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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County

RECEIVED

Honorable Daniel D. Hall, Circuit Court Judge

MAY 26 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTONIO DONTAE ROSS,

APPELLANT

APPELLATE CASE NO. 2016-001260

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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The plea court erred by advising appellant that he could file an appeal if he disagreed with his “sentence today,” since this made appellant’s guilty plea an impermissible conditional guilty plea since appellant pled guilty thinking, after being advised by the plea court, that this Court could reduce his sentence if it thought it was unfair or injustice.3

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STATEMENT OF ISSUE ON APPEAL

The plea court erred by advising appellant that he could file an appeal if he disagreed with his "sentence today," since this made appellant's guilty plea an impermissible conditional guilty plea since appellant pled guilty thinking, after being advised by the plea court, that this Court could reduce his sentence if it thought it was unfair or an injustice.

STATEMENT OF THE CASE

Appellant was indicted at the November 12, 2015 term of the York County Grand Jury for the offenses of attempted armed robbery, possession of a weapon during the commission of a violent crime, and possession of a handgun by a person convicted of a violent crime. R. 38 – 41. Appellant appeared on June 6, 2016, before the Honorable Daniel D. Hall. Jessica Holland was the assistant solicitor. Harry Dest and BJ Barrowclaugh represented appellant. R. 1. As will be seen *infra*, based on the plethora of mitigation regarding appellant's upbringing the defense attorneys argued that the sentence in this case should not exceed seven years.

At the conclusion of the guilty plea proceeding, Judge Hall sentenced appellant to fourteen years imprisonment for attempted armed robbery, and he imposed concurrent five year prison terms on the weapons charges. R. 30, l. 10 – 31, l. 2.

Defense counsel filed a motion to reconsider the sentence dated that same day. R. 33. The judge denied the motion to reconsider the next day. R. 34.

This appeal follows.

ARGUMENT

The plea court erred by advising appellant that he could file an appeal if he disagreed with his “sentence today,” since this made appellant’s guilty plea an impermissible conditional guilty plea since appellant pled guilty thinking, after being advised by the plea court, that this Court could reduce his sentence if it thought it was unfair or injustice.

Relevant Facts

The plea judge told appellant that the attempted armed robbery charge carried a potential penalty of up to twenty years in prison. The two gun charges made appellant’s total sentencing exposure thirty years. R. 4, l. 9 – 8, l. 18.

The judge then told appellant: “[I]f I make an error or *if you disagree with the sentence today, you would have to file an appeal within ten days* from today. You do that by notifying your lawyers. Do you understand your right to appeal and the time limits?” Appellant answered that he understood he could appeal if he disagreed with the sentence the judge imposed or if the judge made an error. R. 10, l. 12-19. (emphasis added).

Defense counsel Barrowclough asked the judge to sentence appellant to a seven-year prison sentence as a just resolution to the case. R. 22, l. 7 – 24, l. 3. Appellant asked the judge to impose a five to seven-year sentence with probation to follow. R. 27, l. 20 – 28, l. 5.

The judge told appellant, the solicitors, and the defense attorneys, “[T]here’s no perfect justice on the earth.” The judge noted appellant had a prior record, which he considered an aggravating circumstance. The judge sentenced appellant to fourteen years imprisonment for attempted armed robbery and imposed concurrent five-year sentences on the gun charges. R. 29, l. 1 – 31, l. 2.

The defense attorneys, Harry Dest and BJ Barrowclaugh, both stressed throughout their extended mitigation presentations that appellant was entitled to some leniency given the facts of his extremely difficult upbringing. Appellant's mother had her first child when she was thirteen years old. She had nine children with five different fathers. Appellant was one of eight children "all crammed into one very small house." The state routinely called this neighborhood "a gun and drug infested neighborhood [and] he was what they call the black sheep of the family." R. 16, l. 16 – 23, l. 17. Counsel Barrowclaugh asked the judge for a seven-year sentence. R. 23, ll. 18-24.

Defense counsel Dest noted that the punitive purposes of sentencing did not apply here given appellant's background. R. 26, l. 19 – 27, l. 6. Appellant apologized for his actions in attempting to steal money at the ATM, and for shooting at the car. No one was injured, and appellant asked that the penalty be no more than five to seven years imprisonment so he could "get himself together mentally, physically, socially, and emotionally, and also help me stay focused that I come home and be supervised." R. 27, l. 11 – 28, l. 5.

As stated, the judge earlier told appellant he could file an appeal within ten days if he disagreed with his sentence or if he thought the judge made an error during the guilty plea proceeding. R. 10, ll. 12-19. The judge imposed a fourteen-year prison sentence upon appellant. R. 30, l. 23 – 31, l. 5. This sentence was obviously double the sentence the defense in good faith argued was just.

