STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

DAMEON THOMPSON,

APPELLANT.

APPELLATE CASE NO 2015-001029

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2017-UP-245

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 SCACR, appellate counsel petitions for rehearing in this appeal because this Court overlooked the fact that the plea agreement and sentencing recommendation were inextricably linked as one entity; and therefore, the holding that no error occurred as a sentencing recommendation will not bind a judge was amiss since the sentencing recommendation here defined the contractual term(s) (including the treatment of all drug charges as 1st offenses) of the plea agreement as an inseparable component of the agreement, which meant the appellate issue of the plea judge's failure to honor the term(s) of the plea agreement was not addressed. In support of this petition, counsel would submit the following points.

1.) Appellant Dameon L. Thompson pled guilty to failure to stop for a blue light (2013-GS-18-437) and trafficking in crack cocaine, first offense, (2013-GS-18-438) during the November 2014 term of the Dorchester County General Sessions Court before Judge Kristi Lee Harrington. Sentencing was deferred until the January 2015 term of the Charleston County General Sessions Court before Judge Harrington during which time appellant pled guilty to an additional seven offenses.[1] Appellant received an aggregate fifteen-year prison term on all nine of his convictions. Peter Shahid represented appellant at both proceedings, and Assistant Solicitor Nina Savas appeared on behalf of the state at both proceedings.

2.) During the sentencing proceeding, the solicitor referenced a plea bargain reached in the case as followings:

> Your Honor, as part of this plea agreement, the state is recommending eight years. This is in addition to the trafficking in Dorchester County...We are doing these all as first offenses so the defendant does not get a second strike on his record as he has a first one from the trafficking that was part of our agreement here today with the defense that the state is willing to do. And we feel that eight years is a very minimal amount in consideration of the severity of these crimes and the severity of the drug case. R. 52, l. 18 – R. 53, l. 9.

3.) Clearly, the recommendation and plea agreement were one in the same, i.e. inextricably linked. The plea agreement was the umbrella and the contractual terms, i.e., the sentencing recommendation (and treatment of the drug offenses as first offense) fell under the umbrella, all of which were combined as one in the same...hence, one entity, without separation of the parts (the plea agreement and the recommendation and the drug offenses listed as first

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[1] Possession with intent to distribute crack cocaine (2014-10-7267); Possession with intent to distribute cocaine (2014-GS-10-7270); Failure to stop for a blue light, second offense (2014-GS-10-7271); Failure to stop for a blue light, second offense (2014-GS-10-7275); Hit and Run (2014-GS-10-7276); Possession with intent to distribute marijuana (2014-GS-10-7273); Possession with intent to distribute cocaine (2013-GS-10-7493).

offenses). However, instead of honoring the eight-year sentencing cap per the plea bargain, the trial judge sentenced appellant to imprisonment for an aggregate period of fifteen years on the PWID drug charges (and three years on the trafficking drug charge) in violation of the plea agreement. R. 73, l. 18 – R. 75, l. 3.

4.) On January 9, 2015, appellant filed a request for a hearing on his sentencing reconsideration motion in order to argue for specific performance of the plea agreement and/or leave to withdraw the guilty pleas in the case. R. 77-80. In the motion, trial counsel argued as follows:

> The Court imposed the maximum sentence of fifteen (15) years on the possession with intent to distribute cocaine and cocaine base in indictment numbers 2014GS1007270, 2014GS1007267, and 2013GS1007493. These sentences were ordered to run concurrently with each and to run concurrent with the sentences imposed in the above referenced cases. The sentence imposed in those other matters was the maximum sentence allowed by law.
>
> The sentence imposed by this Court was a maximum sentence even though the State negotiated a lesser included offense and recommended a sentence of almost one-half of the maximum possible sentence. In addition, the fifteen-year sentence imposed is a third more severe than the maximum sentence for the greater offense of trafficking as opposed to possession with intent to distribute.
>
> The negotiated plea was construed so that the Defendant would be treated as a first time drug offender; however, this Court's sentence treated the Defendant as a repeat offender. While the Defendant recognizes the Court has a wide discretion in imposing a sentence of up to fifteen years for the possession with intent to distribute charges, the Court did not announce its reason for deviating from the recommended negotiated sentence of eight (8) years and for the recommended sentence by the probation office of ten years suspended upon the service of six years.

The trial judge denied the request for a hearing on the sentencing reconsideration motion and in effect the opportunity to withdraw the pleas by Order dated January 30, 2015. In the Order, the trial judge ruled that the sentences imposed upon appellant "would remain in place." R. 83-84.

