

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

THE STATE,

APPELLANT,

V.

JAMIE SIMPSON,

RESPONDENT

APPELLATE CASE NO 2016-002210

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S ISSUE PRESENTED

The plea court erred in interpreting section 24-13-1530 of the South Carolina Code to allow a sentence of house arrest or home detention after Respondent was convicted of the violent crime of sexual exploitation of a minor second degree when the plain language of the statute makes clear it only applies to “low risk, nonviolent adult and juvenile offenders.”

RESPONDENT'S COUNTER ISSUE PRESENTED

Did the plea judge properly exercise her discretion and sentencing authority pursuant to section 24-13-1530 of the South Carolina Code and the inherent powers of the judiciary when she sentenced Respondent to home detention where the undisputed evidence demonstrated Respondent was “a low risk, nonviolent adult ... offender” as contemplated by the statute?

STATEMENT

On January 13, 2015, law enforcement arrested Respondent, charging him with sexual exploitation of a minor in the second degree. R. *(memo). After spending two days in jail, Respondent was released on a \$10,000 surety bond with several conditions. Tr. 30, ll. 15-16; R. *(memo). At all times prior to his guilty plea, Respondent complied with all conditions of his bond. R. *(memo).

During its January 2016 term, a Richland County grand jury indicted Respondent for four counts of sexual exploitation of a minor in the second degree. R. *(Indictments). Respondent pled guilty on October 18, 2016, before the Honorable Alison R. Lee. Tr. 1. R. Kyle Senn represented the state, and Alexandra M. Benevento represented Respondent. Tr. 1. Judge Lee sentenced Respondent to four years' imprisonment, which she suspended upon the service of two years in home detention supervised through electronic monitoring to be followed by two years of probation. Tr. 46, l. 2-18. Additionally, Judge Lee explained Respondent's home detention would restrict him to his residence with the exception of work and medical treatment, including continued counseling with his doctor and/or "medical psychiatric or mental health treatment or counseling." Tr. 46, ll. 6-11. Finally, Judge Lee ordered that Respondent not have access to a personal computer. Tr. 46, ll. 11-13.

Judge Lee explained her reasoning for permitting Respondent to serve his sentence on home detention:

[U]nder the circumstances ... continuing to receive the counseling and treatment, as well as the home detention, as well as the protocol for sex offender registry by the probation department, would be sufficient to be - - and the fact that it is a first offense, he has no prior criminal record, that he ought to be given the opportunity to continue with treatment and be successful with his treatment.

Tr. 47, l. 19 – Tr. 48, l. 7. Additionally, Judge Lee explained that permitting Respondent to serve his sentence at home would “minimize the financial impact on the family” because incarceration for a lengthy sentence would cause his military retirement benefits to cease, causing “enormous hardship on his family.” Tr. 48, ll. 8-19. Further, Judge Lee indicated the testimony of Dr. Thomas Martin supported sentencing Respondent to home detention due to Respondent’s ability to be “rehabilitated in the community after a period of home detention and house arrest for the minimum a 2-year period.” Tr. 49, l. 22 – Tr. 50, l. 2.

On October 27, 2016, the state filed and served its notice of appeal. Petitioner filed its brief. Respondent files this brief in response.

ARGUMENT

The plea judge properly exercised her discretion and sentencing authority pursuant to section 24-13-1530 of the South Carolina Code and the inherent powers of the judiciary when she sentenced Respondent to home detention where the undisputed evidence demonstrated Respondent was “a low risk, nonviolent adult ... offender” as contemplated by the statute.

Relevant facts

Respondent was born in Connelly Springs, North Carolina in 1981. R. *(memo). After his parents divorced, Respondent’s mother raised him. Tr. 28, ll. 22-24; R. *(memo). Respondent’s grandparents helped, with Respondent’s grandfather stepping in to fill the paternal role. Tr. 28, ll. 24-25; R. *(memo). Unsurprisingly, Respondent was devastated by the loss of his grandfather in 1988. R. *(memo). Respondent did well in school, and even attended community college for a while before he joined the military, where he flourished. Tr. 29, ll. 2-7; R. *(memo).

