STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID ANCRUM,

APPELLANT.

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the plea court reversibly erred by determining it was required by law not to impose a sentence below the mandatory minimum, despite the language of § 17-25-65 of the South Carolina Code permitting sentence reduction after foundational elements of that statute are met?

STATEMENT OF THE CASE

Appellant David Ancrum was indicted by the Charleston County Grand Jury on June 12, 2006 for trafficking cocaine, possession with intent to distribute (PWID) cocaine within proximity of a school, trafficking crack cocaine, PWID crack cocaine within proximity of a school, manufacturing crack cocaine, and manufacturing crack cocaine within proximity of a school. R. 105 (Indictments). A plea hearing was held before the Honorable George C. James, Jr., on October 8, 2007. Appellant was represented by Andrew D. Grimes, while the State was represented by Nathan S. Williams and Gregory K. Voight. R. 1.[1] The plea court accepted Appellant's six guilty pleas, and deferred sentencing for approximately six months. R. 17, ln. 11–R. 27, ln. 5

Appellant's sentence hearing was held before the Honorable Thomas L. Hughston, Jr., from March 17 through 18, 2011. Appellant was still represented by Andrew D. Grimes (Counsel), while the State was represented by Gregory K. Voight. R. 29. The sentencing court confirmed the range recommended by the State pursuant to its agreement with Appellant was ten to twenty years, and that the sentence was deferred due to the federal government's interest in information. Further, the sentences were agreed to run concurrently. Tr. 44, ll. 1-12.

Counsel asserted that Appellant should be given credit for the period of mistaken liberty, and that the sentencing court had the authority to go below the mandatory minimum sentence of seven years due to the new state statute (Sentence Reduction Statute) modeled Rule 35 of the Federal Rules of Criminal Procedure. R. 45, ln. 7–R. 49, ln. 2; R. 65, ll. 3-9;

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[1] Three independently enumerated transcripts were produced over the course of Appellant's guilty plea on October 8, 2007 and sentence hearings on March 17 and 18, 2007.

R. 70, ln. 1—R. 72, ln. 6; R. 86, ln. 3–R. 88, ln. 2. The trial court stated it did not think it could give credit for the three years, and that it was required by law not to go below the mandatory minimum sentence of seven years incarceration. R. 88, ln. 16—R. 89, ln. 25; R. 96, ln. 18—R. 98, ln. 9; R. 101, ll. 5-12. Accordingly, Appellant was sentenced to seven years incarceration on each conviction to run concurrently. R. 103, ll. 3-12.

This Appeal follows.

ARGUMENT

The plea court reversibly erred by determining it was required by law not to impose a sentence below the mandatory minimum, despite the language of § 17-25-65 of the South Carolina Code permitting sentence reduction after foundational elements of that statute are met.

The sentencing court erred when sentencing Appellant because it incorrectly held it was required by law not to impose a sentence below the mandatory minimum of seven years, this ruling went against the clear and unambiguous language of Section 17-25-65 of the South Carolina Code permitting sentence reductions contains no language limiting a court to reduce only non-mandatory minimum sentences. Therefore, the sentence imposed upon Appellant constituted a failure by the court to exercise its discretion. Accordingly, Appellant's sentence should be vacated, and his case remanded for resentencing.

Appellant pled guilty to offenses including trafficking cocaine and crack cocaine, and manufacturing crack cocaine in amounts carrying a mandatory minimum sentence of seven years incarceration. S.C. Code Ann. §§ 44-53-370(e)(2)(b)(1) and -375(C)(2)(b)(i) (West, Westlaw current through end of 2011 Reg. Sess.). However, the Sentence Reduction Statute permits the circuit court the discretion to reduce a sentence when certain foundational conditions are met. Specifically, the statute includes the following provisions:

> (A) Upon the state's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided:
>
> (1) substantial assistance in investigating or prosecuting another person;
>
> . . . . .
>
> (C) A motion made pursuant to this provision shall be filed by that circuit solicitor in the county where the defendant's case arose. The State shall send a copy to the chief judge of the circuit within five days of filing. The chief judge or a circuit court judge currently assigned to that county shall

> have jurisdiction to hear and resolve the motion. Jurisdiction to resolve the motion is not limited to the original sentencing judge.

S.C. Code Ann. § 17-25-65 (West, Westlaw, current through End of 2011 Sess.). Thus, pursuant to the clear and unambiguous terms of the statute, t he circuit court has the discretion to reduce a person's sentence when the State provides a motion to the court regarding assistance provided by that person. See, e.g., State v. Duncan, 392 S.C. 404, 709 S.E.2d 662, 664 (2011) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."). Moreover, there is an absence of any language limiting the circuit court in reducing sentences below mandatory minimums. See, e.g., State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation."). Accordingly, so long as the foundational elements are met, the circuit court possesses the authority to reduce sentences for qualifying persons, even if that person's sentence was already at a mandatory minimum.

