STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Transferred from the South Carolina Supreme Court
Pursuant to Rule 243(1), SCACR

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

MCIVER R. FEAGIN, JR.,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2018-001331

MEMORANDUM ADDRESSING WHETHER THE PETITION FOR WRIT OF CERTIORARI IS MOOT

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ATTORNEY FOR RESPONDENT

MEMORANDUM

In a letter dated February 19, 2021, this Court asked the parties to submit memorandum addressing the question of whether the petition is moot. After the PCR judge granted relief, finding that the parties intended for Respondent to be sentenced for burglary second non-violent pursuant to the newly enacted statute carrying a maximum penalty of ten (10) years rather than the fifteen (15) year sentence imposed, but during the pendency of this appeal, Respondent, McIver R. Feagin, Jr., served the fifteen (15) year probation revocation and was released from the South Carolina Department of Corrections [SCDC]. The State's petition for writ of certiorari appealing the PCR judge's grant of relief is now moot and should be dismissed.

In McClam v. State, 386 S.C. 49, 55, 686 S.E.2d 203, 206 (Ct. App. 2009), this Court wrote:

> "[M]oot appeals result when intervening events render a case nonjusticiable." Sloan v. Greenville County, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct.App.2003). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Id. (brackets in original).
>
> In the civil context, there are three general exceptions under which an appellate court can issue a ruling on an appeal on an otherwise moot controversy: (1) if the issue raised is "capable of repetition but evading review"; (2) if the question is one of "imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest"; and (3) if the trial court's decision "may affect future events, or have collateral consequences for the parties." Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

In McClam this Court dismissed the State's appeal of an order transferring McClam, who had been adjudicated a sexually violent predator [SVP], to a private treatment facility because the issue was moot. At the time of the appeal McClam had successfully completed the SVP Program and had been released from confinement with the consent of the South Carolina

Department of Mental Health. See also Hayes v. State, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) ("Because Petitioner is no longer incarcerated, this issue [challenge to sentence calculation] is moot. However, 'an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review.' *Curtis v. State,* 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)."); State v. Simpson, 429 S.C. 83, 89, 837 S.E.2d 669, 672 (Ct. App. 2020) ("Accordingly, while we find the question of Simpson's own sentence moot due to his completion of the determinate home detention portion of the sentence, we find this home detention sentencing issue is capable of repetition yet generally evades review."). The issue in the present case is moot like the issues in McClam, Hayes, and Simpson. Unlike this Court found in Hayes and Simpson, however, the issue in the present case is not capable of repetition but evading review. In the present case, like this Court found in McClam, none of the three exceptions that would allow the Court to decide a moot issue apply. This Court should dismiss the State's appeal in the present case as moot as it did in McClam.

Any judgment by this Court will have no effect on the existing controversy in this case as Respondent has served the full fifteen (15) year probation revocation. The issue is moot and none of the three exceptions apply. The issue of whether the parties intended for sentencing pursuant to the 2010 Act with a maximum sentence of ten (10) years is not capable of repetition yet evading review. It is now clearly established that the maximum penalty for burglary second degree non-violent is ten (10) years. As a result, the question is not one of imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest. As the issue involves sentencing rather than the conviction, any decision by this Court would not affect future events or carry collateral consequences. As noted by the South

Carolina Supreme Court in Jackson v. State, 331 S.C. 486, 491, 489 S.E.2d 915, 917, n. 2 (1997):

> Other courts have found similar matters reviewable, notwithstanding the expiration of a criminal sentence, so long as the defendant suffers, or may suffer, collateral consequences resultant from the conviction. For example, the United States Supreme Court found that a case is not moot despite completion of the sentence where the conviction may be used for impeachment and sentencing purposes in future criminal proceedings. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). The Sibron court specifically stated, "a criminal case is moot only if it is shown that there is no possibility that any legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57, 88 S.Ct. at 1900. *See also* Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) (case not moot where conviction may be used to rebut any character evidence adduced by defendant in future criminal proceedings, record of conviction would be made available to judge prior to imposition of any future criminal sentence, and defendant could possibly be sentenced in the future as a habitual criminal). A number of courts in other jurisdictions have reached similar results. *See e.g.*, Dancy v. United States, 361 F.2d 75 (D.C.Cir.1965) (fact that defendant had served sentence did not render case moot since prior conviction could affect punishment should defendant entail another conviction); Harrison v. Indiana, 597 F.2d 115, 117 (7th Cir.1979) (where criminal conviction may result in an enhanced sentence should petitioner later be convicted of another crime, stake in relief permits court to exercise its judicial function after she has been freed). *See also* Matthews v. State of Florida, 463 F.2d 679, 681 (5th Cir.1972) (fact that defendant "lost points" on his driver's license, coupled with the "precarious position in which his driver's license had been placed," and "repercussions affecting his career and reputation" rendered defendant's case justiciable).

