

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

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Appeal From Beaufort County

The Honorable Michael G. Nettles, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2012-212349

Antonio D. Bordeaux, Respondent,

v.

State of South Carolina, Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

- I. Whether the Court of Appeals erred by remanding this case for discretionary clarification as to the offenses to which Respondent pled guilty when the plea transcript is patently clear Respondent pled guilty to first-degree burglary?

STATEMENT OF THE CASE

Antonio Bordeaux, (Respondent), was indicted at the May 2004 term of the Beaufort County Grand Jury for two counts of armed robbery (2004-GS-07-846, 847) and two counts of first-degree burglary (2004-GS-07-844, 845). Anthony O. Dore, Esquire, represented him. On October 15, 2005, Respondent pled guilty as indicted to two counts of armed robbery and two counts of first-degree burglary. The Solicitor dismissed a murder indictment in exchange for the plea. The Honorable Perry M. Buckner sentenced him to confinement for twenty-four years for each armed robbery and twenty-five years for each first-degree burglary, provided upon the service of twenty years plus three years' probation. The sentences were to run concurrently.

Respondent filed a *pro se* notice of intent to appeal on October 31, 2005. By Order dated May 23, 2006, the South Carolina Court of Appeals dismissed the appeal for failure to provide a motion to file out of time and to order the transcript out of time. The Remittitur was issued on June 12, 2006.

Respondent filed an application for post-conviction relief on September 29, 2006 and an amended application on January 26, 2007. Petitioner made its Return on June 6, 2007. An evidentiary hearing into the matter was convened on April 18, 2008 at the Beaufort County Courthouse. Respondent was present at the hearing and represented himself *pro se*. Matthew J. Friedman of the South Carolina Attorney General's Office represented the State. By Order dated May 13, 2008, the Honorable Michael G. Nettles granted post-conviction relief in the form of a new trial on the burglary charges.

Petitioner filed a timely Notice of Appeal on October 29, 2008 and a Petition for Writ of Certiorari in the Court of Appeal on March 24, 2009. Katherine H. Hudgins of the South

Carolina Commission on Indigent Defense filed a Return to Petition for Writ of Certiorari on September 8, 2009. By Order dated September 16, 2010, the Court of Appeals granted Certiorari and directed the parties to brief the following issue: In light of Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010), did the PCR court err in finding Respondent's sentences for burglary were illegal when the plea transcript indicates he pled guilty to two counts of first-degree burglary, but the sentencing sheets state he pled guilty to two counts of second-degree burglary? Petitioner filed a Brief of Petitioner on November 3, 2010. Respondent filed a Brief of Respondent on May 12, 2011. An oral argument was heard on March 29, 2012. By Order dated May 9, 2012, the Court of Appeals reversed the PCR court based on an error of law and remanded the case for clarification as to which offenses Respondent pled. On May 15, 2012, Petitioner filed a Petition for Rehearing. On May 24, 2012, the Court of Appeals denied the petition.

Petitioner filed a Petition for Writ of Certiorari with this Court on August 24, 2012. Respondent filed a Return to Petition for Writ of Certiorari on December 27, 2012. This Court granted certiorari to review the Court of Appeals' decision on April 2, 2014. This Brief of Petitioner follows.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The Court of Appeals erred by remanding this case for discretionary clarification as to the offenses to which Respondent pled guilty when the plea transcript is patently clear the Respondent pled guilty to first-degree burglary.

Respondent was indicted for two counts of first-degree burglary¹. The plea transcript clearly reflects Respondent pled guilty as indicted to two counts of first-degree burglary. (App. p. 5 ll. 4-8; p. 25 ln. 4 – p. 28 ln. 24; p. 31 ll. 15-20; p. 25 ll. 6-10). During the plea hearing, the solicitor indicated the two parties had negotiated a cap, or maximum sentence, of twenty-five years. (App. p. 4 ll. 8-17). Respondent told the plea court he understood the sentencing range for first-degree burglary, and he admitted he was guilty of first-degree burglary. (App. p. 26 ll. 10-15; p. 35 ll. 6-10). The plea judge clearly stated Respondent's sentence for first-degree burglary was imprisonment for twenty-five years provided upon the service of twenty years with three years' probation. (App. p. 51 ll. 17-22). The entire plea transcript is devoid of any indication Respondent was pleading to second-degree burglary.

Respondent's two sentencing sheets for the first-degree burglary indictments read "burglary 2nd degree" and refer to the Criminal Docket Report (CDR) Code for second-degree burglary. The sentencing range for second-degree burglary is zero to fifteen years. The PCR court ruled the sentencing sheets take precedent over the plea transcript because the sentencing sheet was a contract. Accordingly, the PCR court held Respondent received an illegal sentence and granted him a new trial with regard to the burglary pleas.

The Court of Appeals reversed the PCR Court based on an error of law where the PCR

¹ Respondent was also indicted for two counts of armed robbery and one count of murder. Respondent pled guilty to the two counts of armed robbery and the State nol prossed the murder charge. While the armed robbery charges were challenged in Respondent's PCR application, they were not subject to the PCR court's order as the sentencing sheets for the armed robbery charges were correct. Thus, they are not the subject of this appeal.

Court held the sentencing sheets took precedent over the plea transcript because “a sentencing sheet is essentially a contract between the applicant, the applicant’s trial counsel, and the court.” (App. p. 128). The Court of Appeals remanded for the PCR court to determine to which offenses Respondent pled. However, the Court of Appeals declined “to lend credence to any position that would favor ambiguous sentencing sheets over an unambiguous plea transcript, whose integrity has not been called into question.” S.C. Ct. App. 2012-UP-284.

