

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Michael G. Nettles, Circuit Court Judge

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S.C. Supreme Court

ANTONIO D. BORDEAUX,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

Appellate Case No. 2012-212349

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals correctly remand the case to the PCR court for clarification as to the offenses to which respondent pled guilty when the transcript indicates he pled guilty to burglary first degree but the sentencing sheets reflect that he pled guilty to burglary second degree?

STATEMENT OF THE CASE

In May of 2004, the Beaufort County Grand Jury indicted Bordeaux for two counts of burglary first degree, two counts of armed robbery and one count of murder, indictments #2004-GS-07-844, 845, 846, 847. On October 15, 2005, Bordeaux appeared before the Honorable Perry Buckner and pled guilty to the burglary and armed robbery charges. Anthony Dore represented Bordeaux at the guilty plea. Judge Buckner sentenced Bordeaux to 24 years concurrent for the armed robbery charges and concurrent 25 years suspended upon the service of 20 years with 3 years probation for the burglary charges. The direct appeal was not perfected.

On September 29, 2006, Bordeaux filed an application for post conviction relief. the application was amended on January 26, 2007. The State filed a return on June 6, 2007. On April 18, 2008, an evidentiary hearing was held before the Honorable Michael G. Nettles. Bordeaux proceeded at the PCR hearing *pro se*. Matthew Friedman was present on behalf of the State. In a written order dated May 13, 2008, Judge Nettles granted relief as to the burglary charges. Both the State and Bordeaux filed motions pursuant to Rule 59(e). Judge Nettles denied both motions. The State filed a timely notice of intent to appeal. The petition for writ of certiorari was filed on March 24, 2009. A return was filed on September 8, 2009.

On September 16, 2010, the South Carolina Court of Appeals granted the State's petition for writ of 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? On November 3, 2010, the State filed the brief of

petitioner. On May 12, 2011, the respondent's brief was filed. On March 29, 2012, a three judge panel of the South Carolina Court of Appeals heard argument. On May 9, 2012, the Court of Appeals reversed the PCR judge's grant of relief and remanded the case for clarification as to which offense respondent pled. On August 24, 2012, the State filed a petition for writ of certiorari to the Court of Appeals. On December 27, 2012, Respondent filed a return to the petition for writ of certiorari. On April 2, 2014, this Court granted the State's petition for writ of certiorari. The State filed the brief of petitioner on May 2, 2014. This brief of respondent follows.

ARGUMENT

The Court of Appeals correctly remanded the case to the PCR court for clarification as to the offenses to which respondent pled guilty when the transcript indicates he pled guilty to burglary first degree but the sentencing sheets reflect that he pled guilty to burglary second degree.

The order granting relief contains inconsistent findings, making remand the proper remedy. In the order the PCR judge wrote, "Since Applicant pled guilty to burglary – 1st degree, counsel was not ineffective in failing to object to the sentence imposed." (App. p. 127). Later in the order, however, the PCR judge determined that the twenty five year sentence for burglary was illegal because the sentencing sheets reflect the guilty plea was to burglary second degree. (App. pp. 127-128). The PCR judge also found that "the sentencing sheets take 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 reversed and remanded writing:

We are unable to reconcile the PCR court's finding that Bordeaux pled guilty to first-degree burglary with its subsequent conclusion that the twenty-five-year sentence was illegal because it exceeded the maximum sentence for second-degree burglary. The PCR court based its conclusion that plea counsel was not ineffective for failing to object to Bordeaux's sentence on the finding that Bordeaux pled guilty to first-degree burglary. If Bordeaux pled guilty to first-degree burglary, then his sentence was not illegal. On the other hand, if Bordeaux pled guilty to second-degree burglary, as the PCR court implied when it concluded the sentence was illegal, then plea counsel would have been ineffective for failing to object to an illegal sentence. Therefore, it is necessary to remand this case to the PCR court for clarification as to the offenses to which Bordeaux pled guilty.

Both sentencing sheets, signed by respondent, note the charge as burglary second degree and include the CDR code for burglary second degree. (App. p. 147, 150). During

the PCR hearing respondent testified that when he signed the sentencing sheets the charge listed was burglary second degree. (App. p. 95, lines 1-3). Respondent testified that after he signed the plea sheet for indictment 2004-GS-07-845, the fifteen years originally noted as the sentence had been scratched out by an unknown person. (App. p. 87, lines 19 – p. 88, lines 1-2). The sentencing sheet for indictment #2004-GS-07-845, notes the charge as burglary second degree. (App. p. 147). At the top of the sentencing sheet below the indictment number, the CDR code is noted as 79, the CDR code for burglary first degree. Respondent was originally indicted for burglary first degree. In the area noting the charge to which is being pled, however, the CDR code is listed as 86, the CDR code for burglary second, violent. The code section listed on the sentencing sheet is §16-11-312 (B), the code section for burglary second degree, violent. The charge is noted “as indicted” pursuant to a negotiated sentence. Both the serious and most serious boxes are checked with some notation under the most serious box. It appears that the term of the sentence on this sentencing sheet has been scratched through and changed to reflect a sentence of 25 years suspended upon the service of 20 years. (App. p. 150). The statutory maximum sentence for burglary second degree violent is 15 years. S.C. Code §16-11-312 (B). Burglary second degree is a serious offense. Burglary first degree is a most serious offense.

