

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Michael G. Nettles, Circuit Court Judge

RECEIVED

JUL 19 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

ROBERT WAYNE MITCHELL,

APPELLANT

APPELLATE CASE NO. 2012-212534

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT

This Court should vacate appellant’s guilty plea where the State breached the plea negotiations by recommending a sentence on the “higher end” of fifteen years for second degree burglary where it had agreed to remain “silent” on a sentence where defense counsel was requesting probation 5

Relevant Facts 5

Discussion 6

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

TABLE OF AUTHORITIES

Cases

Cf. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007)..... 7

Santobello v. New York, 404 U.S. 257 (1971)..... 6, 7

State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994)..... 7

STATEMENT OF ISSUE ON APPEAL

Whether this Court should vacate appellant's guilty plea where the State breached the plea negotiations by recommending a sentence on the "higher end" of fifteen years for second degree burglary where it had agreed to remain "silent" on a sentence where defense counsel was requesting probation?

STATEMENT OF THE CASE

Appellant was indicted by the York County Grand Jury for the offense of burglary in the second degree. R. 14. Appellant appeared on June 18, 2012 before the Honorable Michael G. Nettles. Chisa Putman represented appellant. Matthew A. Shelton was the assistant solicitor. R. 1.

Appellant pled "straight-up" to the charge of burglary in the first degree. The solicitor said this crime "carried a sentence" from probation to fifteen years imprisonment. R. 3, ll. 2-10. At the conclusion of the guilty plea proceeding the judge sentenced appellant to nine years imprisonment. R. 12, ll. 3-7.

This appeal follows.

ARGUMENT

This Court should vacate appellant's guilty plea where the State breached the plea negotiations by recommending a sentence on the "higher end" of fifteen years for second degree burglary where it had agreed to remain "silent" on a sentence where defense counsel was requesting probation.

Relevant Facts

At the beginning of the guilty plea proceeding the solicitor stated: "This is a straight-up plea that carries zero to 15 years. The State will be requesting a sentence in the higher range of the 15 years, and I'll explain why at the appropriate time." R. 3, ll. 2-10.

The solicitor told the judge that on September 25, 2011 around four o'clock in the morning appellant was involved with Ryan Brannon in an attempt to go into the End Zone Bar and Grill in Rock Hill to allegedly steal food items and beer. R. 4, l. 15 – 5, l. 3. The alarm went off before they were able to enter the building. The men fled in Brannon's automobile. The solicitor maintained that Brannon slowed down enough for appellant to jump out and flee. Brannon also stopped his vehicle and ran. The K-9 unit assisted in locating him, and he confessed. Brannon named appellant as his accomplice. R. 5, ll. 4-25.

The solicitor stated: "It's a plea without recommendation, but the State *feels the higher end* [of zero to fifteen years] *is appropriate* given all the circumstances." R. 9, ll. 15-17. (emphasis added). Defense counsel Putman disagreed: "I was told the State *was going to remain silent on sentencing*, and I was - - wanted to be able to argue on behalf of probation." The judge replied: "We'll proceed forward in that fashion. We'll just act

like he didn't ask for anything. Does that sound fair to you?" Defense counsel and appellant acknowledged that "sounded fair." R. 9, l. 22 – 10, l. 2. (emphasis added).

Defense counsel Putman told the judge appellant was fifty-five years old and that he would be a good candidate for probation, and he would adhere "to the stipulations of probation." R. 11, ll. 10-21. As seen, the judge sentenced appellant to nine years imprisonment. R. 12, ll. 3-7.

Discussion

In Santobello v. New York, 404 U.S. 257 (1971) the United States Supreme Court stated that because disposition of criminal charges after plea discussions was an essential part of the process, all considerations presuppose fairness in securing an agreement between an accused and the prosecutor. In Santobello the Court dealt with a very similar situation where the state agreed no sentencing recommendation would be made by the prosecutor, and the Court held that the prosecution was not in a good position to argue that the breach of that agreement was only inadvertent.

The Court wrote: "We need not reach the question of whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation *did not influence him and we have no reason to doubt that*. Nevertheless, we conclude that the interest of justice and appropriate recognition of the duties of the prosecution in relation to promises made in negotiation of pleas of guilty will be best served by remanding the case to the state court for further consideration." Santobello v. New York, 409 U.S. at 262-263 (1971).

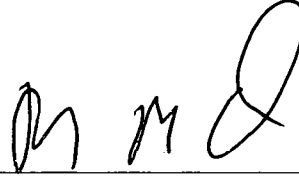
In State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) our Supreme Court held that all plea agreements had to be on the record and had to recite the scope, offenses, and individuals involved in the agreement. The situation here is must simpler than that in Thrift. The solicitor agreed to remain silent on a sentencing recommendation for appellant, and she breached that plea agreement. The solicitor did not claim that a plea agreement had not been reached for her to remain silent on a sentence, and therefore a breach of the plea agreement is apparent. Cf. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007).

Defense counsel only stated it sounded “fair” for the judge to “ignore” the solicitor’s breach of the plea agreement. Counsel never agreed to waive her objection to the breach of the plea agreement. Defense counsel again objected to the trial judge’s sentence in her notice of why this guilty plea appeal should go forward because of the solicitor’s breach of the plea agreement. Consequently, it is proper given the reasoning, logic, and holding of Santobello v. New York, for appellant’s guilty plea to be vacated.

CONCLUSION

By reason of the foregoing arguments this Court vacate appellant's guilty plea.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M D', is written above a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of July, 2013.

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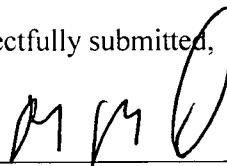
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Wayne Mitchell states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's guilty plea before Judge Michael G. Nettles, which was held on June 18, 2012, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Robert Wayne Mitchell.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of July, 2013.

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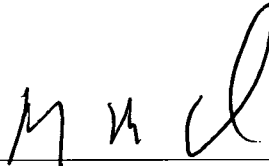
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Guilty Plea Transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 19th, 2013



Robert M. Dudek
Chief Appellate Defender

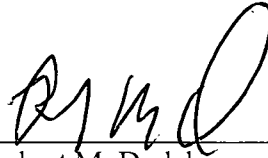
South Carolina Commission on Indigent Defense
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(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 19th, 2013



Robert M. Dudek
Chief Appellate Defender

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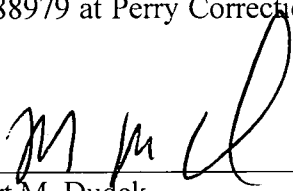
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CERTIFICATE OF SERVICE

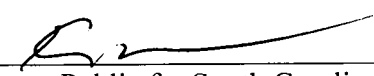
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Robert Wayne Mitchell, #288979 at Perry Correctional Institution, this 19th day of July, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of July, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .