

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

Robert Frank Addy, Probate Judge

RECEIVED

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

ANDREW LEE HARRISON,

APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Is the penalty portion of S.C. Code §56-5-1210 (Leaving the Scene of an Accident with Death Resulting) unconstitutional because it violates the Eighth Amendment's proscription against cruel and unusual punishment?

STATEMENT OF THE CASE

Andrew Lee Harrison was indicted by the Greenwood County grand jury for Leaving the Scene of an Accident with Death Resulting, in violation of S.C. Code Ann. 56-5-1210 and Driving under Suspension during its January 2010 term. Harrison proceeded to trial before the Honorable Frank R. Addy, Jr. on August 30, 2011. He was convicted, and sentenced to 20 years incarceration. He was represented by Janna M. Nelson and E. Charles Grose, Esquires.

This appeal timely follows.

ARGUMENT

The penalty portion of S.C. Code §56-5-1210 (Leaving the Scene of an Accident with Death Resulting) is unconstitutional because it violates the Eighth Amendment's proscription against cruel and unusual punishment.

Andrew Harrison is a 43 year old man serving a 20 year sentence in the South Carolina Department of Corrections after being convicted at trial of Leaving the Scene of an Accident with Death Resulting. He challenges the penalty portion of S.C. Code Ann. §56-5-1210 (1976) which states, in pertinent part:

The driver of a vehicle involved in an accident resulting in injury to or the death of a person immediately shall stop the vehicle at the scene of the accident or as close to it as possible. He then shall return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 56-5-1230. However, he may temporarily leave the scene to report the accident to the proper authorities. The stop must be made without obstructing traffic more than is necessary. A person who fails to stop or to comply with the requirements of this section is guilty of . . . (3) a felony and, upon conviction, must be imprisoned not less than one year nor more than 25 years and fined not less than \$10,000 nor more than \$25,000 when death results.

Harrison appeals his sentence, and submits that the penalty portion of the statute is unconstitutional because it is a violation of the Eighth Amendment's proscription against cruel and unusual punishment.

RELEVANT FACTS

The facts of this case are undisputed. On the morning of September 27, 2009, Andrew Harrison picked up a Ford F-350 truck from Wilson's Auto Sales for the purpose of detailing the truck for Wilson's. He drove the truck a short distance down Highway 25 in Greenwood County to Parson's Used Cars to use its facilities to perform the detailing work on the truck. At approximately 3:00pm, Harrison completed the work on the truck and left

Parson's Used Cars to deliver the truck back to Wilson's Auto Sales. Tr. 235, l. 9- 240, l. 3; Tr. 243, l. 5- 249, l. 16.

Harrison exited Parson's driveway by making a right turn onto Highway 25. After the truck was completely in the roadway, Harrison was hit in the rear by Gary Timms, who was riding a motorcycle and was not wearing a helmet or any other protective gear. After the impact, Harrison continued down Highway 25, and then pulled over. Harrison was approached by a witness to the accident, Daniel Gantt, who asked Harrison to return to the scene of the accident to check on Timms. Harrison then returned the truck to Wilson's. Tr. 207, l. 9- 226, l. 1.

An ambulance transporting a patient happened upon the accident scene within minutes and stopped to treat Timms, who was unresponsive, was not breathing, and had unequal pupils. Timms was transported by helicopter to a hospital in Greenville, and shortly afterwards was declared to be brain-dead. He was later removed from life-support and pronounced dead. Timms died of massive head trauma, including a skull fracture and hemorrhaging of the brain. Tr. 294, l. 5- 312, l. 19; Tr. 325, ll. 11-18. Harrison was arrested on September 29, 2009 and charged with Leaving the Scene of an Accident with Death Resulting, Failure to Yield Right of Way, and Driving under Suspension. The state, at trial, went forward on Leaving the Scene, and Driving under Suspension. He was convicted, and sentenced to 20 years in prison.

