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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SHERWIN ALFONZO GREEN,

APPELLANT

APPELLATE CASE NO. 2019-000441

Appeal from Kershaw County

Honorable L. Casey Manning, Circuit Court Judge

Opinion No. 5907

PETITION FOR REHEARING

On May 4, 2022, this Court affirmed Appellant's conviction because Appellant's guilty plea waived his appellate rights regarding the violation of his right to a speedy trial under the Sixth Amendment and Fourteenth Amendment of the U.S. Constitution. This Court's holding misconstrued both United States Supreme Court and South Carolina jurisprudence. Due to those aforementioned errors, Appellant must respectfully request a petition for rehearing pursuant to Rules 221(a) and 240, SCACR.

Appellant's direct appeal should be addressed on the merits because his guilty plea did not waive his right to appeal the state's violation of his right to a speedy trial because a speedy trial violation is a ground that if asserted would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect.

This Court's opinion failed to address the merits of Appellant's properly raised direct appeal issue. Instead, the opinion held that "Appellant's speedy trial defense is not a jurisdictional claim" such that it was waived when Appellant pled guilty. Green v. State, Op. No. 5907 (S.C. Ct. App. filed May 4, 2022) (Howard Adv. Sh. No. 16 at 53 – 56). That holding was an error.

As an initial matter, this Court incorrectly held that Appellant's "speedy trial defense" was "not a defense that would have prevented the State from prosecuting him in the first place." Id., at 55. The remedy for violating a defendant's right to a speedy trial is dismissal. See Langford, 400 S.C. 421, 441 – 42, 735 S.E.2d 471, 482. If a defendant is successful in arguing that their right to a speedy trial has been violated, there is no opportunity for the state to cure the violation and the state no longer has the right to prosecute the defendant regardless of the strength of the evidence against him. Accordingly, Appellant's argument that his speedy trial rights were violated was not waived by his guilty plea and should be evaluated on the merits.

This Court misapplied its own holding in State v. Sims, 423 S.C. 397, 814 S.E.2d 632 (Ct. App. 2018). Sims was indicted for attempted murder and claimed immunity from prosecution pursuant to the Protection of Persons and Property Act. Sims, at 399, 814 S.E.2d at 633. The trial court held an evidentiary hearing and denied Sims' immunity claim. Id. Sims then pled guilty to the lesser-included offense of assault and battery of a high and aggravated nature. Id.

Sims then appealed his conviction asserting that his immunity pursuant to the Protection of Persons and Property act was a "jurisdictional challenge a defendant may raise on appeal even

after pleading guilty." Id. Sims specifically argued that the Menna-Blackledge series of federal cases for the proposition that a "defendant who pleads guilty to something he could not be properly convicted of does not give up his right to claim he could not have been prosecuted in the first place." Sims, at 401, 814 S.E.2d at 634; See Blackledge, 94 S.Ct. 2098 (1974); see also Menna, 96 S.Ct. 2098 (1975).

As an initial matter, this Court in Sims stated the general rule that guilty pleas in South Carolina waive "nonjurisdictional defects and claims of violations of constitutional rights." Sims, at 400, 814 S.E.2d at 633. However, this Court recognized that in the criminal prosecution context that rule is not so clear. This Court lamented that "while a valid guilty plea waives 'nonjurisdictional' defects[1] and defenses, it is unclear what amounts to a jurisdictional defect to a criminal prosecution." Id.

This Court seemed displeased with the Menna-Blackledge doctrine cases because despite being "well recognized" those cases "lack[ed] a core guiding principle capable of reliable application." Sims, at 401, 814 S.E.2d at 634. In its search for a "core guiding principle" this Court favorably cited the Second Circuit's opinion in United States v. Curcio, 712 F.2d 1532, 1539 (2nd Cir. 1983) for the proposition that a "defendant who *unconditionally pleads guilty may still challenge his conviction on any ground 'that*, if asserted before trial, *would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect.*'" (emphasis added)

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[1] It is interesting to note that other state courts, like the Missouri Supreme Court, en banc, have held that the U.S. Supreme Court decision in Class v. U.S., 138 S.Ct. 798 (2018) "expressly rejected the argument that a guilty plea waives all nonjurisdictional claims" because the Court in Class stated "the Government contends that by entering a guilty plea, Class inherently relinquished his constitutional claims. The Government is correct that a guilty plea does implicitly wave *some* claims, including some constitutional claims." State v. Russel, 598 S.W.2d 133, 139 (MO 2020) (quoting Class v. U.S., 138 S.Ct. at 805) (emphasis in original).

