

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Lexington County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILEY EUGENE SISK,

APPELLANT

APPELLATE CASE NO 2017-000098

FINAL BRIEF OF APPELLANT

RECEIVED

MAY 14 2018

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

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?

STATEMENT OF THE CASE

On December 7, 2015, a Lexington County grand jury indicted Appellant for murder (2015-GS-32-2943). R. 888-889. On October 3, 2016, the grand jury indicted Appellant for criminal conspiracy (2016-GS-32-2153) and possession of a weapon during the commission of a violent crime (2016-GS-32-2154). R. 891-892; R. 894-895. The state, represented by Gill Bell and Suzanne Mayes, called the case for trial November 28 – December 2, 2016 before the Honorable Eugene C. Griffith, Jr., and a jury. R. 1; R. 2, ll. 7-16. Aimee J. Zmroczek represented Appellant. R. 1; R. 2, ll. 17-19. The jury found Appellant guilty as charged. R. 755, ll. 11-17. Judge Griffith deferred sentencing until January 13, 2017. R. 756, ll. 18-20. On that date, Judge Griffith sentenced Appellant to forty-five years for murder, ten years for criminal conspiracy, and five years for possession of a weapon. R. 886, ll. 8-13; R. 890; R. 893. He ordered all sentences to be served concurrently. R. 886, ll. 13-14; R. 890; R. 893.

On January 18, 2017, Appellant served his notice of appeal. This brief of appellate follows.

ARGUMENT

The trial judge erred 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.

Relevant facts

Appellant was charged with violating the law against criminal conspiracy found at section 16-17-410 of the South Carolina Code. R. 891-892. Specifically, the state alleged that from July 3, 2015 through August 4, 2015, Appellant “unlawfully and willfully, knowingly and feloniously [did] unite, combine, conspire, confederate, agree, and have a tacit understanding with Charles Morehouse, and/or other individuals unknown or undisclosed, for the purpose of accomplishing criminal activity.” R. 891-892. The criminal activity was alleged to relate to “possession and/or distribution of illegal narcotics and/or financial gain or monetary transactions related to the distribution of illegal narcotics and/or financial gain or monetary transactions related to the distribution of illegal narcotics and/or the criminal act of Murder, resulting in the death of James David Porter on August 3rd, 2015.” R. 888-889. The indictment specifically alleged that Appellant’s conduct was “in violation of Section 16-17-410 of the South Carolina Code of Laws (1976), as amended.” R. 891-892.

The jury found Appellant guilty of this offense. R. 755, l. 16. On January 13, 2017, Judge Griffith sentenced Appellant to ten years imprisonment for criminal conspiracy. R. 886 ll. 11-13; R. 893.

Discussion

According to South Carolina statutory law, “[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.” S.C. Code Ann. § 16-17-410. The statute further provides that a person convicted of conspiracy “must not be given a greater fine or sentence than he would receive if he carried out the unlawful act contemplated by the conspiracy and had been convicted of the unlawful act contemplated by the conspiracy or had he been convicted of the unlawful acts by which the conspiracy was to be carried out or effected.” Id.

Appellant readily admits there was no objection to the imposition of the unlawful ten-year sentence on this conviction. However, this Court should address the merits of the issue in the interest of judicial economy. It is certainly not unprecedented for South Carolina’s appellate courts to address obvious sentencing errors even where unpreserved.

In a case similar to the present one, the South Carolina Supreme Court agreed to address an unpreserved sentencing error because the case presented an “exceptional circumstance.” State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999). Johnston was convicted of conspiracy to possession marijuana with the intent to distribute. Id. at 461, 510 S.E.2d at 424. According to the relevant statute, the maximum sentence on the charge was one-half the penalty for the substantive offense, which was a maximum of ten years. Id. “Therefore, the maximum sentence the court could impose for this offense [was] five years.” Id. at 462, 510 S.E.2d at 424. However, the trial judge sentenced Johnston to ten years in prison. Id. Despite trial counsel’s failure to object to the error, the Supreme Court agreed to address the matter. Id. at 463-464, 510 S.E.2d at 425. The Court explained the case presented “the exceptional circumstance in which the state [] conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence.” Id. at 463, 510 S.E.2d at 425. The Court refused to “unyieldingly enforce[] PCR as the only avenue of relief in th[e] case,” explaining to do so would recreate “the real threat”

that Johnston would “remain incarcerated beyond the legal sentence due to the additional time it [would] take to pursue such a remedy.” Id. at 464, 510 S.E.2d at 425.

In State v. Vick, 384 S.C. 189, 203, 682 S.E.2d 275, 282 (Ct. App. 2009), this Court vacated his sentence for kidnapping because he had been sentenced for murder of the same person he was alleged to have kidnapped and South Carolina statutory law forbade sentencing for kidnapping in those circumstances. Concerning the preservation aspect, this Court noted there was no challenge to the sentence at Vick’s trial. Id. at 201, 682 S.E.2d at 281. Nevertheless, this Court addressed the sentencing error where the state conceded the error and recognized “that the issue, if determined unreviewable on direct appeal, will in all likelihood be addressed in a post-conviction relief proceeding.” Id. at 202, 682 S.E.2d at 282. Unlike the defendant in Johnston, supra, there was no threat that Vick would remain incarcerated beyond the legal sentence. Id. Despite this distinction, this Court addressed the sentencing error, by vacating the sentence, in the interest of judicial economy. Id.

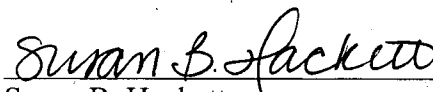
This Court confronted a similar issue in State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012). Bonner was sentenced to life without parole for the offense of burglary in the first degree, which occurred when he was seventeen-years old. Id. at 563, 735 S.E.2d at 526. Bonner’s trial attorney did not object to the imposition of the sentence at trial; therefore, the issue was not preserved for appeal. Nevertheless, this Court addressed the issue in the interest of judicial economy. Id. at 565, 735 S.E.2d at 527. Relying upon Vick, supra, this Court excused the lack of preservation to address the merits of Bonner’s claim. This Court found Bonner’s sentence violated the United States Constitution, vacated the sentence, and remanded the case for re-sentencing. Bonner, 400 S.C. at 567, 735 S.E.2d at 528.

This Court should address the merits of the issue in the interest of judicial economy. Without question, Appellant could raise this issue in an application for post-conviction relief as a claim of ineffective assistance of trial counsel for failing to object to an improper sentence.¹ Based upon the clear statutory language and the abundance of case law on the matter presented, Appellant's ten-year sentence is improper and illegal. Thus, judicial economy weighs heavily in favor of this Court addressing the merits of the claim at this time. Appellant respectfully requests this Court address the merits of the issue, vacate his sentence for conspiracy, and remand for re-sentencing.

¹ If the case were affirmed on procedural basis, trial counsel could not articulate any strategic reason for failing to object at a post-conviction relief proceeding, State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991), and the prejudice is manifest.

CONCLUSION

Appellant respectfully requests this Court vacate his sentence for criminal conspiracy and remand for a new sentencing proceeding.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of May, 2018.

CERTIFICATE OF COUNSEL

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

May 14, 2018

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