Respondent joined the United States Army and actively served for thirteen years. Tr. 28, ll. 19-22; Tr. 29, l. 14; R. *(memo). He “was deployed three times, suffered a gunshot wound, traumatic brain injury, and was awarded several honors, including the Purple Heart.” Tr. 29, ll. 17-22; R. *(memo). While deployed in Iraq, Respondent suffered a gunshot wound in 2006 and a traumatic brain injury in 2007 after several IED blasts. Tr. 29, ll. 17-22; R. *(memo). As a result, he was diagnosed with PTSD and depression stemming from the trauma. Tr. 29, ll. 22-24; R. *(memo). After achieving the rank of Staff Sergeant, Respondent retired honorably from the military in light of the criminal charges against him. Tr. 29, ll. 6-9; R. *(memo). Over the years, Respondent received a bachelor’s degree and earned hours toward a master’s degree. R. *(memo).

In 2010, Respondent married Melinda Simpson. Tr. 31, l. 10; R. *(memo). Respondent and Melinda were raising Melinda’s son from a prior marriage. Tr. 31, ll. 11-14; Tr. 40, ll. 11-15; R.

*(memo). Although Melinda was a school teacher, Respondent was the primary financial support for the family. R. *(memo). At the time of his guilty plea, Respondent worked as a manager at AutoZone to support his family. Tr. 33, ll. 19-20; Tr. 40, l. 10; R. *(memo).

On February 19, 2014, “Special Investigator Lucinda McKellar with the South Carolina Attorney General’s Office conducted an investigation into the use of file sharing programs on the internet being used for possession and distribution of files” containing child pornography. Tr. 12, ll. 10-16. One “user” sent McKellar some files depicting child pornography. Tr. 12, ll. 17-19. Then, on March 13, 2014, McKellar received additional files showing child pornography from the user. Tr. 13, ll. 1-2. McKellar tracked the user to Respondent’s residence. Tr. 13, ll. 6-9. Almost a year later, on January 9, 2015, law enforcement executed a search warrant on Respondent’s house, seizing several computers. Tr. 13, ll. 14-16. Respondent admitting to searching and downloading child pornography using the file sharing program to police. Tr. 13, ll. 16-19. At the guilty plea hearing, Respondent admitted to the facts as conveyed by the state and admitted his guilt. Tr. 16, ll. 19-21. After his arrest in 2015, Respondent sought help. Tr. 30, ll. 17-22. On November 4, 2015, Dr. Thomas Martin of Martin Psychiatric Services conducted a comprehensive psychosexual evaluation of Respondent, which included reviewing the discovery and investigator reports provided by the state and a full interview. Tr. 20, l. 19 – Tr. 21, l. 18R. *(memo). Dr. Martin concluded Respondent was “not a pedophile, a psychopath, or a sexual predator.” Tr. 22, ll. 2-19; Tr. 22, l. 24 – Tr. 23, l. 1; R. *(memo). Additionally, Dr. Martin concluded Respondent showed “no evidence of paraphilia or risk for re-offense.” Tr. 22, ll. 2-9; Tr. 25, ll. 15-18; Tr. 26, l. 4 – Tr. 27, l. 10; R. *(memo). After the evaluation, Respondent attended Dr. Martin’s group therapy sessions twice a month. R. *(memo). According to Dr. Martin, Respondent actively participated in the sessions, showing he was motivated for treatment, and cooperated in Dr. Martin’s medication regimen,

including treatment of Respondent's depression, PTSD, and combat-related issues. Tr. 23, ll. 2-7; Tr. 23, ll. 13-23; Tr. 24, ll. 3-5; Tr. 25, ll. 11-14; R. *(memo). At the time of the guilty plea hearing, Dr. Martin had observed Respondent for thirty hours, including "in a group setting, individual setting," and with his spouse. Tr. 22, ll. 20-24. According to Dr. Martin, Respondent "was genuine in treatment" and was "making great strides in the treatment setting." Tr. 25, ll. 8-10.

Further, on August 30, 2016, Respondent passed a polygraph examination indicating he never engaged in any type of actual inappropriate physical sexual behavior with minors. R. *(memo).

Respondent expressed shame for his conduct and remorse for the pain he caused. Tr. 39, ll. 8-17. He explained he had dishonored his wife with his conduct and wanted to spend as much time as he could "trying to rebuild what [he had] broken." Tr. 40, ll. 6-9. Respondent accepted the anger others felt toward him and acknowledged the broken trust resulting from his conduct. Tr. 40, ll. 16-20.

