

BACKGROUND

Appellant, Ernest Battle, was convicted of trafficking in cocaine §44-53-370(e)(2)(b)(3), Charleston County. Honorable judge Thomas L. Hughston, Jr. He was sentenced to twenty-five years. After Appellant had served approximately (11) years on his sentence he was informed by his institutional Caseworker that S.C. State Classification changed his sentence from the service of 85% to reflect 100%. Appellant completed the grievance procedure for SCDC and on 12/12/2018, an order was issued by the South Carolina Court of Appeals affirming the ALC's ruling denying Appellant relief. Appellant files this Petition for Rehearing pursuant to SCACR-Rule 221(a).

This Appeals follows:

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

Appellant was convicted under §44-53-370(e)(2)(b)(3).

That statute provides that:

(e) Any person who knowingly sell, manufacture, cultivates, delivers, purchases, or bring into this state, or who provides financial assistance, or otherwise aide, abets, attempts, or conspires to sell, manufacture, cultivates, deliver, purchase, or bring into this state, or otherwise who is knowingly in actual or constructive possession or who knowingly attempt to become in actual or constructive possession of:

(2) ten grams or more of cocaine or any mixture containing cocaine, as provided in Section 44-53-201(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and upon conviction, must be punished as follows if the quantity involved is:

(b) twenty-eight grams or more, but less than one hundred grams:

(3) For a third or subsequent offense, a mandatory minimum term of imprisonment of not less than twenty-five years and not more than thirty years, no part of which may be suspended nor probation granted, and fined a fifty thousand dollards fine.

S.C. Code Ann §44-53-370(e)(2)(b)(3) Westlaw through 2001 (emphasis added)
At the end of Subsection (e), the statute also provides:

A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum terms of imprisonment of not less than twenty-five years, nor more than thirty yeas is not eligible for parole, extended work release, as provided in Section 24-13-610, or supervised furlough, as provided in Section 24-13-710. See; *kerr v. State*, 345 S.C. 183, 187, S.E.2d 494, 496 (2001), which held:

At the time the defendant *Kerr*, was convicted for the offense of trafficking in cocaine §44-53-370(e)(2)(c), 1985, provided where the quantity of cocaine involved is 100 grams or more but less than 200 grams, the defendant

shall be sentenced to a mandatory term of imprisonment of 25 years, no part of which may be suspended, and a fine of fifty thousand dollars. At the time when Kerr was convicted in 1988 the statute had been amended to read as follows:

S.C. Code Ann. §44-53-370(e)(2)(c) (1988) (emphasis added) Regarding parole eligibility, an unnumbered paragraph at the end of Section 44-53-370(e) stated as follows:

any person convicted and sentenced under this subsection to a mandatory minimum term of imprisonment of twenty-five years is not eligible for parole.

The Supreme Court held:

While Section 44-53-370(e) prescribes sentences for trafficking based on the quantity of drugs involved, several different sections authorize at least 25 years sentence, however, some provide for a mandatory sentence, while others provide for a mandatory minimum sentence. Despite the various ways that Section 44-53-370(e) mandated a term of imprisonment of at least 25 years sentence the unnumbered paragraph detailing parole eligibility simply stated that someone sentenced to a term of imprisonment for a mandatory minimum 25 years, is not eligible for parole.

While the Court is correct in its interpretation of the statute that if a person is convicted under §44-53-370(e)(2)(b)(3), he/she is not eligible for parole, extended work release, when sentenced to a mandatory minimum sentence of not less than twenty-five years, nor more than thirty years, however, the statute is for sentencing purposes and does not define the amount of time a person convicted under the statute must serve on his/her sentence. S.C. Code Ann. §44-53-370(e)(2)(b)(3) (2018). In its order the Court misinterpreted the statute by stating that the language is that a person convicted under that provision "must serve" a mandatory minimum term of imprisonment of not less than twenty-five years, nor more than thirty years. The statute specifically states that:

For a third offense or subsequent offense the person must be punished or sentenced to a mandatory minimum term of imprisonment of not less than twenty five years and not more than thirty years, not that he/she "must serve a day for day sentence." The legislative intent for a person sentenced to a mandatory sentence is that that sentence must be served as a day for day sentence,

but it is not the legislative intent that a person sentenced to a mandatory minimum sentence "must serve" the sentence as a day for day sentence, but provided a sentencing guideline for the judges to follow, meaning that a person sentenced and convicted under that provision cannot be sentenced to no less than twenty-five years, nor more than thirty years imprisonment. It does not state or mean that if the person is convicted and sentenced under that provision or pursuant to that statute that the sentence must be served as a day for day sentence.

The primary rule of statutory construction is that the Court must ascertain the intention of the legislature...eg., *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When the terms of a statute is clear and unambiguous, the court must apply them according to their literal meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

Over the years there has been a substantial change to Section 44-53-370 (e) whereas, prior to the amendments to Section 44-53-370(e) (1985-1988), a defendant convicted under this statute was eligible for parole, the amendment added mandatory sentences convictions under that statute ineligible for parole only, and extended work release, not the amount of time a person must serve on his/her sentence. In its current form, the parole ineligibility paragraph is ever more specific: Any person convicted and sentenced under this Subsection to a mandatory term of imprisonment of 25 years, a mandatory minimum term of imprisonment of 25 years, or a mandatory minimum term of imprisonment of 25 years, nor more than 30 years is not eligible for parole...§44-53-370(e) (Supp 2000).

CONCLUSION

Based on the following points that was overlooked or misapprehended by the Court, Appellant respectfully request a rehearing.

Respectfully submitted,

s/ Ernest Battle
Ernest Battle

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DEC 31 2018

SC Court of Appeals

AFFIDAVIT OF SERVICE


I, Ernest Battle, #165247, being duly sworn disposes and swears under the penalty of perjury, that on this 27 day of December, 2018, did forward for filing one original petition for rehearing to the Clerk of Court for the S.C. Court of Appeals/Jenny Abbott Kitchings and a true copy to Ms. Kensey Collins, Esq./Attorney for Respondent at the below listed address U.S. Mail postage prepaid 1st class.

Ms. Jenny Abbott Kitchings/Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

Ms. Kensey Collins, Esquire
4444 Broad River Road
P.O. Box 21787
Columbia, S.C. 29221-1787

Respectfully submitted,

Ernest Battle
Ernest Battle

Nicole R. Chapman
Notary expires *12-22-2028*


South Carolina Court of Appeals
Ms. Jenny Abbott Kitchings/Clerk
P.O. Box 11629
Columbia, S.C. 29211

Mr. Ernest Battle # 165244
MacDougall Correctional Inst.
1516 Old Billiard Rd.
Ridgerville, S.C. 29442
Birch # 2 Unit D58

December 21, 2018

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SC Court of Appeals

Re: Ernest Battle # 165244 v. SCDC
Appellate Case No. 2016-002412

Dear Ms. Kitchings:

Enclosed for filing, please find one (1) original Petition
for Rehearing in the above case. Along with attached Affidavit
of Service to Respondent, Ms. Kelsey Collins. Please check
Stamp and return clocked copy to me at the above address
for my records. Thanking you in advance,

Sincerely,

Ernest Battle