

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BOBBY LEON SMITH,

APPELLANT

APPELLATE CASE NO. 2018-000541

INITIAL BRIEF OF APPELLANT

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Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT

The trial judge erred by sentencing Appellant to five years for possession of a
weapon during the commission of a violent crime when he was sentenced to life
without parole for armed robbery in violation of S.C. Code Ann. § 16-23-490(A).4

CONCLUSION.....7

TABLE OF AUTHORITIES

Cases

<u>In re M.B.H.</u> , 387 S.C. 323, 692 S.E.2d 541 (2010).....	3
<u>State v. Dickerson</u> , 395 S.C. 101, 716 S.E.2d 895 (2011).....	2
<u>State v. Owens</u> , 346 S.C. 637, 552 S.E.2d 745 (2001)	5
<u>State v. Palmer</u> , 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016)	5
<u>State v. Rice</u> , 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007)	3

Statutes

S.C. Code Ann. § 16-23-490(A)	1, 4, 5, 6
S.C. Code Ann. § 17-25-45.....	2

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by sentencing Appellant to five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole for armed robbery in violation of S.C. Code Ann. § 16-23-490(A)?

STATEMENT OF THE CASE

A Greenville County grand jury indicted Appellant on August 23, 2016 for murder, armed robbery, and possession of a weapon during the commission of a violent crime.¹ R. *. His case was called to trial on March 12, 2018 before the Honorable Robin B. Stilwell, and a jury. Tr. 1. He was tried jointly with his codefendant and brother, Jarhu Smith. Tr. 1. Assistant Solicitors Brian J. Moroney, Jr. and W. Jeffrey Weston represented the state, Alex Kornfeld represented Jarhu Smith, and C. Timothy Sullivan represented Appellant. Tr. 1.

On March 15, 2018, the jury acquitted Appellant of murder, but found him guilty of accessory after the fact, armed robbery, and possession of a weapon during the commission of a violent crime.² Tr. 669, l. 23 – 670, l. 9. Judge Stilwell sentenced Appellant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for armed robbery, fifteen years for accessory after the fact, and five years for the weapons offense. Tr. 678, l. 19 – 679, l. 6.

This appeal follows.

¹ The indictments list the August 2015 term, but 2015 is crossed out and 2016 is handwritten. The back of the indictments state the grand jury convened on August 23, 2016. The date below the name of the witness who testified before the grand jury is February 4, 2015, the date Appellant was arrested. The indictments are stamped as true billed and include the signature of the grand jury foreman, but do not include the date of his signature. The indictments were stamped as received by the clerk of court's office on April 24, 2015. There was no objection to the indictments at trial.

² The trial judge instructed the jury on accessory after the fact as a lesser included offense of murder. Tr. 656, l. 5 – 657, l. 20; R. * (Verdict Form). The assistant solicitor objected to this charge. He argued accessory after the fact is not a lesser included offense of murder and that if the jury were to acquit Appellant of murder and Appellant was later successful on appeal, the state would not be able to retry Appellant for murder based on double jeopardy. Tr. 606, l. 19 – 607, l. 2; See State v. Dickerson, 395 S.C. 101, 118, 716 S.E.2d 895, 905 (2011) (“It is well-settled that accessory after the fact is not a lesser-included offense of murder in this State.”). While the judge did not “necessarily disagree” with the state that accessory after the fact is not a lesser included offense of murder, he stated he would give the charge “as a matter of fairness” since from Appellant’s testimony the jury could find Appellant was “guilty of the offense of accessory after the fact” as opposed to murder. Tr. 607, l. 8 – 608, l. 4.

STANDARD OF REVIEW

“A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.” In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) (citing State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007)).

ARGUMENT

The trial judge erred by sentencing Appellant to five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole for armed robbery in violation of S.C. Code Ann. § 16-23-490(A).

After the trial judge sentenced Appellant to life without parole for armed robbery, fifteen years for accessory after the fact, and five years for possession of a weapon during the commission of a violent crime, defense counsel objected arguing the five year sentence for the weapons offense was not applicable where Appellant was sentenced to life without parole for armed robbery. The judge overruled the objection. He asserted:

I've read the statute and I read the relevant case law that y'all gave to me. And it - - and under most circumstances, a five-year sentence for . . . possession of a weapon during the commission of a violent crime is compulsory.

The statute says that it's not compulsory when and if there is either a life or death sentence in a suit. The - - I believe that in the - - in the case that you sent me, the holding of the majority was that it was appropriate. A dissent said they didn't think it was appropriate under the statute because the statute says that you don't have to do it.

I read that as . . . essentially, a common sense conclusion by the legislature that it was entirely academic to sentence someone to five years if you have already sentenced them to either life or death.

So I think it says it's not compulsory. But I don't think it precludes the Court from doing so. And as a practical matter in this case - - It doesn't matter a single bit.

Tr. 679, l. 9 – 680, l. 6.

The judge's ruling was erroneous. The plain language of S.C. Code Ann. § 16-23-490(A) is unambiguous. The five year sentence for possession of a weapon during the commission of a violent crime does not apply where the defendant is sentenced to life without parole for the violent crime. Section 16-23-490(A) states:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

(emphasis added).

In State v. Owens, the appellant, who was sentenced to death for murder, argued the trial judge erred in sentencing him for possession of a firearm during the commission of a violent crime because § 16-23-490(A) prohibits such a sentence where the death penalty is imposed. Our Supreme Court agreed. State v. Owens, 346 S.C. 637, 666-667, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). The Court wrote:

Section 16-23-490(A) (Supp.2000) states:

If a person is in possession of a firearm or visibly displays what appears to be a firearm ... during the commission of a violent crime and is convicted of committing ... a violent crime ..., he must be imprisoned five years, in addition to the punishment for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

Section 16-23-490(A) expressly provides the mandatory five year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. Appellant was sentenced to death. Accordingly, we vacate the five year sentence for possession of a firearm during the commission of a violent crime.

Id. (emphasis in original).

Subsequently, in State v. Palmer, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016), this Court stated:

Palmer was found guilty of murder and possession of a weapon during the commission of a violent crime. The court sentenced Palmer to five years'

imprisonment on the possession of a weapon during the commission of a violent crime after sentencing him to life without parole on the murder. Palmer objected to the sentence. Palmer argues this was in error because S.C. Code Ann. § 16-23-490(A) (2015) provides the five-year sentence is inapplicable when a court imposes a life without parole sentence.

The State concedes this was in error, and we agree. Therefore, Palmer's sentence for possession of a weapon during the commission of a violent crime should be vacated.

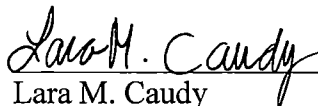
(internal citations omitted).

Appellant was convicted of armed robbery, a violent crime as defined in Section 16-1-60, and sentenced to life without parole. Consequently, the trial judge erred in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime. His five year sentence should be vacated.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court vacate his five year sentence for possession of a weapon during the commission of a violent crime.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

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THE STATE,

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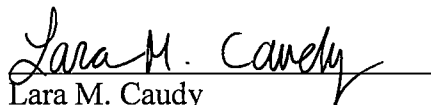
V.

BOBBY LEON SMITH,

APPELLANT

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served upon Bobby Leon Smith, #98962, at Turbeville Correctional Institution, 1578 Clarence Coker Highway, Turbeville, SC 29162, this 28th day of February, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of February, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.