

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

State of South Carolina,
Plaintiff,

—VS—

Clifton D. Cooke,
Defendant.

COURT OF GENERAL SESSIONS

2006-GS-28-00116

Motion to Withdraw
Guilty Plea

RECEIVED

MAR 12 2015

SC Court of Appeals

Defendant Clifton D. Cooke hereby move to withdraw the guilty plea entered March 6, 2014, before the Honorable R. Ferrell Cothran, Jr., Presiding Judge. The basis for this motion is that the guilty plea was involuntary because of the following reason:

- 1). Judge Cothran abused his discretion in failing to recognize the integrity or voluntariness of the plea was in question, requiring him to sua sponte reverse his earlier findings that the plea was voluntary and that there was a factual basis for plea, once it revealed that the State was unable to present material facts at a trial that the State lead the Defendant and the Court to believe would be presented at trial;
- 2). Judge Cothran abused his discretion in failing to inform Defendant of the nature and elements of the

offense Voluntary Manslaughter ;

3). Judge Cothran abused his discretion in failing to inform Defendant of the direct consequences of his Alford plea .

STANDARD

A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of discretion, the appellate court will not interfere .

State vs. Cantrell, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967); Rolen vs. State, 384 S.C. 409, 683 S.E.2d 471 (S.C. 2009) .

ARGUMENTS

I. The Court Erred In Failing To Sua Sponte Reverse Its Earlier Finding of Voluntariness and Factual Basis of Plea .

During the plea hearing, the State lead both the Court and the Defendant to believe that the State's alleged ~~key~~-witness and one-time co-defendant of Defendant would testify at a trial that he observed Defendant shoot and kill the victim . See, Plea Transcript (pages 7, 8, 9, and page 10, lines 1-11) . However, near the

Conclusion, after the Court had found the plea to be voluntary and found a factual basis for the plea, it was revealed that the State had known all along prior to the plea that the State would not be able to present the damaging and highly inculpatory testimony of the State's alleged key-witness at a trial - contrary to what the State led the Court and the Defendant to believe - due to the fact the witness was no longer cooperating with the State's prosecution of the Defendant. See, Transcript (page 23, lines 13-17).

Contrary to the indication made by Defendant's plea counsel, the Defendant did not know prior to the plea that the alleged key-witness was no longer cooperating with the State. If he did, he would not have entered an Alford guilty plea to any charge (Why would Defendant plead guilty plea under Alford, knowing the State could no longer present the sole alleged key-witness who claimed to have witnessed Defendant kill the victim?). The transcript demonstrates that it was Defendant's understanding at the time of the plea that the State would present the alleged key-witness at a trial. See, Transcript, page 10, lines 8-11).

Once the Court became aware of this significant and material discovery of the State's inability to present material facts, the Court should have recognized that the integrity and voluntariness of the plea was in question and, therefore, should have sua sponte reversed the

Court's earlier findings regarding the voluntariness and factual basis of the plea. See, e.g., Gibson vs. State, 514 S.E.2d 320 (S.C. 1999) ("A defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case. When a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary."); see also, Rolon vs. State, 683 S.E.2d 471 (S.C. 2009) (Pleciones, J., dissenting) (stating "...had the plea judge believed the integrity of the plea was in question, he should have sua sponte refused to continue.").

The Defendant has maintained his innocence, and it is clear from the record that he pleaded guilty under Alford only because he feared he was be convicted again of a murder he did not commit, and Defendant's fear of being convicted again resulted from his understanding and belief that the State would present its alleged key-witness Talmadge Dixon at a trial.

Without the inculpatory testimony of Talmadge Dixon, there is no factual basis for the plea and the plea judge should have realized this. For instance, law enforcement records indicate the victim told his wife that Talmadge Dixon shot him (Tr. pg. 16, lines 4-12) and a disinterested witness states that she heard the victim say Talmadge Dixon shot him (Tr. pg. 15, lines 21-25; Tr. pg. 16, lines 1-2).

Accordingly, the Court should permit Defendant to withdraw the Alford plea.

II . The Court Erred In Failing To Inform Defendant of Elements of Voluntary Manslaughter.

