STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY

Court of Common Pleas
The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2020-001116

DENNIS DAVIS,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

I.

Whether S.C. Code Ann. §44-53-370(b) repeals S.C. Code Ann. §24-13-150 by implication, abrogating §150's provision that third-offense drug distribution crimes not predicated solely on prior possession crimes are "no parole" offenses, where no part of §370 expressly repeals §150 as it applies to these cases and the two statutes are not in conflict.

STATEMENT OF THE CASE

On May 21, 2014, Petitioner Dennis Davis pleaded guilty to several drug crimes, including distribution of marijuana. (App.160). Davis had previously been convicted of trafficking and PWID crack cocaine in 2002 and possession of marijuana in 2009. (App.9). Accordingly, he was sentenced for a third offense pursuant to S.C. Code Ann. §44-53-370(b)(2). Defense counsel acknowledged during the plea hearing that Davis's conviction for third offense distribution of marijuana would be treated as a "no parole" offense by the Department of Corrections, meaning he would be required to serve 85% of his sentence. (App.21–22).

Davis filed an appeal. Appellate counsel filed an Anders brief and the appeal was subsequently dismissed. (App.40–41). In 2015, Davis filed an application for post-conviction relief, alleging ineffective assistance of counsel. (App.25). At the PCR hearing, Davis admitted his attorney advised him his charge was a "no parole" offense and that he would be required to serve 85% of his sentence. (App.48, 64). He also admitted he was represented by counsel for his prior convictions, that his trafficking conviction was not a "possession-only" offense, and that the possession of marijuana charge was reduced from a distribution of marijuana charge. (App.51, 63). He did not allege he was improperly serving a "no-parole" sentence, but rather that his conviction should have been treated as a second offense. (App.68). Davis's PCR application was denied. (App.91).

Davis subsequently filed suit against the Department of Probation, Pardon and Parole, alleging the department incorrectly classified his sentence as a "no parole" sentence. The Court of Appeals rejected his argument in an unpublished opinion. Davis v. S.C. Dep't of Prob., Parole & Pardon Servs., Unpublished Opinion No. 2018-UP-385 (S.C. Ct. App. filed Oct. 17, 2018). Davis subsequently filed this PCR application, alleging the same grounds for relief as his suit

against SCDPPP. His application was dismissed as untimely and successive by the Honorable Daniel D. Hall on July 1, 2020. (App.127–28). Davis now seeks certiorari from this order of dismissal.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. Certiorari should denied because this issue has already been litigated. Regardless of the procedural posture, the claim is meritless. §44-53-370 does not repeal §24-13-150 as it relates to third-offense distribution crimes predicated on prior distribution crimes and the statutes are not in conflict. Davis is correctly serving a "no parole" sentence.

Davis claims he is improperly serving a "no parole" sentence for distribution of marijuana, third offense. He argues S.C. Code Ann. §44-53-370(b) impliedly repeals §24-13-150 as it relates to third-offense distribution crimes predicated on at least one prior distribution crime, despite the fact that §370(b) contains no such provision. His claim is meritless. §24-13-150 remains valid and provides that third-offense crimes not predicated solely on prior possession crimes are "no parole" offenses. Certiorari should be denied.

As an initial matter, certiorari should be denied because this issue has already been litigated. Davis raised this exact issue in a previous law suit challenging his parole eligibility filed in the administrative law court against SCDPP. The Court of Appeals rejected his argument in an unpublished opinion. Davis v. S.C. Dep't of Prob., Parole & Pardon Servs., Unpublished Opinion No. 2018-UP-385 (S.C. Ct. App. filed Oct. 17, 2018). The Court of Appeals' decision correctly emphasized that the drug statute provides that only third-offense convictions predicated entirely on prior possession charges are eligible for parole pursuant to §44-53-370(b), and Davis's conviction is not predicated solely on possession charges. Davis's current PCR application is premised on the exact same legal issue as his lawsuit against SCDPPP. Accordingly, the issue has been decided and this petition should be denied as res judicata. See Carpenter v. S.C. Dep't of Corr., 431 S.C. 512, 525, 848 S.E.2d 346, 353 (Ct. App. 2020) (citing

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) and explaining "[t]o establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit" (emphasis omitted)). Because the Court of Appeals has already considered and correctly rejected Davis's purely legal argument, the issue has been decided and certiorari is not warranted in this case. Certiorari should be denied.

Regardless of the fact that this issue has already been litigated, certiorari should be denied because the issue is meritless. Davis is not eligible for parole because his third-offense conviction is not predicated solely on two prior possession-only offenses.

Third-offense Distribution of Marijuana carries a maximum penalty of 20 years in prison. S.C. Code Ann. §44-53-370(b)(2). Accordingly, it is a "Class C Felony". S.C. Code Ann. §16-1-90. "Class C Felonies" are "no parole" offenses. S.C. Code Ann. § 24-13-100. This means the inmate "is not eligible for early release, discharge, or community supervision . . . until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed." S.C. Code Ann. §24-13-150.

S.C. Code Ann. §44-53-370(b)(2) provides an exception to § 24-13-150's provision that Class C felonies are "no parole" offenses. §370(b) supersedes §150 and provides an offender is eligible for parole and other benefits when "a person [is] convicted and sentenced pursuant to this item for a third or subsequent offense **in which all prior offenses were for possession of a controlled substance**. . . ." S.C. Code Ann. §44-53-370(b)(2) (emphasis added). By its plain terms, this provision only applies to third-offense convictions predicated solely on prior possession charges. Davis's third-offense conviction is not predicated solely on possession

offenses; it is predicated on one prior possession and one prior distribution offense. (App.9). Accordingly, the provision by its plain terms does not apply to his sentence.

Davis points to the final sentence of § 370(b)(2), which provides that "[i]n all other cases [besides those predicated solely on possession offenses], the sentence must not be suspended nor probation granted . . . ." He claims that because this sentence does not explicitly include parole eligibility among the benefits that "must not" be granted to those convicted of "no parole" offenses, this Court should infer that the legislature intended to grant parole eligibility to all those convicted of third-offense drug crimes. Davis's argument should be rejected for several reasons.

First, the plain language of the statute is couched in negative terms as it relates to third-offense crimes not predicated solely on prior possessions charges. It provides that probation or suspended sentences "must not" be granted. It does not provide for any affirmative grant of benefits. §370(b) does not purport to change to §150 at all as it relates to parole eligibility for third-offense crimes not predicated solely on prior possession charges. By its plain language, §370(b) simply does not apply to this case.

Davis asks this Court to contort the plain language of §370 to interpret the statute to say something it does not. This Court should not interpret §370's silence regarding parole eligibility for third-offense crimes as an implied repeal of §150. Rather, this Court should read the two statutes together and give them their plain meaning: that §150 remains in full force for third-offense crimes not predicated solely on prior possession charges. See State v. Sweat, 379 S.C. 367, 375, 665 S.E.2d 645, 649 (Ct. App. 2008), aff'd as modified, 386 S.C. 339, 688 S.E.2d 569 (2010) ("The legislature's intent should be ascertained primarily from the plain language of the

statute. The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose.") (internal citations omitted).

Second, Davis argues that §370(b) repeals §150 (as it relates to third-offense drug crimes not predicated solely on prior possession charges) **by implication**. However, "[t]he law does not favor the implied repeal of statute." Hodges v. Rainey, 341 S.C. 79, 88–89, 533 S.E.2d 578, 583 (2000). Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. Id. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Id. (quotations and citation omitted).

Davis cites Bolin v. S.C. Dep't of Corr., 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016), to support his argument. Bolin does not help his case. In Bolin, the Court of Appeals considered whether §370(b) abrogated §150 **as it relates to second-offense crimes**. By its plain terms, §370(b) clearly does so. It expressly provides that "[n]otwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." S.C. Code Ann. § 44-53-370. The statute expressly and plainly repeals §150 "to the extent it conflicts with amended sections 44–53–375 and –370." Bolin v. S.C. Dep't of Corr., 415 S.C. 276, 282, 781 S.E.2d 914, 917 (Ct. App. 2016) (emphasis altered) (citing Strickland v. State, 276 S.C. 17, 19, 274 S.E.2d 430, 432 (1981) for the proposition that "statutes of a specific nature are not to be considered as repealed in whole or in part by a later general

statute unless there is a direct reference to the former statute or the intent of the legislature to do so is explicitly implied therein").

By contrast, this case involves third-offense provision not predicated solely on prior possession charges. When it comes to these third-offense crimes not predicated solely on prior possession charges, §44-53-370(b) does not repeal or in any way conflict with the "no parole" statute. Accordingly, by the very language and logic of Bolin, §370(b) should not be interpreted to impliedly repeal §150. See also Hodges v. Rainey, 341 S.C. 79, 89, 533 S.E.2d 578, 583 (2000) (holding statue not repealed by implication by subsequent statue addressing same subject matter because the two statutes were "not in conflict" and "can be reconciled").

Finally, even though the plain language of §370(b) does not conflict with §150 and does not require consideration of legislative intent, the intent of the legislature clearly was not to provide parole eligibility for third-offense convictions predicated on prior distribution charges. Rather, the intent was to provide leniency for crimes suggesting lesser culpability. Nothing in the statute suggests the legislature intended to provide leniency for the most persistent recidivist drug dealers. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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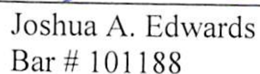

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