

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

William H. Seals, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

TAVARIO D. BRUNSON,

RECEIVED
JAN 09 2013
SC Court of Appeals

APPELLANT

Appellate Case No. 2012-211593

**Reply to Respondent's Opposition to
Motion to Stay Appeal Pending
Supreme Court's Decision in Aiken, et al. v. Byars**

On December 17, 2012, Appellant moved this Court to stay his appeal pending the South Carolina Supreme Court's resolution of Aiken, et al. v. Byars, filed in the Court's original jurisdiction on October 29, 2012. On January 2, 2012, Respondent filed a return entitled "Respondent's Opposition to Motion to Stay Appeal Pending Supreme Court's Decision in Aiken, et al. v. Byars." By letter dated January 3, 2013, this Court directed undersigned counsel to file a reply.

Pursuant to Rule 240(f) SCACR and at the direction of this Court, counsel for the appellant, Tavario Brunson, files this reply to explain why this Court should stay his appeal. Respondent presented two arguments in his return to support his position that this Court should deny Appellant's request for a stay. First, Respondent argued the error was not preserved for review. Second, Respondent argues that Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012) is inapplicable to the instant matter because the trial judge was not required to sentence Appellant to life without parole (LWOP). In other words, the sentence was not mandatory. As explained infra, this Court should reject Respondent's arguments and grant the stay.

The error is preserved for appellate review. South Carolina requires that an issue be raised to and ruled upon by the trial judge in order to be preserved for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003)(citing Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001)). However, the objecting party is not required to "use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694 (citing State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)). As Respondent admits, during the sentencing proceeding, Appellant informed the court of a case pending on appeal in the United States Supreme Court challenging the application of life sentences to individuals less than eighteen years of age. Clearly, this was an objection to the imposition of a life sentence. The only purpose trial counsel would have had in informing the trial court of the pending case was to object. Thereafter, the Honorable William H. Seals sentenced Appellant to life in prison indicating his overruling of trial counsel's objection.

Even if this Court determines trial counsel failed to preserve the issue for review, a reviewing court would consider the issue in the interest of judicial economy. This Court's recent decision in State v. Bonner, Op. No. 5048 (S.C. Ct. App. filed November 14, 2012) provides ample support for this position. Bonner was seventeen-years old at the time of the crimes for which he was convicted. During the sentencing proceedings, trial counsel asked the court to consider Bonner's age and youth, but mistakenly told the judge that Bonner was nineteen-years old, when he was actually eighteen at the time of sentencing. The judge then sentenced Bonner to LWOP for burglary in the first degree, a non-homicide offense. Trial counsel did not object or raise any issue as to the sentence in a post-trial motion. Nevertheless, this Court addressed the issue in the interest of judicial economy. The state conceded that the trial court erred in sentencing Bonner to life without parole in light of Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011 (2010), but argued the appropriate avenue to address the claim was in post-conviction relief proceedings. This Court found Bonner's case presented an exceptional circumstance requiring appellate review in the interest of judicial economy coupled with the concession of error in the state's brief. Thus, if this Court finds the error is not preserved for review in Appellant's case, staying the appeal would be appropriate and in the interest of judicial economy. Although the state has not conceded error, the South Carolina Supreme Court's decision in Aiken et al., v. Byars will likely determine the outcome of Appellant's appeal. It is in the interest of judicial economy to wait for the Supreme Court's decision before reviewing Appellant's case on appeal.

Respondent also argues that because Appellant was not sentenced to a mandatory sentence of LWOP, then the recent United States Supreme Court case of Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2445 (2012) does not apply to him. This is the very issue addressed

in the petition for writ of certiorari filed in the South Carolina Supreme Court's original jurisdiction. The petitioners asked the Court to declare all sentences of life without parole unconstitutional for juvenile offenders. In the alternative, the petitioners asked the Court to remand all cases in which juveniles were sentenced to life imprisonment without the possibility of parole for new sentencing proceedings to comply with the mandates of Miller. Obviously and unquestionably, the outcome of the petition is highly relevant to, and potentially dispositive of, Appellant's appeal.

In conclusion, counsel for Appellant respectfully moves that this Court stay the appeal in Appellant's case pending the South Carolina Supreme Court's decision in Aiken, et al. v. Byars.

This 9th day of January, 2013



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CERTIFICATE OF SERVICE

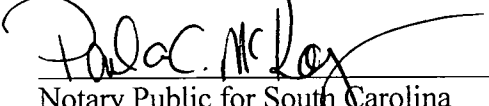
The undersigned attorney hereby certifies that a true copy of the Reply to Respondent's Opposition to Motion to Stay in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of January, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 9th day of January, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires July 24, 2022.