of the statue did not contain that language, then it must be construed that Appellant's 1993 release was the the tolling date for the enhancement statue.Hair v. State,406 S.E.2D 332(S.C.1991)(When statue is penal in nature, it is construed strictly against state and in favor of defendant).

What's more, is that the marijuana offense could not be used either because at the time Appellant caught the trafficking charge, 2002, §44-53-375 and 44-53-470 were in conflict over whether or not marijuana was a narcotic drug that could be used to enhance a cocaine charge.Rainey v. State,414 S.E.2D at 132(S.-C.1992). So, because §44-53-470 was not amended until 2003, State v. Dupree,583 S.E.2D 437(CT.App.2003), then it was barred by the 14th amendment's ex post facto clause from being applied to Appellant's case because it was not proper law at the time Appellant caught the trafficking charge.

So, for the above mentioned reasons, the trial court was with-out **subject matter jurisdiction** to convict or sentence Appellant as a 3rd offender. The court only had proper evidence and jurisdiction to sentence Appellant as a **first** offender, which only allow for a 3 to 10 non-violent sentence to be levied.

So, because Appellant has already served almost 13 years, which is twice the amount that he should have properly served, then his sentence in complete.

CONCLUSION

Appellant should be given his **immediate release**.

THIS 23th DAY OF MAY, 2017

BY: Clifton Lyles 294075.
PRO SE
4848 GOLDMINE HIGHWAY
KERSHAW,S.C. 29067

CERTIFICATE OF SERVICE

I, Clifton Lyles(Appellant), do hereby this motion, certify that I did on this day, serve the "MEMORANDUM AND BRIEF IN SUPPORT OF MOTION AND NOTICE OF APPEAL FROM THE ORDER OF DISMISSAL OF THE HONORABLE S. PHILIP LENSKI" on the Respondent, by depositing the same in the U.S. Mail, addressed as follows:

OFFICE OF GENERAL COUNSEL
P.O. BOX 21787/4444 BROAD RIVER ROAD
COLUMBIA, SOUTH CAROLINA 29221-1787

ON THIS 23th DAY OF MAY, 2017.

BY: Clifton Lyles 294075.
PRO SE
4848 GOLDMINE HIGHWAY
KERSHAW,S.C. 29067

Exhibit B

JURORS WHEN YOU BEGAN DELIBERATIONS. AT THIS POINT IN TIME IT IS PERMISSIBLE TO DISCUSS THIS MATTER WITH ANYONE YOU CHOOSE TO, OR YOU CAN CHOOSE NOT TO. I WANT TO THANK YOU VERY MUCH FOR THE COURT AND FOR THE PEOPLE OF THE COUNTY OF YORK FOR YOUR SERVICE. THIS COMPLETES YOUR SERVICE FOR THE WEEK.

THANK YOU AGAIN FOR YOUR SERVICE. YOU DID SERVE HONORABLY AND WELL FOR THE COUNTY OF YORK AND FOR THE STATE. YOU CANNOT BE CRITICIZED FOR YOUR SERVICE IN THIS CASE. I ASK THAT EVERYONE REMAIN SEATED FOR THE JURY TO RETIRE.

NORMALLY, I WOULD GIVE YOU THE OPTION OF STAYING TO SEE THE SENTENCING OF THE DEFENDANT, BUT SINCE THE DEFENDANT IS NOT PRESENT, THE SENTENCE WILL BE SEALED AND ONLY OPENED WHEN HE IS PRESENT IN COURT. THERE WILL NOT BE A SENTENCING TAKING PLACE PUBLICLY IN THIS CASE.

AT THIS POINT IN TIME, I THANK YOU AND I ASK EVERYONE TO REMAIN SEATED AS YOU RETIRE.

(WHEREUPON THE JURY EXITED THE COURTROOM)

ANYTHING FURTHER FROM THE STATE?

MS. WEAVER: YES, YOUR HONOR. I'D LIKE TO PUT THE DEFENDANT'S PRIOR RECORD INTO THE RECORD.

THE COURT: ALL RIGHT, MA'AM.

MS. WEAVER: IN 1998, HE PLEAD TO ASSAULT WITH A DEADLY WEAPON. THAT WAS A MISDEMEANOR CHARGE IN NORTH

CAROLINA. IN 1995, HE PLEAD TO TWO COUNTS OF LARCENY IN NORTH CAROLINA. IN 1991, FELONY POSSESSION OF COCAINE. IN 1992, POSSESSION WITH INTENT TO SELL OR DISTRIBUTE COCAINE. ALSO, IN 1992, FELONY POSSESSION OF COCAINE. IN 1992, POSSESSION WITH INTENT TO SELL OR DISTRIBUTE COCAINE. DRIVING WHILE LICENSE PERMANENTLY REVOKED.

YOUR HONOR, I WANT TO NOTE FOR THE COURT HE WAS GIVEN AN EIGHT-YEAR SENTENCE ON SOME OF THOSE CHARGES. HE WAS PAROLED IN 1993. AND AGAIN, HIS PAROLE WAS REVOKED IN '94. HE WAS PAROLED AGAIN LATER IN '94.

AS FAR AS SOUTH CAROLINA, TWO CONVICTIONS FOR POSSESSION OF MARIJUANA, THIRD OFFENSE; DRIVING UNDER SUSPENSION; IMPROPER VEHICLE LICENSE; PUBLIC DISORDERLY CONDUCT; AND USE OF ANOTHER'S DRIVER'S LICENSE OR ALTERED LICENSE. THAT WAS IN 2002.

AND, YOUR HONOR, I WANT TO POINT OUT FOR THE COURT THIS IS A THIRD OFFENSE.

THE COURT: I'LL BE HAPPY TO HEAR FROM THE DEFENSE.

MR. SHADD: YOUR HONOR, THIS IS THE FIRST TIME I'VE HAD TO TRY A CASE WHERE THE DEFENDANT ISN'T HERE. ARE YOU PLANNING ON SENTENCING HIM NOW, AND THEN SEALING IT?

THE COURT: YES SIR. THE SENTENCE WILL BE OPENED WHEN HE LOCATED AND RETURNED TO THE COURT.

MR. SHADD: OKAY.