STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County

The Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

Respondent,

v.

WILEY EUGENE SISK,

Appellant.

Appellate Case No. 2017-000098

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. Did the trial judge err in sentencing Appellant to a term of imprisonment for ten years on the offense of criminal conspiracy because the statutory maximum for the offense is five years imprisonment?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Under these particular circumstances, where Appellant failed to preserve the issue for review and his sentence for criminal conspiracy runs concurrent with a forty-five year sentence for murder, is the Court of Appeals the proper venue for Appellant's sentencing issue, or should it be raised in accordance with the Uniform Post-Conviction Procedure Act?

STATEMENT OF THE CASE

Wiley Sisk ("Appellant") was indicted by the Lexington County grand jury on charges of criminal conspiracy (2016-GS-32-2153), possession of a weapon during the commission of a violent crime (2016-GS-32-2154), and murder (2015-GS-32-2943). At trial, Appellant was represented by Aimee J. Zmroczek, Esq. Assistant Solicitors Gill Bell, Esq. and Suzanne Mayes, Esq. prosecuted the case on behalf of the Eleventh Circuit Solicitor's Office. Both charges were tried before the Honorable Eugene C. Griffith, Jr., November 28th through December 2nd, 2016. At the conclusion of the trial the jury found Appellant guilty of all charges. Following the conviction, Judge Griffith deferred sentencing until January 13, 2017. On that date he sentenced Appellant to ten years for conspiracy, five years for possession of the weapon, and forty-five years for murder. Appellant filed a timely Notice of Appeal. Susan Hackett Esq., with the Division of Appellate Defense, submitted Appellant's Initial Brief on February 1, 2018. This Brief of Respondent follows.

STATEMENT OF THE FACTS

On August 3rd, 2015, the victim, David Porter, was contacted by Charles Morehouse (also referred to as "Chuck"). (R. p. 158, l. 14 – p. 159, l. 6; p. 197, l. 22 – p. 198, l. 14). Morehouse was a large scale dealer of meth throughout the Lexington County area. (R. p. 135, l. 4 – p. 136, l. 7; p. 139, l. 20 – p. 140, l. 12). David had recently developed a serious addiction to methamphetamine ("meth"). (R. p. 99, ll. 2-8; p. 150, l. 22 – p. 152, l. 21). Weeks prior to his murder David moved in with his parents who were attempting to help him break his addiction and get clean. (R. p. 102, l. 6 – p. 104, l. 9; p. 152, l. 22 – p. 153, l. 24). Initially their efforts were successful. However, David relapsed in the days prior to his murder. (R. p. 112, l. 6-20; p. 154, l. 14 – p. 155, l. 25).

During the evening of August 3rd, Charles Morehouse contacted David through phone and text message telling him that they needed to meet up. (R. p. 196, l. 12 – p. 198, l. 8; p. 230, l. 17 – p. 231, l. 9; p. 234, l. 18 – p. 235, l. 3). The real purpose of the meeting was to murder David because Morehouse incorrectly believed that David was an informant for law enforcement. (R. p. 290, ll. 6-11; p. 292, l. 24 – p. 293, l. 25; p. 153, l. 17 – p. 154, l. 13; p. 242, ll. 3-7; p. 120, l. 7 – p. 121, l. 9). Prior to his contact with Morehouse, David had been hanging out with some friends celebrating his birthday, but he left between 10:00 and 11:00 p.m. for the meeting. (R. p. 197, l. 22 – p. 198, l. 18; p. 202, l. 18 – p. 203, l. 24). To help him commit the murder, Morehouse recruited the defendant, Wiley Sisk. (R. p. 290, ll. 10-19; p. 294, ll. 1-7; p. 297, l. 25 – p. 299, l. 15). Sisk and Morehouse were close associates, and Morehouse often hired Sisk to act as "muscle" during his drug transactions. (R. p. 285, l. 11 – p. 286, l. 2; p. 330, ll. 5-20).

Charles Morehouse had instructed David to meet him in a rural area of Lexington County, where he and Sisk planned to ambush him. (R. p. 227, l. 21 – p. 228, l. 5; p. 47, l. 15-19;

p. 505, l. 24 – p. 506, l. 3). When David arrived, Sisk snuck up and hit him in the side with a baseball bat, disabling him. (R. p. 506, l. 19 - p. 507, l. 11). It was then that Morehouse and Sisk shot David to death. (R. p. 365, l. 25 – p. 366, l. 17). Morehouse fired the initial three to four shots into the victim, but Sisk delivered the final head shot that killed David. (R. p. 329, ll. 1-21; p. 505, l. 24 – p. 506, l. 3). After committing the murder, the pair returned to their stash house and burned their clothes. (R. p. 321, l. 15 – p. 322, l. 13). Later that night, Sisk confessed to his then girlfriend about the murder; describing the situation simply as "they had to lay one down." (R. p. 326, ll. 6-10).

