

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Sep 04 2020

SC Court of Appeals

On Petition for Writ of Certiorari to the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Honorable Maite Murphy, Circuit Court Judge

Unpublished Opinion No. 2020-UP-178 (S.C. Ct. App. filed June 10, 2020
Withdrawn, Substituted, and Refiled July 29, 2020)

THE STATE, RESPONDENT-PETITIONER

v.

CHRISTIAN ANTHONY HIMES, PETITIONER-RESPONDENT.

Appellate Case No. 2020-001177

STATE'S CROSS-PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803)734-3727

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit
140 N. Main Street, Suite 102
Summerville, South Carolina 29483

ATTORNEYS FOR PETITIONER

INDEX

INDEX i

CERTIFICATION OF COUNSEL.....1

QUESTION PRESENTED.....1

Did the Court of Appeals err by considering and granting relief on an unpreserved sentencing issue contrary to this Court’s precedent and well-established preservation rules?

STATEMENT OF THE CASE.....1

ARGUMENT2

The Court of Appeals plainly erred in reaching an admittedly unpreserved sentencing issue in contravention of this Court’s precedent and well-established preservation rules. 3

CONCLUSION.....5

CERTIFICATION OF COUNSEL

Counsel for Respondent-Petitioner, the State of South Carolina, certifies that a timely Petition for Rehearing was made, and that the Court of Appeals finally ruled on that petition by order dated July 29, 2020. (App. pp. 23-28; p. 32).

QUESTION PRESENTED

Did the Court of Appeals err by considering and granting relief on an unpreserved sentencing issue contrary to this Court's precedent and well-established preservation rules?

STATEMENT OF THE CASE

On September 1, 2016, the Dorchester County Grand Jury indicted Christian Anthony Himes ("Himes") for one count of murder (2015-GS-18-1882) and one count of possession of a weapon during the commission of a violent crime (2015-GS-18-1883). (R. pp. 590-593). A jury convicted Himes on April 6, 2017. (R. 560). Judge Murphy sentenced him to life without the possibility of parole for the murder conviction and five years confinement for the possession of a weapon during the commission of a violent crime conviction, both to be served concurrently. (R. 570). There was no objection to the sentence.

In the direct appeal, the South Carolina Court of Appeals originally vacated the possession of a weapon conviction and sentence. (App. pp. 1-4). The State sought rehearing arguing the sentencing issue was not preserved for review and that the Court of Appeals erred in vacating the conviction. Though denying the petition, the Court of Appeals modified the opinion to vacate only the sentence.

Himes filed a petition for writ of certiorari on August 28, 2020 raising a separate issue. The State submits this cross-petition for writ of certiorari.

ARGUMENT

The Court of Appeals plainly erred in reaching an admittedly unpreserved sentencing issue in contravention of this Court’s precedent and well-established preservation rules.

This case comes to the Court as an addition to a long line of error. The Court of Appeals had created a pattern of reaching sentencing issues that are admittedly not preserved for review on direct appeal. This recurring error should be corrected.¹

Himes argued in the Court of Appeals that “[t]he trial judge erred as a matter of law in sentencing Himes, and the five year sentence for possession of weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490 should be vacated.” (FBOA, p. 30) (emphasis added). He admitted there was no objection:

Though defense counsel did not raise an objection to the improper imposition of this sentence during Himes’ sentencing hearing, this Court can address this issue in the interest of judicial economy. See, e.g., State v. Vick, 384 S.C. 189, 201-03, 682 S.E.2d 275, 281-82 (Ct. App. 2009).

(FBOA, pp. 30-31).

