

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable R. Knox McMahon, Circuit Court Judge

ORIGINAL
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MAR 19 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEMARCO JOHNSON,

APPELLANT

APPELLATE CASE NO. 2018-001424

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in dismissing appellant's motion for resentencing because appellant was a juvenile at the time of the triggering offense for his current life without parole sentence under South Carolina's recidivist statute?

STATEMENT OF THE CASE

On July 1, 2016, appellant filed a motion for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 25. On July 28, 2016, the Supreme Court ordered that the Honorable R. Knox McMahon was vested with jurisdiction to hear appellant's motion and appoint counsel. R. 38-39. On June 1, 2017, Judge McMahon held a hearing on the State's motion to dismiss. R. 1. Daniel R. Goldberg represented the State and J. Taylor Bell represented appellant. R. 1. On June 21, 2018, Judge McMahon signed an Order granting the State's motion. R. 98-101. This appeal follows.

STANDARD OF REVIEW

“Questions of law are reviewed de novo.” Ex Parte TLC Laser Eye Centers, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013).

ARGUMENT

The trial court erred in dismissing appellant's motion for resentencing because appellant was a juvenile at the time of the triggering offense for his current life without parole sentence under South Carolina's recidivist statute.

The facts and procedural history of this case were undisputed below. R. 14. Appellant received his current life without parole sentence for a crime he committed when he was twenty years old. R. 6. He was convicted and sentenced at the age of twenty-one. R. 6. The triggering offense for LWOP, however, was committed when appellant was fifteen years old. R. 12. Appellant was charged with murder, assault with intent to kill, and two counts of armed robbery. R. 12. Appellant was waived up from family court to General Sessions, but trial counsel was unable to locate any records from 1995 regarding a waiver hearing. R. 12-13. The murder charge was ultimately dismissed and appellant was convicted in General Sessions of assault with intent to kill and attempted armed robbery. R. 3, 18-19.

The trial judge below erred in granting the State's motion to dismiss because he failed to recognize that no evidence existed that appellant had a waiver hearing that made findings pursuant to the factors outlined in Kent v. United States, 383 U.S. 541 (1966). The transfer of jurisdiction statute allows the solicitor to seek waiver by petition when a juvenile is charged with murder. S.C. Code Ann. § 63-19-1210(6). Unlike the other transfer provisions, the section dealing with murder does not provide for "full investigation" or a hearing. Id. Therefore, trial counsel likely found no records of a waiver hearing because none was conducted. The murder charge was dismissed, leading to the conclusion that appellant should have received a full Kent hearing.

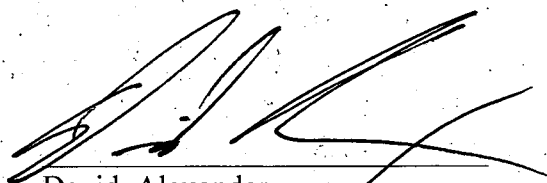
This lack of a hearing examining the Kent factors takes appellant's case out of the ambit of State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015) and State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002). In Standard, the Court held that if a juvenile had been tried and adjudicated as an adult, that conviction could be used as a strike. Standard at 204-07, 569 S.E.2d at 328-30.

Instead, appellant's case falls under the rule of State v. Ellis, 345 S.C. 175, 179-80, 547 S.E.2d 490, 492 (2001). In Ellis, the Court held that a juvenile adjudication may not be used as a "strike." Id. Implicit in the reasoning of Standard is that the juvenile was either facing a valid murder charge or received a full transfer hearing considering the Kent factors. Because the record below does not show appellant ever received such a hearing, the rule of lenity requires that appellant's juvenile record be considered as a juvenile adjudication, not an adult conviction. "[The] rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor." State v. Miles, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017), reh'g denied (Oct. 19, 2017), cert. denied (Oct. 18, 2018).

The rule of lenity requires construction of the recidivism statute in appellant's favor. Without any evidence that appellant's waiver followed Kent, appellant was correct below by arguing that he never had a court fully consider the factors of his youth as required by the Eighth Amendment under Miller v. Alabama, 567 U.S. 460 (2012) and Graham v. Florida, 560 U.S. 48 (2010). This Court should recognize that Ellis is the applicable precedent under state and federal law and remand this case for a full resentencing hearing that takes into account appellant's juvenile status.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for a full resentencing.

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of March, 2019.

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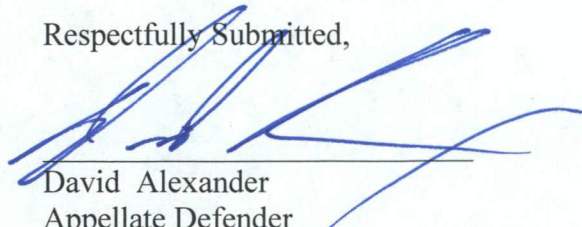
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demarco Johnson states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's hearing before the Honorable R. Knox McMahon, which was held on June 1, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Demarco Johnson.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 19th day of March, 2019.

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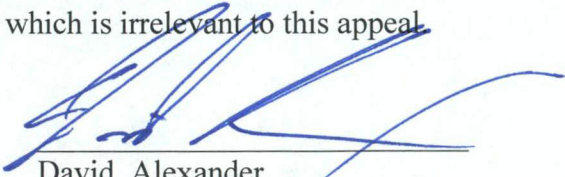
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Transcript of Hearing on State's Motion to Dismiss (June 1, 2017)
- (2) Motion for Re-Sentencing (July 1, 2016)
- (3) State's Motion to Dismiss Re-Sentencing Motion (May 24, 2017)
- (4) Order Appointing Judge McMahan (July 28, 2016)
- (5) Memo in Support of Motion for Re-Sentencing (May 25, 2017)
- (6) Defendant's Exhibits 1-7
- (7) Order of Dismissal (June 21, 2018)

I certify that this designation contains no matter which is irrelevant to this appeal.

March 19, 2019


David Alexander
Appellate Defender

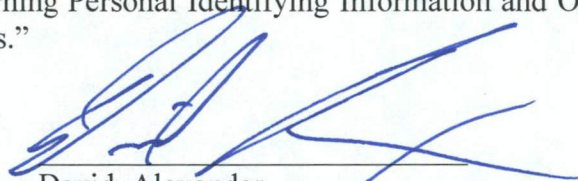
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

March 19, 2019.



David Alexander
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has 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 Anders Brief of Appellant and Designation of Matter have been served on Demarco Johnson, 241438, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 19th day of March, 2019.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of March, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.