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Jun 03 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DETAVIOUS LAMON CUNNINGHAM,

APPELLANT

APPELLATE CASE NO. 2023-001718

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the Plea Court reversibly erred by determining it could not alter Appellant's sentence from qualifying as a second offense rather than a first offense in his negotiated plea agreement to trafficking crack cocaine where the Appellant's prior drug conviction and sentence fell outside of the ten-year period for sentence enhancement, and where sentence enhancement was not an element of the drug offense to which Appellant pled?

STATEMENT OF THE CASE

Appellant Detavious Lamon Cunningham was indicted by the Greenwood County grand jury on February 24, 2023, for trafficking in crack cocaine (more than 28g, but less than 100g). The charge arose from an incident occurring on September 16, 2022. R. 18, ll. 3-9; R.51-52. On October 31, 2023, his case proceeded to a guilty plea before the Honorable Frank R. Addy, Jr. (Plea Court).

At the plea hearing, Appellant was represented by Tristan Shaffer (Counsel) and Colie Stancil, while the State was represented by Andrew Hodges. R. 16; R. 28, ll. 19-21; R. 30, ll. 8-18. Under the negotiated guilty plea deal, Appellant pled to the one count of trafficking crack cocaine, second offense, in exchange for a negotiated sentence of sixteen (16) years, dismissal of multiple other charges, and withdrawal of the State's notice seeking a sentence of life without parole (LWOP Notice). R. 18, ll. 5-25; R. 19, ln. 7—R. 22, ln. 25; R. 23, ll. 9-10; R. 1. The Plea Court accepted Appellant's guilty plea, and imposed the negotiated sixteen year sentence with 410 days credit given for time-served. R. 29, ll. 20-24; R. 35, ll. 4-12.

On November 2, 2023, Appellant again appeared before the Plea Court for a motion to reconsider. R. 37. Specifically, Appellant sought to have his guilty plea amended "to reflect a plea to trafficking first offense." The basis for the motion was that, per his RAP sheet, Appellant's prior conviction in 2010 for possession with intent to distribute, as well as service of his five-year sentence for the same, fell outside the 10-year window necessary to enhance his current trafficking conviction to a second offense. R. 40, ln. 1—R. 41, ln. 16. Counsel acknowledged to the Court that he indeed advised Appellant that the "PWID that I thought was 2010 and a five-year charge would have enhanced." However, Counsel also posited his concern

that the only remedy available in a negotiated plea was withdrawal from the entire plea deal. R. 18, ll. 17-18; R. 20, ll. 17-24.

The Court initially indicated that it could not alter the guilty plea because it was negotiated, and as such could only "entertain a motion to withdraw it and all y'all start back at square one." R. 41, ln. 25—R. 42, ln. 3. After hearing from both the State and Appellant, the Plea Court stated it was "not in a position to . . . go back and say this is a trafficking first;" however, the Court went on to say "[t]he only thing I can entertain at this point in time is a motion to withdraw his sentence," and cautioned Appellant that "if he wants to go there, he does so at his own peril." R. 41, ln. 25—R. 45, ln. 15. Appellant discussed the matter with Counsel, and Counsel then stated the following to the Plea Court:

> Your Honor, . . . we have advised [Appellant] that—I think that you would be inclined, based off of the confusion, to give him—basically undo the guilty plea and let him face trial on all of them; however, he's indicated that he does not want to do that. He has indicated that he would prefer just to appeal.

R. 46, ln. 2; R. 46, ln. 16—R. 47, ln. 12. Appellant's notice of appeal was filed the same day. R. 47, ll. 13-18. In his "Explanation of Appeal," Counsel indicated Appellant was appealing his sentence. R. 50.

This appeal follows.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Nesbitt, 411 S.C. 194, 199, 768 S.E.2d 67, 70 (2015) (quoting State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). "The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). "An abuse of discretion occurs when the sentence imposed was based on either an error of law or a factual conclusion not supported by evidence in the record." Interest of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021) (citing In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010)).

ARGUMENT

The Plea Court reversibly erred by determining it could not alter Appellant's sentence from qualifying as a second offense rather than a first offense in his negotiated plea agreement to trafficking crack cocaine where the Appellant's prior drug conviction and sentence fell outside of the ten-year period for sentence enhancement, and where sentence enhancement was not an element of the drug offense to which Appellant pled.

At the time Appellant pled guilty to trafficking crack cocaine, he was advised that his 2010 drug conviction was within the ten-year window to enhance his sentence exposure up to second offense. However, Appellant challenged his sentence as a second offense to the Plea Court at his motion to reconsider hearing by asserting his prior conviction and completion of sentence fell outside the range required to enhance his sentencing for trafficking from first to second offense. Although the Plea Court indicated it would consider resentencing Appellant, it erroneously believed it only had the ability to do so under trafficking second offense rather than first offense because the guilty plea was negotiated.

"[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1712, L.Ed.2d 274 (1969). "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought." Id.

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). "If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Boykin, 395 U.S. at 243 n.5, 89 S.Ct. at 1712 n.5, L.Ed.2d 274 (quoting Johnson v. Zerbst, 304 U.S. 458, 466, 58 S.Ct. 1019, 1171, 82 L.Ed. 1461 (1938)). "In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea," as well as "an understanding of the charges against him." Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980), and State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)).

Moreover, "[t]o be valid, a guilty plea must be unconditional." Easter v. State, 355 S.C. 79, 81, 584 S.E.2d 117, 119 (2003) (citing State v. Peppers, 346 S.C. 502, 552 S.E.2d 288 (2001); State v. O'Leary, 302 S.C. 17, 18, 393 S.E.2d 186, 187 (1990); and State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)). "Sentencing, although often combined with the admission of guilt in a hearing, is a separate issue from guilt and a distinct phase of the criminal process." Id. (citing Gilbert v. State, 245 Ga.App. 544, 538 S.E.2d 104 (2000)).

In the present case, Appellant pled guilty to the "Trafficking in Crack Cocaine" offense for which he was indicted by the Greenwood County Grand Jury under Section 44-53-375(C) of the South Carolina Code. R. 18, ll. 5-25; R. 19, ln. 7—R. 22, ln. 25; R. 23, ll. 9-10; R. 51-52. In pertinent part, Section 44-53-375(C) provides follows:

> (C) A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial

> assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" and, upon conviction, must be punished as follows if the quantity involved is: . . . . .
>
> (2) twenty-eight grams or more, but less than one hundred grams:
>
> (a) for a first offense, a term of imprisonment of not less than seven years nor more than twenty-five years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars;
>
> (b) for a second offense, a term of imprisonment of not less than seven years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars.

S.C. Code Ann. § 44-53-375(C)(2)(a) and (b) (Westlaw, current through 2024 Act. No. 145). Thus, based upon the plain and unambiguous language of the statute, if a defendant is convicted of the crime of trafficking cocaine base (a.k.a. crack cocaine), then the punishment is based upon (1) the amount of crack cocaine trafficked, and (2) whether the defendant had a prior offense.

As explained by the South Carolina Court of Appeals, "[w]here a statute increases punishment for a second or subsequent offense, the allegation that the offense charged in the indictment was of that character is unnecessary." State v. Scriven, 339 S.C. 333, 337-38, 529 S.E.2d 71, 73 (Ct. App. 2000). Accordingly, even though the trafficking statute "contains provisions for sentence enhancement upon conviction for a second or greater offense, these provisions are not elements of the offense." Id. (citing Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

Here, Appellant did not challenge the guilt phase of his plea; rather, he challenged the Plea Court's interpretation and application of the statutes regarding his sentence. State v. Donahue, 400 S.C. 604, 606, 735 S.E.2d 547, 548 (Ct. App. 2012) ("A criminal defendant does not give up his right to challenge the circuit court's interpretation of a statute regarding his sentence simply by pleading guilty.") State v. Donahue, 400 S.C. 604, 606, 735 S.E.2d 547, 548 (Ct. App. 2012) (citing Easter v. State, 355 S.C. 79, 81–82, 584 S.E.2d 117, 119 (2003)). Specifically, he challenged the application of Section 44-53-470 of the South Carolina Code as to whether his prior drug conviction elevated his current trafficking conviction to a second offense. That Section provides in pertinent part as follows:

> (A) An offense is considered a second or subsequent offense if:
>
> . . . . .
>
> (3) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has been convicted within the previous ten years of a first violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs; and
>
> (4) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs.
>
> . . . . .
>
> (C) If a person is sentenced to confinement as the result of a conviction pursuant to this article, the time period specified in this section begins on the date of the conviction or on the date the person is released from confinement imposed for the conviction, whichever is later. For purposes of this section, confinement

> includes incarceration and supervised release, including, but not limited to, probation, parole, house arrest, community supervision, work release, and supervised furlough.

S.C. Code Ann. § 44-53-470 (A) and (C) (Westlaw, current through 2024 Act. No. 120). Thus, if a defendant's current drug conviction falls within ten years of either (a) the conviction for or (b) the completion of sentence on a prior drug offense, then it is enhanced to a second offense; if not, then it should be sentenced as a first offense.

When applied to the facts of Appellant's prior drug conviction as represented at his reconsideration hearing, Appellant's current trafficking conviction did not qualify for sentencing as a second offense. As explained by Counsel, Appellant's prior drug conviction occurred in 2010, and his sentence therein would likely have ended more than 10 years before his present conviction for trafficking crack cocaine. R. 40, ln. 1—R. 41, ln. 16. Yet, the Plea Court believed it was "not in a position to . . . go back and say this is a trafficking first." R. 41, ln. 25—R. 45, ln. 15. In other words, the Plea Court did not believe it had the discretion to follow the law as demanded by statute and sentence Appellant under first offense rather than second offense simply because Appellant pled under a negotiated agreement. This was error. see Interest of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021) (citing In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010)) ("An abuse of discretion occurs when the sentence imposed was based on either an error of law or a factual conclusion not supported by evidence in the record.").

Appellant was not challenging the validity of his guilty plea; he was merely challenging the lawfulness of the sentencing category. "The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion." Hicks, 377 S.C. at 325, 659 S.E.2d at 500. (citing Smith, 276 S.C. at 498, 280 S.E.2d at 202). Here, as indicated above, the plea

condition for a sentence under trafficking cocaine, second offense, was unlawful. As such, the Plea Court should have exercised its discretion to reconsider and alter Appellant's sentence as a first offense, and imposed a sentence under the lawful category of first offense. Cf. State v. Gilliam, 274 S.C. 324, 326, 262 S.E.2d 923, 924 (1980) ("It is a well established rule in this State that the granting of a motion to withdraw a guilty plea is a matter within the discretion of the trial judge before whom the plea is entered. However, a trial judge has no discretion to withhold a request for the withdrawal of a plea where the plea is conditioned on an invalid agreement.") (internal citations omitted); but see Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) ("All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.") (citing Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000)).

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DETAVIOUS LAMON CUNNINGHAM,

APPELLANT

APPELLATE CASE NO. 2023-001718

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Detavious Lamon Cunningham 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 Frank R. Addy, which was held on Nov 2, 2023, 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 Detavious Lamon Cunningham.

Respectfully Submitted,

____

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 2024.

CONCLUSION

For the foregoing reasons, Appellant Detavious L. Cunningham respectfully requests vacation of his classification and sentence under trafficking crack cocaine, second offense, and remand for classification and sentencing under trafficking crack cocaine, first offense.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 2024.

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THE STATE, RESPONDENT,

V.

DETAVIOUS LAMON CUNNINGHAM, APPELLANT

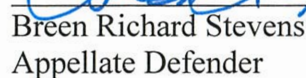
APPELLATE CASE NO. 2023-001718

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Indictment;
(2) Sentence sheet;
(3) Explanation of Appeal, filed November 2, 2023;
(4) Entire Motion to Relieve Counsel Hearing Transcript May 23, 2023;
(5) Entire Guilty Plea Transcript, October 21, 2023;
(6) Entire Motion for Reconsideration Hearing Transcript, November 2, 2023.

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



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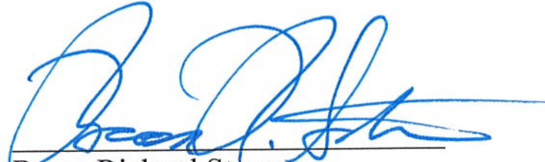
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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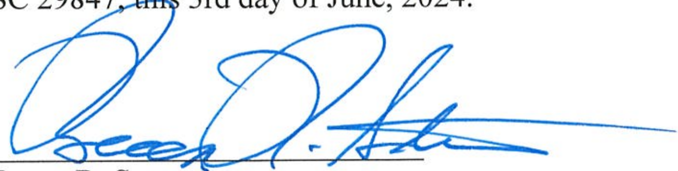
APPELLANT

APPELLATE CASE NO. 2023-001718

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Detavious Lamon Cunningham, #329697, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 3rd day of June, 2024.



Breen R. Stevens
Appellate Defender

ATTORNEY FOR APPELLANT