In State Of South Carolina

For South Carolina Court Of Appeals

John B. Bonner,

Appellant

-Against-

The State Of South Carolina

Respondent.

Whether South Carolina Code Ann. Sec. 16-11-311(1)A.B.C.D(2) Constitutes As Jury Sentencing Factors Under Blakely v. Washington?

The appellant contends, that this is a question of law which involves statutory interpretation. See. Catawba Indian Tribe Of South Carolina v. State. 372 S.C. 519.524. 642 S.E.2d 751.753 (2003)" The Primary rule of statutory construction is to ascertain

and Give effect to the intent of the legislature." Mid-State Auto Auction Of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) The resolution of this case requires court to examine Sec. 16-11-311(1)(2) and revisit State v. Benton, 526 S.E.2d 228 (2000). See Also, State v. Cheatam, 561 S.E.2d 618 (S.ct. App. 2002) in light of the decision in Blakely v. Washington, 124 S.ct 2531 (2004) As such, the defendant contends that Jury is required to impose sentence and not Judge. However, it should be noted that in Chubb v. State, 401 S.E. 2d 159 (1991) Watson v. State, 338 S.E.2d 636 (1985) counsel was held to be ineffective when failing to inform defendant Jury could decide sentence and not Judge. Furthermore, defendant contends that Sec. 16-11-311 is Protected by Hicks v. Oklahoma, 447 U.S. 343 (1980) where court held:

> "In States where convicted defendant entitled to have Jury fix Punishment, defendants interest in exercise of Jury's discretion is not merely matter of State Procedural law but is liberty interest Protected by Fourteenth Amendment."
>
> Hicks v. Oklahoma, supra

This opinion supports the Blakely court view that unitary Proceedings are constitutionally required when its laws already mandate bifurcated Proceedings under Watson, Chubb. Because when the Judge as in this case, must determine facts outside Jury's verdict It is the Jury not Judge, who must do so beyond a reasonable doubt. See Cunningham v. California, 127 S.Ct 856 (2007) The defendant concedes respondent contentions. State has deviated away from bifurcated trials

Simmons v. State, 503 S.E.2d 164 (1998) and are no longer required to be conducted. But since Simmons, the court subsequently thereafter made some ruling in Patrick v. State, 562 S.E.2d 609 (2002) and at no time since then has court been called upon to apply opinion of Blakely v. Washington, supra, to facts of case or as is sought herein to determine if Sec. 16-11-311(1) A.B.C.D(2) can be interpreted as requiring Jury sentencing under Blakely. Vines v. Muncy, 553 F.2d 342 (4th Cir. 1977) when court held:

"Unitary Trial Proceedings at which Jury determines both Guilt And Sentence are constitutional in non-capital cases"

Vines v. Muncy, supra.

Those Justices, who addressed this question in Blakely v. Washington, have ruled bifurcated Procedures like one expressed in Watson, Chubb in which question of Guilt and Sentence is decided by the same Jury. When Bifurcated Proceedings are used, the Blakely court ruled determination of Sentence must be based on facts Proved to his Peers "Beyond A Reasonable Doubt" Blakely v. Washington, 124 S. Ct at 2542; Consequently, the state must concede as it rightly does that this state will be requiring old law in light of Apprendi v. New Jersey 530 U.S. 466 (2000) Cunningham v. California, 127 S. Ct 856 (2007) for Jury trial Sentencing and to do otherwise will violate defendant constitutional rights under Hicks, Muncy to a Jury Sentencing hearing.

Therefore, defendant begins by arguing that as a matter of law Sec. 16-11-311(1) has four (4) aggravating factors which outline serious nature of crime and eventually used by trial court to de-

termine sentence. Yet the state will argue that the "Aggravating Factors" are elements of substantive offense and thus fall outside of the Blakely Apprend. Cunningham court Protections. Such interpretation is an unreasonable application of federal law and does harm to its constitutional application. When court stated:

> "A Jury must find, not only the facts that make up crime of which the offender is charged, but also all (Punishment-Increasing) facts about the way in which the offender carried out that crime"
>
> Blakely v. Washington, 124 S. Ct at 2537

