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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

L. Casey Manning, Circuit Court Judge
Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL EDWARD HOCKADAY

APPELLANT

APPELLATE CASE NO. 2009-146387

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	
In violation of Appellant's right to due process, the judge who opened the sealed sentence refused to consider Appellant's motion to reconsider his sentence based upon the judge's erroneous view that he had no authority to reconsider the sentence because he was not the judge who had imposed the sentence.	6
CONCLUSION	12
PETITION TO BE RELIEVED AS COUNSEL	13

TABLE OF AUTHORITIES

Cases

<u>State v. Jackson</u> , 290 S.C. 435, 351 S.E.2d 167 (1986)	10
<u>State v. Smith</u> , 276 S.C. 494, 280 S.E.2d 200 (1981)	10
<u>State v. Thompson</u> , 355 S.C. 255, 584 S.E.131 (Ct. App. 2003).....	10

Rules

Rule 29(a), SCRCrimP.....	9, 10
---------------------------	-------

STATEMENT OF ISSUE ON APPEAL

Did the judge who opened the sealed sentence violate Appellant's due process rights by refusing to consider Appellant's motion to reconsider his sentence based upon the judge's erroneous view that he had no authority to reconsider the sentence because he was not the judge who had imposed the sentence?

STATEMENT OF THE CASE

On November 27, 2006, an Abbeville County grand jury indicted Appellant for carrying a pistol unlawfully (2006-GS-01-652) and trafficking in cocaine (2006-GS-01-653). R. 64. On September 18, 2007, Appellant appeared before the Honorable L. Casey Manning and entered guilty pleas to the charges. W. Townes Jones represented Appellant, and Elizabeth White represented the state. At the conclusion of the guilty plea hearing, Judge Manning deferred sentencing for thirty days. R. 2, lines 6-8. Due to the conflicting schedules of the parties, the sentencing hearing took place on December 4, 2007. R. 2, lines 11-12. Appellant was not present. R. 2, lines 12-13. Judge Manning imposed a sentence, which he placed under seal due to Appellant's absence. R. 2, lines 16-18.

On November 13, 2009, Appellant appeared before the Honorable Eugene C. Griffith for the reading of his sentence. White and Jones also appeared at the hearing. R. 1. Judge Griffith read the sentences: twenty years' imprisonment for the cocaine charge and one year imprisonment for the pistol charge. R. 3, line 23 – R. 4, line 9; R. 66.

On November 13, 2009, Appellant filed a motion to reconsider sentence. R. 4, line 23 – R. 5, line 3; R. 60. This motion remained pending for some time. On October 17, 2012, Judge Griffith denied the motion to reconsider. R. 61. On January 31, 2013, this Court wrote a letter to Appellant's plea counsel, Jones, explaining that the Court received a copy of the order denying the motion to reconsider sentence, and the appeal was no longer being held in abeyance.¹ Thereafter, this Court appointed the Office of Appellate Defense

¹ Appellant's mother filed a notice of appeal on Appellant's behalf in 2009. This Court subsequently learned of the pending motion, and held the appeal in abeyance by order dated January 8, 2010. Additionally, this Court regularly inquired of the status of the appeal through written correspondence to Appellant's plea counsel.

to represent Appellant. On October 2, 2013, undersigned counsel moved to reconstruct the record from the guilty plea and sentencing because the court reporter no longer had the records from which to create the transcripts due to the passage of time. On December 3, 2013, this Court granted the motion and ordered reconstruction of the record and agreed to hold the matter in abeyance pending the outcome of the reconstruction hearing.

On August 28, 2014, the parties convened before Judge Manning for the reconstruction hearing. Undersigned counsel represented Appellant. Salley W. Elliott represented the state. R. 7. At the conclusion of the hearing, Judge Manning found “that based on the testimony presented here, the arguments made, that this record is complete enough for appellate review.” R. 49, line 24 – R. 50, line 2. Judge Manning stated that Court’s Exhibit #1, which was the standard guilty plea form, was everything he would have asked during the guilty plea. R. 50, lines 2-9.

Following notification to this Court of receipt of the transcript of the reconstruction hearing by undersigned counsel, this Court ordered briefing to follow in the regular course. This brief follows.

ARGUMENT

In violation of Appellant's right to due process, the judge who opened the sealed sentence refused to consider Appellant's motion to reconsider his sentence based upon the judge's erroneous view that he had no authority to reconsider the sentence because he was not the judge who had imposed the sentence.

