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Nov 27 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to Oconee County
Honorable H. Steven DeBerry, IV, Post-Conviction Relief Judge

Appellate Case No. 2024-001408

Derek W. Gibson,

Respondent,

vs.

State of South Carolina,

Petitioner.

MOTION TO WITHDRAW APPEAL

Petitioner, the State of South Carolina, through its undersigned counsel, would respectfully show unto the Court as follows, as to why Petitioner seeks to withdraw the appeal and allow the Court of General Sessions to take jurisdiction and properly re-sentence Respondent, Derek W. Gibson consistent with the grant of post-conviction relief:

PROCEDURAL HISTORY

In the October 2019 term, Gibson was indicted by the Anderson County Grand jury of Distribution of Methamphetamine, 3rd Offense (2019-GS-04-02533) and Unlawful Carrying of a Pistol (2019-GS-04-01790). In the March 2020 term, the Oconee County Grand Jury indicted Applicant of Receiving, Possessing, Concealing, Selling, or Disposing of a Stolen Vehicle, Value of \$10,000 or More (2020-GS-37-00281), Removing or Falsifying Identification Number of

Vehicle or Engine (2020-GS0-37-00282), and Reckless Driving (2020-GS-37-00283). Petitioner directly indicted Applicant on the charge of Trafficking in Methamphetamine between 10-28 grams, 2nd Offense (2021-GS-37-0437), Burglary–3rd Degree, 1st Offense, (2021-GS-37-0438); and Grand Larceny, \$2,000–\$10,000 (2021-GS-37-0439). Applicant was represented by Public Defender Kayla Michelle Porter. Deputy Solicitor Jason Christopher Alderman prosecuted the case. On May 24, 2021, Applicant proceeded to a jury trial before the Honorable R. Scott Sprouse on the charge of Trafficking Methamphetamine between 10-28 grams, 3rd Offense.

On May 25, 2021, Applicant made a global plea before Judge Sprouse, disposing of his Oconee and Anderson charges. Applicant pled guilty off the trial docket to a negotiated sentence of fifteen years active time for Trafficking Methamphetamine between 10-28 grams, 2nd Offense (2021-GS-37-00437); five years for Burglary–3rd Degree; and five years for Grand Larceny, \$2,000–\$10,000, the sentences running concurrently. Applicant waived presentment to these charges. In exchange for Applicant's plea, the State dismissed the remaining charges. Applicant did not appeal his sentences or convictions.

POST-CONVICTION RELIEF ACTION

Gibson filed his post-conviction relief action on March 28, 2022, and failed to allege specific allegations as grounds for relief, but requested a corrected sentence based on wrongful indictment. Petitioner made its Return and Motion for a More Definite Statement filed on June 30, 2022. On April 8, 2024, Applicant filed an amended application, alleging the following:

1. Ineffective assistance of counsel
 - a. Counsel failed to prevent direct indictment of the charge as a trafficking third offense less than two weeks prior to trial; and
 - b. Failed to communicate and advise Applicant regarding Petitioner's plea offer; and
2. Involuntary guilty plea
 - a. Due process violation in the indictment procedure and

insufficiencies in the chain of custody which denied Applicant a fair trial causing him to plea when he otherwise would not have.

On April 9, 2024, an evidentiary hearing convened before the Honorable H. Steven DeBerry, IV. Applicant was present and represented by Susannah C. Ross, Esquire (PCR Counsel). Assistant Attorney General Talida Balaj represented Respondent. At the outset of the hearing, PCR Counsel indicated Applicant wished to go forward on the allegation related to his initial plea offer, as follows:

I have spoken to Mr. Gibson this morning, and he wants to go forward on the issue that's sort of outlined in Davie v. State. That case is at 675 SC 2nd at 416. It's a 2009 case, and it basically states that counsel is deficient if they don't effectively convey a plea offer, and the client has a meaningful opportunity to accept and -- but for that the outcome would have been different. We'd also argue Sprouse v. State -- or Sprouse v. State. That's 585 SC 2nd 278 at 281, 2003. There's a quote finding defendant was entitled to post-conviction relief where Petitioner failed to honor the plea agreement and made the defendant and trial counsel failed to ensure that Petitioner adhered to the original plea agreement. As stated before, Mr. Gibson was indicted from, I believe, a trafficking first was out there, to a trafficking third on May 11th. And then May 23, they -- 23rd, less than two weeks later, proceeded to trial.

(PCR Tr. p. 6, ll. 8-24). At the close of the evidentiary hearing, Judge DeBerry took the matter under advisement.

By written Order filed July 1, 2024, Judge DeBerry granted post-conviction relief, ordering Gibson's sentence and conviction for Trafficking Methamphetamine or Cocaine Base 10 to 28 grams, 2nd Offense be vacated, and remanded the matter to the Oconee County Court of General Sessions for a re-sentencing to the original offer of ten years.

