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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

RECEIVED

JUL 05 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NELSON HERCULES CASTRO,

APPELLANT

APPELLATE CASE NO. 2016-002159

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the resentencing judge, who improperly considered Appellant's decision to exercise his constitutional right to a jury trial when he originally sentenced Appellant, abuse his discretion by again sentencing Appellant to fifteen years after Appellant was granted a new sentencing hearing, because this identical sentence, along with the judge's comments during the resentencing hearing, unequivocally shows the judge once more improperly considered Appellant's decision to exercise his right to a jury trial despite the judge's repeated disavowals?

## STATEMENT OF THE CASE

A Horry County Grand Jury indicted Appellant on January 21, 2010 for trafficking cocaine. R. 20-21. His case was called to trial on April 7, 2010 before the Honorable Larry B. Hyman. Assistant Solicitor Scott Graustein represented the state, and William I. Diggs represented Appellant. The jury found Appellant guilty. R. 3, ll. 8-13. Judge Hyman sentenced him to fifteen years' imprisonment. On August 5, 2010, a hearing was held on Appellant's Motion to Reconsider Sentence. Judge Hyman denied the motion. R. 3, l. 19 – 4, l. 3.

Appellant's conviction and sentence were affirmed on direct appeal. State v. Castro, Op. No. 2012-UP-378 (S.C. Ct. App. filed June 20, 2012). Katherine Hudgins of the Office of Appellate Defense represented Appellant. Id.

On March 18, 2013, Appellant filed an application for post-conviction relief (PCR). The state filed a return to this application dated September 19, 2013. An evidentiary hearing was held on August 27, 2014 before the Honorable Kristi Lea Harrington. Assistant Attorney General Joshua Thomas represented the state, and Daniel Selwa represented Appellant. By order dated October 8, 2014, Judge Harrington denied Appellant relief.

Appellant filed a petition for writ of certiorari with the Supreme Court on July 27, 2015. The state filed a return to this petition on September 10, 2015. Assistant Attorney General Joshua Thomas represented the state, and Wanda Carter of the Office of Appellate Defense represented Appellant. By opinion filed July 20, 2016, the Supreme Court granted the petition, dispensed with further briefing, reversed the order of the PCR judge, and remanded for resentencing. Castro v. State, 417 S.C. 77, 79, 789 S.E.2d 44, 45 (2016). The Court held trial counsel was ineffective in failing to object when the trial judge considered Appellant's decision

to exercise his constitutional right to a jury trial as a factor in sentencing Appellant. Id. at 84-85, 789 S.E.2d at 48.

A resentencing hearing was held on October 13, 2016 before Judge Hyman. R. 1. Assistant Solicitor Scott Graustein represented the state, and J.M. Long, III represented Appellant. R. 1. Judge Hyman sentenced Appellant to fifteen years' imprisonment, which is the same sentence he imposed in 2010. R. 16, ll. 15-23.

This appeal follows.

## ARGUMENT

The resentencing judge, who improperly considered Appellant's decision to exercise his constitutional right to a jury trial when he originally sentenced Appellant, abused his discretion by again sentencing Appellant to fifteen years after Appellant was granted a new sentencing hearing, because this identical sentence, along with the judge's comments during the resentencing hearing, unequivocally shows the judge once more improperly considered Appellant's decision to exercise his right to a jury trial despite the judge's repeated disavowals.

At the conclusion of his jury trial in April 2010, Appellant was sentenced to fifteen years. Based on statements made by the trial judge immediately before Appellant's trial began and later during sentencing, the Supreme Court held the trial judge "unequivocally considered [Appellant's] decision to reject a plea offer and proceed to trial as a factor in sentencing." Castro, 417 S.C. at 84, 789 S.E.2d at 47. Because a judge abuses his discretion when he considers the fact that a defendant exercised his or her right to a jury trial as a factor in sentencing, the Supreme Court held Appellant's trial counsel was ineffective for failing to object and remanded for resentencing. See Id. at 83-85, 789 S.E.2d at 47-48; State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995).

Despite this holding, during the resentencing hearing, the trial judge disavowed any wrongful intent and maintained that his decision to sentence Appellant to fifteen years during the original sentencing hearing "had nothing to do with" Appellant's decision to exercise his constitutional right to a jury trial. R. 7, ll. 9-10. He told Appellant, "You have a right to a jury trial, and *you were not punished for that.*" R. 8, ll. 6-7 (emphasis added). The judge asserted he "imposed a midrange sentence" during the original sentencing hearing because "there was

substantial evidence of your [Appellant's] guilt." R. 7, ll. 19-23. The judge again sentenced Appellant to fifteen years. R. 16, ll. 15-23. This was an abuse of discretion.

As this Court and our Supreme Court have repeatedly held, "the mere disavowal of wrongful intent cannot remove the taint inherent in the [trial judge's] commentary" revealing that he considered the defendant's decision to exercise his or her constitutional right to a jury trial during sentencing. See State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001) (citing Davis v. State, 336 S.C. 329, 332, 520 S.E.2d 801, 802 (1999)).

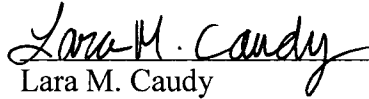
Despite the trial judge's assertion during the resentencing hearing that his decision to sentence Appellant to fifteen years during the original sentencing hearing "had nothing to do with" Appellant's decision to exercise his constitutional right to a jury trial, it is patently obvious that the trial judge was still miffed and perturbed over Appellant's rejection of the state's original seven year plea offer and his pursuit of a jury trial instead. See R. 7, ll. 9-10 and R. 10, l. 9 – 11, l. 13. The fact that the trial judge sentenced Appellant to fifteen years again unequivocally shows that he once more considered Appellant's decision to exercise his constitutional right and put the state to its burden of proof. See State v. Sloan, 278 S.C. 435, 440, 298 S.E.2d 92, 95 (1982) ("[N]o right is more fundamental than the right of an accused to plead not guilty and put the State to its [burden of] proof.").

Respectfully, this Court should hold the trial judge abused his discretion by once again considering Appellant's decision to exercise his right to a jury trial in resentencing Appellant, reverse Appellant's fifteen year sentence, and remand for resentencing.

**CONCLUSION**

Based on the foregoing argument, Appellant respectfully requests this Court reverse his sentence and remand for resentencing.

Respectfully submitted,

  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of July, 2017.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
Honorable Larry B. Hyman, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

NELSON H. CASTRO,

APPELLANT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Nelson H. Castro states:

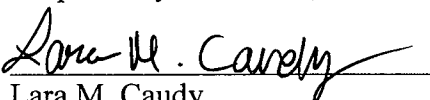
1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's resentencing hearing before the Honorable Larry B. Hyman, which was held on October 13, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 proceeding.

WHEREFORE, she asks the Court to relieve her as counsel for Nelson H. Castro.

Respectfully Submitted,

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JUL 05 2017

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of July, 2017.

**SC Court of Appeals**

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

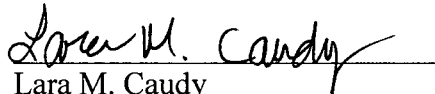
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-Billed Indictment;
- (2) Complete Resentencing Hearing Transcript Dated October 13, 2016;
- (3) Resentencing Order.

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

July 5, 2017

  
Lara M. Caudy  
Appellate Defender

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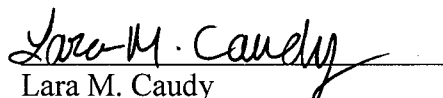
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**CERTIFICATE OF COUNSEL**

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."

July 5, 2017.



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