STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

APPELLANT,

V.

JOSIE JONES

RESPONDENT.

APPELLATE CASE NO 2016-000273

Appeal from Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2018-UP-264

PETITION FOR REHEARING

On June 13, 2018, this Court reversed and remanded this matter based upon an alleged sentencing error. State v. Jones, 2018-UP-264 (S.C. Ct. App. filed June 13, 2018). Despite the state's failure to preserve the issue for appellate review, this Court reached the merits to determine the judge erred by suspending the imposed sentence and granting probation.[1] Pursuant to Rule 221(a), SCACR, Respondent respectfully requests this Court rehear the matter based upon substantial points overlooked and misapprehended in arriving at the conclusion.

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[1] Respondent agrees with this Court that the state's argument concerning the propriety of a home detention sentence was not preserved for review. Thus, Respondent does not seek rehearing regarding the issue of home detention.

When nineteen-year old Josie Jones entered her guilty plea, the Honorable Eugene C. Griffith, Jr., was well aware that Jones was only eighteen years old at the time of the offense, that Jones had no prior criminal history, that Jones was arrested with her older boyfriend who gave her the drugs for which she was entering a guilty plea, and most importantly, that the state had offered to reduce Jones' charges and recommend a probationary sentence in exchange for a guilty plea just a few months prior but had withdrawn the offer when Jones relieved the public defender as her counsel. During the guilty plea, Judge Griffith recognized that Jones suffered from drug addiction and he endeavored to do what all trial judges do – craft a sentence to punish Jones for her conduct, to deter her and others from future criminal conduct, and to offer Jones a chance at rehabilitation.

Achieving those goals, Judge Griffith sentenced Jones to five years imprisonment. R. 26, ll. 2-3. He suspended that sentence upon the service of eighteen months to be served under the home incarceration program. R. 26, ll. 3-4. Judge Griffith explained that Jones would be required to serve the entire eighteen months in the home incarceration program, unlike a prison sentence, which would permit Jones to serve "about fifty percent." R. 26, ll. 14-17. Judge Griffith also ordered Jones to complete probation for thirty-six months. R. 26, ll. 4-5. In light of Jones' addiction, Judge Griffith ordered Jones to complete substance abuse counseling. R. 26, ll. 8-9. Part of his reason for ordering the home incarceration sentence was so that Jones could receive in-patient substance abuse treatment – something she would not receive if she were committed to the Department of Corrections. R. 26, ll. 9-12.

Judge Griffith best expressed how his sentence was fashioned to show "justice tempered by mercy": "So, I want her to do everything that she can to get this behind her. And I think that allows her that opportunity. If she doesn't take advantage of it probation will let us know and we will deal with it then." R. 26, ll. 19-23.

On April 4, 2015, eighteen-year old Jones was riding in a truck with her older boyfriend and a third person when the police pulled them over. R. 19, ll. 4-10; R. 22, ll. 13-18. "[W]hen the truck got pulled over another individual in the truck gave [Jones] the drugs and told her to hide them. And that is what she did." R. 22, ll. 19-21. During the traffic stop, Jones "admitted freely" that she had a suboxone strip in her purse that she was not supposed to have. R. 19, ll. 12-14. As she was being searched at the jail, the police discovered approximately thirteen grams of methamphetamine in her possession – the drugs Jones attempted to hide for someone else. R. 19, ll. 15-21.

On June 5, 2015, the Greenwood County grand jury indicted Josie Jones for possession of a controlled substance and trafficking in methamphetamine between ten and twenty-eight grams. R. 37-40. While the public defender represented Jones, the solicitor offered for Jones to plead to a "lesser offense," which would have allowed for a sentence of three years suspended to two years of probation. R. 12, ll. 22-25; R. 13, ll. 10-19.[2] Unfortunately, Jones misunderstood that offer, resulting in her not accepting it. More specifically, Jones' father explained that Jones misunderstood the state's original plea offer and thought she was "going to have to do three years." R. 12, ll. 22-25; see also R. 6, ll. 22-24.

