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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VINCENT LOMELLI,

APPELLANT

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
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

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by denying Appellant's motion to set aside his guilty plea for second degree harassment where Appellant indicated his plea was not knowingly made because he was informed the agreement was to regular probation, which not include six months of intensive probation?

STATEMENT OF THE CASE

Appellant Vincent Lomelli was with second degree harassment. His case proceeded to a plea hearing before the Honorable Diane S. Goodstein on April 14, 2011. Appellant was represented by John Loy, while the State was represented by Glenn Justice. R. 1. Appellant waived presentment of the charge to the grand jury and, pursuant to North Carolina v. Alford,¹ pled guilty to the offense of second degree harassment with a restraining order in effect. R. 9, ln. 12—R. 11, ln. 21; R. 13, ll. 7-12. As part of the negotiated agreement, Appellant's charge in Magistrate court for violation of the protection order was to be dropped. The trial court accepted the plea, and imposed a sentence of one-year incarceration, suspended upon the service of one-year probation. R. 16, ll. 5-11; R. 19, ln. 11—R. 20, ln. 22; R. 49 (Sentence Sheet).

A post-plea motions hearing was held on May 12, 2011 before Judge Goodstein. Appellant was represented pro se, with John Loy acting as standby counsel (Counsel). State was again represented by Glenn Justice. R. 23. The court interpreted the pro se motion filed by Appellant "as a pro se motion to alter and amend to set aside or to vacate" Appellant's plea. R. 25, ll. 22-24. Appellant's motion was denied on June 21, 2010. R. 45-46 (Order Denying Motion to Set Aside Guilty Plea).

¹ 400 U.S. 25, 91 S.Ct. 160 (1970).

ARGUMENT

The trial court reversibly erred by denying Appellant's motion to set aside his guilty plea for second degree harassment where Appellant indicated his plea was not knowingly made because he was informed the sentence of the agreement was to regular probation, which did not include six months of intensive probation.

At Appellant's post-plea motions hearing, Appellant specifically asserted he did not agree to six months intensified probation, but that the plea agreement was to regular probation. R. 32, ln. 18—R. 33, ln. 1. The plea court responded by flatly stating, “[i]t doesn't matter. That's my sentence.” R. 33, ln. 4. The court further informed Appellant that “if there was an agreement to probation you're not going to tell me what I'm going to do and the terms that I'm going to set on probation[]” R. 33, ll. 12-14.

The Constitution demands that a defendant enter a guilty plea voluntarily, and that the related waivers “not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468-69 (1970). The difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). “The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (internal quotations omitted). Further, erroneous sentencing advice by Counsel constitutes a reversible error where it served to induce the guilty plea. See, e.g., Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing where “trial counsel's improper sentencing advice induced petitioner's guilty plea.”) (citing Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (new trial granted where incorrect parole eligibility advice induced plea)).

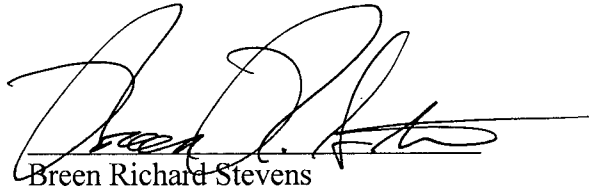
In the case at bar, Appellant readily indicated his decision to plead guilty was based on the advice that he would receive one year of probation as the negotiated sentence. Specifically, Appellant stated that he was not agreeing to “six months intensified probation,” rather he “was informed that it would be just regular probation.” R. 32, ln. 18—R. 33, ln. 1. Further, the plea court acknowledged that it understood the sentence was negotiated for one-year incarceration, suspended upon service of one-year probation. R. 27, ll. 19-23; R. 38, ll. 13-15. Thus, Appellant’s statement to the court shows that he was advised that his negotiated plea agreement and sentence would include regular probation, and not additional terms of intensive probation. Accordingly, Appellant’s plea was not a voluntary, knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences; rather, it was induced based upon the affirmative advice of Counsel regarding the terms of the negotiated sentence. As such, the plea court’s refusal to set aside the Appellant’s guilty plea was erroneous.

Further, Appellant was prejudiced by the plea court’s refusal to set aside the plea. Appellant’s comments indicate the probationary term was material to his decision to plead guilty. Therefore, Appellant would not have pled guilty had he known that additional terms could be added to the probationary sentence. As a result, Appellant should have been permitted to have his guilty plea to second degree harassment set aside.

CONCLUSION

For the foregoing reasons, Appellant Vincent Lomelli respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of June, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VINCENT LOMELLI,

APPELLANT

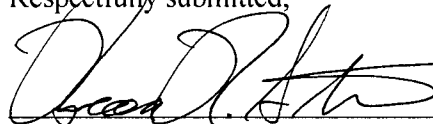
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vincent Lomelli states:

1. He is 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 trial before Judge Diane Schafer Goodstein, which was held on June 23, 2011, 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 Vincent Lomelli.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of June, 2012.

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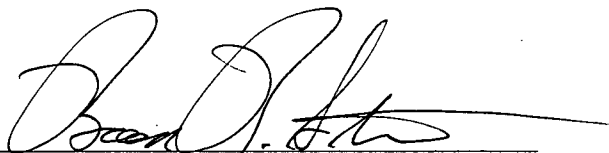
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Plea hearing transcript (April 14, 2011), pp. 1-22;
- (3) Post-plea motion hearing transcript (May 12, 2011), pp. 1-20;
- (4) Order Denying Motion to Set Aside Guilty Plea (signed June 21, 2011);
- (5) Motion for Dismissal and Order of Dismissal (filed May 5, 2011);
- (6) Sentence sheet.

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

June 25th, 2012



Breen Richard Stevens
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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

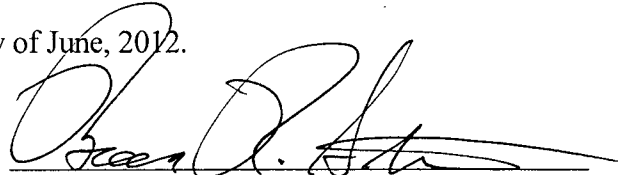
V.

VINCENT LOMELLI,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201; and on Vincent Lomelli, at 107 Elks Lodge Lane, Summerville, SC 29483, this 25th day of June, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of June, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021.