In the present case, Appellant pled guilty on October 8, 2007. Appellant thereafter provided significant assistance to the State by testifying as a key witness against another person. Further, in paragraph five of the agreement signed by the State and Appellant, the State recognized Appellant's assistance.[2] Although the document was signed prior to

[2] Paragraph five of the agreement between the State and Appellant provides as follows: Provided the Defendant, David Ancrum, cooperates pursuant to the provisions of this Plea Agreement, and that cooperation is deemed by Attorneys for the State as providing substantial assistance in the investigation or prosecution of another person who has committed an offense, the Attorneys for the State agree to advise the sentencing Court of the extent and value of the Defendant's cooperation if called upon to do so by the Defendant, David Ancrum. The Defendant, David Ancrum, further understands that

passage of the Sentence Reduction Statute, the statute was in full force and effect by the time the State called Appellant's case for sentencing. See 2010 Act No. 273, § 13, eff June 2, 2010. Therefore, Appellant asserts that paragraph five of the 2007 agreement serves as the necessary motion by the State, and his critical testimony for the State in 2007 served to satisfy the "substantial assistance" element of the Sentence Reduction Statute. Therefore, the sentencing court possessed the authority and discretion to impose a reduced sentence upon Appellant. S.C. Code Ann. § 17-25-65(A) and (C) (West, Westlaw, current through End of 2011 Sess.).

The sentencing court's failure to exercise its discretion constituted an error of law. A trial court's failure to exercise discretion is itself an error of law. See, e.g., State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."). In Appellant's case, the trial court unequivocally indicated it was required by law not to sentence Appellant below the mandatory minimum despite Counsel's invocation of the Sentence Reduction Statute. Accordingly, the sentencing court erred by failing to exercise its discretion regarding sentencing in light of the Sentence Reduction Statute.

Further, Appellant was prejudiced by the trial court's error. By imposing a sentence three years below the range recommended by the State, the sentencing court indicated a willingness to sentence Appellant to a lower term. Thus, although Counsel requested relief

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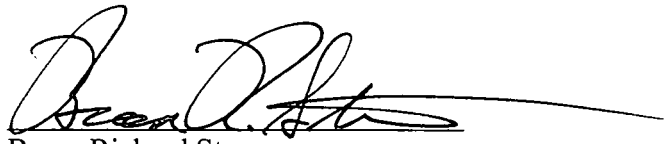
should the Court sentence the Defendant to the maximum penalty prescribed by law, the Defendant will have no right to withdraw his plea. R. 123 (Court Exhibit #1).

for Appellant in the form of a seven year sentence, the trial court's ultimate sentence of seven years was nonetheless controlled by its erroneous view that it did not possess the discretion to impose a sentence below the mandatory minimum. R. 88, ll. 11-15. In short, due to the court's error in interpreting and applying the Sentence Reduction Statute, a seven-year floor was erroneously recognized by the court when it sentenced Appellant to seven years. Accordingly, Appellant was prejudiced because the sentencing court felt it could not exercise greater discretion in sentencing Appellant. This would have included the possibility of a sentence below the traditional seven year minimum. See Smith, 276 S.C. at 498, 280 S.E.2d at 202.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests vacation of his sentence, and remand for resentencing.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of May, 2012.

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Thomas L. Hughston, Jr., Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Ancrum states:

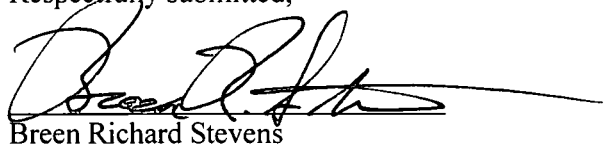
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Thomas L. Hughston, Jr., which was held on March 18, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for David Ancrum.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

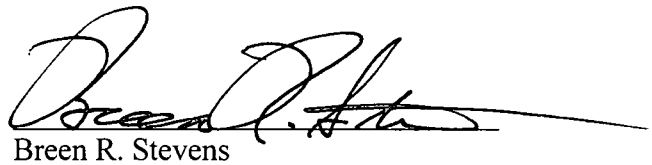
ATTORNEY FOR APPELLANT

This 11th day of May, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 11th, 2012.



Breen R. Stevens
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
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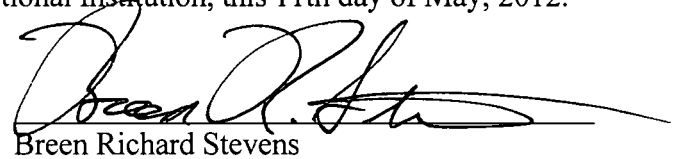
CERTIFICATE OF SERVICE

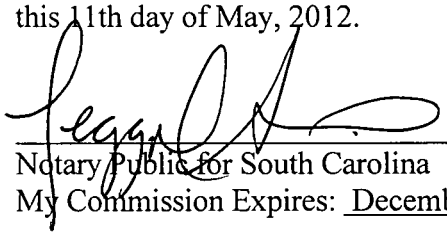
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on David Ancrum, #345272 at Kirkland Correctional Institution, this 11th day of May, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of May, 2012.



(L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017.