During the guilty plea proceeding, the state recommended a sentence of "a 4-year active jail sentence." Tr. 15, ll. 3-5; Tr. 35, l. 25 – Tr. 36, l. 3. The state posited that "the house arrest sentence would not be a valid sentence" because the statute provided that the home detention program was "to be used as an alternative for non-violent offenders" and Respondent's criminal charge was "defined as a violent offense in 16-1-60." Tr. 36, ll. 2-3; Tr. 36, l. 22 – Tr. 37, l. 4. Plea counsel responded that "the actual offense itself [was] not violent in nature." Tr. 42, ll. 9-11. Further, plea counsel explained the statute classifying the offense as violent was for the purpose of designating how much time a person would have to serve and not whether the offense was "violent" in nature. Tr. 42, ll. 11-16.

Prior to sentencing, plea counsel argued that serving his sentence on home detention would satisfy the penological concerns of the Legislature and the community. Plea counsel explained Respondent was accepting responsibility for his actions and his punishment. Tr. 32, ll. 13-22; R. *(memo). Dr. Martin informed Judge Lee that Respondent acknowledged responsibility for his offenses, expressed remorse, and showed a desire to improve and change. Tr. 23, ll. 2-13. In fact, Respondent never “minimize[d] what he had done.” Tr. 23, ll. 24-25. Due to the nature of home detention and the consequences Respondent would suffer and had suffered, Respondent’s sentence of home detention would be a “just punishment.” R. *(memo).

Additionally, plea counsel argued home detention would deter future criminal conduct and protect the public from future crimes. R. *(memo). Plea counsel emphasized Respondent’s lack of prior criminal history and the collateral consequences of the offense, including the ending of his military career and the ending of his pursuit of becoming a teacher. Tr. 28, l. 18; Tr. 32, l. 23-9; R. *(memo). Additionally, if Respondent were to be incarcerated for more than sixty days, he would lose his military benefits and retirement pay. Tr. 34, ll. 5-10; Tr. 40, ll. 1-5; R. *(memo). His family would suffer the loss of his income and likely the loss of their home. Tr. 34, ll. 9-10; Tr. 41, ll. 5-9; R. *(memo). On this point, plea counsel also noted Dr. Martin’s conclusion that Respondent was at a low risk for re-offending. R. *(memo). Dr. Martin explained how he arrived at this conclusion. According to Dr. Martin, Respondent had “a lot of positive factors of not reoffending.” Tr. 26, ll. 4-8. Respondent immediately acknowledged responsibility for his conduct, demonstrated a pattern of genuine remorse and empathy, had no history of “errant” behavior, passed a polygraph examination, was not abusing drugs or alcohol, had “good general and social regulation of his own behavior,” and responded favorably to treatment. Tr. 26, l. 6 – Tr. 27, l. 10. These factors led Dr.

Martin to conclude “to a reasonable degree of medical and psychiatric certainty that [Respondent was] a very low risk to sexually reoffend.” Tr. 27, ll. 7-10.

Concerning rehabilitation, plea counsel explained that incarceration “would provide no needed treatment or vocational training” to Respondent. Tr. 34, ll. 21-22; R. *(memo). Rather, Respondent’s “continued access to private counseling and treatment with Dr. Thomas Martin [would] be far more effective to maintain his mental health than the correctional environment of a prison.” Tr. 35, ll. 2-10; R. *(memo). Dr. Martin recommended that Respondent continue his treatment in a group setting with periodic individual and conjoint marital situations and continue with the psychotropic prescription medications. Tr. 27, ll. 11-18. According to Dr. Martin, if Respondent were able to do these things, “his prognosis from there would be favorable.” Tr. 27, ll. 18-19. Respondent expressed a strong desire to continue his treatment with Dr. Martin. Tr. 34, ll. 11-21.

Judge Lee reviewed the home detention statute and explained that such programs “may be used as an alternative to incarceration for low risk non-violent adult and juvenile offenders if selected by the Court if there is a home detention program available in the jurisdiction.” Tr. 44, ll. 14-19. Judge Lee found Respondent was at low risk for re-offending based on Dr. Martin’s testimony and no contrary evidence in the record. Tr. 44, ll. 20-21. Thus, the issue was whether Respondent was a “non-violent adult ... offender.” Tr. 44, ll. 21-23. Judge Lee acknowledged the offense had been classified as violent under section 16-1-60 of the South Carolina Code, and as a result, she had some concern as to whether the home detention program was available to Respondent. Tr. 44, l. 24 – Tr. 45, l. 2. However, Judge Lee expressed her determination that Respondent was a “good candidate for home detention” and that despite the classification of the offense as “violent,” it was not what was typically considered violent. Tr. 45, ll. 3-8. Thereafter,

