

The Supreme Court of South Carolina

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November 14, 2014

The Honorable Jerri Ann Roseneau
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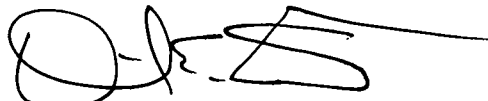
REMITTITUR

Re: Antonio D. Bordeaux v. The State
Lower Court Case No. 2006CP0702548
Appellate Case No. 2012-212349

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,



CLERK

cc: Kathrine Haggard Hudgins, Esquire
James Rutledge Johnson, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Antonio D. Bordeaux, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-212349

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27457
Heard September 23, 2014 – Filed October 29, 2014

AFFIRMED IN PART, REVERSED IN PART

Assistant Attorney General James Rutledge Johnson, of
Columbia, for Petitioner.

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari in this post-conviction relief (PCR) action to review the Court of Appeals' decision, which remanded for a determination of the lawfulness of Antonio Bordeaux's sentence. *Bordeaux v. State*, Op. No. 2012-UP-284 (S.C. Ct. App. filed May 9, 2012). The State argues

the Court of Appeals erred because the unambiguous plea colloquy and imposition of sentence control over the ambiguous written sentence. We agree. It is clear Bordeaux pleaded guilty to *first* degree burglary, was sentenced within the legal limits for that crime, and in consonance with his negotiated plea agreement. We therefore affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Bordeaux's plea agreement was capped at a sentence of twenty-five years. He pled guilty to two counts of armed robbery and two counts of burglary. He was sentenced to twenty-four years' imprisonment on the armed robbery charges, and to twenty-five years' imprisonment, suspended upon the service of twenty years with three years' probation on the burglary counts.

Bordeaux's plea proceeding was conducted simultaneously with that of his co-defendant, Wesley Washington. Like Bordeaux, Washington had been indicted on two counts of first degree burglary, but pleaded guilty to two counts of second degree burglary. The transcript demonstrates that the plea colloquy with the trial judge alternated between Bordeaux and Washington. During Bordeaux's plea colloquy, he acknowledged on at least *seven* occasions that he was pleading guilty to two counts of *first* degree burglary. At sentencing, Bordeaux was again reminded, and acknowledged, that he was being sentenced pursuant to his plea negotiations for two counts of first degree burglary, each of which carried a minimum fifteen-year sentence, and a maximum of life imprisonment. The trial judge announced Bordeaux's sentence for first degree burglary as:

"a term of *twenty-five years*, provided that upon the service of twenty years the balance is suspended and you be placed on probation for a period of three years." (Emphasis added).

The sentencing sheets, however, indicated Bordeaux pleaded guilty to "Burglary 2nd Degree," included the CDR Code for second degree burglary, and referenced S.C. Code Ann. § 16-11-312 (2014), the second degree burglary statute. Despite these references, the sentencing sheets also indicated Bordeaux pleaded guilty "as indicted," and that his sentence was in accord with the plea colloquy.

At the PCR hearing, Bordeaux claimed his twenty-five year sentence was illegal because the sentencing sheets clearly indicated that he pleaded guilty to second degree burglary, and because his twenty-five year sentence exceeded the maximum for second degree burglary. See § 16-11-312(C)(2) (setting a fifteen-year maximum term of imprisonment for defendants convicted of second degree

burglary pursuant to § 16-11-312(B)). In support of his contention, Bordeaux offered into evidence the two sentencing sheets. Bordeaux further testified that after the sentencing sheets were signed, someone scratched out "15" years, and replaced it with "25" years.

The PCR judge granted Bordeaux a new trial as to the burglary charges because he found Bordeaux was serving an illegal sentence for second degree burglary given his sentence of twenty-five years. The PCR judge based his finding on his conclusion that Bordeaux's sentencing sheets amounted to a "contract" between Bordeaux and the State, and trumped the unequivocal plea transcript.

The State appealed. The Court of Appeals reversed and remanded for a determination of the lawfulness of Bordeaux's sentence given the conflict between his plea colloquy and the sentencing sheets. *Bordeaux*, Op. No. 2012-UP-284. The court found the PCR judge committed an error of law in ruling the sentencing sheets definitively took precedence over the unambiguous plea transcript and directed the PCR judge, on remand, to give "appropriate weight to the plea transcript." *Id.* The State sought certiorari on the remand issue. We granted the petition.

