

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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JAN 12 2017

SC Court of Appeals

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JANICE L. KILGORE,

APPELLANT

APPELLATE CASE NO 2016-001578

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	3
CONCLUSION	5
PETITION TO BE RELIEVED AS COUNSEL.....	6

TABLE OF AUTHORITIES

Cases

<u>State v. Riddle</u> , 278 S.C. 148, 292 S.E.2d 795 (1982).....	3
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STATEMENT OF ISSUE ON APPEAL

Whether the plea court abused its discretion when it did not follow the solicitor's recommended sentence?

STATEMENT OF THE CASE

On January 28, 2016, appellant with three other defendant's appeared for a guilty plea before the Honorable Edward W. Miller in Pickens County. Appellant pled guilty to shoplifting, resisting arrest, and two counts of assault and battery in the third degree. She was sentenced to five (5) years for shoplifting, to one (1) year for resisting arrest, and to time served on the remaining charges.

A motion to reconsider the sentence was filed on February 2, 2016. The motion was denied on July 12, 2016. Plea counsel was John Maxwell Gravlee, Esquire. John Baker Cleveland, Esquire was the solicitor.

This appeal follows.

ARGUMENT

The plea court erred and abused its discretion because it did not follow the solicitor's recommended sentence.

The solicitor stated during the guilty plea that the recommendation in appellant's case was 42 months with credit for 253 days served. (Tr. p. 10, ll. 18-19) Instead, the plea judge sentenced her to five (5) years for shoplifting, to one (1) year for resisting arrest, and to time served on the assault and battery charges.

In his motion to reconsider the sentence plea counsel submitted the following in support of the motion:

1. Counsel for Defendant received a recommendation from the State of 42 months, to be back-dated from Defendant's initial date of incarceration of February 25, 2015 on an unrelated offense.
2. Counsel for Defendant advised Defendant before the entry of the plea that, should the Court be inclined to not follow the recommendation from the solicitor, Counsel would make a motion to withdraw the plea.
3. Before having the opportunity to make such a motion, the Court imposed a sentence of greater duration than initially recommended by the assistant solicitor.
4. Counsel could not make a motion to attempt to withdraw the plea after the imposition of the sentence, and Defendant was therefore denied an opportunity to make such a request from the Court.
5. Although Counsel acknowledges the Court is not bound to follow the recommendation and "[t]he withdrawal of a guilty plea is generally within the sound discretion of the trial judge," State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982), Counsel for Defendant nevertheless urges this Honorable Court to reconsider the sentencing based on Counsel's inability to make any such motion prior to the upward departure from the sentencing recommendation.

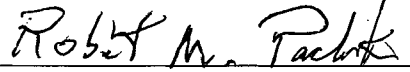
Plea counsel then asked that appellant's sentence be reconsidered and adjusted to reflect the 42 month recommended sentence discussed with appellant prior to the plea, or, in the alternative, that appellant's sentence be vacated to allow appellant the opportunity to reevaluate her decision to plead or to proceed to trial on her charges.

The plea judge in his order denying the motion for reconsideration of the sentence simply said after careful consideration of the issues raised in the motion, the motion is denied. He gave no reasons for why he rejected the issues. He never explained to appellant during the plea that he was not bound by the recommendation. And he never explained to appellant that she could withdraw her plea if he did not follow the recommendation.

The above deficiencies by the plea judge were an abuse of discretion.

CONCLUSION

Appellant should be entitled to the sentence recommended by the solicitor.

A handwritten signature in black ink, reading "Robert M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of January, 2017.

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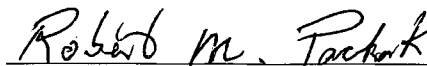
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Janice L. Kilgore states:

1. He is 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 Edward W. Miller, which was held on January 28, 2016, 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 Janice L. Kilgore.

Respectfully Submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

This 12th day of January, 2017.

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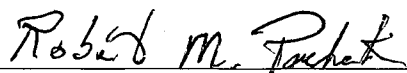
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Guilty Plea Transcript Dated January 28, 2016
- (2) Motion to Reconsider Sentence
- (3) Denial of Motion to Reconsider Sentence

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

January 12, 2017



Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent
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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."

January 12, 2017.

Robert M. Pachak

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