

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

v.

KENNETH LAMONT ROBINSON, JR.,

RESPONDENT,

APPELLANT.

Reply to Return in Opposition to Motion to Hold Appeal in Abeyance and to Remand to the Court of General Sessions for a Hearing on a Motion for Resentencing Based on After-Discovered Evidence

I. Introduction

Appellant, Kenneth Robinson, submits this reply to Respondent's Return in Opposition to Appellant's Motion to Remand. Respondent claims that "the expanded proceedings under Aiken v. Byars were not actually required in this instance as the State was not seeking a life sentence." Return at 1, n.1. Respondent also argues that State v. South only applies to capital cases and not to non-capital sentencing proceedings. Return at 6-7. Finally, Respondent maintains that there is no evidence of vindictiveness present in the record of the proceedings below. Return at 7-9. As will be set forth in more detail in this Reply, each assertion is incorrect.

ORIGINAL

RECEIVED

MAR 20 2019

SC Court of Appeals

II. Argument

A. The Sentencing Procedures Contemplated in Aiken v. Byars Were Required in this Case.

Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014), mandates that a juvenile receive an individualized sentencing hearing in any case where life without parole (or its functional equivalent) is a possible punishment. While Respondent claims that Aiken v. Byars was not implicated because the State was not seeking a life without parole sentence Return at 1, n.1, it fails to point out that there was no agreed upon sentence, and thus, the trial judge retained the authority to send Appellant to prison for the rest of his life. Furthermore, she, for all practical purposes, did. Trial counsel argued, with supporting statistical evidence, that a 50-year sentence was the functional equivalent of life without parole. See Exhibit #9 (p. 9, ll 19–25). Although his attorneys presented a wealth of mitigating evidence establishing beyond any certainty that Kenneth is not “permanent[ly] incorrigib[le]” or irreparably corrupt,¹ the court imposed a 50-year sentence, virtually assuring that he will die as an inmate in the South Carolina Department of Corrections. Exhibit #9 (p. 328, ll. 2–3); Exhibit #10 (p. 6–7). In sum, Respondent’s assertion that Aiken v. Byars was not implicated in this case is legally and factually incorrect.

B. State v. South Applies to Juvenile Life Without Parole Cases.

As noted in Aiken v. Byars, the Supreme Court of the United States has described juveniles that face the possibility of life without parole as similarly situated to adult defendants against whom the State is seeking the death penalty. See Graham v. Florida 560 U.S. 48, 69–70, 82 (2010) (analogizing the death penalty to life without parole for juveniles when ultimately prohibiting life

¹ Life without parole is a punishment reserved for “the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016). Accordingly, the Supreme Court of the United States has “[drawn] a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.” Id.

without parole as a cognizable punishment for juveniles that commit non-homicide offenses); Aiken v. Byars, 410 S.C. at 545, 765 S.E.2d at 572 (recognizing “Graham’s treatment of juvenile life sentences as analogous to capital punishment”); see also Miller v. Alabama, 567 U.S. 460, 474–75 (2012) (reiterating that in Graham, the Court treated a life without parole sentence similarly to the death penalty because it “viewed this ultimate penalty for juveniles as akin to the death penalty”). Miller, which held that mandatory life without parole sentences in cases involving juvenile offenders violate the Eighth Amendment’s individualized sentencing requirement, drew specifically upon the Supreme Court’s capital sentencing jurisprudence. Miller, 567 U.S. at 489; see also Aiken, 410 S.C. at 544, 765 S.E.2d at 577 (Miller “specifically linked the individualized sentencing requirements of capital sentencing to juvenile life without parole sentences.”). In arguing that State v. South does not apply to cases involving juveniles facing life without parole, Respondent fails to acknowledge the link between the two categories of case embraced by the United States and South Carolina Supreme Courts. See Return at 6–7. Because Supreme Court precedent deems these punishments as equivalent, State v. South applies to juvenile cases where life without parole is a possibility, as was the case here. See Exhibit #9 (p. 10, ll 1–4). Accordingly, Appellant may seek a motion for a new sentencing hearing based on after-discovered evidence.