The decision in this case runs directly opposite to that "core guiding principle" that this Court favored in Sims. An appeal based on a right to a speedy trial violation is the exact type of ground that the Curcio principle contemplates. If a defendant successfully "asserted his right" that his right to a speedy trial was violated, the state would be precluded "from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect." See Curcio, at 1539; see also Langford, 400 S.C. 421, 441 – 42, 735 S.E.2d 471, 482 (2012) ("If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy") (quoting Barker v. Wingo, 92 S.Ct. 2182, 2188 (1972). Accordingly, pursuant to this Court's own jurisprudence Appellant's guilty plea did not waive his right to appeal the violation of his speedy trial right.

Furthermore, this Court's holding runs afoul of United State's Supreme Court jurisprudence. In Blackledge, Perry, a North Carolina inmate, was charged with the misdemeanor of assault with a deadly weapon for conduct against another inmate. Blackledge v. Perry, 94 S.Ct. 2098, 2099 – 2100 (1974). Perry was convicted but while his appeal was pending the prosecutor obtained another indictment for the same conduct. Id. Perry pled guilty to the new charge in state court in North Carolina. Id.

Subsequent to that guilty plea, Perry appealed for writ of habeas corpus in Federal District Court claiming the felony indictment to which he pled guilty deprived him of due process because the felony charge constituted double jeopardy. Blackledge, at 2100 – 01. In an "unreported" decision the District Court dismissed Perry's petition for failure to exhaust state remedies. Id. The Fourth Circuit Court of Appeals reversed, "holding that resort to state courts would be futile, because the Supreme Court of North Carolina consistently rejected the constitutional claims by Perry." Id.

The Fourth Circuit remanded the case to the District Court and the District Court granted the writ because the guilty plea to the felony charge violated Perry's protections against double jeopardy from the Fifth Amendment. Id. The District Court also held Perry "had not, by his guilty plea... waived his right to raise his constitutional claims." Id.

The United States Supreme Court directly addressed the issue of whether Perry was barred from raising his constitutional claims on appeal because of his guilty plea in North Carolina state court. Id., at 2103. The Court explained there was an important exception to the rule that a guilty plea is "a break in the chain of events which has preceded it in the criminal process" such that a criminal defendant may not raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. Id. That exception is when the constitutional claim on appeal "went to the very power of the State to bring the defendant into court to answer the charge brought against him." Id.

Since North Carolina chose to proceed on the misdemeanor charge first, it was precluded from subsequently "calling upon" Perry to answer to the more serious felony charge. Id., at 2104. Accordingly, Perry's appeal did not raise antecedent constitutional violations, instead he was asserting "the right not to be haled into court at all" because the proceedings against him in Superior Court "operated to deny him due process of law." Id. Thus, the Supreme Court affirmed the Fourth Circuit's decision allowing Perry to proceed on his appeal of his guilty plea for a constitutional violation and the District Court's opinion vacating Perry's guilty plea to the felony charge in state court. Id.

The Supreme Court's opinion in Class v. U.S., 138 S.Ct. 798 (2018), further clarified the Menna-Blackledge doctrine for determining what types of appellate issues are not barred due to an unconditional guilty plea. The defendant in Class pled guilty to possessing firearms on the

grounds of the Capital Buildings. Class, at 802 – 03. It is axiomatic that our courts strongly condemn conditional guilty pleas. Sims, at 400, 814 S.E.2d at 485. That worry can be assuaged by the fact that, while Class pled guilty to federal charges, the decision in Class focused directly on unconditional guilty pleas and refers to state and federal defendants interchangeably such that the decision in Class is instructive here. Class, at 804. (Discussing how federal and state courts throughout the 19th and 20th centuries hold similar views of the nature of a guilty plea.)

After pleading guilty, Class appealed his conviction, arguing that the statute was an unconstitutional violation of the Second Amendment. Class, at 802 – 03. The Court of Appeals for the District of the Columbia Circuit held that Class waived his constitutional claims by pleading guilty. Class, at 802 – 03. The U.S. Supreme Court held that the guilty plea itself did not bar the appeal. Id., at 801 – 02.

The Court in Class first laid out the history of the Menna-Blackledge doctrine. In Menna, a case where the Supreme Court further developed the principle from Blackledge, that "a guilty plea does not waive a claim – that judged on its face – the charge is one which the State may not constitutionally prosecute." Class, at 803 – 04 (citing Menna v. New York, 96 S.Ct. 241 (1975)). The Court noted that Menna's argument "amounted to a claim that 'the State may not convict' him 'no matter how validly his factual guilt is established.'" Id. Accordingly, "Menna's 'guilty plea, therefore, [did] not bar the claim.'" Id. (alterations in original)

The Court then elaborated that a valid guilty plea relinquished any claim that would contradict the "admissions made upon entry of a voluntary plea of guilty," but claims which by their nature extinguish the government's power to prosecute the defendant if the claim were successful are not barred. Class, at 805 – 06. Accordingly, since Class's argument was that the

statute was unconstitutional, his guilty plea did not bar his appeal because the issue on appeal went to the state's ability to prosecute him if his argument was successful. Class, at 807.

The majority opinion supports Appellant's argument in this case as Appellant's speedy trial argument also went directly to the state's ability to prosecute him if his argument was successful. See Langford, 400 S.C. 421, 441 – 42, 735 S.E.2d 471, 482. However, Appellant's argument is even supported by the dissent in Class. The dissent specifically acknowledged that the Court's holding in Class would allow Appellant's appeal here. Justice Alito asked and answered the issue in this case in his dissent in Class. He posited, "would [the holding in Class] permit a defendant [who pled guilty unconditionally] to argue his prosecution was barred by a statute of limitations or by the Speedy Trial Act? Presumably the answer is yes." Class, at 814. Accordingly, both the majority and the dissent in Class would agree that this Court's opinion barring Appellant from appealing the violation of his speedy trial right was an error.

While there have been decisions, such as one by the Fourth Circuit that held the right to a speedy trial is waived by a guilty plea, Appellant respectfully argues this Court should not follow that erroneous line and more faithfully adhere to the holding set forth in Class. See United States v. Lozano, 962 F.3d 773 (4th Cir. 2020); see also Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013) (holding that our state courts are not bound to follow the decisions of the Federal Circuit of Courts of Appeals). The dividing line between the appeals that are implicitly waived by an unconditional guilty plea and those that survive is whether there was any chance the defendant could be retried if his argument on appeal was successful or if the state could cure the error and continue the case properly. See United States v. Chavez-Daiz, 949 F.3d 1202, 1208 – 09 (9th Cir. 2020) (Chavez-Diaz conceded that if his claims were successful, the government could still retry him. That inevitable concession necessarily removes Chavez-Diaz from the limited ambit of the

Menna-Blackledge exception, because his challenges do not "amount[ ] to a claim that 'the State may not convict' him." (quoting Menna, 423 U.S. at 63 n.2, 96 S.Ct. 241)); See State v. Legare, 935 N.W.2d 773 (ND 2019) (Legare's claim fell outside the Menna-Blackledge exception because even if the court erred in denying Legare's motion in limine, the error could have been cured.)

Stated more simply, if there is any possibility the defendant could be retried even after his appeal is successful, his claim was waived by his guilty plea. If, however, the state could not retry him if he was successful, his appeal is not barred and must be adjudicated on the merits. Appellant's case falls into the latter category because if he is successful on the speedy trial issue the state will be forever precluded from retrying him. See Langford, at 441 – 42, 735 S.E.2d at 482.

The final reason this Court should address the merits of Appellant's appeal regards the public interest. The public has an interest in the expeditious administration of justice. The underpinning for the right to a speedy trial is derived from public interest for penalizing official abuse of the criminal process and discouraging official lawlessness. See Dickey v. Fla., 90 S. Ct. 1564, 1571 (1970). "Thus the guarantee [to a speedy trial] protects our common interest that government prosecute, not persecute, those whom it accuses of crime." Id.

Public policy would dictate that a speedy trial violation should not be waived via guilty plea. Such a policy would allow the state to intentionally weaponize onerous delays to pressure defendants to plead guilty then hide its wrongful conduct behind the implicit waiver from the guilty plea. In such a circumstance, the fair administration of criminal justice would be compromised. In this case, the state's delay is what caused the guilty plea. The state should not be allowed to delay the trial to wear a defendant down into pleading guilty then have their dilatory behavior evade appellate review.

Respectfully Submitted,

VICTOR R SEEGER
Appellate Defender

This 19th day of May, 2022.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Sherwin Alfonzo Green, #365577, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 19th day of May, 2022.

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT