STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

Appeal from Williamsburg County
Michael G. Nettles, Circuit Court Judge

THE STATE,

Appellant,

v.

RONALD HAKEEM MACK,

Respondent.

Appellate Case No. 2017-002441

INITIAL REPLY BRIEF OF APPELLANT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General
S.C. Bar No. 101477
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
Post Office Box 836
Sumter, South Carolina 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENTS IN REPLY

I.

This Court properly denied respondent's previous motion to dismiss the appeal as interlocutory where appellant demonstrated the circuit court's ruling is immediately appealable because the State would be substantially impaired if the appeal was not heard. It is not necessary for the Court to revisit its prior ruling.

Appellant submits the decision by the circuit court vacating respondent's sentence and ordering a new sentencing proceeding pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), is immediately appealable because the rights of the State would be substantially impaired if the appeal was not heard. Without recourse to the appellate court, the State will be precluded from correcting the error of law in the trial court's ruling, the error will become the law of the case, and the State will be left without a remedy. This Court properly denied respondent's previous motion to dismiss the appeal.[1]

The right to appeal is controlled by statute. *State v. Wilson*, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010). Only final orders are generally appealable, absent a statute or rule permitting the immediate appeal of an interlocutory order. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). An order is interlocutory and not final when "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993). This is done to prevent piecemeal appeals. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000).

---

[1] Respondent did not seek rehearing of the denial of the previous motion. *See* Rule 240(j) ("Except where these rules require the concurrence of two or more members of an appellate court, an individual judge [] may grant or deny any motion [] on behalf of the court. Any review of an order issued by an individual judge [] shall be by petition for rehearing."). Accordingly, it is not clear whether this issue is properly before the Court for a second time.

The right to an immediate appeal of an interlocutory order is found in S.C. Code Ann. § 14-3-330, which lays out the categories of decisions subject to immediate appeal. *See also* Rule 201, SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision."); *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) ("In both state and federal court, the right to appeal is conferred by statute or rule, S.C. Code Ann. § 14-3-330."). Specifically, § 14-3-330(2) confers jurisdiction on our appellate courts for the correction of errors of law when the order or ruling affects "a substantial right when such order . . . in effect determines the action and prevents a judgment from which an appeal might be taken . . . ." An order affecting a "substantial right" is defined as one which discontinues an action, prevents an appeal, grants or refuses a new trial, or strikes an action or defense. *Mid-State Distrib., Inc.*, 310 S.C. at 334 n.4, 426 S.E.2d at 780 n.4; *see also Breland*, 339 S.C. at 93, 529 S.E.2d at 13 (stating immediate appeals are permitted where a substantial right could not be vindicated on appeal). An immediate appeal of an interlocutory order is permitted when no appellate review is available to correct the trial court's error after the final judgment. *Id.* at 93, 529 S.E.2d at 13 (citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985)).

Based on double jeopardy concerns, state appeals in criminal cases are generally prohibited after an acquittal based on insufficiency of the evidence. *State v. McWaters*, 246 S.C. 534, 535, 144 S.E.2d 718, 718 (1965). However, the State may appeal orders and rulings that significantly impair the prosecution before final judgment or when the jury's guilty verdict is set aside based on an error of law. *See State v. Dasher*, 278 S.C. 395, 396, 400, 297 S.E.2d 414, 414, 417 (1982) (holding the State may appeal an order setting aside a conviction where the order is based upon an error of law); *State v. Holliday*, 255 S.C. 142, 142, 177 S.E.2d 541, 542-43 (1970) ("[T]he State has no right of appeal from a judgment of acquittal . . . unless the verdict

of acquittal was procured by the accused through fraud or collusion . . . or from a judgment reversing or setting aside a conviction on purely legal grounds."); *State v. Thompson*, 348 S.C. 152, 157, 558 S.E.2d 917, 919 (Ct. App. 2001) (noting the State may appeal an order setting aside a jury's guilty verdict when it is based upon an error of law); *Reed v. Becka*, 333 S.C. 676, 681, 511 S.E.2d 396, 399 (Ct. App. 1999) ("Because it so significantly impairs the prosecution of a criminal case, an order which prohibits the State from withdrawing a plea offer is directly appealable by the State under § 14-3-330(2)(a)."); *State v. Saunders*, 324 S.C. 314, 319, 476 S.E.2d 711, 713-14 (Ct. App. 1996) (finding the State may appeal an order quashing an indictment on double jeopardy grounds).

Respondent seeks, for the second time, to dismiss the appeal asserting the decision by the circuit court does not constitute a final order. Respondent argues the ruling is an interlocutory order that is not immediately appealable because it does not involve the merits, does not affect a substantial right, or prevent appellant from raising any issue in a future appeal after final sentencing. For two reasons, the Maryland case cited by respondent lends little support to its position the appeal here should be dismissed. First, the case is easily distinguishable from this one as it involves a challenge to an aggregate sentence of five consecutive life sentences with the possibility of parole, rather than a single term-of-years sentence like the one respondent received. *See State v. Clements*, 2018 WL 4140659 (Md. Aug. 29, 2018) at *1 (noting the facts of the case and explaining the juvenile defendant was sentenced for five counts of murder and attempted murder, among other charges). Second, South Carolina does not have a similar rule in place which restricts the appellate courts' jurisdiction. The *Clements* court noted, "[W]hile a motion under Rule 4-345 may be made at any time, it is part of the same criminal proceeding and not a wholly independent action. The Rule simply grants the trial court limited continuing authority in

the criminal case to revise the sentence." *Id.* at *5. Regardless of the findings by the Maryland courts or rule in Maryland by which a defendant can challenge an "illegal" sentence, respondent's discretionary, term-of-years sentence within the statutory range for murder is not an illegal sentence and the circuit court's decision to vacate it is immediately appealable.

The grant of relief in respondent's case is premised on an error of law and the State would be substantially prejudiced if it cannot appeal the ruling. The circuit court improperly extended *Aiken* to include juveniles sentenced to a term-of-years when its holding was narrowly tailored to limit it to those given a sentence of life without parole. *See Aiken*, 410 S.C. at 543, 765 S.E.2d at 577 ("In our view, whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment."). *Aiken* relied on *Miller v. Alabama*, 567 U.S. 460 (2012) in which the United States Supreme Court expressly stated, "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.'" *Miller*, 567 U.S. at 465. Respondent did not receive a life without parole sentence. The sentencing court, in its discretion, sentenced respondent to a term of years in the permissible statutory range for murder. *See* S.C. Code Ann. § 16-3-20(A) (providing murder is punishable by imprisonment of thirty years to life). The circuit court's ruling in this case is premised upon legal error that invalidated in its entirety a proper sentence by the original sentencing court. The circuit court's ruling affected a substantial right of the State, and no appellate remedy exists other than to permit an appeal pursuant to S.C. Code Ann. § 14-3-440(2).

Therefore, this Court properly denied respondent's previous motion to dismiss the appeal,

the appeal is not interlocutory and is immediately appealable, and the circuit court's ruling is properly before this Court.

II.

> The circuit court exceeded its authority in finding respondent's term-of-years sentence for murder was the functional equivalent of a life sentence which entitled him to resentencing pursuant to *Aiken*, where neither our Supreme Court nor the United States Supreme Court have extended relief to juvenile homicide offenders sentenced to any other term than actual life without parole.

Respondent is not entitled to resentencing pursuant to *Aiken* as he received a valid term-of-years sentence and the circuit court erred in finding respondent's sentence was a *de facto* life sentence because the court deviated from existing precedent to create a cognizable claim under *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. *Miller* and *Aiken* expressly apply only to juvenile homicide offenders sentenced to life without parole and respondent is not part of that class.