None of the above examples apply to the challenge to the sentence in the present case. This Court should dismiss the petition as moot.

In the case of In Interest of Catrice S., 322 S.C. 204, 206–07, 470 S.E.2d 856, 858 (Ct. App. 1996), this Court wrote:

> In the case of In re Darlene C., 278 S.C. 664, 301 S.E.2d 136 (1983), our Supreme Court adopted the position taken by the United States Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), holding that when an issue is "capable of repetition but evading review" the court will not refuse to consider the issue based on mootness. In Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996), the Supreme Court clarified the exceptions to

> the mootness doctrine in South Carolina. The Court held that a court may take jurisdiction of a case if (1) the challenged action in its duration was too short to be fully litigated prior to its cessation or expiration; and (2) the relevant issue is "capable of repetition but evading review." Id. 468 S.E.2d at 864 (quoting In re Darlene *C.*, 278 S.C. at 665, 301 S.E.2d at 137).

In the Catrice S. case the juvenile pled guilty to contempt of court for violating the conditions of her probation. The judge sentenced the juvenile to DJJ. At the disposition hearing in 1995, S.C. Code § 20–7–2205 provided that a child who violates the conditions of probation for an offense must **not** be committed to the custody of a correctional institution operated by the Department of Juvenile Justice or to secure evaluation centers operated by the department. The juvenile appealed. During the pendency of the appeal the juvenile served her sentence and was released from the custody of DJJ. The Court of Appeals dismissed the appeal as moot. The Court found that although the sentence was in fact too brief to be fully litigated through appeal prior to its expiration, the issue was not capable of repetition while evading review because the statute was amended in 1996 to allow judges to sentence status offenders, like Catrice S., to DJJ.

The present case is similar to Catrice S.. Respondent was granted relief by the PCR judge and the State appealed. During the pendency of the appeal Respondent served the fifteen year probation revocation sentence and was released from SCDC. While the sentence was too brief to be litigated through the appeal process[1], the issue is not capable of repetition while evading review. Since the passage of the Omnibus Crime Reduction and Sentencing Reform Act [the Act] on June 2, 2010, the maximum sentence for burglary in the second degree non-violent pursuant to subsection (A) is ten (10) years. S.C. Code §16-11-312(C). There is little to no expectation that the Court will ever have to decide the issue of whether the intent of the parties, at the time of a plea in September of 2010, was for sentencing to be done pursuant to the ten-year

[1] At the time of the PCR hearing in November of 2017, Respondent had approximately eighteen (18) more months left to complete the full sentence. (App. p. 63, lines 8-13).

maximum provided by the July 2010 Act as opposed to the fifteen-year maximum prior to the Act. This Court should dismiss the petition as moot.

The petition for writ of certiorari is moot because Respondent completed the fifteen (15) year probation revocation sentence and was released from SCDC. None of the exceptions for the Court to consider a moot issue apply. The issue of the intent of the parties at sentencing in 2010, the year the maximum penalty for burglary second non-violent was reduced from fifteen (15) years to ten (10) years is not an issue that is capable of repetition while evading review. The issue is not one of imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest. As the issue involves sentencing rather than the conviction, any decision by this Court would not affect future events or carry collateral consequences. This Court should dismiss the petition as moot.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 11h day of March, 2021.

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Mar 11 2021
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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Respondent's Memorandum Addressing Mootness in the above entitled case has been served upon Lindsey McCallister, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and copy of the Respondent's Memorandum Addressing Mootness has been served on McIver Feagin, Jr., at 211 Rhea Ln, Clinton, TN, 37716 this 11th day of March, 2021.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT