STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Kristi Lea Harrington, Circuit Court Judge

The State, Respondent,

v.

J'Quan Scott, Appellant.

Appellate Case No. 2016-000559

BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the circuit court err by sentencing Scott to thirty years' imprisonment for kidnapping in light of 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 COUNTER STATEMENT OF ISSUE ON APPEAL

Whether appellant's sentencing issue should be addressed when the issue is patently unpreserved; there is no exceptional circumstance to warrant addressing the issue to prevent imminent and actual prejudice in light of appellant's life sentence for murder; and, the State of South Carolina provides a method for post-conviction relief which is more comprehensive as to entire matter?

RESPONDENT'S STATEMENT OF THE CASE

J'Quan Scott ("appellant") pled guilty in Charleston County on May 27, 2015, on the charges of murder (2013-GS-100-7416), armed robbery (2013-GS-100-7418), kidnapping (2013-GS-100-7419), and possession of a firearm during the commission of a violent crime (2013-GS-100-7421). (R. pp. 116-123). James Brown, Esq. was plea counsel for appellant. Solicitor Scarlet Wilson was the prosecutor.

On May 27, 2015, the Honorable Kristi L. Harrington heard and accepted appellant's guilty plea to all charges as indicted. Sentencing was deferred until completion of a pre-sentencing investigation. (R. p. 29).

Sentencing occurred on August 26, 2015. Judge Harrington sentenced appellant to life imprisonment for murder, thirty (30) years for armed robbery, thirty (30) years for kidnapping, and five (5) years for possession of a weapons during the commission of a violent crime. (R. p. 97).

On September 4, 2015, plea counsel filed a motion to reconsider the sentences. (R. pp. 110-112). On October 19, 2015, the court denied the motion through written order. (R. p. 113). Appellant sought a timely direct appeal.

Appellate counsel filed a Final *Anders*[1] Brief of Appellant on February 16, 2017, and raised the following issue:

> Whether there was sufficient evidence to support the judge's order denying appellant's motion to reconsider the sentence?

(Final *Anders* Brief, p. 1).

On December 15, 2017, the court issued an order directing the parties to brief the following issue:

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[1] *Anders v. California*, 386 U.S. 738 (1967).

> Did the circuit court err by sentencing Scott to thirty years' imprisonment for kidnapping in light of 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)?

Appellant filed his Brief of Appellant on January 12, 2018, addressing the issue reference in the December order. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

Sometime before the murder, Alex Apps ("victim") decided to sell his truck on Craigslist as the vehicle was becoming cumbersome to operate in downtown Charleston, where victim was a college student. (R. p. 34, l. 24 – p. 35, l. 2). Victim met with appellant once to discuss the sale of the vehicle, and agreed to meet again on October 3, 2013. (R. p. 35, ll. 4-6).

On October 3, 2013, at 7:00 AM, victim and his mother, who drove from Beaufort carrying the title to the vehicle, met with appellant and Isaac Williams ("Co-Defendant") at Hardee's on Spring Street. (R. p. 35, ll. 7-15). Victim, appellant, and co-defendant got in the truck to take a short "test drive," while victim's mother stayed at Hardee's with the title to the truck as a security measure. (R. p. 35, ll. 13-18). Rather than victim returning, victim's mother received text messages indicating the sale fell through and suggesting she return to Beaufort, which she did. (R. p. 35, l. 18- p. 36, l. 5). The texts conveyed a promised that the victim would contact her later. (R. p. 36, ll. 1-5). However, that would not occur. During the short drive, appellant had shot and killed victim in the truck. (R. p. 40, ll. 3-4). Appellant then discarded victim's body just over the Arthur Ravenel Bridge in Mt. Pleasant. (R. p. 38, ll. 7-9).

In the days following the murder, appellant used victim's credit card to go shopping and also showed off the truck to friends while partying in Beaufort. (R. p. 36, l. 18 – p. 37, l. 6). Eventually, after four days of investigation by victim's mother, Beaufort County police, and Charleston County police, appellant led detectives to victim's body. (R. p. 36, l. 23 – p. 38, l. 10). Further investigation indicated that this crime was premeditated and that appellant and co-defendant intended the purchase of the truck to be a ruse all along. (R. p. 38, ll. 15-22).

