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Mar 16 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

Through a published decision issued on March 3, 2021, this Court affirmed Appellant Ontavious Derenta Plumer's convictions for the crimes of attempted murder and possession of a weapon during the commission of a violent crime along with his accompanying life-without-parole sentence but vacated his concurrent five-year sentence for the weapon charge. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021). In arriving at that result, this Court correctly rejected most of Plumer's four allegations of legal error after explicitly recognizing its role was limited to reviewing for errors of law only in light of the standard of review applicable to criminal cases. This Court further correctly applied our state's issue preservation requirements to the third of Plumer's allegations and determined the issue was not properly preserved for appellate review due to Plumer's failure to take the steps needed to preserve the issue at the trial level. However, when reviewing the fourth and final allegation of error raised by Plumer, this Court indicated it believed it was appropriate to address that particular issue—

which was unquestionably neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review under well-established South Carolina law— “notwithstanding issue preservation rules” because the State did not dispute an error had occurred *and also* “as a matter of criminal equity.” This Court then went on to vacate Plumer’s concurrent sentence for the weapon charge even though no challenge to that sentence was ever previously lodged. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent (“the State”) respectfully petitions for rehearing because this Court appears to have overlooked and misconstrued several important points when vacating Plumer’s weapon charge sentence.

First, this Court appears to have overlooked the fact our Supreme Court’s issue preservation precedent bound this Court to find Plumer’s sentencing challenge was unpreserved for appellate review. That is true because—despite appearing to recognize the limits of the highly-specific and unique issue preservation exception our Supreme Court created in State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)—this Court found it could address Plumer’s appellate challenge to his weapon charge sentence even though it did not fall within the parameters of the Johnston exception based solely on its *own* precedent that it described as *disapproving of* our Supreme Court’s holding in Johnston. See State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (addressing an unpreserved sentencing issue related to an improper concurrent sentence despite the fact “the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston”). Critically though, this Court is *constitutionally* bound to follow the precedent of our Supreme Court and cannot validly ignore that precedent simply because it disapproves of it. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); cf. Daniels v.

City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (“Of course, the decisions of the Supreme Court bind this Court as precedents. Thus, any modification or limiting of Abbeville Arms must be done by the Supreme Court.” (citation omitted)). As a result, this Court should reconsider its decision to ignore our Supreme Court’s precedent in favor of its own, faithfully adhere to the limits of the decision in Johnston just as it has correctly done in the past, and find Plumer’s issue with his concurrent five-year sentence for the weapon charge was not properly preserved for appellate review since it was indisputably neither raised to nor ruled upon by the trial judge.¹ Cf. State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 282-283 (Ct. App. 2005) (“We find the exceptional circumstance carefully carved out by the Johnston court is not present here. [Passmore] 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. . . . Regrettably, [Passmore] has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand.”).

Second, in addition to failing to faithfully follow our Supreme Court’s Johnston decision, this Court appears to have overlooked the fact “criminal equity” is not a recognized or proper

¹ As this Court readily acknowledged in its decision in Plumer’s case, there is no “real threat” Plumer will remain incarcerated beyond the length of his aggregate sentence due to the fact he was sentenced to life without parole for attempted murder, so a delay in the resolution of his sentencing challenge until it can be raised in the proper venue of post-conviction relief will not result in any harm at all to Plumer. See Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (addressing Johnston’s appellate challenge to her sentence despite issue preservation rules because there was a “real threat” she would be incarcerated beyond the permissible sentencing range for her conviction if she was not immediately granted relief). Meanwhile, inconsistent application of procedural rules can itself result in harm because such inconsistency undermines the integrity of the rules and can actually foster non-compliance by removing the disincentives that exist to ensure the purpose of the rules is achieved. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (recognizing procedural rules—through their enforcement and application—ensure the trial court is *guaranteed* a fair opportunity “to rule properly after it considered all relevant, facts, law, and arguments”).