Judge Lee imposed a sentence on Respondent requiring home detention, followed by probation, and accompanied by a host of conditions, including electronic monitoring, continued treatment with Dr. Martin, and no access to a personal computer. Tr. 46, l. 2 – Tr. 47, l. 18. Judge Lee was particularly persuaded to impose the home detention sentence because of Respondent’s ability to continue with his treatment, his lack of prior criminal record, and to minimize the financial burden on Respondent. Tr. 47, l. 19 – Tr. 48, l. 19; Tr. 49, l. 22 – Tr. 50, l. 2.

Discussion

Standard of review

“In criminal cases, the appellate court sits to review errors of law only.” State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). Therefore, an appellate court will not overturn a sentence “absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.” In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 541 (2010)(citing State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007)). “A trial judge has broad discretion in sentencing within statutory limits.” Id. (citing Brooks v. State, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997)). Due to this broad sentencing authority, “[a] judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant.” Id. (citing State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008)); see also Wasman v. United States, 468 U.S. 559, 563 (1984).

This Court may not interfere with the trial judge’s discretionary sentence. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976)(explaining that an appellate court “has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression, or corrupt motive.”); State

v. Warren, 392 S.C. 235, 237-38, 708 S.E.2d 234, 235 (Ct. App. 2011)(noting that “[t]he authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge.”).

Error Preservation

In its brief, Appellant argued Respondent is not a “low risk” offender due to the underlying facts of the charges against him. BOA at 7. However, Appellant posed no such argument during the guilty plea hearing. Specifically, Appellant argued to the plea judge that house arrest “would not be a valid sentence” because (1) it would be counterintuitive to permit a defendant to serve his sentence in his home when the statute provides that a defendant would not be eligible for parole until service of a minimum sentence; (2) that because the offense required mandatory incarceration, home incarceration was not available, and (3) the legislature intended the home incarceration program to “be used as an alternative for non-violent offenders,” and Respondent’s offense was classified as violent pursuant to statute. Tr. 35, l. 25 – Tr. 36, l. 5. None of Appellant’s arguments before the plea judge concerned whether Respondent was a “low risk offender.” Appellant’s attempt to argue on appeal that Respondent was not a “low risk” offender was *not* made to the trial judge and *cannot* be raised for the first time on appeal. See Wilder Corp. v. White, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

Statutory Construction

Appellant’s principal argument on appeal is the plea judge erred in sentencing Respondent to home detention because Respondent was convicted of a “violent offense.” Most specifically, Appellant argued Respondent’s sentence was improper because the offense for which he was convicted was classified by statute as violent and the statutory provision permitting home detention

to be employed as an alternative to incarceration was limited to “nonviolent adult offenders.” In short, Appellant argued that the Legislature intended the home detention statute to be read in conjunction with statute defining violent offenses. Although the Home Detention Act never referenced the statutory provision classifying certain offenses as violent and the Act’s language referred to the “offender” and not the offense, Appellant persisted in this flawed statutory construction argument.

“The cardinal rule of statutory construction is to ascertain and effectual legislative intent.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. Put another way, “[i]f a statute’s language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning.” Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct. App. 2003). “When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning.” State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). “[I]n construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Id. “Finally, when a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant.” Id.

First, an examination of the Home Detention Act is necessary. The primary statutory provision governing the analysis is the one permitting judges to use home detention programs as an alternative to incarceration. 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. Thus, the text permits a judge to use a home detention program as an alternative to incarceration for “low risk, nonviolent adult ... offenders.” In deciding whether Respondent may be sentenced to home incarceration, the judge was required to determine if Respondent were a non-violent offender. Based on the evidence presented, the judge exercised her discretion and determined Respondent was a non-violent offender and sentenced him to home incarceration.

Respondent admitted his guilt to the offense of second degree sexual exploitation of a minor as prohibited by section 16-15-405(A) of the South Carolina Code. The statute provides that such an offense is a felony and that upon conviction a person “must be imprisoned not less than two years nor more than ten years. No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence.” S.C. Code Ann. 16-15-405(D). Under section 16-1-60 of the South Carolina Code, the legislature provided that the offense of exploitation of a minor in the second degree is a violent crime. S.C. Code Ann. § 16-1-60.