ARGUMENT

The issue of whether the trial judge erred in sentencing appellant for kidnapping when he was sentenced for murder of the same victim is not preserved for appeal. Further, because appellant is also currently serving a life sentence for murder, there are no exceptional circumstances to justify reaching the issue when to do so would contravene and damage our settled rules of issue preservation and the orderly review afforded in post-conviction relief.

Standard of Review:

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003).

"[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. 459, 462, 510 S.E.2d 423, 425 (1999). An exception to the general preservation rule exists to allow swift address of a sentencing issue where "there is the real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue" post-conviction relief. *Id.,* 333 S.C. at 464, 510 S.E.2d at 425.

Discussion:

S.C. Code § 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.***

(emphasis added).

"The statute does not mandate a vacation of the kidnapping conviction" but "merely provides that either the life imprisonment sentence or the death penalty sentence required in a murder conviction shall be sufficient punishment." *State v. Perry,* 278 S.C. 490, 495–96, 299 S.E.2d 324, 327 (1983). If such a sentence is imposed, it is considered "ineffective." *See State v. Council,* 335 S.C. 1, 6, 515 S.E.2d 508, 510 n. 2 (1999). "The [Supreme] Court has summarily vacated life sentences for kidnapping when the defendant received a concurrent sentence under the murder statute." *Owens v. State,* 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (collecting cases).

However, as noted above, the general rule is that "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal." *Dunbar,* 356 S.C. at 142, 7 S.E.2d at 693-94. "Our courts have 'consistently refused to apply the plain error rule.'" *State v. Passmore,* 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (quoting *Jackson v. Speed,* 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997)). In particular, the Supreme Court of South Carolina has "consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *Johnston,* 333 S.C. at 462, 510 S.E.2d at 425. Respondent submits there is discord in application of our preservation rules in this area. Applying the general rule, and the exception from *Johnston*, appellant's issue should be considered procedurally barred.

Here, there was no objection to the sentence below, and no request the court reconsider the kidnapping sentence imposed. Further, appellant was sentenced to life imprisonment for murder. (R. p. 97). Thus, allowing appellant to challenge the kidnapping sentence in post-conviction relief, along with any other collateral challenges that may be brought, causes no irreparable prejudice to appellant, inflicts the least damage to the structure of judicial review, and does not "disrupt out settled rules on issue preservation," which was an expressed concern in *Johnson.*

In *Johnston*, the court decided to expedite the correction of the sentencing error even though it was unpreserved, but only due to "exceptional circumstances," *i.e.,* the real concern the defendant would remain incarcerated beyond the legal maximum sentence if she were to be referred to post-conviction relief where the error in sentencing was conceded in the appeal. *Id.* The *Johnston* exception does not apply in a case such as the instant one where there is no danger of serving time beyond the maximum imposed. Other precedent from this Court follows that logic.

For example, in *State v. Passmore,* 363 S.C. 568, 585–86, 611 S.E.2d 273, 282–83 (Ct. App. 2005), this Court considered applicability of the *Johnston* exception in regard to an unpreserved challenged to an already expired contempt sentence. The panel found:

> We find the exceptional circumstance carefully carved out by the *Johnston* court is not present here. Appellant has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. *Johnston* does not control.

The panel concluded, in the absence of a properly preserved issue or recognized exception: "Appellant will be forced to seek redress through the avenue of post-conviction relief." *Id.* The Court included the parenthetical quote: "In criminal cases, although the failure of an attorney to preserve an issue at trial will preclude appellate review of that issue, it may nonetheless be a ground in a civil action for post-conviction relief as a claim of ineffective assistance of counsel." (quoting Toal, Vafai, and Muckenfuss, *Appellate Practice in South Carolina* at 62 (2d ed. 2002)). *Id.,* 363 S.C. at 586, 611 S.E.2d at 283.

In *State v. Vick*, though, this Court expanded the Supreme Court *Johnston* exception finding the sentence for kidnapping, though unpreserved, would be vacated in light of the concession by the State that the sentence was improper, judicial economy, and that the same issue

would likely be addressed in a later post-conviction relief action. *State v. Vick,* 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). This Court concluded:

> ...because the State concedes the kidnapping sentence was erroneously imposed, and in light of the fact our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand, in the interest of judicial economy we vacate the clearly erroneous kidnapping sentence.

