

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County

Honorable D. Craig Brown, Circuit Court Judge

RECEIVED

Aug 12 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

EDWARD KIRK,

APPELLANT

APPELLATE CASE NO. 2022-001823

ANDERS BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

JESSICA M. SAXON
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the plea judge abused her discretion in only reducing Appellant's sentence to sixteen years where Appellant's more culpable co-defendant was only sentenced to twelve years?

STATEMENT OF THE CASE

During the August 2015 term of the Richland County grand jury, Appellant was indicted for his part in the armed robberies of three delivery drivers for various local restaurants. App. 22-23, 24-25, 28-29; App. 77, l. 23-App. 80, l. 8. In June 2016, the State called one of the armed robbery cases to trial before the Honorable Jocelyn Newman and a jury. The State was represented by April Sampson. Appellant was represented by Anna Goode Browder. App. 73-74. After jury selection the parties conducted a pre-trial hearing to determine whether the State could use the facts of the other two robberies during Petitioner's trial. App. 75. After hearing arguments from the parties Judge Newman ruled to allow the State to introduce the evidence of the other robberies during Appellant's trial. App. 92-99. Based on this ruling, Appellant agreed to enter a guilty plea to one set of charges. App. 75, ll. 16-23.

Appellant was originally sentenced to twenty years incarceration on one count of armed robbery and one count of kidnapping, and five years on a weapons charge; all sentences to run concurrently. App. 23; App. 26; App. 29; App. 87-88. The parties reconvened on August 11, 2016, on the defense motion to reconsider sentence. App. 88, ll. 10-12. The court resentenced Appellant to sixteen years incarceration on the armed robbery and kidnapping charges. App. 90, ll. 5-11.

A notice of appeal was never filed. Petitioner filed an application for post-conviction relief on June 8, 2021, alleging he was denied a direct appeal. App. 1-App. 8. The State filed a return and partial motion to dismiss dated August 18, 2021. App. 9-18. On December 16, 2022, the parties entered into a consent order granting belated appellate review pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 19-21. Due to the passage of time between the plea and the PCR application, there the transcript of Petitioner's plea hearing could not be

produced. Former Appellate Counsel Taylor Gilliam made a motion to remand the matter to the Court of General Sessions to reconstruct the record of the guilty plea. App. 31-68. This Court remanded the matter for reconstruction on April 21, 2023. App. 69-70.

A reconstruction hearing was held on December 15, 2023. The State was represented by April Sampson. Petitioner was represented by Appellate Counsel Jessica Saxon. App. 71. Also present was Petitioner's plea counsel, Anna Browder, and D. Russell Barlow for the Attorney General's Office. App. 73-74. At the conclusion of the hearing Judge Newman ruled the record had been adequately reconstructed. App. 102. This Anders Brief of Appellant Pursuant to White v. State, supra, and a simultaneously filed petition for writ of certiorari, follow.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews only errors of law and is bound by the factual findings of the trial court unless the findings are clearly erroneous. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). The authority to change a sentence rest solely and exclusively within the discretion of the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). An abuse of discretion occurs where the conclusions of the trial court are either controlled by an error of law or lack evidentiary support. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010).

ARGUMENT

The plea judge abused her discretion in only reducing Appellant's sentence to sixteen years where Appellant's more culpable co-defendant was only sentenced to twelve years.

Relevant Facts

On January 13, 2015, Appellant, along with co-defendants Octavia Gill, Timothy Beecham, and Shatavia Flowers, robbed a delivery driver for Domino's Pizza. After the driver had made his delivery, Appellant and Beecham approached the driver with a gun, knocked the pizza bag from his hands and took his money. On January 15, Gill called in an order for delivery from Beezer's. Gill gave a fake name on the order. When the delivery driver arrived to make the delivery, Beecham pointed a gun at the delivery driver. Appellant and Flowers were present during the robbery. The defendants took the driver's purse, food, money, and cellphone during the robbery. During the third robbery, Gill called in an order for delivery from the Tea Pot under a false name. When the driver arrived to deliver the food he was flagged down by a male. He attempted to deliver the food but was then robbed of the food, money, and cellphone at gunpoint. App. 77, l. 23-App. 79, l. 11.

Gill was arrested on unrelated charges and her cellphone seized. The cellphone number was the same number that called in the orders to Beezer's and the Tea Pot. During an execution of a search warrant, officers found clothing matching the description of what was worn by the suspects, along with receipts and menus from all three restaurants. Gill confessed and implicated her three co-defendants. Once Flowers was arrested, she implicated her co-defendants as well. Beecham and Appellant eventually both confessed to their involvement. App. 79, l. 12-App. 80, l. 8.

When Appellant pled guilty he was twenty one years old and had no prior record. Gill had been the ringleader of the group. She had planned the robberies and had a lengthy criminal record. Counsel Browder informed the court that Appellant did not have a weapon during the robberies and was the least culpable of all the co-defendants. Additionally, Appellant did not participate in the Tea Pot robbery. Appellant had the support of his family at the time of his plea and had obtained his GED during his sixteen months of pre-trial detention. The original offer had been for ten to fifteen years and Counsel Browder requested the court sentence Appellant to ten years. App. 83, l. 20-App. 84, l. 19. The plea court sentenced Appellant to twenty years incarceration. App. 87, l. 19-App. 88, l. 5.

Counsel Browder timely filed a motion to reconsider the sentence on June 29, 2016. The parties reconvened for a hearing on August 11, 2016. At the hearing Counsel Browder argued that Appellant was the least culpable of the co-defendants and had no prior record. After Appellant's plea, co-defendant Beecham pled guilty and received a twelve-year sentence. Beecham had possessed a weapon during the robberies and had prior record. Based on that Counsel Browder requested the court sentence Appellant in line with the more culpable co-defendant. The State argued the Beecham was going to testify at trial against Appellant and that he received some consideration for that fact. The plea court resentenced Appellant to sixteen years incarceration on the kidnapping and arm robbery charges. App. 88, l. 10-App. 90, l. 15.

Discussion

It is well settled that the authority to change a sentence rests solely within the discretion of the sentencing judge. See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). The only time a judge is without authority to change a sentence is after the term of court at which the sentence was imposed has expired. State v. Best, 257 S.C. 361, 186 S.E.2d 272 (1972).

Otherwise, the sentencing, and resentencing, of an offender is entirely within the purview of the sentencing judge with the only limits on a judge's sentencing discretion being the statutorily created maximum and minimum sentencing limits for certain offenses. Notably, in 2010, the Legislature passed the Omnibus Crime Reduction and Sentencing Reform Act. One of the goals of that Act was to ensure fairness and certainty in sentencing offenders for violent crimes.

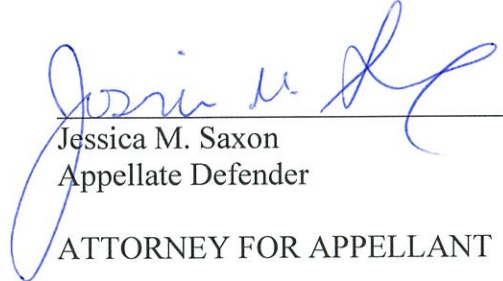
Appellant was one of the least culpable individuals involved in the series of armed robberies arranged by Gill and yet he is serving the harshest sentence. Even Gill, the ringleader of the group, only received a sentence of eleven years.¹ In fairness to the plea judge, she did not know how much time Gill would eventually be sentenced to but she was aware that a more culpable co-defendant, Beecham, had received a twelve-year sentence. However, instead of sentencing Appellant in line with his more culpable and seasoned co-defendants, the court gave Appellant sixteen years for his first offense.

This was an abuse of discretion because such a sentence flies in the face of the fair sentencing ideals within the Omnibus Crime Reduction and Sentencing Reform Act. That the least culpable defendant would receive the harshest sentence is illogical. Appellant should have been sentenced to, at most, the same twelve years as Beecham. Admittedly, Appellant's sentence is in line with the mandatory minimums and maximums set forth by statute. However, it is not in line with the sentences of his co-defendants. The disparity in sentencing can be attributed to the plea court's abuse of discretion in knowingly sentencing Appellant to more time than his more culpable co-defendant.

¹ <https://publicindex.sccourts.org/Richland/PublicIndex/PISearch.aspx> search Gill, Octavia

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court remand his case to the Court of General Sessions of Richland County for resentencing.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

This 12th day of August, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Edward Kirk states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held on December 15, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Edward Kirk.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of August, 2024.

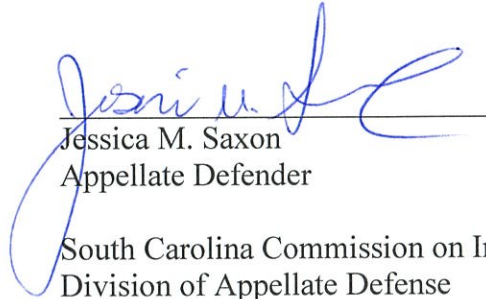
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant Pursuant to White v. State 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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This 12th day of August, 2024.