The South Carolina Supreme Court has held that "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense." Pittman vs. State, 337 S.C. 597, 524 S.E.2d 623 (S.C. 1999).

The Court did not inform Defendant of the nature and crucial elements of Voluntary Manslaughter, which renders the plea involuntary. (NOTE: The Court did not even ask Defendant if he understood the charge).

The Defendant did not understand the charge of Voluntary Manslaughter. See, Henderson vs. Morgan, 96 S.Ct. 2253 (1976).

III . The Court Erred In Failing To Inform Defendant of Direct Consequence of Postrelease Supervision.

Because the offense of Voluntary Manslaughter (to which Defendant pleaded) is a "no-parole offense," statutory law requires the Defendant to complete a term of postrelease supervision under the Community Supervision Program (CSP). See, Section 24-21-560. Because the CSP requirement is

mandatory and alters the standard of punishment for Voluntary Manslaughter, it necessarily follows that the CSP requirement is a direct consequence of the guilty plea as will be shown below.

(Inapplicability of Jackson)

As an initial matter, Defendant will point out that the South Carolina Supreme Court's holding in Jackson vs. State, 349 S.C. 62, 64, 562 S.E.2d 475, 475 (2002) does not preclude Defendant's argument here because for one, the claim in Jackson was one of ineffective assistance of counsel, unlike Defendant's claim which is one of involuntary guilty plea; for two, the Jackson court held CSP to be a collateral consequence of the "sentence," unlike Defendant's argument which is that the imposition of CSP is a direct consequence of the "conviction" (FN1); for three, the Jackson court did not decide a question of whether the imposition of CSP is a direct consequence of the conviction and, therefore, Jackson is not to be considered as binding precedent on the legal point raised here (FN2) and thus, the Defendant's argument is novel and one of first impression as there is no controlling legal authority in South Carolina holding the CSP is not a direct consequence of the conviction for certain offenses (FN3); for four, the Jackson court did not analyze the framework of the distinction

between collateral and direct consequences (FN4), and the Jackson court did not analyze the material distinction between the discretionary nature of parole and the mandatory nature of the ^{CSP} (FN5) and therefore, the Jackson opinion is not adequate to serve as controlling authority on the legal point raised here; and for fifth, the Defendant will demonstrate that while the "composition" of CSP is a collateral consequence of "sentencing," (of which a court need not inform a criminal defendant), the "imposition" of CSP is a direct consequence of the conviction for certain crimes which a court must inform a defendant.

A. Direct Consequence of CSP:

Because the question of whether CSP is a direct consequence of a guilty plea is novel and one of first impression in South Carolina, it is appropriate to consider foreign authorities ^{which} are persuasive because of the similarity of the statutes involved and because they lay down a sound public policy and produce a just result. See, Citizens Southern Nat. Bank of S.C. vs. Conner, 11 S.E.2d 271, 195 S.C. 203 (S.C. 1940) ("In a case of novel impression, South Carolina may follow the authorities from other states which are persuasive because of the similarity of the statutes of those states to the statutes of South Carolina, and because they lay down a sound public policy and produce a just result. ").

In People vs. Catu, 4 NY3d 242 (2005) the Court of Appeals concluded mandatory postrelease supervision is a direct consequence of a criminal conviction for offenses which requires a "determinate sentence" (the equivalent of South Carolina's so-called "no-parole offense"). In reaching its conclusion, the Catu court began by setting forth the required analytical framework from which to examine the elements of (and distinction between) collateral consequences and direct consequences, stating that the former "are peculiar to the individual and generally result from the actions taken by agencies the court does not control," while the latter "is one which has a definite, immediate and largely automatic effect on defendant's punishment." Id. The Catu court then observed that, in eliminating parole for all violent offenders in 1998, the legislature enacted a scheme of determinate sentencing to be followed by periods of mandatory postrelease supervision, and defined each determinate sentence to "also include, as a part thereof, an additional period of post-release supervision." Id. Thereafter, the Catu court explained that, whereas the term of supervision to be imposed may vary depending on the degree of the crime and the defendant's criminal record, imposition of supervision is mandatory and "thus has a definite, immediate and largely automatic effect on defendant's punishment," precisely within the definition of direct consequence. Id.