During this time, Jones' boyfriend advised her to move to relieve her public defender. R. 6, ll. 18 – 7, l. 19; R. 12, ll. 22-25. In November 2015, Jones appeared before the Honorable Eugene C. Griffith, Jr. R. 2, ll. 7-24; R. 19, ll. 21-23. At the hearing, Judge Griffith relieved the public defender who had been assigned to represent Jones. R. 3, ll. 4-10.

Just two months later, in January, Jones appeared before the Honorable Frank R. Addy, Jr. R. 11, ll. 6-11; R. 19, ll. 23-24. Judge Addy admonished Jones to get an attorney. R. 11, ll. 6-11; R.

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[2] The Honorable Eugene C. Griffith, Jr., explained that the solicitor's initial offer was for "something that probation was perhaps available for," bearing in mind that Jones "has no prior record, she has never done anything wrong, never broken the law and . . . never been in trouble before." R. 13, ll. 1-19.

19, ll. 23-24. Thereafter, Jones tried to retain counsel, but she was unable to afford to do so. R. 2, ll. 16-18; R. 2, l. 25 – R. 3, l. 3; R. 8, l. 25 – R. 9, l. 6; R. 9, ll. 11-13; R. 11, l. 20.

On February 3, 2016, Jones appeared *pro se* before the Honorable Eugene C. Griffith, Jr. R. 1. William A. Maxey represented the state. R. 1. According to the solicitor, Jones was there "to be warned of the dangers [of] proceeding *pro se*." R. 2, ll. 2-6. Jones requested until the end of the week to finish gathering the money she needed to retain counsel. R. 10, ll. 7-11. Jones had never "been in trouble" and Judge Griffith expressed concern with her ability to act in her own best interest, particularly in light of her age and inexperience with the criminal justice system. R. 2, ll. 16-24.

Nevertheless, Judge Griffith held Jones in contempt for not following Judge Addy's direction to hire a lawyer. R. 11, l. 21 – R. 12, l. 8. Judge Griffith acknowledged that his decision to hold Jones in contempt was unrelated to her conduct in court: "[Y]ou have been very polite. … You have not been disrespectful to me nor has your father. Y'all have always been respectful in here." R. 11, ll. 21-24. Specifically, he ordered that she be taken into custody until she hired an attorney or applied for representation by the public defender's office. R. 12, ll. 3-8; R. 13, l. 25 – R. 15, l. 2. He said that he spoke with Jones' former public defender, who was still familiar with Jones' case. R. 12, ll. 10-21. He suggested that they may be able to work together because they did not have any serious problems communicating. R. 10, l. 22 – 12, l. 21; R. 13, l. – 15, l. 2. Jones was then taken into custody, where she remained overnight. R. 15, l. 3; R. 17, ll. 11-19.

While in jail, Jones re-applied for a public defender, and Patricia Bolen was appointed to represent her. R. 20, l. 1. The solicitor refused extend any additional plea offers, such that Jones' only choice other than trial was to plead guilty to the charged offenses. R. 12, l. 22 – 13, l. 24; R. 15, ll. 6-13.

The following day, February 4, 2016, Jones pled guilty to the above offenses before Judge Griffith. During the guilty plea hearing, the solicitor made clear the "plea [was] straight up without recommendation. R. 15, ll. 12-13; R. 25, ll. 21-22. When Judge Griffith questioned Jones about any recent use of drugs, Jones revealed the depth of her commitment to rehabilitation. Specifically, Judge Griffith asked if she had taken any alcohol, drugs, or medication in the last twenty-four hours. R. 16, ll. 23-24. Jones responded, "Not in the last 24." R. 16, l. 25. In light of this response, Judge Griffith asked a follow-up question -- asking whether she had used alcohol, drugs, or medication in the last forty-eight hours. R. 17, l. 1. Jones confessed that she used methamphetamine in the past forty-eight hours but that she felt okay. R. 16, l. 21 – R. 17, l. 10.