6.) On appeal, appellant raised the following issue:

> The trial judge erred in denying appellant's request for a hearing on his sentencing reconsideration motion in order to argue for specific performance per the sentencing terms of the plea agreement that reflected an eight-year sentencing cap or to withdraw the guilty pleas because the outcome of the case did not reflect the terms agreed upon via the plea bargain.

7.) This Court decided this case primarily based on case law indicating that a judge does not have to accept sentencing recommendations and may sentence within his discretion[2]

8.) Again, the Court **improperly severed** the plea agreement from the recommendation and rendered them two entities when the two parts were clearly one in the same because the recommendation actually constituted the contractual terms of the plea agreement. Thus, this Court's holding that focused on the rule that sentencing recommendations are not binding was amiss as the focus should have been directed on the question of whether the plea agreement was enforced in the case.

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[2] PER CURIAM: Dameon L. Thompson appeals the circuit court's denial of his motion for reconsideration to this sentences on various convictions, arguing the sentences did not reflect the terms of a plea agreement between himself and the State. We affirm pursuant to Rule 220(b), SCACR, and following authorities: *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion."; *Brooks v. State*, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) ("A court is not required to accept a plea agreement reached by the State and the defendant.")' *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) ("All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea."); *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982) ("The withdrawal of a guilty plea is generally within the sound discretion of the trial judge."); id. ([W]hen the State fulfills its agreement to recommend a specific sentence, the fact that the judge does not accept the recommendation does not affect the validity of the plea."; *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.").

9.) Specific performance is the remedy used where one has been denied a constitutionally-guaranteed right. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), citing to Turner v. Tennessee 858 F.2d 1201 (6th Cir. 1988) and United States v. Morrison 449 U.S. 361 (1981). In Davie, the Court held that counsel was ineffective in failing to communicate a plea offer to the defendant. Moreover, specific performance of a plea agreement is an allowable remedy. In Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003), the case was remanded for specific performance on the plea agreement where counsel was ineffective in failing to ensure that the state adhered to the original plea agreement in order to grant the defendant the benefit of the bargain. In Sprouse, supra, the plea agreement breach was the solicitor's classification of the defendant's second-degree burglary offense as violent because this deviated from the plea agreement. See also Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007),where the case was remanded for specific performance where counsel was ineffective in failing to have a plea agreement enforced because the defendant detrimentally relied on the promised plea bargain. In Custodio, supra, there was a breach of a plea agreement that included a fifteen-year cap on non-violent burglary charges in exchange for the defendant's cooperation in returning stolen items and where there was reliance on the plea bargain by the defendant when he pled guilty in the case. In Jordan v. State, 247 S.C. 52, 374 S.E.2d 683 (1989), the Court remanded the case for specific performance on the plea agreement where the solicitor did not fulfill his promise not to oppose probation at the plea proceeding according to the plea agreement. See also Smith v. State, 413 S.C. 194, 775 S.E.2d 696 (2015), affirming reversal in Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (S.C. Ct. App. 2014), and Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000). In Thompson, and Smith, the Court remanded for specific performance in both cases on both of the plea agreements where both of the

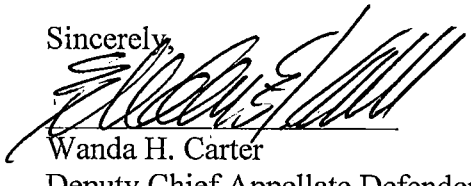
solicitors promised not to make sentencing recommendations on the defendants' voluntary manslaughter pleas, but breached the agreements and asked for maximum sentencing in those cases.

As a rule, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); Santobello v. New York, 404 U.S. 257 (1971). Prosecutors are obligated to fulfill the promises they make to defendants when the promises are inducements to plead guilty. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). Breached plea agreements will invalidate guilty pleas. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000). In Thompson, there was a breached plea agreement in existence in appellant's case, and thus the trial judge erred in failing to hold a hearing to entertain the motion for specific performance or a request for the withdrawal of appellant's guilty pleas. The Thompson Court struck down a guilty plea where the plea agreement in that case was violated because the solicitor promised that there would be no specific sentencing recommendation requested in the case, but yet recommended the maximum sentence of thirty years at sentencing after the defendant plead guilty to voluntary manslaughter. Appellant was prejudiced because the sentence he received was greater than the sentence agreed upon via the plea bargain.

In the case at bar, the solicitor promised that appellant's guilty plea on the drug charges would result in an eight-year sentence per the terms of the plea bargain, but appellant did not receive the benefit of the plea bargain as he received a fifteen-year sentence in the case instead.

WHEREFORE, counsel would request a petition for rehearing on whether the terms of the plea agreement were honored in appellant's case.

Sincerely,



Wanda H. Carter
Deputy Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Dameon Lamar Thompson, #362864, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 29th day of June, 2017.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 29th day of June, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.