In other words, while the "composition" of the terms and conditions of postrelease supervision is merely a collateral consequence of the sentence (because composition of the same is peculiar to the defendant and result from the actions taken by agencies the court does not control), on the other hand, the "imposition" of post-release supervision is a direct consequence of the conviction because it is inexorable or mandatory and thus, has a definite, immediate and largely automatic effect on defendant's punishment.

South Carolina (like the New York legislature) eliminated parole for nearly all violent felony offenders in 1996 by enacting a scheme of determinate sentencing (referred to as "no-parole offense" sentence) to be followed by periods of mandatory postrelease supervision (called CSP), and required each determinate sentence to include, as a part thereof, the completion of CSP. § 24-21-560(A). Whereas the terms and conditions may vary depending the discretion of the Department of Probation, Parole, and Pardon Services (and we, therefore, collateral consequences), the imposition of CSP is mandatory and thus, has a definite, immediate and largely automatic effect on a defendant's punishment (and is, therefore, a direct consequence).

In addition to the Catu court, the Supreme Court of Washington reached the same conclusion which is that postrelease supervision (in Washington it is termed "community placement") is a direct consequence of a

guilty plea to certain serious offenses. See, State vs. Ross, 129 Wn2d 279, 916 P.2d 405 (1996). Better than the Catu court opinion (and unlike the Supreme Court of South Carolina opinion in Jackson vs. State), the Ross court thoroughly analyzed each element of a direct consequence as applied to mandatory postrelease supervision, expressly addressing and demonstrating how the postrelease supervision meets the definition of direct consequence. Id. Moreover, of significant importance is the Ross court's observation that there is a "fundamental distinction between community placement and the related effects of probation and parole: Community placement occurs in addition to the period of confinement, while probation and parole occur in lieu of confinement. On this basis federal courts have described mandatory special parole, a term similar to community placement imposed in addition to and following a prison term, as a direct consequence as opposed to the collateral consequence of probation or parole." (Id.)

In Carter vs. McCarthy, 806 F.2d 1373 (9th Cir. 1986) the federal court conducted a thorough analysis of the question of whether mandatory postrelease supervision is a direct consequence of a guilty plea. Id. In concluding that it is, the Carter court explained: "Where a criminal statute imposes a mandatory parole term to be served following completion of the period of confinement, the parole term necessarily is direct consequence of the guilty plea." Id.

Finally, there is yet another state supreme court opinion which holds postrelease supervision is a direct consequence. See Palmer vs. State, 118 Nev. Adv. Op. No. 81 (Nev. 2002). In Palmer the court wrote: "We conclude that lifetime supervision is a direct consequence of a guilty plea." Id.

In light of the foregoing, the Court should find and conclude the CSP to be a direct consequence of the guilty plea/conviction for a "no-parole offense" in South Carolina.

B. Failure To Inform Defendant of CSP :

It is well-settled that for a guilty plea to be deemed voluntary the record must show that the criminal defendant was made fully aware of all direct consequences. State vs. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975); Brady vs. United States, 397 U.S. 742 (1970).

Here, the record demonstrates that the Court failed to inform Defendant that will be required to serve a mandatory term of CSP to be served following completion of the term of confinement and thus, this Court abused its discretion by failing to inform Defendant of direct consequences of his guilty plea.

C. Prejudice of Involuntary Plea:

In the event the State were to attempt to undo the prejudice of Defendant's involuntary guilty plea by pointing out that Defendant was sentenced to only twenty (20) years despite he was aware that the Court could have sentenced him to thirty (30) years, the Defendant submit that his knowledge of his maximum prison sentence was insufficient to assure his understanding of the direct consequence of the CSP. See, State vs. Ross, 129 Wn.2d 279 (1996) ("Defendant's knowledge of his maximum prison sentence was insufficient to assure his understanding of the direct consequence of community placement. ").