Relevant facts

Guilty plea hearing as reconstructed

During the reconstruction hearing, plea counsel testified that Appellant was facing a mandatory minimum sentence of twenty-five years' imprisonment due to the nature of his charges. R. 11, line 25 – R. 12, line 3. Appellant's case was placed on the trial docket. Appellant and plea counsel appeared for trial on September 18, 2007.² According to plea counsel, Appellant requested plea counsel approach the prosecutor about a prior offer. When the prosecutor agreed, Appellant accepted the offer. R. 11, line 11 – R. 13, line 6. Per plea counsel, the terms of the offer were "[h]e would plead straight up to trafficking in cocaine, second offense, five to 25; possession of a weapon, that carried one year. Unlawful possession of a weapon." R. 14, line 25 – R. 15, line 5. Plea counsel, Judge Manning, and the prosecutor discussed the case in chambers "about Judge Manning giving serious consideration to the minimum sentence he could give him under that charge." R. 15, lines 19-24. During the in-chambers conversation, the prosecutor indicated she would not recommend the minimum, but she "wouldn't necessarily vehemently oppose a mandatory minimum five-year sentence" and Judge Manning "was inclined to tell [plea counsel] that

² On September 10, 2007, plea counsel sent Appellant a letter instructing him to appear at court for "roll call." R. 13, line 18 – R. 15, line 18; R. 58.

he didn't see five years as being an unreasonable sentence under the circumstances of the case." R. 16, lines 6-19.

Immediately prior to the guilty plea hearing, Appellant asked plea counsel to negotiate deferring sentencing for thirty days "so that he could get his personal effects in order back in Greenville." Although the prosecutor was hesitant, the prosecutor agreed not to oppose the request. Thereafter, plea counsel asked the judge for the deferral and the judge agreed. R. 17, line 5- R. 18, line 5. Plea counsel recalled Judge Manning informing Appellant that he would defer sentencing for thirty days, but Judge Manning "was clear to point out that [he would not] be here in [thirty] days, so the sentence would have to be in Richland County and [Appellant would] have to get down there whenever" the hearing was scheduled. Further to this point, plea counsel claimed Judge Manning told Appellant that if Appellant did not appear for sentencing, then Judge Manning would proceed in his absence and sentence him accordingly. R. 20, lines 10-22. At the reconstruction hearing, the prosecutor recalled that Judge Manning instructed Appellant "that if he didn't appear [for sentencing] that that would be taken into consideration on his sentence." R. 32, lines 11-13.

Sentencing hearing as reconstructed

At the reconstruction hearing, plea counsel claimed he appeared at the sentencing proceeding, but Appellant did not appear. Plea counsel further claimed he told Judge Manning that he "had made a diligent effort to locate" Appellant. However, plea counsel did not request a continuance. R. 23, lines 13-22. Nevertheless, plea counsel asked "Judge Manning to consider the minimum sentence given the nature of the offense." R. 24, lines 13-16. The prosecutor recalled plea counsel asking for a sentence in the "lower end of the range ... more in the five to ten range." R. 35, lines 4-11.

Unsealing of the sentence

During the unsealing of Appellant's sentence, Appellant told Judge Griffith that when he was supposed to return for sentencing, the court was in recess and then he got arrested for some "tickets." Appellant believed the tickets were resolved when he entered his guilty plea; however, they were not. After his arrest for the tickets, he had to serve time for those violations. When he was "released from Columbia," the sentencing date was a week later, but Appellant had no transportation to Abbeville to make his court appearance. R. 3, lines 5-19. After Judge Griffith read the sentence, plea counsel informed the court that Judge Manning had "veer[ed] from the negotiations in the case" and there had been "a recommended sentence." R. 4, lines 11-16. The solicitor responded that "[i]t was a straight up plea." According to the solicitor, "Judge Manning indicated he would do five or whatever the minimum was if [Appellant] showed at the end of the thirty days, but that he would not if the defendant failed to show." R. 4, lines 17-22.

Motion for Reconsideration

During the unsealing of the sentence, plea counsel moved for reconsideration of the sentence. Plea counsel stated he was filing the motion with the clerk of court "so that if, you know, [Appellant] is able to find somebody to go forward with the motion and Judge Manning would entertain the motion, then he could have that motion heard." R. 4, line 23 – R. 5, line 3; R. 60. The motion contained no facts or legal analysis to support reconsideration of the sentence. R. 60.

Concerning the motion for reconsideration, plea counsel testified at the reconstruction hearing that he was "advised by Judge Manning's law clerk at some point in time during 2010 ... that Judge Manning was denying the motion." However, plea counsel

“continued to request the opportunity to be heard on the record and at some point in time, ... the motion was denied either by Judge Manning or by Judge Griffith.” R. 26, lines 8-17. Interestingly, plea counsel testified that he “was under the impression at that point in time that [Appellant]’s mother had hired Todd Rutherford, an attorney, to represent him during this process” but plea counsel did not know whether Rutherford “was handling any kind of efforts on that end or not.” R. 26, line 22 – R. 27, line 2.

The prosecutor recalled that “it got kind of confusing which Judge was gonna hear the motion and where it was supposed to be.” R. 38, lines 16-21. Likewise, Judge Manning recalled “there was some confusion about reconsidering.” According to Judge Manning, Rutherford got in touch with him and Judge Manning informed him that he did not have jurisdiction over the matter. According to Judge Manning “whoever unseals the sentence does.” He told Rutherford that Rutherford would need to address the motion for reconsideration to the judge who unsealed the sentence. R. 46, lines 9-14.

