STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2017-000890

State of South Carolina, Appellant,

vs.

Jason Skylar Israel Pogue, Respondent.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

RECEIVED
JUL 17 2018
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2017-000890

State of South Carolina, Appellant,

vs.

Jason Skylar Israel Pogue, Respondent.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The plea court erred in sentencing Respondent to home detention after his guilty plea to second degree sexual exploitation of a minor under section 16-15-405 of the South Carolina Code, a violent offense, when the statute requires he must be imprisoned not less than two years and home detention is only available for "low risk, nonviolent adult and juvenile offenders" under section 24-13-1530 of the South Carolina Code.

STATEMENT OF THE CASE

On April 6, 2017, Respondent waived presentment of four indictments for third degree sexual exploitation of a minor and one indictment for second degree sexual exploitation of a minor before the Honorable Edward W. Miller.[1] (Indictment; T.11-14; R.11-14; 34-35). He proceeded to admit his guilt to all five charges. He knowingly and voluntarily pled guilty as charged. (T.16; 20; R.16; 20). Respondent was sentenced to ten years in prison, suspended on the service of four years in home detention and five years' probation, along with several other requirements. (T.31; R.31). The State filed a timely Notice of Appeal on April 13, 2017. This brief follows.

[1] The only indictment relevant to this appeal is the one for second degree sexual exploitation of a minor.

ARGUMENT

I. The plea court erred in sentencing Respondent to home detention after his guilty plea to second degree sexual exploitation of a minor under section 16-15-405 of the South Carolina Code, a violent offense, when the statute requires he must be imprisoned not less than two years and home detention is only available for "low risk, nonviolent adult and juvenile offenders" under section 24-13-1530 of the South Carolina Code.

The circuit court erred in sentencing Respondent to four years house arrest as opposed to requiring incarceration for a minimum of two years in direct contravention of section 16-15-405. Section 24-13-1530 of the South Carolina Code does not apply to Respondent's conviction because sexual exploitation of a minor in the second degree is a violent crime and house arrest under section 24-13-1530 can only be given to "nonviolent adult offenders." Further, section 16-15-405 explicitly requires two years imprisonment and home detention is not the equivalent of imprisonment. Accordingly, this Court should vacate Respondent's sentence for second degree sexual exploitation of a minor and remand for resentencing.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161. The statute must also be read as

a whole and in harmony with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "The statute must be interpreted with realistic circumstances and rationales in mind." State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011); State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.").

Section 24-13-1530 states in relevant 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.

S.C. Code Ann. § 24-13-1530(A) (Supp. 2016) (emphasis added). Significantly, section 16-1-60 of the South Carolina Code clearly and expressly defines sexual exploitation of a minor in the second degree as a **violent** offense. S.C. Code Ann. § 16-1-60 (Supp. 2016).

The clear language of section 24-13-1530(A) indicates it applies only to "nonviolent" adults. Because of this clear, unambiguous language, there is no reason to "resort to subtle or forced construction to limit or expand the statute's operation." See State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). The home detention program is to be used as an alternative for **nonviolent** offenders, and to allow a person convicted of a violent offense as defined by section 16-1-60 to be eligible for the alternative is clearly anathema to the legislative intent, and clear wording, of the statute. The only reasonable interpretation of section 24-13-1530 is in light of section 16-1-60 and to find the legislature clearly did not intend a person convicted of a "violent offense" to be considered a "nonviolent offender."[2] Additionally, the legislature is presumed to

[2] The relevant provisions of Section 24-13-1530 do not appear to have been interpreted in any reported case in South Carolina. While it is unpublished and therefore not of precedential value, this Court recently addressed the issue in

know the current statutes and specifically wrote section 24-13-1530 to include the term "nonviolent offender" knowing that another of their statutes defined what crimes constituted "violent offenses." See State v. McKnight, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation . . . when later statutes are enacted concerning related subjects.").

Also, section 16-15-405 provides: "A person who violates the provisions of this section is guilty of a felony and, upon conviction, **must be imprisoned not less than two years** nor more than ten years." S.C. Code Ann. § 16-15-405 (D) (Supp. 2016) (emphasis added). Home detention is not imprisonment, or as the Fourth Circuit made clear: "Home confinement is not incarceration." United States v. Hager, 288 F.3d 136, 137 (4th Cir. 2002). The Fourth Circuit found home confinement or home detention was an "alternative" to incarceration and because it was an "alternative" it could not be the same thing. Id. ("The word alternative simply does not imply that two things are the same or equivalent."); see also, United States v. Phipps, 68 F.3d 159, 162 (7th Cir. 1995) (finding home detention is not imprisonment but is instead a "substitute for imprisonment.").

Additionally, one need only look at how our Legislature has treated time served in a penal institution versus home detention in regards to sentence calculations. Under section 24-13-40 of the South Carolina Code, the legislature differentiated between time served and house arrest providing: "In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest." S.C. Code Ann. § 24-13-40 (Supp. 2016). Clearly the Legislature does not equate home detention or home arrest with incarceration or imprisonment.

State v. Williams, Op. No. 2016–UP–448 (S.C.Ct. App. Filed November 2, 2016) (also found at 2016 WL 6471974 and Appellate Case No. 2014–001886).

Additionally, section 16-15-405 states:

> A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not less than two years nor more than ten years. **No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence.**

S.C. Code Ann. § 16-15-405(D) (Supp. 2016) (emphasis added). It seems highly incongruous the legislature would consider the crime of sexual exploitation of a minor second degree so serious as to mandate the minimum sentence cannot be suspended and require no parole until after someone has served a minimum of two years but allow the individual to be on house arrest to serve that two year sentence. See State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("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."); Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (same).

Finally, even if the term "violent **offense**" as used in section 16-1-60 is interpreted different from the way "nonviolent **offender**" is used in section 24-13-1530, the plea court erred in allowing Respondent to serve his sentence on house arrest. While Respondent's crimes do not allege an actual touching by Respondent, the nature of the material sought out and viewed by Respondent indicates he is not a "nonviolent offender." Respondent distributed, via a file sharing program, videos of young girls, as young as seven, being orally and vaginally raped. (T.19; R.19).[3] Respondent searched for child pornography videos of children as young as four and used search terms such as PTHC which stands for pre-teen hardcore. It is illogical that someone who enjoys and desires videos showing children being raped is a nonviolent offender.

[3] The indictment for the second degree sexual exploitation of a minor charge indicates the file that was distributed was titled "pthc_ptsc jenny_9yo daughter asking for cum new.avi".

Further, the fact that he admitted downloading these types of files for many years certainly indicates he is not to be considered "low risk." (T.19; R.19).

Accordingly, the plea court erred in allowing Respondent to serve his two-year mandatory sentence on house arrest under section 24-13-1530. This Court should vacate the four year house detention sentence and remand for resentencing consistent with the intent of the legislature and the requirements of section 16-15-405(D).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the sentence of the circuit court on Respondent's second degree sexual exploitation of a minor charge should be vacated and this case remanded for resentencing consistent with the requirements of section 16-15-405.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General
S.C. Bar No. 15608

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

July 17, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2017-000890

State of South Carolina, Appellant,

vs.

Jason Skylar Israel Pogue, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that 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."

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

July 17, 2018