In People vs. Van Deusen, 7 NY3d 744 (2006) the Court of Appeals vacated the defendant's guilty plea despite the fact that the defendant's sentence, including post-release supervision, was actually less than the maximum potential period of incarceration that she agreed to serve. Id. This is because the constitutional defect lies in the plea itself and not in the resulting sentence. Id.

In People vs. Hill, 9 NY3d 189 (2007), the Court explained: "The dissent incorrectly believes that Catu and VanDeusen turned on the question of whether the defendant got the full benefit of her plea bargain; thus, the dissent attempts to undo the prejudice of defendant's involuntary guilty plea. Rather, Catu, VanDeusen, and Louree made clear that the courts violated the defendant's due

process rights — not the defendants' sentencing expectations. Therefore, we vacated the defendants' involuntary guilty pleas to remedy the constitutional violations." (Id., at 193).

Therefore, in that the constitutional defect lies in the plea itself and not in the resulting sentence, vacatur of the plea is the remedy for a "Cato error" since it returns Defendant to his status before the constitutional infirmity occurred. See, Rolen vs. State, 683 S.E.2d 471 (S.C. 2009) (recognizing that the remedy for a constitutional violation "should be tailored to the injury suffered from the constitutional violation.")

D. Manifest Injustice:

The Ross court properly determined that the trial court's failure to inform a defendant that his sentence would include mandatory postrelease supervision was a "manifest injustice," permitting a defendant to withdraw his guilty plea. State vs. Ross, 129 Wn.2d 279 (1996).

Like the Ross court, this Court should conclude that its failure to inform Defendant that his sentence will include mandatory postrelease was a "manifest injustice" as well as an abuse of discretion, and thus permit Defendant to withdraw his Alford plea.

Finally, the Court failed to inform Defendant of the mandatory minimum of Voluntary Manslaughter which also renders the guilty plea involuntary. See, Pittman vs. State, 524 S.E.2d 623 (S.C. 1999) (defendant's plea involuntary where court failed to inform him of mandatory minimum penalty).

Therefore, the Court should permit Defendant to withdraw his guilty plea.

CONCLUSION

Based upon the foregoing reasons and legal authorities, the Defendant moves this Court to withdraw the Alford plea.

BY: Clifton D. Cooke #320091

Mr. Clifton D. Cooke, #320091

Turbeville Correctional Inst.

P.O. Box 252

Turbeville, S.C. 29162

October 13, 2014,
Turbeville, South Carolina.

Footnotes

1. Sentencing is a separate and distinct issue from the conviction. See, Easter vs. State, 584 S.E.2d 117 (S.C. 2003) ("Sentencing, although often combined with the admission of guilt in a hearing, is separate issue from guilt and distinct phase of criminal process.").

Footnotes

2. The Jackson opinion did not mention whether CSP is a direct consequence of a guilty plea nor was the issue argued in the Jackson case. Therefore, Jackson is not binding precedent on this issue. See, Butto vs. Southern Farm Bureau Life Ins. Co., 191 S.E.2d 7 (S.C. 1972) ("A case is not binding precedent on a legal point not mentioned in opinion or argued in the case. ").
3. See, Citizens Southern Nat. Bank of S.C. vs. Conner, 11 S.E.2d 271, 195 S.C. 203 (S.C. 1940) ("In a case of novel impression, the South Carolina may follow the authorities from other states which are persuasive because of the similarity of the statutes of those states to the statutes of South Carolina, and because they lay down a sound public policy and produce a just result. ").
4. Collateral consequences "are peculiar the individual and generally result from the actions taken by agencies the court does not control." People vs. Catu, 4 NY3d 242 (2005). Direct consequences are those whose result represents "a definite, immediate and largely automatic effect on defendant's punishment." Id.
5. Multiple cases recognize there is a fundamental distinction between discretionary parole and mandatory postrelease supervision. State vs. Ross, 129 Wn.2d 279 (1996); Carter vs. McCarthy, 806 F.2d 1373 (9th Cir. 1986).

ition

\$ 01.61⁰

RECEIVED
MAR 12 2015
SC Court of Appeals

South Carolina Court of Appeal
Jenny ABBott Kitchings, Clerk
P. O. Box 11629
Columbia, SC. 29211