The motion remained pending until October 17, 2012 when Judge Griffith denied it. Specifically, Judge Griffith explained that he had considered the request “and in light of the fact that the Court’s only involvement in this case was only to publish the sentence set by Judge Manning” he was denying the request to reconsider the sentence. R. 61.

Discussion

Rule 29(a) of the South Carolina Rules of Criminal Procedure provides for the filing of post-trial motions. The Rule further provides “the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term.” Concerning the procedure to follow, the Rule requires the motion to be heard in the circuit where the trial or hearing was held except by consent of the parties.”

Rule 29(a), SCRCrimP. South Carolina case law also permits “a trial judge to alter, amend or modify a sentence after the same has been imposed.” State v. Smith, 276 S.C. 494, 497, 280 S.E.2d 200, 201 (1981). However, the judge “is without authority to alter, amend or modify a sentence imposed by him (1) after the expiration of the term of court at which the sentence was imposed or (2) within the same term of court unless the state is afforded due notice.” Id. Further, it is axiomatic that “[a] sealed sentence does not become the judgment of the court until it is opened and read to the defendant.” Id.

In Smith, the South Carolina Supreme Court held “the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion.” Id. at 498, 280 S.E.2d at 202. The question in Appellant’s case is who was the sentencing judge – Judge Manning who imposed the sentence or Judge Griffith who unsealed the sentence and read it to Appellant. In State v. Thompson, 355 S.C. 255, 259, 584 S.E.131, 133 (Ct. App. 2003), this Court interpreted Smith, supra, to mean that the “circuit judge opening the sealed sentence is under the law the sentencing judge.” See also, State v. Jackson, 290 S.C. 435, 437, 351 S.E.2d 167, 167 (1986)(reiterating for the benefit of the trial bench “that when a sealed sentence is opened and read, the judge has the authority to consider a motion for reduction of sentence”).

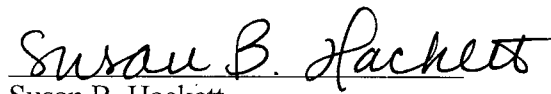
Judge Griffith erred in failing to consider Appellant’s motion for reconsideration of his sentence based upon his flawed understanding of his authority to consider the motion. In his order denying the motion to reconsider, Judge Griffith stated his decision was based upon “the fact that the Court’s only involvement in this case was only to publish the sentence set by Judge Manning.” It is clear Judge Griffith believed he had no authority to alter the sentence imposed by Judge Manning. This was a legal error. Due to Judge

Griffith's legal error, Appellant respectfully requests this Court reverse his convictions and sentences or, in the alternative, remand the matter to Judge Griffith for consideration of the motion to reconsider Appellant's sentence.

CONCLUSION

Appellant respectfully requests this Court remand this matter to the Honorable Eugene C. Griffith for consideration of Appellant's motion for reconsideration of sentence in light of the judge's erroneous legal conclusion regarding jurisdiction.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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L. Casey Manning, Circuit Court Judge
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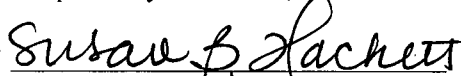
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Edward Hockaday states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of the unsealing of Appellant's sentence before Judge Eugene C. Griffith, which was held on November 13, 2009, and the reconstruction hearing of Appellant's guilty plea and sentencing before Judge L. Casey Manning, which was held on August 28, 2014. In counsel's opinion, the appeal is without legal merit sufficient to warrant vacation of the guilty plea.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the guilty plea, sentencing, and motion for reconsideration.

WHEREFORE, she asks the Court to relieve her as counsel for Michael Edward Hockaday.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of April, 2015.

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APPELLATE CASE NO. 2009-146387

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Transcript dated November 13, 2009;
- (2) Transcript dated August 28, 2014;
- (3) Court's Exhibit #1;
- (4) Defendant's Exhibit #1;
- (5) Defendant's Exhibit #2;
- (6) Motion to Reconsider Sentence;
- (7) Order Denying Defendant's Motion to Reconsider Sentence;
- (8) Arrest warrants (J-095661; J-095662);
- (9) True-billed Indictments (2006-GS-01-0652; -0653);
- (10) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.



Susan B. Hackett

Appellate Defender

South Carolina Commission on Indigent Defense

Division of Appellate Defense

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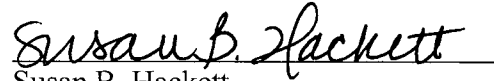
(803) 734-1343

April 9th, 2015

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 9, 2015

A handwritten signature in black ink, reading "Susan B. Hackett", written over a horizontal line.

Susan B. Hackett
Appellate Defender

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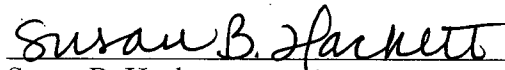
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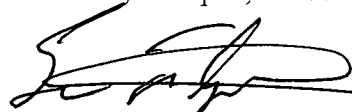
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Michael Edward Hockaday, #276153 at Broad River Correctional Institution, this 9th day of April, 2015.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of April, 2015.


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