Harrison now asserts that the statute under which he was convicted is unconstitutional because it authorizes a term of imprisonment that is disproportionate to the offense, and thus violates the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. Other states do not recognize such a harsh penalty under

similar circumstances, as demonstrated in Exhibit A, *infra*, and Harrison's conduct in this case was not so reprehensible as to deserve a 20 year sentence. Respectfully, Harrison asks this Court to find S.C. Code Ann. §56-5-1210 (Leaving the Scene of an Accident with Death Resulting) is unconstitutional and remand his case for a new sentencing hearing.

A. The Eighth Amendment prohibits a term of imprisonment that is disproportionate to the offense.

The Eighth Amendment to the United States Constitution is applicable to the states by reason of the Fourteenth Amendment. Robinson v. United States, 370 U.S. 660 (1962). While the prohibitions of the Eighth Amendment are aimed at inhuman and barbarous penalties such as torture, the duration of punishment also falls within the purview of the amendment when the duration of imprisonment is so disproportionate to the offense that it shocks the moral sense of the community. See Am.Jur.2d, Criminal Law, §§612, 614. For example, in the seminal case on this issue, imprisonment of 12 to 20 years for falsifying a public document was held to constitute cruel and unusual punishment. Weems v. United States, 217 U.S. 349 (1910). Similarly, a sentence of life imprisonment without the possibility of parole for the crime of forcible rape has also been held unconstitutional as to juvenile defendants. Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968). The "proportionality" bedrock of Eighth Amendment jurisprudence is equally important a principle as "evolving standards of decency" when determining whether a sentence constitutes cruel and unusual punishment. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (upholding 30 year sentence for 12 year old who killed his grandparents with a shotgun, then lied about it, after finding other courts have given similar sentences).

The United States Supreme Court has applied a proportionality analysis in granting an Eighth Amendment challenge to a penalty of life without parole for juveniles who are not charged with homicide. Graham v. Florida, 130 S.Ct. 2011 (2010). In Graham, the Court noted that Eighth Amendment challenges based on proportionality fall into two general classes. The first of these classes, which applies in the instant case, is a challenge to the “length of term-of-years sentences given all the circumstances in a particular case.” Id. at 2021. The Court noted the test used in its previous opinions on Eighth Amendment challenges to penalties in Solem v. Helm, 463 U.S. 277 (1983) and Harmelin v. Michigan, 501 U.S. 957 (1991). This test first involves a comparison of the gravity of the offense with the severity of the sentence. Harmelin at 1005. When this comparison “leads to an inference of gross disproportionality,” the court should then compare sentences imposed for the same crime in other jurisdictions to see if that comparison “validate[s] an initial judgment that [the] sentence is grossly disproportionate.” Id.

In State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003), this Court recognized that the Eighth Amendment requires the duration of the sentence not be grossly out of proportion with the severity of the crime. This Court examined the penalty for homicide by child abuse and found that it was not disproportionate under the Eighth Amendment. In doing so, the Court reviewed the factors articulated in Solem: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions.¹ This Court

¹ The Court noted that the stringent three-factor Solem test may no longer be mandated in Eighth Amendment cases given the United States Supreme Court's decision in Harmelin. See State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct. App. 2000)

found that 20 years in prison, suspended upon service of 12 years, for causing stillbirth of defendant's viable fetus by using cocaine was not cruel and usual punishment, considering that homicide was a severe offense, the penalty was no harsher than that imposed upon any other individual charged with murder, and other states imposed severe sentences on those found guilty of murder or neglect of a child. McKnight at 652-53, 647 S.E.2d at 177.

In contrast to the McKnight case, the gravity of the offense here is not nearly as severe in that it does not involve a homicide, nor even any intent to harm anyone. In fact, the unlawful conduct is the same whether leaving the accident scene results in property damage to an unattended vehicle or death of another party involved in the accident. A defendant is not even required to have caused the accident in order to be charged with leaving the scene, and the penalty adjusts based on the result rather than on the underlying conduct of leaving. In addition, the overwhelming majority of other jurisdictions have much less severe penalties for the same conduct, with only two additional states imposing penalties as steep as that imposed by South Carolina law.

However, we do not stop at simply considering the gravity of the offense as compared with the punishment or at comparing the penalties of other jurisdictions. The Eighth Amendment is also violated when the penalty imposed for a particular offense is **greater** than a sentence that could be imposed for a more serious crime. For example, in Oregon, a defendant sentenced to life imprisonment for assault with intent to rape successfully argued that the penalty constituted cruel and unusual punishment when the maximum punishment for statutory or forcible rape was 20 years imprisonment. Cannon v.