During the colloquy, Jones was advised of the charges against her, her right to a jury trial, and that she may face more severe penalties if she is ever convicted of a second offense. R. 15, l. 17 – R. 16, l. 6; R. 17, l. 23 – R. 18, l. 20; R. 20, ll. 10-20. Judge Griffith also advised Jones that because "the trafficking is considered a violent offense . . . ***if*** you are sent to the Department of Corrections, you are not qualified for all the programs that non-violent offenders are qualified for." R. 20, ll. 21-25 (emphasis added). Notably, Jones was never advised on the record of any mandatory minimum sentence.

During the mitigation presentation, defense counsel explained that while the weight of the drugs fell under the trafficking section of the statute, Jones did not know the weight of the drugs that were thrust at her and was not engaged in the conduct that ordinarily connotes "drug trafficking." R. 23, ll. 16-25. Jones had never made or sold drugs. R. 22, l. 17 – 23, l. 2. Additionally, Jones had since distanced herself from those individuals and broken up with her boyfriend. Jones had also been applying for jobs and admission to a G.E.D. program. Jones further recognized her need for treatment for her own drug use. R. 23, ll. 2-16. Defense counsel

said that Jones spent the night in jail when she was arrested and then again the night before the hearing. Counsel observed the noticeable impact that being in jail, even for such a short time, had on Jones. Twice, she asked the judge to consider a sentence of **house arrest or probation**, which would allow Jones an opportunity "to get her life together." R. 24, ll. 1-18.

The solicitor asked to be heard. R. 24, l. 19. The solicitor did not object to the sentence requested by defense counsel or point to any potential problems with such a sentence. Instead, the solicitor produced a print out from Jones' Facebook page, which still reflected that she was "in a relationship" with "Trey," the boyfriend she told the court that she was no longer dating. Defense counsel noted that the page did not reflect any recent activity by Jones. R. 24, l. 19 – 25, l. 12. The following exchange occurred between Judge Griffith and the solicitor.

JUDGE:	She is pleading to what she is charged to.
MR. MAXEY:	I just wanted you to know she may be less than forthcoming with the Court.
JUDGE:	I think she is forthcoming this morning by her admission to me about the last 48 hours [referencing Jones' admission that she took methamphetamine within the last forty-eight hours].
MR. MAXEY:	Okay, that is true, yes.
JUDGE:	What else you got, anything else?
MR. MAXEY:	**Nothing, Your Honor. Just no recommendation.**

R. 25, ll. 13-22 (emphasis added).

As mentioned, on the trafficking charge, Judge Griffith sentenced Jones to five years, suspended upon the service of eighteen months of house arrest, followed by three years of probation and substance abuse counseling. R. 26, ll. 2-23; R. 36. On the possession charge, Judge Griffith

sentenced Jones to six months, suspended upon the service of time-served, and three years of probation. R. 26, ll. 23-25.

The solicitor objected "to that sentence" as not complying with S.C. Code Ann. § 44-53-375(C)(1)(a). R. 27, ll. 1-9.

Not preserved for review

On appeal, the state argued Judge Griffith erred "in suspending Jones' prison sentence below the three year minimum and granting probation for Jones' conviction for trafficking methamphetamine where the statute expressly requires a minimum three year prison sentence and prohibits suspending any part of the sentence or granting probation." Brief of Appellant at 3. However, the state failed to preserve any alleged error for appellate review during the guilty plea.

South Carolina does not recognize "the plain error rule." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). In South Carolina, trial attorneys must properly preserve their issues for appellate courts to review the arguments.

> The losing party must first try to convince the lower court it ... has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtaining a ruling before an appellate court will review those issues and arguments.

I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Put simply, an issue which is not properly preserved cannot be raised for the first time on appeal. State v. Vanderbilt, 287 S.C. 597, 598, 340 S.E.2d 543, 544 (1986).

In order to preserve an error for appellate review, the issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dep't of Transp. v. First Carolina

Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. A trial judge commits no error in overruling a general objection. State v. Bailey, 253 S.C. 304, 310, 170 S.E.2d 376, 379 (1969). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996).