Appellant argues Respondent is not a “nonviolent” offender because he was convicted of a crime statutorily classified as violent. Appellant’s argument fails due to the plain language of the statute, which fails to make reference to the statutory provisions classifying non-violent and violent offenses, refers to the offender as nonviolent with no reference to the criminal offense, and requires the offenders to be “selected by the court” for participation in a home detention program. Quite simply, the plea judge did not abuse her discretion by imposing a sentence of home incarceration on

Respondent, whom the judge found to be a non-violent offender based upon the evidence before her.

In addition to categorizing crimes into felonies and misdemeanors, South Carolina has created a statutory scheme for defining certain offenses as violent crimes and others as non-violent crimes. Cf. S.C. Code Ann. § 16-1-60 (defining violent crimes) and S.C. Code Ann. § 16-1-70 (defining non-violent crimes). In section 16-1-60, the legislature provided a laundry list of offenses it classified as violent. In section 16-1-70, the legislature said simply that any crime not listed in section 16-1-60 was a non-violent crime.

Had the legislature intended to link the definition of “nonviolent offender” in the Home Detention Act to the classification of violent and nonviolent offenses, it would have been a simple matter to do so. As the legislature has done in other statutes, it could have inserted after the phrase “nonviolent” a reference to the statutes classifying offenses. See S.C. Code Ann. § 24-21-480 (permitting placement in the restitution center “for a defendant convicted of a nonviolent offense, as defined in Section 16-1-70”); S.C. Code Ann. § 63-19-2050 (allowing expungement of juvenile records related to “a status offense or a nonviolent crime, as defined in Section 16-1-70”).

On the other side of the coin, had the legislature intended to exclude individuals convicted of statutorily defined violent offenses, the legislature certainly knew how to do so as evidenced by its work in countless other statutory provisions. In fact, the legislature has shown this ability in almost every aspect of the law. Quite naturally, and unsurprisingly, the criminal statutes are replete with examples of the legislature’s ability to make its intent to refer to the statutorily defined violent offenses. See S.C. Code Ann. § 16-1-130(A)(excluding from diversion programs persons with a current charge or prior conviction “for a violent offense as defined in Section 16-1-60” or who “is currently on parole or probation for a violent crime as defined in Section 16-1-60”); S.C. Code

Ann. § 16-3-1045(A)(specifically defining an offense in reference to “a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-3-1080(A)(same); S.C. Code Ann. § 16-3-1083(A)(1)(same); S.C. Code Ann. § 16-3-1085(A)(prohibiting the possession of body arm by “a person who has been convicted of a violent crime, as defined in Section 16-1-60”); S.C. Code Ann. § 16-8-230(4)(a)(defining pattern of criminal gang activity in reference to “a violent offense as defined in Section 16-1-60”); S.C. Code Ann. § 16-11-440(C) & (D)(describing the parameters for the Protection of Persons and Property Act in reference to “a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-15-342(A)(defining a crime in reference to “a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-23-490(A)(authorizing additional punishment for possession of a weapon “during the commission of a violent crime” when the person “is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 16-23-500(A)(excluding individuals “convicted of a violent crime, as defined by Section 16-1-60” from possession of a firearm); S.C. Code Ann. § 16-25-120 (A)(delineating the factors to be considered during a bond hearing for “a person ... who is charged with a violent offense, as defined in Section 16-1-60”); S.C. Code Ann. § 17-15-55(C)&(D)(explaining reconsideration of bonds for a person who committed “a violent crime, as defined in Section 16-1-60”).

Also not surprisingly, the legislature’s promulgation of laws governing criminal procedures is replete with how the legislature refers to the statutory provision defining violent crimes. See S.C. Code Ann. § 17-22-50(A)(2)(e)(excluding from pre-trial intervention programs a person who is charged with “a crime of violence as defined in Section 16-1-60”); S.C. Code Ann. § 17-25-45(D)(allowing a person convicted of certain offenses to be eligible for work release as long as the crime did not involve “an additional violent crime as defined in Section 16-1-60”); S.C. Code Ann.

§ 17-25-140(1)(defining a targeted offender for a community penalties program as a criminal defendant “not previously convicted of a violent crime as defined in § 16-1-60”).