SUMMARY OF THE ARGUMENT

The State would concede that the Court exceeded the statutory maximum when it imposed a ten year sentence for the criminal conspiracy conviction. Nevertheless, Post-Conviction Relief is the proper venue for presenting Appellant's claim because his claim was not preserved for Appellant review, is cognizable under Post-Conviction Relief, and presents no risk of Appellant serving additional time despite the mistake.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. [The Appellate Court is] bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citations omitted). Issues not raised and ruled on in the trial court will not be considered on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003); *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct.App.2005). Therefore, "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). Nevertheless, an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under "exceptional circumstances." *Id.* at 463, 510 S.E.2d at 425.

ARGUMENT

I. Appellant's Appropriate Remedy Is Through Post-Conviction Relief—Despite The Trial Judge's Error In Sentencing Appellant Beyond The Statutory Maximum, The Error Was Not Preserved For Appellant Review, And Appellant's Case Does Not Present Any Level Of Prejudice That Would Justify This Court In Disregarding The Post-Conviction Procedure Act.

The state concedes that the trial court exceeded its judicial authority in sentencing Appellant to a term of ten years for criminal conspiracy. Section 16-17-410 clearly limits the term of imprisonment for a conviction of criminal conspiracy to five years. *See* S.C. Code Ann. § 16-17-410 ("[a] person who commits the crime of conspiracy is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years.").[1]

Nevertheless, Appellant acknowledges and the record reflects that Trial Counsel failed to preserve Appellant's sentencing issue for appellate review. *See* Appellant's Brief, p. 4; *see also* R. p. 886, l. 8 – p. 887, l. 7. "[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). Appellant's Trial Counsel did not object to the court's issuance during the Appellant's sentencing. (R. p. 886, l. 8 – p. 887, l. 7). Moreover, Trial Counsel failed to submit a subsequent motion for reconsideration.

Because Appellant failed to preserve the sentencing issue for appellate review, Appellant should be required to submit the issue in compliance with the Post-Conviction Procedure Act. Section 17-27-20 of the Post-Conviction Relief Act states that PCR is the exclusive remedy of:

(A) Any person who has been convicted of, or sentenced for, a crime and who claims:

(3) *That the sentence exceeds the maximum authorized by law*[.]

[1] The current conspiracy statute was signed into law under 1993 Act No. 184, § 35.

S.C. Code Ann. § 17-27-20 (A)(3) (emphasis added).

Furthermore, § 17-27-20(B) of the Post-Conviction Procedure Act states that "it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. *It shall be used exclusively in place of them.*" S.C. Code Ann. § 17-27-20(B) (emphasis added).

A narrow exception exists that authorizes the appellate court to consider an unpreserved issue under appropriate circumstances In *State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999), the Supreme Court reversed and remanded the case for resentencing, despite petitioner's failure to preserve the issue, after the Court found "exceptional circumstances" justifying its conclusion. *Johnston,* 333 S.C. at 464, 510 S.C. at 425. There, the State had conceded error in its brief *and* the Court found there existed a "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.* The Court held that the concession and the prejudice, together, justified breaking from the statutory requirements of § 17-27-20. *See Johnston*, 333 S.C. at 463–64, 510 S.E.2d at 425 ("Under these exceptional circumstances, we hold that this case should be remanded for resentencing.").

Appellant's circumstance does not present any level of prejudice required by *Johnston. See Johnston*, 333 S.C. at 464, 510 S.E.2d at 425 ("real threat that Defendant will remain incarcerated beyond the legal sentence . . ."). Appellant has not sought to challenge the legitimacy of his forty-five year murder sentence, which runs concurrent with his ten-year sentence for conspiracy. As such, he faces no threat that he would remain incarcerated, but for the excessive conspiracy sentence. Accordingly, Appellants circumstances do not justify disregarding the requirements of the Uniform Post-Conviction Procedure Act. In fact, doing so undermines *Johnston's* holding and the legislative intent behind implementing the Act. *See* S.C.