The sentencing sheet for indictment #2004-GS-07-844, also notes the charge as burglary second degree. (App. p. 147). As with the 845 indictment, at the top of the sentencing sheet below the indictment number, the CDR code is noted as 79, the CDR code for burglary first degree. In the area noting the charge to which is being pled, however, the CDR code is listed as 86, the CDR code for burglary second, violent. The code section listed on the sentencing sheet is §16-11-312 (B), the code section for burglary second

degree, violent. The charge is noted “as indicted” pursuant to a negotiated sentence. Both the serious and most serious boxes are checked with some notation under the most serious box. The sentence noted is 25 years suspended upon the service of 20 years. (App. p. 147). As stated above, the statutory maximum sentence for burglary second degree violent is 15 years. S.C. Code §16-11-312 (B). Burglary second degree is a serious offense. Burglary first degree is a most serious offense.

At the beginning of the guilty plea, the assistant solicitor informed the judge that respondent was pleading guilty to two counts of burglary first degree and two counts of armed robbery for a negotiated cap of 25 years. (App. p. 4, lines 8-17). Respondent was originally indicted for two counts of burglary first degree and two counts of armed robbery as well as murder. The State agreed to dismiss the murder charge against respondent and his co-defendant, Wesley Washington. (App. p. 4, lines 18-21). The co-defendant, who pled guilty at the same time as respondent, was allowed to plead to two counts of burglary second degree and two counts of armed robbery. (App. p. 2, lines 1- p. 3, lines 1-25).

As noted by the Court of Appeals, if respondent pled guilty to burglary second degree, counsel was ineffective for failing to object to the illegal sentence. On the other hand, if the guilty plea was to burglary first degree, the plea was entered involuntarily. In signing the sentencing sheets as they appeared, Bordeaux had every reason to believe that he was pleading guilty to burglary second degree, despite any colloquy that took place during the guilty plea. This is especially true in light of the fact that during the plea the judge references burglary first degree and Bordeaux was originally indicted for burglary first degree. The negotiated cap of 25 years is not determinative of the issue as Bordeaux was also pleading guilty to two counts of armed robbery.

These are factual determinations that need to be made by the PCR judge. The remand is proper.

In Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010), this Court wrote:

We are persuaded by the reasoning of those courts, and find a trial's fairness is compromised when a trial judge increases a defendant's sentence outside his presence. Accordingly, in a situation such as the one on appeal, due process requires the judge's oral pronouncement control over a conflicting written sentencing order. Here, the trial judge announced one sentence from the bench in the presence of the defendant, but later increased that sentence in his written order. If trial counsel had made the appropriate motion regarding the sentencing discrepancy, the oral pronouncement would have controlled and Petitioner would have received the twenty-year sentence. Thus, Petitioner has demonstrated a reasonable probability the result would have been different if trial counsel had made the appropriate motion. Accordingly, we hold Petitioner has established the required elements for a claim of ineffective assistance of counsel, and the PCR judge erred in denying his petition.

The present case is distinguished from Boan. The plea judge in the present case did not impose a different sentence on the sentencing sheet than the oral pronouncement of sentence in the defendant's presence as the trial judge did in Boan. The sentence announced at the plea and written on the sentencing sheet was the same, 25 years. The sentencing sheet, however, reflects a plea to burglary second, which carries a maximum penalty of 15 years.

In Tant v. S.C. Dep't of Corr., --- S.E.2d ----, 2014 WL 2208277 (S.C. filed May 28, 2014), this Court found that the South Carolina Department of Corrections is confined to an unambiguous sentencing sheet in determining an inmate's sentence, but may consider the sentencing transcript if the sheet is ambiguous. Respondent's sentencing sheets are unambiguous and reflect burglary second degree. Respondent's burglary conviction is listed on the South Carolina Department of Corrections web site as

a burglary second conviction with a sentence of twenty years. Pursuant to Tant, the South Carolina Department of Corrections correctly noted the burglary convictions as burglary second degree.

In State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 444, 454 (Ct.App.2007), the South Carolina Court of Appeals wrote:

State prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). South Carolina has recognized the principles set forth in Santobello; when an accused pleads guilty upon the promise of a prosecutor, the agreement must be fulfilled. See Sprouse v. State, 355 S.C. 335, 338, 585 S.E.2d 278, 280 (2003); State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994); see also State v. Mathis, 287 S.C. 589, 592, 340 S.E.2d 538, 540 (1986) (“The public interest of encouraging settlement of criminal cases without necessity of trial favors permitting an accused to plead guilty to the offense charged without prejudicing his position if it is later withdrawn.”) (quoting State v. Wright, 103 Ariz. 52, 436 P.2d 601, 604-05 (1968)).

Respondent was induced to plead guilty by the sentencing sheets reflecting that the burglary guilty pleas were to burglary second degree. Respondent believed he was pleading guilty to burglary second degree. (App. p. 87, lines 6-11). Any purported plea to burglary first degree was rendered involuntary by the sentencing sheet reflecting pleas to burglary second degree. The remand is proper for the PCR court to determine if the guilty pleas were to burglary second rendering trial counsel ineffective in failing to object to the illegal sentence or if the guilty pleas were to burglary first, in which case the plea was entered involuntarily.

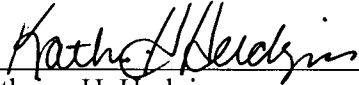
Petitioner argues that the remand is improper because “the plea transcript is patently clear the Respondent pled guilty to first- degree burglary.” This determination, however, is a factual determination that should properly be decided by the PCR judge. Additionally,

Petitioner ignores the argument that a finding that the Respondent's pleas were to burglary first degree renders the guilty plea involuntary.

CONCLUSION

Based on the above argument, the remand is proper.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 2nd day of June, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Michael G. Nettles, Judge

ANTONIO D. BORDEAUX,

RESPONDENT,


V.

STATE OF SOUTH CAROLINA,

PETITIONER

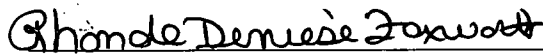
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon J. Rutledge Johnson, Esquire; at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and upon Antonio D. Bordeaux at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 2nd day of May, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.