ISSUE

Did the Court of Appeals err in remanding for reconsideration of the legality of Bordeaux's convictions and sentences for first degree burglary?

LAW/APPLICATION

Whether a sentencing transcript or sentencing sheet is ambiguous is a question of law. *See Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 346, 759 S.E.2d 398, 404 (2014). Likewise, whether a PCR applicant is serving an illegal sentence is a question of law. *See Talley v. State*, 371 S.C. 535, 545, 640 S.E.2d 878, 883 (2007); *see also United States v. Johnson*, No. 13-3649, 2014 WL 4211065, at *7 (7th Cir. Aug. 27, 2014) (comparing the sentencing transcript with the written judgment to determine whether an error occurred as a matter of law). We therefore review de novo the lawfulness of a sentence. *See Tant*, 408 S.C. at 346, 759 at 404; *Talley*, 371 S.C. at 545, 640 S.E.2d at 883.

A sentence is ambiguous if its pronouncement is susceptible of differing interpretations based on the totality of the circumstances. *See United States v. Stallone*, 399 F.2d 415, 422–27 (2d Cir. 2005) (viewing the totality of the circumstances to determine whether a sentencing pronouncement was ambiguous);

Tant, 408 S.C. at 344–45, 759 S.E.2d at 403–04 (finding both the oral and written sentencing pronouncements were ambiguous because it was not clear from either whether Tant's sentences were to run concurrently or consecutively). An unambiguous sentencing pronouncement will control over an ambiguous sentence, whether oral or written, so long as giving effect to that pronouncement does not result in an illegal sentence or a deprivation of a defendant's constitutional rights. *See, e.g., Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) (declining to give effect to an unambiguous sentencing sheet over an unambiguous plea colloquy because to do so would result in a deprivation of the defendant's right to due process).

Here, Bordeaux's oral sentencing pronouncement was subject to only one interpretation as it is clear Bordeaux pled guilty to two counts of *first* degree burglary, and he was sentenced in consonance with his negotiated plea agreement. As stated, Bordeaux acknowledged on seven occasions that he was pleading guilty to two counts of *first* degree burglary. Further, Bordeaux twice acknowledged that he was being sentenced pursuant to a negotiated agreement, which included pleading guilty to two counts of *first* degree burglary. Moreover, the trial judge reminded Bordeaux that he was being sentenced for pleading guilty to two counts of *first* degree burglary. Thus, we find the oral sentencing pronouncement unambiguous as it is susceptible of only one interpretation. *Cf. Tant*, 408 S.C. at 344–45, 759 S.E.2d at 403–04.

On the other hand, the written sentences were subject to multiple interpretations as it is not clear whether Bordeaux pleaded guilty to first or second degree burglary. For example, the sentencing sheets indicated Bordeaux was being sentenced for "Burglary 2nd degree," included the attendant CDR Code for that crime, and referenced the *second* degree burglary statute. Yet, the sentencing sheets also indicated that he was being sentenced "as indicted," and Bordeaux's indictments referenced only *first* degree burglary. Moreover, one sentencing sheet had a sentence of fifteen years crossed out and replaced with the twenty-five year sentence. If Bordeaux had in fact pleaded guilty to second degree burglary as the sentencing sheets suggested, his sentence of twenty-five years would have exceeded the fifteen year maximum for that crime. *See* § 16-11-312(C)(2). Therefore, we find the written sentencing pronouncements are ambiguous as they are susceptible of differing interpretations.¹ *See Tant*, 408 S.C. at 344–45, 759 S.E.2d at 403–04.

¹ It appears the ambiguity may have arisen from the confusion attendant upon the

Therefore, we affirm in part the Court of Appeals' decision as we agree the PCR judge committed an error of law in ruling the ambiguous sentencing sheets took precedence over the unambiguous plea transcript. However, we reverse the Court of Appeals' decision to remand because we find as a matter of law that Bordeaux pleaded guilty to two counts of first degree burglary and was properly sentenced to twenty-five years' imprisonment pursuant to his negotiated plea agreement. *See Talley*, 371 S.C. at 545, 640 S.E.2d at 883.