Respondent asserted throughout his brief the *Aiken* Court held the principles of *Miller* were not restricted to only the fifteen inmates who were part of the class before the Court, but applied to those similarly situated and to any individuals affected by the holding. (BOR, p.3, n.3; p.7; p.19; p.26; p.35). By respondent's reasoning, "it is logical to conclude that the *Aiken* Court did not mean to restrict its interpretation of the applicability of *Miller* to only those cases denominated 'life without parole,' but rather intended to provide relief" to someone such as himself. (BOR, p.26). However, respondent's reading of the language used by the Court in *Aiken* is too broad and outside the scope of the case's procedural posture and context at the time it was decided. Tyrone Aiken and the named plaintiffs were part of a class of about three dozen inmates serving sentences of life without parole for homicide offenses committed while they were juveniles. When the Court used the phrase "similarly situated," it was referring to those

people beyond the fifteen named plaintiffs—i.e. the two dozen or so inmates not named in the case, but also serving life without parole. The Court was not referring to someone such as respondent who is outside of the class of inmates serving life and is serving a term-of-years sentence. Read in context, the holding in *Aiken* only applies to those juvenile homicide offenders sentenced to life without parole. *See Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 ("We hold the principles enunciated in *Miller v. Alabama* apply retroactively to those petitioners, to those similarly situated, and prospectively to all juveniles offenders who may be subject to life imprisonment without the possibility of parole."). *Aiken* and *Miller* do not apply to any other type of sentence and have not been so broadly construed to include the argument made by respondent that his sentence for murder is the functional equivalent of life without the possibility of parole.

Finally, respondent in his brief attempts to distinguish the cases relied on by appellant which found a term-of-years sentence was not the functional equivalent of life. (BOR, pp.33-36). Respondent argued the cases involved challenges to aggregate sentences or were decided by jurisdictions that found *Miller*'s reasoning limited to mandatory sentencing schemes. (BOR, p.33). However, respondent similarly relied on numerous cases which involved non-homicide crimes or challenges to aggregate sentences when arguing "courts around the country have recognized de facto life sentences specifically in the context of finding them unconstitutional if imposed without compliance with the requirements of *Graham* [*v. Florida*, 560 U.S. 48, 75 (2010)] and *Miller*." (BOR, pp.27-30). Such an assertion misapprehends appellant's general contention that there is a split among the various jurisdictions around the country. It further underscores the circuit court's error of law and lends support to appellant's argument because neither our Supreme Court nor the United States Supreme Court have ever held the *Miller* rule

applied to sentences other than life without parole, such as a *de facto* life sentence or, for that matter, defined or determined what constitutes a *de facto* life sentence. Accordingly, with such a clear split among the courts, the circuit court exceeded its authority in finding respondent's fifty-year sentence was a *de facto* life sentence, extended *Miller*'s narrow applicability, and made a determination that is reserved for higher courts.

Therefore, for the reasons argued in the brief and in this reply, respondent is not entitled to resentencing, his sentence does not violate the Eighth Amendment, and the circuit court erred in granting respondent's motion for resentencing pursuant to *Aiken*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the circuit court's decision granting the motion for resentencing should be reversed, and respondent's fifty-year sentence for murder should be reinstated.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: _____
SHERRIE BUTTERBAUGH

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

September 24, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Williamsburg County
Michael G. Nettles, Circuit Court Judge

THE STATE,

Appellant,

v.

RONALD HAKEEM MACK,

Respondent.

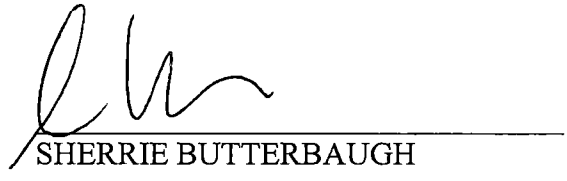
Appellate Case No. 2017-002441.

CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Appellant, certify that I have served the Initial Reply Brief of Appellant on Respondent by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: Laura R. Baer, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 24th day of September, 2018.



SHERRIE BUTTERBAUGH

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR APPELLANT

ALAN WILSON
ATTORNEY GENERAL

September 24, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Ronald Hakeem Mack*
Appeal from Williamsburg County
Appellate Case No. 2017-002441

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Reply Brief of Appellant, together with Certificate of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Sherrie Butterbaugh,
Assistant Attorney General

SB/dmd
Enclosures
cc: Laura Ruth Baer, Esq. (w/two copies of encls.)
The Honorable Ernest Finney, III, Solicitor 3rd Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)