That same day, June 6, 2016, defense counsel Barrowclaugh filed a motion to reconsider the sentence. He argued the "fourteen year sentence was excessive." R. 33. The following day, June 7, 2016, the judge summarily denied the motion in his written order. R. 34.

Discussion

In the case of In the Interest of Johnny Lee W., 371 S.C. 217, 638 S.E.2d 682 (2006), our Supreme Court reiterated that a trial court cannot accept a guilty plea if any condition is attached to the plea. In that case, the judge allowed the defense to continue its challenge to the constitutionality of the disturbing the schools statute.

The Supreme Court found the guilty pleas were invalid because they were conditioned on Johnny Lee W's right to appeal the issue of whether the statute making it illegal to disturb schools was unconstitutionally vague. The Attorney General conceded at oral argument before the Court that the defendant's pleas were conditional, given that Johnny Lee W. was led to believe he could challenge the constitutionality of the statute on appeal even though he pled guilty.

The same thing essentially happened in State v. O'Leary, 302 S.C. 17, 393 S.E.2d 186 (1990), where the court erroneously accepted the defendant's guilty plea conditioned upon his right to appeal the constitutionality of the applicable statute. In O'Leary, the Supreme Court also vacated the guilty plea. The Supreme Court has repeatedly ruled that conditional guilty pleas are improper. They are not a recognized procedure in South Carolina, and our Supreme Court has expressly disapproved of them.

If a person pleading guilty attaches any condition to appeal a trial court ruling or otherwise seeks to condition or qualify his guilty plea, the Supreme Court has ruled the trial court must order that a plea of not guilty be entered for the defendant. See, State v. Peppers, 346 S.C. 52, 552 S.E.2d 288 (2001); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982).

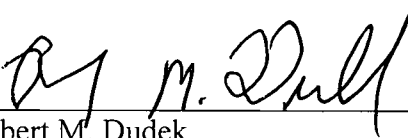
Here, the judge clearly advised appellant if he did not think his sentence was fair that he could appeal it within ten days. Appellant's entire guilty plea concerned what was a "just"

sentence. The judge's fourteen-year prison term at the conclusion of the plea was double the sentence that was advocated as constituting justice in this case. Defense counsel filed a motion to reconsider the sentence the same day it was imposed.

This was a conditional guilty plea. Appellant was advised by the trial judge that he could appeal the sentence to this Court if he thought it was unfair. Appellant had every right to think that this Court would address the sentencing issue – the fairness of the sentence or whether the sentence was just -- given what he was advised by the plea court. Given that a twenty-year prison sentence was the maximum allowed for attempted armed robbery under the statute, S.C. Code §16-11-330 (A), not even an argument that the sentence constituted cruel and unusual punishment or that it was excessive was possible under State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).

CONCLUSION

By reason of the foregoing arguments, appellant's guilty plea should be vacated.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of May, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ANTONIO DONTAE ROSS,

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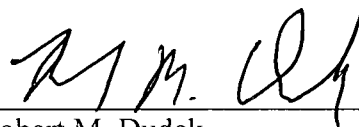
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Antonio D. Ross states:

1. He is Chief 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 guilty plea before Judge Daniel D. Hall, which was held on June 6, 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 Antonio D. Ross.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of May, 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) True-billed indictments:
- (2) Entire trial transcript.
- (3) Motion to Reconsider Sentence.
- (4) Order for Motion to Reconsider.
- (5) Notice of Appeal.
- (6) Rule 203(B) Explanation.

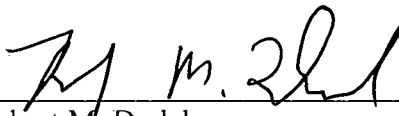
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I certify that this designation contains no matter which is irrelevant to this appeal.

May 26, 2017


Robert M. Dudek
Chief Appellate Defender

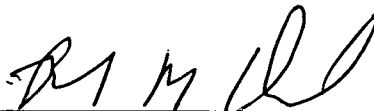
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ATTORNEY FOR APPELLANT

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."

May 26, 2017.



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Chief Appellate Defender

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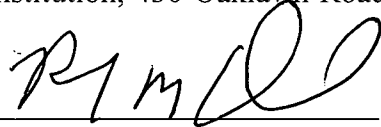
V.

ANTONIO DONTAE ROSS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, 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 have been served on Antonio D. Ross, #317755, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of May, 2017.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of May, 2017.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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SC Court of Appeals