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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SINCERE JAMAL OWENS,

APPELLANT

APPELLATE CASE NO. 2012-213550

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION.....	8
PETITION TO BE RELIEVED AS COUNSEL	9

TABLE OF AUTHORITIES

Cases

<u>Fontaine v. Peitz</u> , 291 S.C. 536, 354 S.E.2d 565 (1987)	7
<u>Samples v. Mitchell</u> , 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1997).....	7
<u>State v. Goodall</u> , 221 S.C. 175, 69 S.E.2d 915 (1952)	6
<u>State v. Gregory</u> , 198 S.C. 98, 16 S.E.2d 532 (1952)	7
<u>State v. Kimbrough</u> , 212 S.C. 348, 46 S.E.2d 273 (1948).....	7
<u>State v. Mansfield</u> , 343 S.C. 66, 538 S.E.2d 257 (Ct.App. 2000)	7
<u>State v. Phillips</u> , 215 S.C. 314, 54 S.E.2d 901 (1949)	7
<u>State v. Scates</u> , 212 S.C. 150, 46 S.E.2d 693 (1948)	7
<u>State v. Smith</u> , 276 S.C. 494, 280 S.E.2d 200 (1981).....	6, 7
<u>State v. Steadman</u> , 216 S.C. 579, 59 S.E.2d 168 (1950).....	6

STATEMENT OF ISSUE ON APPEAL

Did the judge who heard the motion to reconsider sentence abuse his discretion in failing to address the claim that the sentencing judge abused his discretion in considering gang violence in the community in imposing sentence when there was no evidence that the present case involved gang violence?

STATEMENT OF THE CASE

In June of 2009, the Colleton County Grand Jury indicted Owens for murder and possession of a weapon during the commission of a crime of violence, indictments #2009-GS-15-305, 306. On September 13, 2010, Owens proceeded to jury trial before the Honorable D. Craig Brown. Attorney David Mathews represented Owens at trial. Attorney Sean P. Thornton prosecuted the case on behalf of the State. The jury returned with a verdict of guilty on the lesser included offense of voluntary manslaughter and guilty of possession of a weapon during the commission of a crime of violence. Judge Brown sentenced Owens to twenty seven (27) years for voluntary manslaughter and five years consecutive for the weapon charge.

Owens filed a motion to reconsider sentence and on May 29, 2012, a hearing was held before Judge Brown on the motion to reconsider sentence. A different attorney, David Michel, represented Owens at this hearing. Attorney Sean Thornton was present on behalf of the State. Judge Brown took the matter under advisement and then at some point recused himself. Another hearing on the motion to reconsider sentence was held on November 13, 2012, before the Honorable Perry M. Buckner. Attorney, David Michel, represented Owens at this hearing and attorney Sean Thornton was present on behalf of the State. Judge Buckner denied the motion to reconsider sentence. A timely notice of intent to appeal was served on December 3, 2012. This appeal follows.

ARGUMENT

The judge who heard the motion to reconsider sentence abuse his discretion in failing to address to address the claim that the sentencing judge abused his discretion in considering gang violence in the community in imposing sentence when there was no evidence that the present case involved gang violence.

The jury convicted Owens of voluntary manslaughter in the shooting death of Keith "Showtime" Williams. Shante Glover had a child by both Owens and Williams. On the day of the shooting Owens went to pick up both children from Shante Glover's grandmother, Annie Glover's house. Williams lived a few houses down from Annie Glover on Francis Street. (R. pp. 115-116). Owens told police that he encountered Williams on Francis Street, Williams pulled a gun and Owens shot in self defense. (R. p. 303). Shante Glover testified that just prior to the shooting she and Williams argued about who was going to pick up the children. (R. p. 119, lines 1-20). Shante also testified that Williams had threatened Owens. (R. p. 122, lines 9-24).

Prior to sentencing the trial judge stated, "Whether that consequence is a small consequence or a great consequence, this community has made the headlines of many a times over the last year about the violence going on in this community." (R. p. 258, lines 4-7). Judge Brown then sentenced Owen to twenty seven (27) years for voluntary manslaughter and five (5) years consecutive for possession of a weapon during the commission of a violent crime. (R. p. 259, lines 4-13). Owens filed a motion to reconsider sentence.

After the first hearing on the motion to reconsider sentence, the trial judge recused himself. A second hearing was held before the Honorable Perry M. Buckner. During that hearing Owens argued:

At the sentencing, Your Honor, Judge Brown brought up the fact that – that in the headlines were gang related shootings and that these type of incidents needed to cease and that he needed to send a message to the community. What I’m asking you today is to reconsider, just based on the facts alone of this case, not what is happening in the community. It was not gang related. It was clearly an issue between this – just Mr. Sincere Owens and Mr. Williams.