basis for a grant of relief in a criminal appeal in South Carolina when relying on it as an *additional* ground upon which it was permitted to vacate the weapon charge sentence. Significantly, the phrase “criminal equity” has *never*—prior to the decision in Plumer’s case—appeared even a single time in any published South Carolina decision issued at any point throughout the long history of our state’s jurisprudence, and it does not have a defined meaning in South Carolina law due to the fact it has never previously been recognized or applied.² See, e.g., Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419, 422 (1938) (recognizing the existence of “the established rule that equity has no criminal jurisdiction”). In fact, the phrase “criminal equity” does not even appear in Black’s Law Dictionary, which is a more-than-a-century-old comprehensive source widely used by judges and lawyers in our nation to determine the accepted definition of any known legal term regardless of how common or obscure it may be.³ See BLACK’S LAW DICTIONARY (9th ed. 2009) (containing many definitions for different forms of equity but containing no definitions whatsoever for “criminal equity”); see also United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001) (recognizing Black’s Law Dictionary as a predictably-used source for ascertaining “the most widely accepted legal meaning” of terms). Therefore, “criminal equity”—whatever it may be—is simply not something that constitutes an accepted exception to South Carolina’s well-settled issue preservation rules, and, respectfully, this Court

² Notably, during the oral argument held in Plumer’s case, this Court described “criminal equity” as “a new term” it “*just created.*” (State v. Plumer Oral Argument Recording, 34:00 to 34:05) (emphasis added). This Court further appeared to suggest it viewed “criminal equity” as something separate and distinct from judicial economy. (State v. Plumer Oral Argument Recording, 29:21 to 29:29).

³ Beyond that, this Court itself did *not* provide a definition or any clear explanation as to what the phrase “criminal equity” means despite explicitly identifying the phrase as a basis upon which Plumer’s sentence could be and was vacated, which only adds to the confusion caused by this Court’s reliance upon “criminal equity” as a ground for appellate relief in a criminal—as opposed to an equity—case. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021).

is constitutionally prohibited from manufacturing “criminal equity” as a means by which it can ignore our Supreme Court’s binding precedent articulating those rules whenever it wishes to do so. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (reaffirming the existence of “settled” issue preservation rules that require a challenge to a sentence to be raised to and ruled upon by the trial judge in order to be preserved for appellate review but applying a limited exception to those rules in Johnston’s “unique” case based on its “exceptional circumstances” because: (1) the State had conceded error in regard to the sentence; *and* (2) a “real threat” existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action); cf. United States v. Reyes, 945 F.2d 862, 866 (5th Cir. 1991) (explaining there “seems to be no adequate statutory or historical warrant to authorize federal courts to” vacate a criminal conviction on equitable grounds and further instructing: “Absent a clearer statutory or historical basis, an article III court *should not arrogate such power unto itself*. We, too, operate under the law.” (emphasis added)).

Third and finally, this Court appears to have overlooked the fact “criminal equity”—which, presumably, is something that must surely have been intended to be equitable in nature based on its name alone—should not entitle Plumer to relief when the circumstances of his case are considered with principles of equity in mind. Specifically, pursuant to equitable principles, Plumer would not be entitled to equitable relief because he did *nothing* which ought to have been done to obtain the sentencing relief he has sought on appeal before he first tried to obtain it from this Court. Cf. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) (“A court of equity should scrutinize the conduct of the plaintiff with the

utmost care, to ascertain *he has done everything which ought to have been done* to secure the action requested.” (emphasis added)). Instead, Plumer remained silent regarding his sentence at the trial level and raised no objections to the concurrent term of imprisonment he received for the weapon charge even though he recognized—at least based on the arguments he has raised on appeal—that sentence was “expressly prohibit[ed]” by statute.⁴ (Final App. Br. p. 19). Under such circumstances, Plumer’s actions concerning the sentencing issue should not be rewarded with sentencing relief as a matter of equity since equitable principles would *deny* him that relief in an equitable action due to his failure to take the steps that ought to have been taken at the trial level when presented with an undeniable opportunity to do so. See Upton v. Tribilcock, 91 U.S. 45, 55 (1875) (“Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person.”); Hemingway v. Mention, 228 S.C. 211, 216, 89 S.E.2d 369, 371 (1955) (instructing “equity aids the vigilant”); Regions Bank, 394 S.C. at 260, 715 S.E.2d at 358 (recognizing the importance of the issue preservation rule requiring an issue to be raised to and ruled upon before it can properly be raised on appeal in a case involving *an action in equity*); see also State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) (“One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal.”). Accordingly, even if this Court believes its new creation—“criminal equity”—can be legitimately applied in a criminal case in South Carolina, this Court should not find “criminal equity” trumps our state’s issue preservation rules and other controlling precedent since such a finding would itself be plainly incompatible with well-