Defense counsel requested that the trial judge consider home detention and probation in her presentation to the court. R. 24, ll. 1-18. The solicitor made no objection or argument against either of those in response and said that the state had no recommendation. R. 24, l. 19 – R. 25, l. 22. Although the solicitor asked to be heard following the defense's mitigation presentation and request for home detention and probation, the solicitor posed no objection to the request. R. 24, l. 19 – R. 25, l. 22. Therefore, the solicitor's objection to the sentence came too late. See State v. Hoffman, 312, S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (explaining that a "contemporaneous objection is required to properly preserve an error for appellate review").

Once the trial judge imposed the sentence of five years, suspended upon the service of eighteen months of home detention and followed by three years of probation, the solicitor objected. R. 25, l. 25 – 27, l. 9. He said:

> Your Honor, the State objects to that sentence pursuant to [S.C. Code Ann. §] 44-53-375(c)(1)(a); provides that for someone convicted of trafficking of 10 grams or more but less than 28 grams, for a first offense a term of, imprisonment of not less than 3 years, no more than 10 years, no part of which may be suspended nor probation granted and a fine of $25,000.00 dollars. I just wanted to note the State's objection to that sentence is not complying with the statute for the record.

R. 27, ll. 1-9. The solicitor failed to articulate how the sentence imposed purportedly did not comply with the statute. In other words, the solicitor failed to state an objection with specificity.

While a party need not use the exact name of a legal doctrine in order to preserve the issue for appellate review, the objection must be sufficiently specific to permit the trial judge to understand the objection. State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) (explaining "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review"). "An objection must be made on a specific ground." State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011).

After referring to the statute, the state simply argued the sentence imposed by the judge did not comply with the statute. Not once did the solicitor offer any explanation for *how* the sentence did not comply with the statute. The record is unclear as to the precise nature of the state's objection: Was the objection to the suspension of the sentence? Was the objection to the imposition of home incarceration? Was the objection to the term of imprisonment imposed? Was the objection to the length of the suspended sentence? Was the objection to the granting of probation? Was the solicitor objecting to the requirement that Jones obtain substance abuse counseling? The state's objection was not stated with sufficient specificity to permit the judge to know the precise nature of the alleged error.

Therefore, the state's argument on appeal was not properly preserved below. Despite these well-established principles, this Court held the state's objection was timely made and on a specific ground. The record shows otherwise. Respondent respectfully requests this Court rehear the matter regarding the preservation question.

Lawful sentence

Judge Griffith issued a lawful sentence pursuant to S.C. Code Ann. § 44-53-375(C)(1)(a) and S.C. Code Ann. § 24-13-1530. A person convicted of trafficking ten grams or more, but less than twenty-eight grams, of methamphetamine, first offense, must be sentenced to: "a term of

imprisonment of not less than three years nor more than ten years, no part of which may be suspended nor probation granted, and a fine of twenty-five thousand dollars." S.C. Code Ann. § 44-53-375(C)(1)(a). However, S.C. Code Ann. § 24-13-1530 provides, in pertinent part:

> **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.

(emphasis added).

The plain language of the home incarceration statute indicates that it takes precedence over any statutes requiring mandatory incarceration. S.C. Code Ann. § 24-13-1530; see Mosteller v. County of Lexington, 336 S.C. 360, 364, 520 S.E.2d 620, 622 (1999) (holding 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); Bolin v. S.C. Dep't of Corrections, 415 S.C. 276, 282-83, 781 S.E.2d 914, 917 (Ct. App. 2015) (holding that 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); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994) ("When a statute is clear and unambiguous, the terms of the statute must be given their literal meaning."). "Furthermore, when a statute is penal in nature, it is construed strictly against the State and in favor of the defendant." State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980).