C. Evidence of Vindictiveness Is Present in This Case.

As set forth in detail in the initial motion to remand, a presumption of vindictiveness arises when “there is a reasonable likelihood . . . that the increase of sentence is the product of actual vindictiveness on the part of the sentencing authority.” Alabama v. Smith, 490 U.S. 794, 799 (1989); see also State v. Higgenbottom, 344 S.C. 11, 14–15, 542 S.E.2d 718, 720–21 (2001). The State’s argument that no presumption of vindictiveness arose here, see Return at 7–9, ignores the substantial evidence of retaliatory behavior by the prosecution and trial judge present on this record. First, prior

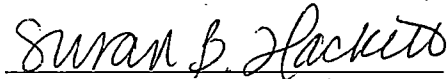
to his trial, the State offered Kenneth a 23-year sentence if he would plead guilty to voluntary manslaughter. Exhibit #10 (p. 10). He declined, choosing instead to exercise his Sixth Amendment right to jury trial. Exhibit #10 (p. 10). After the jury rendered a jury verdict, and thus with no incentive to avoid trial, the State offered Kenneth a 30-year sentence if he would forego his right to ask this Court to reverse his convictions. Exhibit #10 (p. 10). Again, he demurred, electing to preserve his due process right to appeal his convictions. Exhibit #10 (p. 10). After a sentencing hearing, where evidence regarding the features of his youth and his strong rehabilitative potential was presented (and no new negative information came to light), the State recommended (and the trial judge imposed) a 50-year sentence. Exhibit #9 (p. 328, ll. 2–3; p. 358; ll. 11–13); Exhibit #10 (p. 6–7). The State made this recommendation despite the fact that Kenneth was a fifteen-year-old juvenile who not only did not fire the fatal shot, but who affirmatively advised Richard Simmons, the adult co-defendant, not to shoot because it was the wrong car. Exhibit #6 (p. 907, ll 1–9; p. 975, l. 6–p. 976, l. 17); Exhibit #9 (p. 358, ll. 11–13); Exhibit #10 (p. 3). The same prosecutor then recommended, and the judge imposed, a 30-year sentence for Simmons. Exhibit #12 (p. 2, ll. 21–24; p. 8, ll. 9–13). Keon Anderson, whose conduct in the offense was virtually identical to Kenneth’s, received (on the same prosecutor’s recommendation) a 15-year sentence. Exhibit #6 (p. 2, l. 5; p. 3, l. 7; p. 14, ll. 11–15). Accordingly, the state’s and the judicial system’s disparate treatment of Kenneth, Simmons and Anderson, in apparent response to Kenneth’s exercise of his rights guaranteed by the Sixth and Fourteenth Amendments, raises a presumption of vindictiveness. Thus, this case should be remanded to the trial court to permit the filing and consideration of a motion for a new sentencing hearing based on after-discovered evidence.

III. Conclusion

For these additional reasons, counsel for Appellant Kenneth Robinson respectfully requests

that this Court hold his appeal in abeyance and remand this case to the Charleston County Court of General Sessions for a hearing on a motion for resentencing based on after-discovered evidence.

Respectfully submitted,



SUSAN B. HACKETT
Office of Appellate Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201
(803) 734-1330

JOHN H. BLUME
Samuel F. Leibowitz Professor of Trial Techniques
Director, Cornell Death Penalty Project
Director, Clinical, Advocacy and Skills Programs
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030

ATTORNEYS FOR APPELLANT

March 20, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

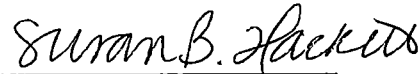
V.

KENNETH LAMONT ROBINSON, JR.,

APPELLANT.

CERTIFICATE OF SERVICE

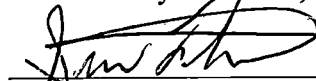
I certify that a copy of the reply to return in opposition to motion to hold appeal in abeyance and to remand to the Court of General Sessions for a hearing on a motion for resentencing based on after-discovered evidence in the above-referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of March, 2019.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of March, 2019.

 (L.S.)

Notary Public for South Carolina

My Commission Expires October 30, 2022.