(finding three-pronged inquiry no longer applicable requiring only a threshold comparison of the gravity of the offenses against the severity of the sentence).

Gladden, 203 Or. 629, 81 P.2d 233 (1955). Courts in additional states have also held penalties to violate the Eighth Amendment when they were greater than penalties for more serious crimes. See State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963) (holding a penalty of 20 to 30 years for possession of burglary tools was unconstitutional as it provided for a time of imprisonment 3 times as long as the penalty that could be imposed for the crime of housebreaking); Roberts v. Collins, 404 F.Supp. 119 (D.C.Md. 1975) (finding 20 year sentences for the lesser- included offense of simple assault unconstitutional when the maximum penalty for the more aggravated offense of assault with intent to murder was 15 years); People v. Schueren, 10 Cal. 3d 553, 111 Cal. Rptr. 129, 516 P.2d 833 (1973) (finding a term of six months to life, which could exceed 14 years, for assault with a deadly weapon unconstitutional when the charge of assault with a deadly weapon with intent to commit murder carried a term of one to 14 years); Buchanan v. State, 68 S.W.3d 136 (Tex. App. 2001) (Prohibition against grossly disproportionate punishment survives under the Eighth Amendment apart from any consideration of whether the punishment assessed is within the range established by the legislature.”).

A similar disparity exists in our state when the penalty for the statute in question is compared with the much lower penalty for Reckless Homicide. Reckless Homicide carries a maximum of 10 years imprisonment, a full 15 years less than the maximum penalty of 25 years imprisonment for the statute at issue in this case. S.C. Code §56-5-2910. Reckless Homicide is undoubtedly the more serious crime, since leaving the scene of an accident with death resulting does not require either negligent behavior on the part of the defendant, much less reckless behavior.

Similarly, the offense of Involuntary Manslaughter carries a maximum penalty of only 5 years. Involuntary manslaughter requires proof of criminal negligence, defined in the statute as the “reckless disregard for the safety of others.” S.C. Code §16-3-60 (1976). In contrast, Leaving the Scene of an Accident does not require proof of any negligent behavior whatsoever on the part of the defendant, neither simple negligence nor the reckless disregard standard for criminal negligence, yet it carries a maximum penalty that is 20 years in excess of the maximum penalty for Involuntary Manslaughter.

In addition to the obvious difference in duration of the maximum penalties for these three offenses, the actual time a convicted defendant would serve in the South Carolina prison system for Leaving the Scene of an Accident with Death Resulting as opposed to the either Reckless Homicide or Involuntary Manslaughter is much greater, even if the defendant were sentenced within the penalty range allowed for the two latter, more serious, offenses. Leaving the Scene of an Accident with Death Resulting is a no-parole offense, while a defendant's sentence for either of the other two offenses would be eligible for parole after serving only one fourth of the sentence. For example, a defendant sentenced to 5 years for Leaving the Scene of an Accident with Death Resulting would be required to serve 85% of that sentence and would be ineligible for parole during that time, while a defendant sentenced to 5 years for either of the other two more serious charges would be eligible for parole after serving only 1.25 years. Even if the defendant did not successfully make parole or choose not to seek parole after serving that time, he would be required to serve a maximum of 65% of that five-year sentence, or 3.25 years.

These vast differences in penalties for more serious offenses make it clear that the penalty imposed for Leaving the Scene of an Accident with Death Resulting is disproportionate to the crime and therefore violates the Eighth Amendment.