Here, Judge Griffith noted Jones' lack of criminal record and young age during the February 3, 2016, hearing. R. 13, ll. 11-17. The judge mentioned those again during the sentencing phase of the February 4, 2016, plea hearing, as well as her honesty and his desire to give her an opportunity for drug treatment and "to get this all behind her." R. 25, l. 17 – 26, l. 21. As such, he found her to

be a "low risk, nonviolent offender." See S.C. Code Ann. § 24-13-1530. Judge Griffith further explained the reasoning behind the length of home incarceration that he imposed. R. 26, ll. 2-21. He said, "If I were to give her 3 years [incarceration], rough figures, would be parole eligible, it would be about fifty percent." R. 26, ll. 15-17. However, with home incarceration you serve "day-for-day" and do not get any good time credit. R. 26, ll. 14-19. Thus, the eighteen months that Jones will serve on home incarceration with keep her confined for approximately the same equivalent period as she would be confined in the Department of Corrections.

The principles of statutory construction support a finding that Judge Griffith's sentence achieved the intended legislative purposes of both S.C. Code Ann. 44-53-375(C)(1)(a) and S.C. Code Ann. § 24-13-1530. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks omitted). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Id. "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Id. at 351, 688 S.E.2d at 575. "In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute." State v. Johnson, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011). Here, the legislature could not possibly intend that low risk, non-violent offenders serve more time on home incarceration than their counter-parts serve in the Department of Corrections, as such a result would be absurd. Thus, the imposition of eighteen months of house arrest in this case was proper.

This Court's reliance on State v. Taub, 336 S.C. 310, 519 S.E.2d 797 (Ct. App. 1999) is misplaced. Both the defendant in Taub and Jones were convicted of drug trafficking under statutory provisions that prescribed a punishment for a first offense of "a term of imprisonment of not less than three years nor more than ten years, no part of which may be suspended nor probation granted, and a fine of twenty-five thousand dollars." See S.C. Code Ann. § 44-53-370(e)(2)(a)(1) (applicable in Taub); S.C. Code Ann. § 44-53-375 (C)(1)(a). However, the sentence in Taub was not the same sentence imposed in the present case. Taub was sentenced to five years, suspended upon five years of probation, and a fine of five thousand dollars. 336 S.C. at 312, 519 S.E.2d at 798. The trial court ordered that the probation could be terminated upon payment of the fine. Id. at 312, 519 S.E.2d at 798-99. The present case involves a split sentence, for which home incarceration was imposed rather than incarceration pursuant to S.C. Code Ann. § 24-13-1530. R. 25, l. 25 – 26, l. 23; R. 27, l. 25 – 28, l. 3. Thus, unlike Taub, who would potentially never be confined, Jones' sentence requires that she serve the eighteen months of home detention prior to her probation.

Additionally, the statutory construction argument made by the defense in Taub is distinct from the present case. In Taub, the defense argued that a judge's general discretionary power to suspend sentences in S.C. Code Ann. § 24-21-410 allowed the judge to suspend the mandatory minimum sentence provided in S.C. Code Ann. § 44-53-370(e)(2)(a)(1) for trafficking cocaine. 336 S.C. at 316-17, 519 S.E.2d at 801. The Court rejected that argument based on the principle of statutory construction that "a specific statute prevails over a more general one." Id. As discussed *supra*, the home incarceration statute, applicable in the present case, begins "[n]otwithstanding another provision of law which requires mandatory incarceration," expressing the legislature's intent that it take priority of over provisions regarding mandatory minimum incarceration. S.C. Code Ann. § 24-13-1530; Mosteller, 336 S.C. at 364, 520 S.E.2d at 622.

Therefore, the sentencing judge's use of the alternative of eighteen months of home incarceration was proper in this case. Respondent respectfully requests rehearing regarding this Court's interpretation of the statute.

Pursuant to Rule 221(a), Respondent respectfully asks this Court to rehear the matter to address the significant points overlooked or misapprehended in arriving at its decision.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 28th day of June, 2018.

LAURA R. BAER
Appellate Defender

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Josie Jones, at 418-A Andrews Chapel Road, Hodges, SC 29653, this 28th day of June, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 28th day of June, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.