(R. p. 285, lines 16-24). There was no evidence presented that the shooting in the present case was gang related.

Judge Buckner denied the motion to reconsider sentence and stated, “My concern here is that the sentence was proper under the statute. And while I recognize, Mr. Michel, that you’ve done everything that a lawyer could do to try to benefit your client, I don’t know that you’ve given this court a reason to disturb the judge’s finding where the judge has sentenced, . . .” (R. p. 292, lines 2-7). Judge Buckner did not specifically address the allegation that the sentencing judge considered recent gang violence in the community in imposing the aggregate thirty two year sentence. The judge erred in refusing to reconsider the sentence when the sentencing judge relied on an irrelevant factor – gang violence in the community - in imposing sentence.

The authority to change a sentence rests 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).

In State v. Goodall, 221 S.C. 175, 178, 69 S.E.2d 915, 916 (1952) the South Carolina Supreme Court wrote:

It was said in State v. Steadman, 216 S.C. 579, 59 S.E.2d 168, 182, certiorari denied, 340 U.S. 850, 71 S.Ct. 78, 95 L.Ed. 623, as follows: ‘It is the established rule in this state that this court has no jurisdiction on appeal to correct a sentence alleged to be excessive, when it is within the limits prescribed by law for the discretion of the trial judge, and is not the result of partiality, prejudice, oppression, or corrupt motive. State v.

Phillips, 215 S.C. 314, 54 S.E.2d 901; State v. Scates, 212 S.C. 150, 46 S.E.2d 693; State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273; State v. Gregory, 198 S.C. 98, 16 S.E.2d 532.’ And the following was quoted with approval from the Scates case: ‘An exhaustive definition of the phrase ‘abuse of discretion’ would be difficult, if not impossible. Each case must be determined with reference to its own peculiar facts. The exercise of a sound judicial discretion must and should be performed in every case with a conscientious regard for what is just and proper under the circumstances.’

Owens argued that the sentencing judge considered an improper and irrelevant factor, gang violence in the community, in imposing the sentence. The judge reconsidering sentence, however, did not rule on this issue. Rather, the judge simply denied the motion to reconsider sentence based on the fact that the sentence was legal and there was no reason to disturb the sentence. The judge had the discretion to reconsider the sentence. Owens alleged the judge considered an improper factor in sentencing. The judge erred in failing to exercise his discretion and reconsider the sentence imposed.

In State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct.App. 2000) the South Carolina Court of Appeals wrote:

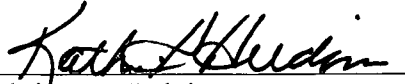
The failure to exercise discretion, however, is itself an abuse of discretion. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 Ct.App.1997). See also Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)(“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)(“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”).

The judge’s failure to exercise discretion and reconsider the sentence based on the fact that the sentencing judge considered an improper factor in imposing sentence constitutes an abuse of discretion requiring a new hearing on the motion to reconsider sentence.

CONCLUSION

Based on the above argument the case should be remanded for a new hearing on the motion to reconsider sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathrine H. Hudgins", written over a horizontal line.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
D. Craig Brown, Circuit Court Judge

THE STATE,

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SINCERE JAMAL OWENS,

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APPELLATE CASE NO. 2012-213550

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sincere Jamal Owens 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 November 13, 2012, 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 Sincere Jamal Owens.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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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 indictments and sentencing sheets;
- (2) State's #9 – Miranda form;
- (3) State's #10 – Statement;
- (4) State's #11 – SLED Forensic Report.

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

January 27th, 2014


Kathrine H. Hudgins
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Attorney for Appellant

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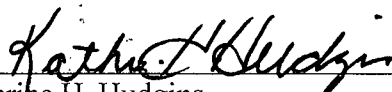
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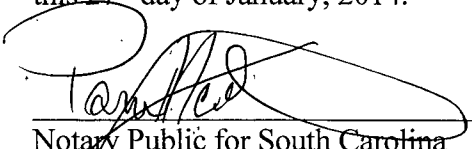
CERTIFICATE OF SERVICE

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 Sincere Jamal Owens, #342813 at Lieber Correctional Institution, this 27th day of January, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of January, 2014.

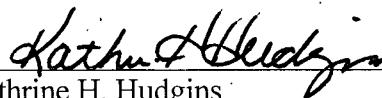


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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."

January 27, 2014



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