¹ See, for example, the following cases which have been identified as reaching unpreserved sentencing issues: *State v. McKnight*, 2017 WL 4838470, at *1 (S.C. Ct. App. Oct. 18, 2017) (unpublished); *State v. Howard*, 2016 WL 6609708, at *1 (S.C. Ct. App. Nov. 9, 2016) (unpublished); *State v. Singleton* (Frank Terrance III), 2015 Westlaw 2125696 (S.C.App. May 6, 2015) (unpublished); *State v. Miller* (Antonio), 2014 Westlaw 6488693 (S.C. App. Nov. 19, 2014) (unpublished); *State v. Inman*, 2014 WL 2737603, at *1 (S.C. Ct. App. May 21, 2014) (unpublished); *State v. Grant*, 2012 WL 10861335, at *1 (S.C. Ct. App. July 11, 2012) (unpublished); *but see State v. Scott*, 2018 Westlaw 5045987 (S.C.App. Oct. 17, 2018) (finding issue on appeal procedurally barred). Respondent-Petitioner does not cite these cases for authority, but simply to factually reflect the trend after *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). See Rule 268(2), SCACR (“Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.”). Respondent-Petitioner is aware of one other case where the error was similarly applied, *State v. Kenneth Strother Collins*, which is a case presently pending before this Court on the State’s petition for writ of certiorari. See Appellate Case No. 2020-000531. In *Collins*, the grant of relief resulted in a reduction of sentence by twenty-years. The Court of Appeals, while addressing the unpreserved sentencing issue for the defendant, denied the suggestion for remand to return the matter to the sentencing judge.

It is evident that the sentencing issue is not preserved for direct appeal review – Himes admitted that the sentencing issue was not preserved, and the Court of Appeals noted Himes concession that his sentencing issue was not preserved writing, “Himes admits this argument is not preserved for appeal....” (App. p. 7). The issue should not have been reached.

“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). “[T]he plain error rule does not apply in South Carolina state courts.” *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (citing *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997)). *See also Kennedy v. S.C. Ret. Sys.*, 349 S.C. at 532–33, 564 S.E.2d at 323 (“Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.”) (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 65 (1999)). Even more plainly to sentencing error, this Court has instructed, “a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.” *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). In *Johnston*, the Court recognized an extremely limited exception to the general preservation rule – an exception to allow swiftly addressing a sentencing error where “there [was] the real threat” Johnston “w[ould] remain incarcerated beyond the legal sentence due to the additional time it will take to pursue” post-conviction relief. *Id.*, 333 S.C. at 464, 510 S.E.2d at 425. The *Johnston* exception does not apply in a case such as the instant one where there is no danger of serving time beyond the maximum imposed. The Court of Appeals had previously adhered to this Court’s precedent.

In *State v. Passmore*, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005), the Court of Appeals considered whether the *Johnston* exception applied to an unpreserved challenged to an already

expired contempt sentence and found:

... the exceptional circumstance carefully carved out by the *Johnston* court is not present here. Appellant has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. *Johnston* does not control.

363 S.C. at 585–86, 611 S.E.2d at 282–83. The panel concluded in the absence of a properly preserved issue or recognized exception: “Appellant will be forced to seek redress through the avenue of post-conviction relief.” *Id.*, at 586, 611 S.E.2d at 283. Thus, in *Passmore*, the Court of Appeals correctly applied this Court’s precedent. However, in the 2009, the Court of Appeals expanded the *Johnston* exception in *State v. Vick* when it addressed Vick’s unpreserved challenge to his sentence for kidnapping noting the State conceded that the sentence was improper; judicial economy; and, that the same issue would likely be addressed in a later post-conviction relief action. 384 S.C. at 203, 682 S.E.2d at 282. Now the aberrant exception has largely become the rule.