The Blakely court decision reveals statutory Provision has Provided a basis for interpreting Sec. 16-11-311(1) A. B. C. D as a sentencing Provision. Despite fact, statute at first glance has a look to it suggesting relevant aggravating factors and weapon Possession are elements of the offense. However, my conclusion aggravating factors listed in Sec. 16-11-311(1) A. B. C. D are sentencing factors, is supported by statutory structure, text and Judiciary obligation to Protect constitutional issues implicated by a contrary holding that reduces Jury role to low level Gate-keeping in violation of constitutional Protections expressed in Blakely Apprendi. Such application includes instances in which under Apprendi, Blakely, the defendant admits relevant facts or Jury finds relevant facts beyond a reasonable doubt. In Blakely, the court defined latter term as "The Maximum Sentence A Judge May Impose Solely On The Basis Of The Facts Reflected In Jury Verdict Or Admitted By Defendant" Blakely v. Washington, 124 S. Ct at 2537. Facts about offender like recidivism or about the way in

the basis of the facts reflected in jury verdict or admitted by de-
fendant" Blakely v. Washington 124 S.ct at 2537. Facts about the offen-
der, like recidivism or about the way in which crime was comm-
itted. As it relates to, seriousness of the injury or weapon possess-
ion that helps sentencing Judge determine a convicted defendant
specific sentence. It is not difficult to understand, why it should ma-
tter for jury trial purposes whether this statute Sec. 16-11-311(1) A.B.
C.D labels these aggravating factors a sentencing fact about way in
which defendant carried out crime and court or Prosecution deci-
sion of whether a lesser burglary under South Carolina Code Ann. Sec.
16-11-312(A) (Cum. Supp. 09) South Carolina Code Ann. Sec. 16-11-313)
Cum. Supp. 09) is warranted. Or a factual element to elevate this bur-
glary to Sec. 16-11-311(A); Sec. 16-11-312(B) with any of those ag-
gravating factors present. The only difference between these two
circumstances concerns a legislature about which label to place on
the facts that will lead to a greater sentence. At a minimum, a two-
jury system preventing Judge from taking account of aggravating
factors. Would not undercut or nullify legislative efforts as state might
suggest to ensure through statute punishments reflect a convicted
offenders conduct. In these and other ways, the two-jury system will
not work a radical change in existing law. State v. Watson, supra.
State v. Chubb, supra, and it is therefore not surprising that this
states highest court has already suggested the constitution outside
context of death Penalty might require bifurcated jury-based sen-
tencing State v. Chubb, 401 S.E.2d at 160, and it is respondent argu-
ment that poses an impediment to legislative intent of Sec. 16-11-311(1)

which casts doubt on its constitutional validity.

After addressing all the aggravating factors, as it relates to Sec. 16-11-311(1) A.B.C.D., it is now important to address the recidivism statutory Provision of Sec. 16-11-311(2) under two relevant Parts (1) Constitutional Doubt; (2) Statutory Interpretation, and as logically demonstrated that nature of charge and fact, it is a typical sentencing factor has nothing to do with what this statute means. (1) Constitutional Doubt

The defendant contends, that doctrine of Constitutional Doubt requires court to interpret Sec. 16-11-311(2) as setting forth a sentencing factor not a Separate crime. This court and Federal court has held:

> "A statute must be construed, if fairly Possible, so as to avoid not only the conclusion that it is unconstitutional but also Grave doubts upon that score"

United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)

The doctrine seeks in Part to minimize disagreement between the branches by Preserving legislative enactments that might otherwise founder on legislative constitutional objections. It is not designed to aggravate that friction by creating statutes foreign to those legislature intended, simply through fear of a constitutional difficulty that upon analysis, will evaporate. Thus, by invoking this doctrine I believe the alternative is a serious likelihood statute will be held unconstitutional. Only then can this doctrine serve its basic democratic function of maintaining a set of statutes that Reflect, Rather than distort, the Policy that

elected Representatives have made. For this reason, the statute is susceptible to two constructions after, and not before these complexities are unraveled. Then the statutory construction that avoids the constitutional question a "fair" one. The defendant contends that Doctrine Of Constitutional Doubt is not applicable to Sec. 16-11-311(a) is not fairly susceptible of the construction which avoids the constitutional Problem. the construction whereby Sec. 16-11-311(a) sets forth an element of offense. Accoeding6ly, defendant beGins this analysis not by examining the text of Sec. 16-11-311(a), but by demonstrating that the "Subject Matter" of the statute Prior commission of a serious crime is as typical a sentencing factor as one might imaGine. The statutory lanGuage is somewhat complex, but after considering matter in context I believe the interpretative circumstances point significantly in one direction. Consequently, even if we assume defendant construction of statute is not fairly Possible. The constitutional questions he raises, while requiring discussion leads one to believe legislature authorized court to impose longer sentences upon recidivist who commit this particular crime. See, State v. Washington, 526 S.E.2d 709 (2000) Fact defendant unlike respondent, doubt statute's constitutionality in this respect is a crucial point as court held:

> "An Enhanced sentence imposed on a Persistent offender, thus, is not to be viewed as a new jeopardy or additional Penalty for the earlier crimes. But as a stiffened Penalty for the latest crime which is considered to be an aGGravated offense because it is repetitive one."
>
> State v. Washington, 526 S.E.2d at 711

Hence, court is asked to address question of whether Purpose of statute is covered by Blakely decision for bifurcation of Process.

Wherefore, court is asked to Grant Writ.

Date: 3rd day of September, 2013.

Respectfully Submitted

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