This Court held in Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010), that, as a matter of first impression, due process requires that the judge’s oral pronouncement of the sentence control over a conflicting written sentencing order.² Additionally, the Court of Appeals held in Tant, “[i]f there is some ambiguity in the sentencing sheets, SCDC may examine the transcript of record to determine the intent of the sentencing judge.” Tant v. S.C. Dep’t of Corr., 395 S.C. 446, 449, 718 S.E.2d 753, 755 (Ct. App. 2011). Numerous other courts have held that where there is a conflict between the oral pronouncement of the sentence and the sentence in the written judgment, the oral pronouncement controls. See United States v. Martinez, 250 F.3d 941, 942 (5th Cir. 2001) (“it is well settled law that where there is any variation between the oral and written pronouncements of sentence, the oral sentence prevails.”) (quoting United States v. Shaw, 920 F.2d 1225, 1231 (5th Cir.1991)); United States v. Munoz-Dela Rosa, 495 F.2d 253, 256 (9th Cir. 1974) (“where there is a direct conflict between an unambiguous oral pronouncement of sentence and the written judgment and commitment, this Court has uniformly held that the oral pronouncement, as correctly reported, must control.”); Williams v. State, 957 So. 2d 600, 603 (Fla. 2007) (“a court’s oral pronouncement of a sentence controls over the

² While factually distinguishable, the holding in Boan applies to this case because the oral pronouncement is the accurate sentence which Respondent received and the agreed upon bargain between the State and Respondent.

written sentencing document”); State v. Waters, 1999 MT 229, 296 Mont. 101, 112, 987 P.2d 1142, 1149 (1999) (“the oral pronouncement of sentence controls “even if contrary to the trial judge's intent.””); State v. O'Rourke, 463 A.2d 1328, 1332 (R.I. 1983) (“when a discrepancy exists between an unambiguous oral pronouncement and a written judgment, the oral pronouncement will control.”); Hastings v. State, 308 S.W.3d 792, 796 (Mo. Ct. App. 2010) (“[i]f a material difference exists” between the written judgment and oral pronouncement, “the oral pronouncement controls.”) (quoting State ex rel. Zinna v. Steele, 301 S.W.3d 510, 514 (Mo. banc 2010) (citations omitted)); Taylor v. State, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) (“When there is a conflict between the oral pronouncement of sentence and the sentence in the written judgment, the oral pronouncement controls.”).

In the present case, Respondent’s sentence was the same in the oral pronouncement as it was on the sentencing sheet, but the offense listed on the sentencing sheet was different than the charge to which Respondent pled guilty. Upon close review of the sentencing sheets, it appears the CDR code for first-degree burglary (0079) was first written and then the CDR code for second-degree burglary (0086) was written on top of the previous code. Also, it appears the term “Burglary, 1st degree” was written then changed to “Burglary, 2nd degree.” Since clearly an ambiguity exists on the sentencing sheets, the plea judge’s oral pronouncement at the plea hearing controls over the conflicting written sentencing sheets pursuant to Boan and Tant.

This Court should direct the sentencing sheets be corrected to reflect the oral pronouncement of twenty-five years for first-degree burglary. The discrepancy in the sentencing sheets appears to be the product of a clerical error.

A trial judge loses jurisdiction to modify an order after the term at which it is issued, except for the correction of clerical orders.

Once the term ends, the order is no longer subject to any amendment or modification which involves the exercise of judgment or discretion on the merits of the action.

Doran v. Doran, 288 S.C. 477, 478, 343 S.E.2d 618, 619 (1986).

The Court of Appeals erred in remanding the case for discretionary clarification because the record clearly established Respondent pled guilty to two counts of first-degree burglary. The Court of Appeals, however, was correct in declining “to lend credence to any position that would favor ambiguous sentencing sheets over an unambiguous plea transcript, whose integrity has not been called into question.” Neither the PCR court nor the plea court have discretion to change the offenses to which Respondent pled, but only the jurisdiction to correct the clerical error on the sentencing sheets. Thus, the lower court should be directed to change the clerical errors to conform to the oral pronouncement of twenty-five years’ imprisonment.

Pursuant to Boan and Tant, this Court should hold the unambiguous oral pronouncement of Respondent’s sentence for first-degree burglary control over the conflicting sentencing sheets and direct the lower court to correct the clerical errors located in the sentencing sheets.

CONCLUSION

For the reasons stated above, this Court should find the Court of Appeals erred in remanding this case for discretionary clarification as to the offenses Respondent pled and hold the unambiguous oral pronouncement of Respondent's sentence for first-degree burglary controls over the conflicting sentencing sheets.

Respectfully submitted,

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By: 
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May 2, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2012-212349

Antonio D. Bordeaux,

Respondent,

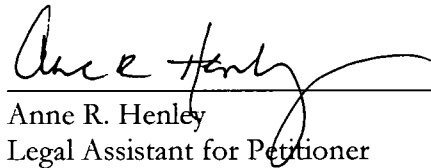
v.

State of South Carolina

Petitioner.

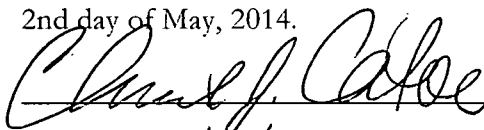
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner has been served upon opposing counsel, Kathrine H. Hudgins, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 2nd day of May, 2014.



Anne R. Henley
Legal Assistant for Petitioner

SWORN to before me this
2nd day of May, 2014.

 (L.S.)
5/30/23