AFFIRMED IN PART, REVERSED IN PART.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

plea proceeding being conducted simultaneously with Washington's who was "pleading down" to burglary second.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Antonio D. Bordeaux, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From Beaufort County
Michael G. Nettles, Circuit Court Judge

Unpublished Opinion No. 2012-UP-284
Heard March 29, 2012 - Filed May 9, 2012

REVERSED AND REMANDED

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior
Assistant Deputy Attorney General Salley W.
Elliott, Assistant Attorney General Matthew J.
Friedman, and Assistant Attorney General J.
Rutledge Johnson, all of Columbia, for Petitioner.

Appellate Defender Kathrine H. Hudgins, of
Columbia, for Respondent.

PER CURIAM: In this post-conviction relief (PCR) action, the State appeals the PCR court's granting of a new trial to Respondent Antonio Bordeaux on two first-degree burglary charges. The State argues Bordeaux pled guilty to these charges, and, therefore, it challenges the PCR court's conclusion that Bordeaux's sentences were illegal because they exceeded the maximum penalty for second-degree burglary. We reverse and remand.

"[A]ny evidence' of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citation omitted). However, reversal is appropriate when the PCR court's decision is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

In the present case, Bordeaux was indicted for two counts of first-degree burglary. He was also indicted for two counts of armed robbery and one count of murder. The plea transcript indicates that the State had agreed to a dismissal of the murder charge and a cap of twenty-five years of imprisonment in exchange for Bordeaux's plea of guilty to two counts of first-degree burglary and two counts of armed robbery. The sentencing sheets indicate that the plea court sentenced Bordeaux to twenty-four years for each count of armed robbery and twenty-five years for each count of first-degree burglary, with all sentences to run concurrently.

However, each sentencing sheet for the respective burglary offenses contained internally inconsistent information as to whether Bordeaux had pled guilty to first-degree burglary or second-degree burglary. Bordeaux alleged in his PCR application that his sentence for twenty-five years was illegal because he pled guilty to second-degree burglary and the twenty-five-year sentence exceeds the maximum sentence for second-degree burglary. Bordeaux also claimed that plea counsel was ineffective for failing to object to the sentence.

At the PCR hearing, plea counsel testified that he did not object to the sentences imposed because they were "within the negotiation." He explained: "We had negotiated for a cap of twenty-five years" Further, the PCR court specifically found that plea counsel was not ineffective for failing to object to Bordeaux's sentence because Bordeaux pled guilty to first-degree burglary. However, the PCR court also concluded that the twenty-five-year sentence was illegal because it exceeded the maximum sentence for second-degree burglary. In reaching this conclusion, the PCR court ruled that the sentencing sheets took precedence over the plea transcript because "a sentencing sheet is essentially a contract between the applicant, the applicant's trial counsel, and the court."

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.

Further, in the absence of any challenge to the integrity of the plea transcript, the PCR court committed an error of law in ruling that the sentencing sheets took precedence over the plea transcript because "a sentencing sheet is essentially a contract between the applicant, the applicant's trial counsel, and the court." See Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000) ("When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing." (emphasis added)). Given the sanctity with which statements given under oath are regarded,^[1] we decline 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. Therefore, on remand, the PCR court must give appropriate weight to the plea transcript in determining the offenses to which Bordeaux pled guilty.

REVERSED AND REMANDED.

[1] See Blackledge v. Allison, 431 U.S. 63, 74 (1977) (holding that solemn declarations in open court "carry a strong presumption of verity"); see also State v. Thrift, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994) ("[A]ll plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement."); cf. Edmonds v. Lewis, 546 F.2d 566, 567-68 (4th Cir. 1976) ("[T]he accuracy and truth of a prisoner's denial of any threats inducing his plea of guilty, given during an examination on the record at his sentencing . . . will be considered conclusively established by that proceeding . . . unless he offers (by the allegations of his petition) a valid reason why he should be permitted to depart from the apparent truth of his earlier statement." (citations and quotation marks omitted)).