THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

Opinion No. 2015-UP-217
Heard February 5, 2015 – Filed April 29, 2015
Withdrawn, Substituted, and Refiled May 8, 2015
Appellate Case No. 2015-001576

The State of South Carolina.....Respondent/Petitioner,

v.

Venancio Diaz Perez ..... Petitioner/Respondent.

PETITIONER/RESPONDENT VENANCIO DIAZ PEREZ'S RETURN TO THE STATE'S PETITION FOR A WRIT OF *CERTIORAI*

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Venancio Diaz Perez

Petitioner/Respondent Venancio Diaz Perez submits the following[1] return to the State's Petition for a Writ of Certiorari:

A. There is ample evidence in the Record supporting the Court of Appeals' finding of vindictiveness.

Regarding evidence of the trial court's vindictiveness or a desire to punish, the State maintains: "...there is nothing in the record upon which to base such a motive..." (State Pet. p. 13). The Record actually establishes the contrary, and reversal was proper.

Perez was sentenced to fifteen years for his conviction for Lewd Act and ten years for ABHAN. (R. pp. 8, 14, 554-56). These were the maximum sentences for each crime, and the trial court ordered Perez to serve them consecutively, thus effectively sentencing him to twenty-five years in prison. (R. pp. 8, 14, 554-56). This sentence did not *initially* appear objectionable; it is the colloquy that took place afterwards where the lack of propriety became apparent:

> Perez's Counsel: Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.
>
> Trial Court: I'm sorry, what now?
>
> Perez's Counsel: We object to the sentence being run consecutively as being vindictive and punishing Mr. Perez for going to trial. I think there were -- and this is where I'm a little reluctant to go into detail but we did have -- I think I have to, to preserve Mr. Perez's rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas –

[1] To the extent that any issue in the State's Petition appears unaddressed, Perez contests it and opposes a writ of *certiorari* on the issue(s) presented by the State.

Trial Court: I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record. I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.

Perez's Counsel: Yes, sir.

Trial Court: That's what I told you.

Perez's Counsel: Yes, sir.

Trial Court: Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?

Perez's Counsel: Yes, sir.

Trial Court: Because if it is it's the last time I will speak with you without a court reporter present.

Perez's Counsel: I apologize. But, yes, sir. I think I have to.

Trial Court: Pardon? It was not an in-camera hearing. I was trying to facilitate the disposition of this case.

Perez's Counsel: I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record, but that was what was said.

Trial Court: Pardon?

Perez's Counsel: That's an accurate summary of what was said.

Trial Court: Okay. Now, do you want to make a motion on that, what I put on the record?

Perez's Counsel: Yes, sir.

Trial Court: What's your motion?

Perez's Counsel: That running these sentences consecutively is punishing Mr. Perez for his right to go to trial.

Trial Court: **Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty. The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?**

Perez's Counsel: Yes, sir.

Trial Court: All right. Motion denied. Anything else?

Perez's Counsel: No, sir.

Trial Court: Thank you very much.

(R. p. 554 l. 7 – p. 556 l. 17) (emphasis added).

Before the trial began, the trial court offered Perez a sentence of ten to fifteen years, and dismissal of his other charges, in exchange for a guilty plea to Lewd Act. (R. pp. 554-55, 660). Perez refused this offer, forcing a trial in this matter. After the jury returned a verdict finding him *not* guilty of CSC (but guilty of ABHAN) and guilty of Lewd Act, the trial court sentenced him to at total of twenty-five years in prison, a full decade longer than the upper limit of the plea deal the trial court originally offered. (R. pp. 8, 14, 554-56). This scenario on its face smacks of punishment for Perez exercising his right to trial by jury. Apparently recognizing this concern, the trial court did attempt to place on the record grounds for its decision (R. p. 556 ll. 5-12), but these grounds are not objective and do not rise to the level of "relevant, reliable and trustworthy" evidence.

The Court of Appeals was correct in reversing the trial court and remanding for a new sentence.[2]

As the Court of Appeals correctly recognized, it is a violation of due process to punish a person for exercising a protected statutory or constitutional right. See State v. Higgenbottom, 344 S.C. 11, 14-15, 542 S.E.2d 718, 720 (2001); (R. pp. 655-56). A trial court may not impose a greater sentence on a defendant because the defendant exercised his constitutional right to stand trial rather than plead guilty. See Alabama v. Smith, 490 U.S. 794 (1989); Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). The South Carolina and United States Constitutions grant every criminal defendant the absolute right to plead not guilty and to be tried by a jury. U.S. Const. art. III, § 2; U.S. Const. amend. VI; S.C. Const. art. I, § 14.

A sentencing judge's mere disavowal of considering the defendant's assertion of his right to a jury trial is insufficient to avoid reversal in South Carolina, without an otherwise appropriate basis appearing in the record. In State v. Brouwer (cited by the Court of Appeals), despite the trial judge's comments that he would never punish someone for exercising his or her right to a jury trial, the majority opinion found the trial judge improperly considered that fact during sentencing, "especially since the record fail[ed] to reflect an otherwise appropriate basis for Brouwer's disparate sentence." 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001); cf. North Carolina v. Pearce, 395 U.S. 711, 726 (1969) ("whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear... so that the constitutional legitimacy of the increased sentence may be fully reviewed on

[2] This argument is made preserving, and without prejudice to, Perez's arguments in his Petition for *Certiorari* that the trial court must be reversed *in toto* and remanded for a new trial.

appeal."); Higgenbottom (A defendant's due process rights are violated when, in response to the defendant's motion for reconsideration and without any reasons on the record, the judge increases his sentence.).

However, any basis for the court's sentence placed on the record by the judge must be based on "relevant, reliable and trustworthy" evidence. State v. Gulledge, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997). Additionally, while sentencing judges are given deference to their decisions, an appellate court may reverse such a decision in the event of a constitutional violation or that the sentencing judge acted with partiality, prejudice, or pressure. Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995).

Here, the Record reflects evidence of partiality, prejudice, or pressure, and of a decision made on evidence that was not "relevant, reliable, and trustworthy":

(1) After sentencing, the trial court stated on the record that it believed Perez to be "guilty of all the charges", presumably including CSC, which he was acquitted of. (R. pp. 536, 556).

(2) The trial court stated on the record that "there was penetration, digital penetration", when this was an element of CSC, which he was acquitted of committing (R. pp. 536, 556).[3]

(3) Even though the trial court previously excluded testimony of alleged intercourse

[3] In order to find a person guilty for CSC of any degree, there must be a finding of "sexual battery". S.C. Code § 16-3-655 (Supp. 2010). "Sexual battery" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body..." S.C.Code § 16-3-651(h) (Supp. 2010). Digital penetration is considered sexual battery. (R. pp. 11, 124, 337). The jury made no finding of "sexual battery" (*i.e.* digital penetration) necessary for a conviction for CSC; in fact, it acquitted Perez of this crime. (R. p. 536). The jury instead found Perez guilty of ABHAN, which required no finding of "sexual battery" (*i.e.* digital penetration). (R. pp. 337, 524-25,536). Accordingly, it was improper for the trial court to consider this finding in sentencing.

between Minor 2 and Perez, this testimony was brought up by the State during sentencing. (R. pp. 114, 552).

(4) The plea offer (from the trial court, not the State) was made off-the-record, in violation of ABA Standard 14-3.3(f)[4] and is evidence of pressure to accept a guilty plea. See Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981).

(5) The comment: "The jury has found her [Minor 1] not guilty" indicates consideration of a completely irrelevant issue (*i.e.* the criminal liability of Minor 1), thus showing partiality towards the State or Minor 1. (R. p. 556).

(6) The comment: "...it's the last time I will speak to you without a court reporter present" (made after the sentence was pronounced) also indicates partiality against the defense for challenging the trial court on its sentence.

"The due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'" Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661, 678 (4th Cir.1989) (quoting Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 825 (1986)). The due process clause, therefore, "may sometimes bar trial by judges who have no actual bias and who would do their very

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[4] This standard provides:

> All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981).

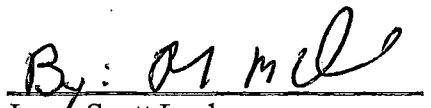
best to weigh the scales of justice equally between contending parties." Id. (quoting In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)).

B. The issue of sentencing was properly preserved.

At sentencing, Perez objected to the consecutive running of his sentences for ABHAN and Lewd Act, *i.e.* he objected to the length of his sentence. (R. p. 554 l. 7 – p. 556 l. 17). It appears that the State argues (State Pet. p. 18) that this prevents a reviewing court from considering the length of his sentence. This is the first time this argument has been advanced by the State, and thus the State's preservation argument is not preserved. See Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari...").

Even if the State's argument was preserved, it is hypertechnical and incorrect. See Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973) ("an exercise in semantics without any significance of substance"). Perez objected to the length of the sentence being the product of vindictiveness. This is sufficient to put all parties on notice of the defect in sentencing, and considering the tense climate in the courtroom is probably all that could and should be said at the time. Further, requiring Perez to enumerate every minute element of his objection exalts form over substance and signals a return to a "...primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal." Wood v Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (N.Y. 1917) (Cardozo, J.).

24th day of August, 2015

By: 

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THE STATE,

RESPONDENT/PETITIONER,

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VENANCIO DIAZ PEREZ,

PETITIONER/RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari, in this case has been served on Amie L. Clifford, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Mr. Venancio Diaz Perez #353944, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210 and the S.C. Court of Appeals this 24th day of August, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of August, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022