Vick, 384 S.C. at 203, 682 S.E.2d at 282.

In support of judicial economy, the Court of Appeals' panel in *Vick,* cited two cases: *S. Bell Tel. & Tel. Co. v. Hamm,* 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) and *Jeter v. S.C. Dep't of Transp.,* 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006). *Id.* Both of those cases are civil cases, and do not contemplate an option for post-conviction relief. Further, the *Bell Telephone* opinion reflects the court actually found "the trial court properly considered the issue," but would at any rate address and resolve a novel constitutional issue regarding a right of privacy to a publically offered, widely available, service. 306 S.C. at 75, 409 S.E.2d at 778. The *Jeter* case resolved a venue issue in a matter that had two other trials and was likely to be tried a third time, 369 S.C. at 441, 633 S.E.2d at 147 n. 6.

Here, in a criminal appeal context where post-conviction relief is available for issues not preserved for direct appeal review, appellant should not be excused from adherence to the general preservation rules. Should appellate courts routinely cite judicial economy to address un-preserved errors, the exception becomes the rule, which undermines the scope and purpose of the Post-Conviction Relief Act, see S.C. Code §§ 17-27-10 et.seq., and our state supreme court's rejection of the clear error rule. Moreover, such action may tend to inhibit rather than promote judicial economy.

For example, where an appellate court on direct appeal would vacate a kidnapping sentence on the basis of the statutory prohibition, and a subsequent post-conviction relief court should vacate only the murder sentence, the appellate action has created more work for subsequent courts. Resentencing would have to occur on the kidnapping or there would be no active sentence for the kidnapping conviction that was not otherwise disturbed. This was not the concern in *Owens* which was on PCR appeal. See 331 S.C. at 583, 503 S.E.2d at 463. Further, as *Council,* instructs the sentencing is not unconstitutional, or otherwise infirm such that a resentencing is mandated; rather, the sentence imposed is simply ineffective by virtue of the statute expressing the murder sentence is sufficient punishment. 335 S.C. at 6, 515 S.E.2d at 510 n. 2. In channeling this matter to post-conviction relief, there is no specter of longer incarceration than what is due, and no premature setting aside of a sentence which could become effective and proper, after post-conviction relief consideration of the entire matter with action on the murder sentence.

Respondent would agree it is also true that an action in post-conviction relief could result in the murder conviction being affirmed and the kidnapping sentence vacated. If that would be the only possible result, then the most recent trend of vacating the sentence on direct appeal would tend to be supported. *See Vick, supra.*[2] However, that is not the only possible result, and the more

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[2] See also *State v. McKnight,* 2017 WL 4838470, at *1 (S.C. Ct. App. Oct. 18, 2017) (unpublished); *State v. Howard,* 2016 WL 6609708, at *1 (S.C. Ct. App. Nov. 9, 2016) (unpublished); *State v. Singleton* (Frank Terrance III), 2015 Westlaw 2125696 (S.C.App. May 6, 2015) (unpublished); *State v. Miller* (Antonio), 2014 Westlaw 6488693 (S.C. App. Nov. 19, 2014) (unpublished); *State v. Inman,* 2014 WL 2737603, at *1 (S.C. Ct. App. May 21, 2014) (unpublished); *State v. Grant,* 2012 WL 10861335, at *1 (S.C. Ct. App. July 11, 2012) (unpublished). Respondent does not cite these cases for authority, but simply to factually reflect the trend after *State v. Vick.* See Rule 268(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.").

prudent path – and actually more judicially economical path – would be to allow the entire matter to proceed normally into post-conviction relief.

Thus, Respondent respectfully asks this Court to apply the well-established preservation rules and find the instant issue barred from review on direct appeal. If this Court disagrees and addresses the issue on the merits, relief is limited to vacating the kidnapping sentence only. *Perry, supra.*

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed. Alternatively, if the Court should entertain the appeal on the merits, only the sentence for kidnapping should be vacated. *Perry, supra.*

Respectfully submitted,

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