

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT/PETITIONER,

V.

CHRISTIAN ANTHONY HIMES,

PETITIONER/RESPONDENT.

APPELLATE CASE NO. 2020-001177

RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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QUESTION PRESENTED

Whether the Court of Appeals correctly vacated Petitioner's five-year sentence in the interest of judicial economy since S.C. Code Ann. § 16-23-490(A) prohibits the imposition of a five-year sentence for possession of a weapon during the commission of a violent crime in cases where life without parole was imposed for the violent crime?

STATEMENT OF THE CASE

Petitioner-Respondent Christian Himes (Petitioner) was indicted by a Dorchester County Grand Jury on September 1, 2016, for murder and possession of a weapon during the commission of a violent crime. R. 590 – 593. The indictments alleged that on November 1, 2015, Petitioner shot and killed David Ham with malice aforethought, and that he possessed a handgun during the commission of this violent crime. R. 590 – 593.

Petitioner proceeded to trial before the Honorable Maite Murphy and a jury, from April 3 – April 6, 2017. R. 1. Petitioner was represented by Michelle Williams and Pierce Wehman. R. 1. The State was represented by Donald Sorenson and Ryan Templeton. R. 1. Judge Murphy denied Petitioner’s motion for immunity from prosecution following a pretrial hearing. R. 184, l. 21 – 188, l. 3; R. 416, l. 18 – 417, l. 6; R. 507, ll. 14-21. Petitioner was convicted as indicted and he was sentenced to life without the possibility of parole for murder and a concurrent term of five years for the weapons offense. R. 570, ll. 6-11; R. 594 – 595.

On April 7, 2017, Petitioner served his notice of appeal. Laura R. Baer and undersigned counsel represented Petitioner before the Court of Appeals. Petitioner challenged the trial court’s finding that he was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act. Petitioner also challenged the imposition of a five-year sentence for possession of a weapon during the commission of a violent crime since he was sentenced to life imprisonment without parole for murder. On June 10, 2020, in an unpublished opinion, the Court of Appeals affirmed Petitioner’s conviction and sentence for murder but vacated his conviction and sentence for possession of a weapon during the commission of a violent crime. *State v. Himes*, Op. No. 2020-UP-179 (S.C. Ct. App. Filed June 10, 2020).

Thereafter, Petitioner and the State both filed petitions for rehearing, which were denied on July 29, 2020. However, Op. No. 2020-UP-179 was withdrawn, substituted, and refiled on July 29, 2020, in an unpublished opinion, in which the Court of Appeals again affirmed Petitioner's conviction and sentence for murder. However, the Court of Appeals vacated only Petitioner's sentence, rather than his conviction and sentence, for possession of a weapon during the commission of a violent crime. The Court addressed this issue in the interest of judicial economy. *State v. Himes*, Op. No. 2020-UP-179 (S.C. Ct. App. Filed June 10, 2020, Withdrawn Substituted, and Refiled July 29, 2020).

On September 4, 2020, the State filed a cross-petition for writ of certiorari challenging the Court of Appeals' decision which vacated Petitioner's five-year sentence for possession of a weapon during the commission of a violent crime. Petitioner now files his return to the State's petition.¹

¹ Petitioner has filed a petition for writ of certiorari asking this Court to review the Court of Appeals' decision which affirmed the trial court's finding that Petitioner was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act.

ARGUMENT

The Court of Appeals correctly vacated Petitioner's five-year sentence in the interest of judicial economy since S.C. Code Ann. § 16-23-490(A) prohibits the imposition of a five-year sentence for possession of a weapon during the commission of a violent crime in cases where life without parole was imposed for the violent crime.

Petitioner was convicted and sentenced to life without the possibility of parole for murder and he was sentenced to a concurrent term of five years for possession of a weapon during the commission of a violent crime. R. 570, ll. 6-11; R. 594 – 595. Petitioner's five-year sentence for possession of a weapon during the commission of a violent crime was unlawful because S.C. Code Ann. § 16-23-490(A) provides that,

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). Under the plain language of the statute, Petitioner should not have been sentenced to five years for possession of weapon during the commission of a violent crime. *See State v. Owens*, 346 S.C. 637, 666-67, 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) (holding a defendant sentenced to death could not also be sentenced to five years for possession of a firearm during the commission of a violent offense). Therefore, the trial court erred as a matter of law in sentencing Petitioner to five years for the weapons offense.

Contrary to the State's assertion, the Court of Appeals correctly reached and vacated Petitioner's five-year sentence in the interest of judicial economy, in accordance with precedent.

In *Treece v. State*, 365 S.C. 134, 136 n. 1, 616 S.E.2d 424, 425 n. 1 (2005), this Court corrected a criminal sentence for purposes of judicial economy. In *State v. Hewins*, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014), this Court found it proper to address the merits of an issue in the interest of judicial economy. In *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 599, 553 S.E.2d 110, 119 (2001), this Court decided an issue “[f]or the sake of judicial economy and to prevent further litigation between the parties.” In *Bruning v. SCDHEC*, 418 S.C. 537, 549 n. 2, 795 S.E.2d 290, 297 n. 2 (Ct. App. 2016), the Court of Appeals addressed an issue for the sake of judicial economy.