⁴ Interestingly, Plumer elected *not* to include any facts or statements in his appellate brief that would have alerted this Court the argument he raised on appeal in support of his request for sentencing relief was being raised for the first time, which—at least based on existing South Carolina precedent—would have been exceedingly pertinent to the matter of whether appellate review of the issue was proper. (Final App. Br. pp. 1-19).

established principles of equity.⁵ See Regions Bank, 394 S.C. at 254, 715 S.E.2d at 355 (“When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent.”); cf. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (“[T]he fact that the writ [of habeas corpus] has been called an equitable remedy . . . does not authorize a court to ignore this body of statutes, rules, and precedents. There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges. Rather, courts of equity must be governed by rules and precedents no less than the courts of law. As Selden pointed out so many years ago, the alternative is to use each equity chancellor’s conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor’s foot.”).

For all the foregoing reasons, the State respectfully urges this Court to reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, strike its highly-confusing reference to the newly-created—and totally undefined—field of “criminal equity,” and issue a new opinion correctly affirming Plumer’s convictions along with both his life-without-parole sentence for attempted murder and his *unobjected-to* five-year sentence for possession of a weapon during the commission of a violent crime. By doing so, this

⁵ Relatedly, while equity abhors a wrong without a remedy, the remedy of post-conviction relief will remain available to Plumer to obtain the sentencing relief he has prematurely sought from this Court through his unpreserved allegation of error even if this Court reconsiders its decision to create a new field of law—“criminal equity”—to award such relief to him at this juncture. Lane v. New York Life Ins. Co., 147 S.C. 333, ___, 145 S.E. 196, 207 (1928); see S.C. Code Ann. § 17-27-20(A)(3) (recognizing one of the express grounds upon which a person may seek and obtain post-conviction relief is when “the sentence exceeds the maximum authorized by law”); Johnston, 333 S.C. at 464, n. 3, 510 S.E.2d at 425 (explaining its decision based on the “unique” circumstances of Johnston’s case was “not intended to disrupt our settled rules on issue preservation and PCR applications”). And, a post-conviction action already appears inevitable regardless of whether this Court does or does not address Plumer’s unpreserved sentencing error for the first time on appeal based on Plumer’s appellate counsel’s representations during the oral argument, which seems to raise some compelling questions about whether any judicial efficiency concerns would truly be served by ignoring our long-standing issue preservation rules and precedent in Plumer’s case. (State v. Plumer Oral Argument Recording, 32:42 to 32:54).

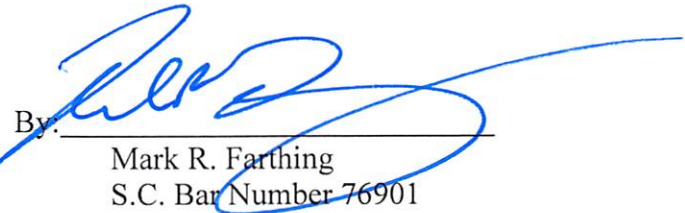
Court will ensure it has faithfully complied with our Supreme Court’s precedent as it is duty-bound to do, adhered to our State’s previously well-settled issue preservation rules, and remained within the constitutional limits that have been established for it by our citizenry. S.C. Const. art. V, § 9; see State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (“In criminal cases, the appellate court sits only to review *errors of law which have been properly preserved*, i.e., the issue has been raised to and ruled on by the trial court.” (emphasis added)); see also Marbury v. Madison, 5 U.S. 137, 176-177 (1803) (“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”).

Respectfully submitted,

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PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Respondent's Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

E. Charles Grose, Jr., Esq.
Grose Law Firm
404 Main St.
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I further certify all parties required by Rule to be served have been served.
This 16th day of March, 2021.


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Shana Montgomery

From: Shana Montgomery
Sent: Tuesday, March 16, 2021 4:40 PM
To: Charles Grose
Cc: Shana Montgomery; Mark Farthing; William Blich
Subject: Plumer.Pet for Rehearing (02516911.PDF;1).PDF
Attachments: 02516911.PDF

Good Afternoon,

Attached please find a copy of the Respondent's Petition For Rehearing along with proof of service for Ontavious D. Plumer (2017-000481). Please confirm receipt. This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. Please don't hesitate to contact us should you have any questions or concerns.

Thank You.

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