Petitioner received the Order Granting Post-Conviction Relief on July 8, 2024. On July 18, 2024, Petitioner provided the parties with its motion to reconsider pursuant to Rule 59(e), SCRPC, and sent it to the Oconee County Clerk of Court for filing on the same day. Unbeknownst

to Petitioner—State of South Carolina through the Attorney General's Office—the Honorable J. Cordell Maddox, Jr., re-sentenced Gibson to ten-years on the trafficking charge (2021-GS-37-00437) on July 17, 2024, while Petitioner's motion to reconsider was pending before Judge DeBerry. Subsequently, On July 29, 2024, Judge DeBerry filed an Order denying Petitioner's motion to reconsider the Order Granting Post-Conviction Relief. Because the Order Granting Post-Conviction Relief was not final due to Petitioner's pending motion to reconsider, the Oconee Court of General Sessions lacked subject matter jurisdiction to re-sentence Gibson on July 17, 2024.

On August 28, 2024, Petitioner filed a Notice of Appeal of Judge DeBerry's Order Granting Post-Conviction Relief. On October 10, 2024, counsel for Gibson informed Petitioner that Gibson had been re-sentenced.

MOTION TO WITHDRAW APPEAL

As mentioned *supra*, while Petitioner's motion to reconsider pursuant to Rule 59(e), SCRPC, was pending, Gibson was re-sentenced to ten years on his trafficking charge (2021-GS-37-00437) by Judge Maddox with the knowledge of Judge DeBerry's Order Granting Post-Conviction Relief. The Oconee Solicitor's Office was not aware of Petitioner's pending motion to reconsider.

Based on the fact the Oconee Solicitor's Office is satisfied with a ten-year sentence, Petitioner no longer wishes to proceed with its appeal. See Starnes v. State, S.C. Sup. Ct. Order dated March 24, 1992 ("By accepting the plea and allowing respondent released on time served, however, the State evidenced its judgment against further imprisonment of respondent.").¹ However, as the Oconee General Sessions Court did not have jurisdiction to re-sentence Gibson,

¹ The Order is attached to this filing for the Court's convenience.

Petitioner requests the improper sentence be vacated and remanded to the Oconee General Sessions Court for re-sentencing with proper jurisdiction, consistent with grant of relief by Judge DeBerry. Id. (The Supreme Court vacating respondent's plea and modifying sentence to thirty years where respondent was given a new plea on the same indictment subject to the action on appeal and given a ten-year sentence while petitioner's petition for rehearing was pending before the Supreme Court.).

Pursuant to Rule 260(c) of the South Carolina Appellate Court Rules, Petitioner asks this Court to allow withdrawal. See Rule 260(c), SCACR ("An appeal or other proceeding may be dismissed on motion of the appellant or petitioner upon such terms as may be fixed by the court."). Additionally, Petitioner requests this Court to vacate Gibson's sentence and remand the action to the Oconee General Sessions Court for re-sentencing on indictment 2021-GS-37-00437 with proper jurisdiction. Counsel for Petitioner has conferred with Gibson's counsel, who agrees and consents to the withdrawal.

[Conclusion Page Follows]

CONCLUSION

WHEREFORE, Petitioner prays this Court will grant Petitioner's motion to withdraw its appeal and vacate Gibson's sentence on indictment 2021-GS-37-00437 and remand the action to the Oconee General Sessions Court for re-sentencing on indictment 2021-GS-37-00437 with proper jurisdiction.

Respectfully submitted,

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November 27, 2024

The Supreme Court of South Carolina

APR 19 AM 10 25
CLERK OF COURT
COURT HOUSE
COLUMBIA, S.C.

CERTIFIED A TRUE
AND CORRECT COPY.

Melanie Hugger
HORRY COUNTY CLERK OF COURT
BY *Melanie Hugger*

Somjai Fung Eue Starnes, Respondent,
v.
State of South Carolina. Petitioner.

ORDER

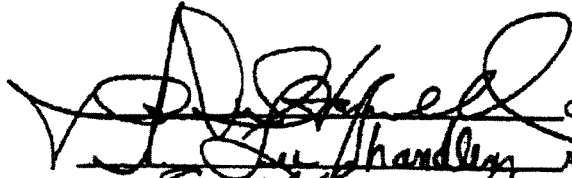
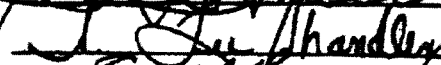
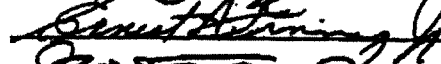

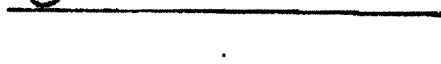
While the petition for rehearing was pending in this matter, respondent was returned to Horry County and, pursuant to a plea agreement with the solicitor, enter a plea of nolo contendere to the "lesser included offense" of committing a lewd act on a minor. She was sentenced to ten years imprisonment, satisfied upon time served. No direct appeal was taken.

Respondent asks the Court to again grant rehearing and withdraw its opinion. We deny the petition for rehearing.

The State has filed a motion asking the Court to vacate the conviction for lewd act on a minor and to reinstate the conviction for CSC. Because respondent's plea to the charge of lewd act on a minor was under the indictment for criminal sexual conduct which was the subject of the case on appeal to this Court, the lower court did not have jurisdiction to accept her plea and it is therefore vacated. By accepting the plea and allowing respondent released on time served, however, the State evidenced its judgment against any further imprisonment of

respondent. In light of that decision by the State and the fact that respondent has been released, we modify her sentence to thirty years, satisfied upon time served.

IT IS SO ORDERED.


C.J.

A.J.

A.J.

A.J.

A.J.

Columbia, South Carolina
March 24, 1992