The statutory schemes governing corrections, including incarceration, probation, and parole contain numerous instances of the legislature showing its intent to refer to the statutorily defined violent crimes. See S.C. Code Ann. § 22-5-510 (A)(specifically stating that the term “‘violent offenses’ as used in this section means the offenses contained in Section 16-1-60”); S.C. Code Ann. § 22-5-920(B)(2)(b)(excluding “an offense classified as a violent crime in Section 16-1-60” from the expungement provision for youthful offenders); S.C. Code Ann. § 24-3-20(B)(2)(b)(excluding from work release a prisoner “currently serving a sentence for a violent offense as defined in Section 16-1-60”); S.C. Code Ann. § 24-3-210(D)(excluding “a person convicted of a violent crime as defined in Section 16-1-60” from participating in furlough programs unless certain conditions are met); S.C. Code Ann. § 24-13-125(A)(providing the parameters for work release, including a reference to a “violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 24-13-230(F)(2)(not allowing the earning of educational credits “to any individual convicted of a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 24-13-650 (prohibited the release of an offender “committed to incarceration for a violent offense as defined in Section 16-1-60” under the work release program); S.C. Code Ann. § 24-13-710 (directing the implementation of supervised furlough programs with reference to individuals who “have not committed a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 24-13-1310(1)(c)(using a definitions section of the statutory scheme providing for shock incarceration programs to define an “eligible inmate” as one “who has not been convicted of a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 24-19-10 (d)(i)&(ii)(using a definitions of the statutory scheme for youthful offender program to define “youthful offender” as an offender of a

certain age accused of committing or convicted of committing “an offense that is not a violent crime, as defined in Section 16-1-60); S.C. Code Ann. § 24-21-30 (discussing the granting of parole to “an offender who commits a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 24-21-610 (discussing parole of “a prisoner who if sentenced for a violent crime as defined in § 16-1-60”); S.C. Code Ann. § 24-21-610 (prohibiting the granting of parole “to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60”); S.C. Code Ann. § 24-21-645(D)(requiring review of cases every two years for a determination of parole for “prisoners in confinement for a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 24-21-650(providing the number of signatures required for parole “for persons convicted of a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 24-21-1300(C)(1)(excluding a person sentenced for “a violent crime, as provided for in Section 16-1-60” from participating in “day reporting centers”).

The legislature’s role in licensing the workforce of this state show the legislature can and will make reference to “violent crimes as defined by Section 16-1-60” when that is the intent of the legislature. See S.C. Code Ann. § 40-22-20(18)(using a definitions section of the statutory scheme governing engineers to define a person of “good character” as “one who has not been convicted of a violent crime, as defined in Section 16-1-60”); S.C. Code Ann. § 40-29-200(F)(permitting the denial of a license for manufactured home sales to an applicant who “has been convicted ... of a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 40-30-230(8)(defining misconduct as including a conviction of “a violent crime as defined in Section 16-1-60” for those licensed in massage or bodywork); S.C. Code Ann. § 44-7-264(B)(1)(b)(prohibiting the issuance of a nursing home license to a person who has been convicted of “any violent crime, as defined in Section 16-1-

60”); S.C. Code Ann. § 59-19-117(A)(requiring school districts to establish policies that prohibit the “hiring of individuals convicted of violent crimes as defined in Section 16-1-60”); S.C. Code Ann. § 59-25-280(A)(1)(providing for the revocation of teaching certificates when the person is convicted of “a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 59-63-370(requiring notification to schools when a student is convicted of “a violent offense as defined in Section 16-1-60”).

The Children’s Code contains innumerable references to the statute defining violent crimes. See S.C. Code Ann. § 63-19-810(B)(2)(proscribing the rules for releasing a child taken into custody for “a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 63-19-820(B)(1)(providing a child is eligible for detention in a secure facility if the child “is charged with a violent crime as defined in Section 16-1-60”); S.C. Code Ann. § 63-19-1430(B)(creating a Youth Mentor Program and requiring its availability to all “juveniles who commit nonviolent offenses” and explaining that “nonviolent offenses mean all offenses not listed in Section 16-1-60”); S.C. Code Ann. § 63-19-1440(E)(requiring transfer of juveniles to the Department of Corrections on their seventeenth birthdays “following an adjudication for a violent offense contained in Section 16-1-60”); S.C. Code Ann. § 63-19-1820(A)(2)(providing for parole procedures in juvenile cases for offenders who have “not committed a violent offense, as defined by Section 16-1-60” and for offenders who committed “a violent crime, as defined in Section 16-1-60”); S.C. Code Ann. § 63-19-2020(E)(1)(a)(requiring notification to the school when a child is charged with “a violent crime, as defined in Section 16-1-60”); S.C. Code Ann. § 63-19-2030(E)(1)(requiring provision of incident reports to a school when a child is charged with “ a violent crime, as defined in Section 16-1-60”); S.C. Code Ann. § 63-19-2040(A)(4)(a)(establishing confidentiality of juvenile offender information unless the child has been adjudicated delinquent for “a violent crime, as defined in Section 16-1-60”).

In State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), the Supreme Court, relying upon a statutory provision from 1989 and case law dating back to 1996, held that a trial judge had the general power to suspend sentences and impose probation unless the legislature specifically mandated that no part of a sentence may be suspended and probation imposed. Id. at 468, 642 S.E.2d at 725. Where a statute failed specifically to prohibit suspension of a sentence, then the court had the authority to suspend the sentence even where the statute required a minimum sentence be imposed. Id. In short, the legislature knew how to prohibit the suspension of a sentence as evidenced by its enactment of other statutes doing just that, but chose not to do so in the statute at issue; therefore, the court had the authority to suspend the sentence.

As has been made abundantly clear by examining South Carolina's Code, the legislature knows how to make reference to "violent crimes as defined by Section 16-1-60." See State v. Ramsey, 409 S.C. 206, 211, 762 S.E.2d 15, 17 (2014)(explaining the legislature's "use of the term 'freshly committed' in section 23-13-60 illustrates the legislature knows how to draft a statute extending an officer's authority to freshly committed crimes" which was not done in the statute at issue in the case). Quite simply, the legislature chose not to refer to "violent crimes as defined by Section 16-1-60" in the Home Detention Act because it was not the intent of the legislature to limit the number of individuals permitted to serve their terms of incarceration in home detention to those convicted of statutorily defined non-violent offenses. Because "[t]he legislature could have employed this phrasology when enacting" the Home Detention Act, "but it did not," the Court "must give such omission effect." See Ramsey, 409 S.C. at 211, 762 S.E.2d at 18; see also South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 390 S.C. 418, 427, 702 S.E.2d 246, 251 (2010)(explaining that the legislature's use of a particular phrase in one statute indicated "the legislature knew how to draft the statute to accomplish

this result” had it wanted to do so in another statute). Rather, the legislature’s intent was to leave the determination of whether an offender was violent or non-violent to the judge.

The plain and unambiguous language of the statute shows the legislature left it up to the sentencing judge to determine who is a “nonviolent” offender, placing the court’s focus on the individual, not necessarily the crime for which he was convicted. See S.C. Code Ann. § 24-13-1530. The Home Detention Act authorizes home incarceration for “nonviolent adult ... offenders as selected by the court.” S.C. Code Ann. § 24-13-1530(A). The statute uses “nonviolent” to describe the offender, not the offense. S.C. Code Ann. § 24-13-1530(A). The legislature specifically chose this language, which differs from the language chosen by the legislature when referring to violent offenses as defined in Section 16-1-60 or nonviolent offenses as defined in Section 16-1-70, to evidence its intent to permit the presiding judge to determine whether an individual should serve his sentence in a home incarceration program.

Appellant’s contention that Respondent’s sentence was improper because “[i]t seems highly incongruous the legislature would consider the crime of sexual exploitation of a minor second degree so serious as to mandate the minimum sentence cannot be suspended and require no parole until after someone has served a minimum of two years but allow the individual to be on house arrest to serve that two year sentence” also fails based on the plain reading of the statute. See BOA at 6. According to Appellant, such would be an “absurd” result. BOA at 6. To the contrary, the statutory language permits an individual convicted of sexual exploitation of a minor to serve his sentence in home incarceration. The statute plainly states that it applies “[n]otwithstanding another provision of law which requires mandatory incarceration.” S.C. Code Ann. § 24-13-1530(A). In Mosteller v. County of Lexington, 336 S.C. 360, 364, 520 S.E.2d 620, 622 (1999), the South Carolina Supreme Court held that by using the introductory phrase “notwithstanding any