As shown in Note 1, *supra*, the Court of Appeals has since created a distinct pattern of invoking the phrase “judicial economy” to offend error preservation rules. It is not only misusing the concept to undermine procedural rules, it is also misusing the concept by applying it to issues in criminal appeals. There is already an established process in which to reach matters that are not available for direct appeal, the Post-Conviction Relief Act. See S.C. Code §§ 17-27-10 et.seq.² Attempting to apply the concept to criminal cases undermines the scope and purpose of the Act. Moreover, it may actually inhibit rather than promote judicial economy. For example, if in PCR, the sentence for murder is modified to less than life without parole, then the existing five-year sentence is proper. There would be no error to correct. It would be only logical to address the two

² *Vick* cites to *S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) and *Jeter v. S.C. Dep’t of Transp.*, 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006). *Id.* Both of those cases are civil cases, and do not contemplate an option for post-conviction relief.

together. *See generally State v. Owens*, 346 S.C. 637, 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) (new sentencing granted noting if defendant did not receive life without parole or death, he could also receive a sentence of five years for possession of a firearm). There is little judicial economy to be found in separating the two. It is especially difficult to understand when Himes received a life sentence and the five years concurrent to that sentence. (R. 570). The need to offend the rules of error preservation in order to quickly reach the issue is as unclear as it is unwise. The Court of Appeals is wrong to upset and ignore established rules of error preservation.³ This unpreserved issue may be addressed in the ordinary course of collateral review.

CONCLUSION

Based on the foregoing, this Court should grant the petition, dispense with further briefing, and reverse the grant of relief. The error is so plain that this Court could summarily correct the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

³ The Court of Appeals cites to *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525 (Ct.App. 2012), and *State v. Palmer*, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016) in the opinion, apparently to indicate a concession of error. (See App. p. 7). Again, it is wrong. The State in briefing relied solely on the fact the issue was not preserved for review. (See FBOR, pp. 24-25).

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit
140 N. Main Street, Suite 102
Summerville, South Carolina 29483

s/Melody J. Brown
By: _____
MELODY J. BROWN
S.C. Bar No. 14244

ATTORNEYS FOR PETITIONER

September 4, 2020
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

On Petition for Writ of Certiorari to the Court of Appeals **Sep 04 2020**

APPEAL FROM DORCHESTER COUNTY
Honorable Maite Murphy, Circuit Court Judge

SC Court of Appeals

Unpublished Opinion No. 2020-UP-178 (S.C. Ct. App. filed June 10, 2020
Withdrawn, Substituted, and Refiled July 29, 2020)

THE STATE, RESPONDENT-PETITIONER

v.

CHRISTIAN ANTHONY HIMES, PETITIONER-RESPONDENT.

Appellate Case No. 2020-001177

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent-Petitioner, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the State's Cross-Petition for Writ of Certiorari, and Proof of Service has been forwarded to Petitioner-Respondent's counsel, Joanna K. Delany, Esq., via email today, September 4, 2020 to jdelany@sccid.sc.gov, and to her assistant at kkasperski@sccid.sc.gov, and by depositing one copy of the same in the United States mail, postage prepaid, and addressed to his attorney of record: Joanna K. Delany, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 4th day of September, 2020.



Donna D'Alessio,
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General

From: Melody Brown
To: "Kasperski, Katriel"; [Delany, Joanna \(jdelany@scjid.sc.gov\)](mailto:Delany,Joanna@scjid.sc.gov)
Cc: [Angela Bennett](#)
Subject: Himes, Christian Anthony - Appellate Case No. 2020-001177 State's Cross-Petition for Certiorari
Date: Friday, September 4, 2020 4:47:00 PM
Attachments: [Himes, Christian Anthony - Appellate Case No. 2020-001177 -States Petition for Writ of Certiorari \(02372647xD2C78\).PDF](#)
[Proof of Service to Cross-Petition - 9-4-20 - Christian A. Himes \(02372639xD2C78\).PDF](#)
[image001.jpg](#)

Dear Joanna:

Please find attached a scanned copy of the State's Cross-Petition for Writ of Certiorari in the referenced case. The petition is being submitted to the Supreme Court by e-filing this afternoon, with a copy also submitted to the Court of Appeals by e-filing.

Thank you.

Sincerely,
Melody



Melody J. Brown

Senior Assistant Deputy Attorney General
Capital and Collateral Litigation Section

Office of the Attorney General, State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549
P 803-734-6305
F 803-734-4035
mbrown@scag.gov

RECEIVED
Sep 04 2020
SC Court of Appeals