B. The vast majority of other states impose much less severe penalties for this offense.

The Eighth Amendment should be regarded as a precept that punishment for crime should be graduated and proportioned to the offense in light of **present day concepts of morality and decency**. United States ex rel. Bongiorno v. Ragen, 54 F. Supp. 973, affd 146 F.2d 349 (7th Cir. 1944) (emphasis added). For the purposes of determining these present-day concepts of morality and decency, it is useful to look at the practices of other states and compare the penalties they impose for the offense of Leaving the Scene of an Accident with Death Resulting with the penalty allowed in South Carolina. Our courts have followed this practice in looking at cases in which sentences for particular crimes were alleged to be in violation of the Eighth Amendment. See McKnight, *supra*. And see Thacker v. Garrison, 445 F.Supp. 376 (D.C.N.D. 1978) (finding sentence of 48 to 50 years for breaking into a building and stealing a small amount of money was unconstitutional where other crimes more threatening to the safety of persons had lesser maximum sentences and only 3 other states provided as harsh a penalty).

In an effort to assist this Court in comparing the penalties from other states for the offense of Leaving the Scene of an Accident with Death Resulting, please see Exhibit A, Memorandum of Law in Support of Motion. This exhibit includes a chart which lists penalties for all 50 states, the statutes from each state prohibiting leaving the scene of an accident, and the statutes from each state providing the penalty allowed for the offense. A

review of how the other 49 states view the appropriate punishment for the crime at issue is quite telling and is an appropriate measure of our present day concepts of morality and decency.

The vast majority of the rest of the country believes that a penalty of 10 years or less for the offense in question is appropriate. A full 40 other states impose a penalty in that range when someone leaves the scene of the accident and death results. A few of these 40 states require a finding of fault in order for the penalty to be imposed. The penalty ranges for these 40 states break down as follows:

Up to 10 years—16 states

Up to 8 years—one state

Up to 7 years- 3 states

Up to 6 years—2 states

Up to 5 years—11 states

Up to 4 years—2 states

25 months or less—5 states

This leaves 9 other states to compare to South Carolina. Of those 9, **only two** other states, Florida and Wisconsin, imposed as harsh a penalty as does our state. The remaining 7 of the 9 states impose maximum penalties of 12 to 15 years (up to 12 years—2 states; up to 12.5 years—1 state; up to 15 years—4 states).

Given that 94% of other jurisdictions in our country sees fit to impose significantly less harsh penalties than that required in South Carolina, it is abundantly clear that our State is imposing a penalty for the offense in question that violates the Eighth Amendment.

Under the Solem test that requires comparison of sentences in other jurisdictions, our penalty in South Carolina is unconstitutional.

C. Harrison's conduct is not so reprehensible as to warrant a sentence up to 25 years.

In South Carolina, the offense of Leaving the Scene of an Accident with Death Resulting does not require proof of any negligent or careless act on the part of an accused other than simply leaving the scene of the incident. The statute requires only that a person involved in an accident, whether at fault for the accident or completely blameless, remain at the scene of the accident. Other than the charge of Leaving the Scene of an Accident with Death Resulting, the only additional unlawful behavior for which Harrison was accused is driving while his license was suspended and failing to yield the right-of-way. He was not charged with any conduct involving reckless behavior, such as that required for a conviction for Reckless Homicide or Involuntary Manslaughter, and there is no allegation that he was driving while intoxicated. Additionally, the State did not offer any evidence suggesting that he intentionally set out to harm anyone on the date of this accident. In fact, there is no indication of any intentional bad behavior other than the allegation that he did not remain at the scene after the accident.

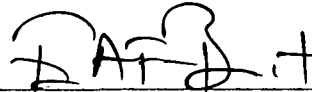
The penalty for Leaving the Scene of an Accident with Death Resulting violates the Eighth Amendment to the United States Constitution because the penalty is disproportionate to the offense. More serious charges carry much less severe penalties, the vast majority of other jurisdictions impose much less severe penalties, and Harrison's conduct was not such that a penalty of 20 years is appropriate. For these reasons, Harrison asks this Court to

declare that the penalty portion of the statute is unconstitutional, and remand his case for a new sentencing hearing.

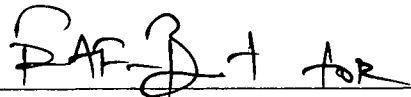
CONCLUSION

For the preceding reason, Harrison respectfully asks this Court to declare the penalty portion of S.C. Code Ann. §56-5-1210 (Leaving the Scene of an Accident with Death Resulting) is unconstitutional, and remand his case for a new sentencing hearing.

Respectfully submitted,



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This 6th day of October, 2011.