Code Ann. § 17-27-20 *supra.*

While Appellant cites to *State v. Vick* for relief, it is clear that the circumstances in *Vick* are distinct from Appellant's circumstances. In *Vick*, the trial court erred in sentencing the appellant to murder and kidnapping. *State v. Vick*, 384 S.C. 189, 201, 682 S.E.2d 275, 281 (Ct. App. 2009). Similarly, the appellant had failed to preserve the issue for appellate review. *Id.* Despite not finding any danger that the appellant would remain incarcerated beyond the legal sentence, this court vacated the appellant's sentence for kidnapping. In doing so, it relied on "judicial economy" and a tradition of "'*summarily vacat[ing]*' sentences for kidnapping where such sentences were precluded by § 16–3–910 because the defendant received a concurrent sentence under the murder statute." *Vick,* 384 S.C. at 202, 682 S.E.2d at 282 (quoting *Owens v. State*, 331 S.C. 582, 503 S.E.2d 462 (1998)) (emphasis added). Unlike *Vick,* Appellant's sentence cannot be summarily vacated. Rather, a new sentence within the statutory sentencing range must be imposed. Therefore, this court will have to remand for sentencing. This presents a substantially different issue than the one faced in *Vick.*

Moreover, Respondent would submit that the holding in *Vick* runs counter to *Johnston.* In *Vick*, this court acknowledged that the case lacked the prejudice found in *Johnston. Vick*, 384 S.C. at 202, 682 S.E.2d at 282 (Ct. App. 2009) ("the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in *Johnston* . . ."). Nevertheless, this court concluded:

> [B]ecause 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.

Id. at 203, 682 S.E.2d at 282.

Respondent respectfully submits that the Court of Appeals misapplied the *Johnston* exception. It is clear that the *Johnston* Court found that the combination of concession by the State and prejudice on the Appellant justified the outcome. The last line of the *Johnston* opinion in conjunction with the Court's limitation found in the accompanying footnote clearly articulates this point. *Johnston*, 333 S.C. at 464, 510 S.E.2d at 425 *supra.* ("Under these exceptional circumstances, we hold that this case should be remanded for resentencing.") ("Our holding today is not intended to disrupt our settled rules on issue preservation and PCR applications. The facts here are unique and demand an expedited result.")

Appellant also cites to this court's holding in *State v. Bonner,* 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012). However, Respondent would posit that the circumstances this court faced in *Bonner* are also distinguishable from the current action. In *State v. Bonner*, this court was faced with a minor who had been sentence to life without parole after his attorney incorrectly asserted at sentencing that his client was nineteen years old. The Court of Appeals had a concession from the State, and apparent prejudice in light of the recent decisions in *Miller v. Alabama* and *Aiken v. Byars. See State v. Bonner*, 400 S.C. 561, 565, 735 S.E.2d 525, 527 (Ct. App. 2012); *see also Miller v. Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 2460, 183 L.Ed.2d 407 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); *Aiken v. Byars*, 410 S.C. 534, 537, 765 S.E.2d 572, 573 (2014) ("We hold their sentences violate the Eighth Amendment under *Miller* and the petitioners and those similarly situated are entitled to resentencing."). Moreover, unlike Appellant's case, granting relief under the circumstances in *Bonner* required a substantially more expanded proceeding:

> *Miller* requires the sentencing authority "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S.Ct. at 2469. Consequently, *Miller* establishes a specific framework, articulating that the factors a sentencing court consider at a hearing must include: (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; (2) the "family and home environment" that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation." 132 S.Ct. at 2468.

Byars, 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller,* 132 S.Ct. at 2468-69).

In consideration of the substantial procedural requirements set forth in *Byars,* this court's decision in *Bonner* to remand for a resentencing procedure—not a simple entry of an order vacating—cannot be compared. The circumstances in Appellant's case do not justify side stepping the Post-Conviction Procedure's Act. The relative simplicity of the matter along with the complete lack of prejudice mandates that Appellant's sentencing issue be allowed to proceed along the intended procedural course.

Respondent submits that the exception to preservation set forth in *State v. Johnston* requires both a concession from the State and prejudice to the appellant to justify surpassing the Post-Conviction Procedure Act. Therefore, because (1) Appellant failed to preserve the sentencing issue for appeal, and (2) is not in danger of serving additional time but for the excessive sentence, this appeal should be dismissed, whereupon Appellant may appropriately file for Post-Conviction Relief.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

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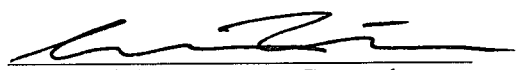

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April 26, 2018

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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Assistant Attorney General

April 26, 2018