In *S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991), this Court determined, “since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now.” Here, as in *Hamm*, both parties briefed this issue to the Court of Appeals, and it would have been raised at a future time, through post-conviction relief (PCR), had it not been addressed by the Court of Appeals.

In *State v. Sledge*, 428 S.C. 40, 59, 832 S.E.2d 633, 644 (Ct. App. 2019), the Court of Appeals vacated Sledge’s five-year sentence for possession of a weapon during the commission of a violent crime since he had been sentenced to life without parole for murder. Although Sledge had not raised the issue below, the Court of Appeals adhered to precedent and found the issue could be addressed in the interest of judicial economy. *Id.*, citing *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012); *State v. Johnston*, 333 S.C. 459, 463-64, 510 S.E.2d 423, 425 (1999); *State v. Vick*, 384 S.C. 189, 202-03, 682 S.E.2d 275, 281-82 (Ct. App. 2009). Here, as in *Sledge*, the Court of Appeals correctly vacated Petitioner’s five-year sentence

for possession of a weapon during the commission of a violent crime, since he had been sentenced to life without parole.

In *State v. Johnston*, 333 S.C. at 461-62, 510 S.E.2d at 424, Johnston challenged her sentence on direct appeal as exceeding the statutory limit, although she did not object at trial. The State contended Johnston could only obtain relief through PCR. However, this Court remanded the case for resentencing since “there is the real threat that [Johnston] will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue such a remedy.” *Id.* at 464, 510 S.E.2d at 425. Here, the State argued in its petition that “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.” *See* State’s Cross-Petition for Writ of Certiorari at 3. However, although Petitioner is not in danger of serving time beyond the maximum, it is possible he may face the danger of additional consequences in the Department of Corrections due to the five-year sentence for a weapons offense.

The State further argues in its petition that the “Court of Appeals has created a pattern of reaching sentencing issues that are admittedly unpreserved for review on direct appeal. This recurring error should be corrected.” *See* State’s Cross-Petition for Writ of Certiorari at 2. The State then goes on to cite seven unpublished opinions by the Court of Appeals in support of its argument that the Court of Appeals has “created a pattern” of errors. However, in six of the seven unpublished opinions cited by the State, the State did not seek certiorari.² The State’s

² The State cited the following cases: *State v. McKnight*, Op. No. 2017-UP-384 (S.C. Ct. App. filed Oct. 18, 2017); *State v. Howard*, Op. No. 2016-UP-474 (S.C. Ct. App. filed Nov. 9, 2016); *State v. Singleton*, Op. No. 2015-UP-220 (S.C. Ct. App. filed May 6, 2015); *State v. Miller*, Op. No. 2014-UP-409 (S.C. Ct. App. filed Nov. 19, 2014), *reversed on other grounds by State v. Miller*, Op. No. 2016-MO-009 (S.C. Sup. Ct. filed March 30, 2016); *State v. Inman*, Op. No. 2014-UP-197 (S.C. Ct. App. filed May 21, 2014); *State v. Grant*, Op. No. 2012-UP-406 (S.C. Ct. App. July 11, 2012); *State v. Collins*, 2020-UP-012 (S.C. Ct. App. filed January 15, 2020). Out

argument that these cases have created a pattern of error—when the State has largely failed to claim error in the cases individually—is illogical. In six of the seven unpublished opinions cited by the State in support of its argument, the State apparently agreed with the Court of Appeals that correcting an illegitimate sentence was proper in the interest of judicial economy. Additionally, the State’s reliance on unpublished opinions is improper. *See* Rule 268(d)(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.”) Here, the unpublished opinions were not directly involved in these proceedings and should not have been cited by the State. Rule 268(d)(2), SCACR.

Finally, the State argues that the Court of Appeals’ decision applying the principle of judicial economy to vacate Petitioner’s sentence may “inhibit” judicial economy because “if, in PCR, the sentence for murder is modified to less than life without parole, then the existing five-year sentence is proper.” *See* State’s Cross-Petition for Writ of Certiorari at 4. This argument is not grounded in law. The State does not cite, and cannot cite, a basis under which the PCR court would have authority to modify the trial court’s sentence.

The State has implicitly conceded that Petitioner’s five-year sentence for possession of a weapon during the commission of a violent crime was improper, since it failed to argue Petitioner could be lawfully sentenced to five years for that offense where he was sentenced to life without parole for the underlying violent crime. The State does not argue that Petitioner would not be entitled to relief on this claim in PCR, and instead argues that Petitioner and the courts should be required to make additional filings, hold a hearing, and potentially have another

of the seven cases, the State has only sought certiorari in one—*Collins*—which is pending before this Court. *See* Appellate Case No. 2020-000531.

appeal so that Petitioner may be granted the relief to which he is entitled: vacating his unlawful five-year sentence.

The Court of Appeals properly vacated Petitioner's unlawful five-year sentence in the interest of judicial economy. *Hewins*, 409 S.C at 113, 760 S.E.2d at 824; *Hamm*, 306 S.C. at 75, 409 S.E.2d at 778; *Treece*, 365 S.C. at 136, 616 S.E.2d at 425.

CONCLUSION

Petitioner respectfully requests this Court deny the State's petition for certiorari. In the event this Court grants the State's petition and dispenses with further briefing, Petitioner respectfully requests that this Court affirm the Court of Appeals on this question.

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of October, 2020.