other provision of law,” the legislature clearly intended that the statute be exclusive of and “trump” other provisions of law. Recently, this Court, in Bolin v. S.C. Dep’t of Corrections, 415 S.C. 276, 282-83, 781 S.E.2d 914, 917 (Ct. App. 2016), tackled the phrase “notwithstanding any other provision of law” in a statute. According to this Court, 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. Id. See also, Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970)(holding the legislature’s use of the phrase “notwithstanding any other provision of law,” the legislative intent was to allow alcohol on certain premises notwithstanding the provisions of a different statute); Mead v. Beaufort County Assessor, 419 S.C. 125, 136, 796 S.E.2d 165, 171 (Ct. App. 2016)(interpreting “notwithstanding any other provision of law” to mean “despite what any other provision of law says”). Therefore, despite the statutory provision providing for the punishment of the offense to be imprisonment of not less than two years, of which no part may be suspended nor may the person be eligible for parole until having served the minimum, the Home Detention Act permits the person to be placed in home incarceration based on the plain language of the Home Detention Act.

Finally, the legislature specifically excluded certain individuals from the Home Detention Act. S.C. Code Ann. § 24-13-1590(1). The legislature made clear the Home Detention Act did not apply “to a person, regardless of age, who violates, or is awaiting trial on charges of violating, the illicit narcotic drugs and controlled substances laws of this state which are classified as Class A, B, or C felonies or which are classified as an exempt offense by Section 16-1-10(D) and provide for a maximum term of imprisonment of twenty years or more.” S.C. Code Ann. § 24-13-1590(1). “The canon of construction ‘*expressio unius est exclusion alterius*’ or ‘*inclusio unius est exclusion alterius*’ holds that ‘to express or include one thing implies the

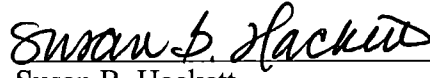
exclusion of another, or of the alternative.” Hodges, 341 S.C. at 86, 533 S.E.2d at 582. “The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.” Id. at 87, 533 S.E.2d at 582 (internal quotation omitted). When the legislature chose to specifically exempt individuals charged with and convicted of certain crimes, the legislature evidenced its intent that the provision include all others not specifically enumerated in its exclusion. Therefore, Respondent, who was not charged with or convicted of an offense specifically enumerated in Section 24-13-1590(1), could be sentenced to serve his term of incarceration on home detention.

The plea judge correctly determined the Home Detention Act applied to Respondent as he was a low risk, nonviolent offender. At the guilty plea hearing, no one disputed that he was a low risk offender and the undisputed evidence from Dr. Martin was that he was at a very low risk of re-offending. When examining whether Respondent was a “nonviolent offender,” Judge Lee considered the uncontroverted evidence of Respondent’s upbringing, his distinguished military career, his pursuit of higher education, and his mental health. After the judge learned that Respondent suffered a gunshot wound and a traumatic brain injury during his military service in Iraq, Respondent’s psychologist, Dr. Martin, informed the judge of Respondent’s mental illnesses – PTSD and depression – resulting from his combat-related experiences and injuries. Judge Lee learned of Respondent’s stable marriage, his efforts to support his family financially, and his clean criminal record, including his time while out on bond. Judge Lee considered Respondent’s acceptance of responsibility, which occurred immediately, and his initiative to seek help. The undisputed evidence showed Respondent was motivated in his therapy and was progressing. Dr. Martin assured the court that Respondent was not a pedophile, psychopath, or a sexual predator. In fact, he showed no evidence of paraphilia at all. Judge Lee considered the

nature of the offense and expressed her desire for Respondent to continue to receive treatment, which he could only do if he were not incarcerated. In conjunction, Judge Lee considered whether a sentence of home detention would serve the penological goals of the criminal justice system and society, including punishment, retribution, and deterrence. Judge Lee exercised her discretion to sentence Respondent to a just and proper sentence – home incarceration.

CONCLUSION

Respondent respectfully requests this Court affirm the decision of the sentencing judge.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 30th day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

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AUG 31 2017

SC Court of Appeals

THE STATE,

APPELLANT,


V.

JAMIE SIMPSON,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Respondent and Designation of Matter have been served on Jamie Lee Simpson at 448 Fountain Lake, Columbia, SC 29209, this 30th day of August, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT

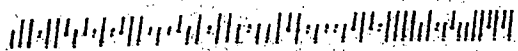
SUBSCRIBED AND SWORN TO before me
this 30th day of August, 2017.



(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.



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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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