

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Orangeburg County

The Honorable Benjamin H. Culbertson, Circuit Court Judge

AMY RENEE LANE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2016-002403

Brief of Respondent Pursuant to White v. State¹

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¹ White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)

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RESPONDENT'S QUESTIONS PRESENTED

1. Did Counsel contemporaneously object and preserve this issue for appellate review?
2. Did the plea judge properly consider relevant State's evidence in determining Petitioner's sentence, and does this Court lack the jurisdiction to disturb Petitioner's sentence, because the sentence was within the limits prescribed by statute and there was no prejudice, oppression, or corrupt motive?
3. Was any error by the plea judge harmless because the judge sentenced Petitioner to the statutorily mandated minimum sentence for armed robbery?

STATEMENT OF THE CASE

The Orangeburg County Grand Jury indicted Petitioner for armed robbery (2014-GS-38-0714) during the May 2014 Grand Jury term. App. 76-77. Michael Culler, Esquire, (Counsel) represented Petitioner. App. 1. Ashley Cornwell, Esquire, prosecuted the case for the State. App. 1. On November 20, 2014, Petitioner pleaded guilty as indicted to all charges before the Honorable Edgar W. Dickson. App. 1-22. Judge Dickson sentenced Petitioner to imprisonment for ten years. App. 21.

Petitioner filed a notice of appeal on December 4, 2014. Supp. App. 1. The South Carolina Court of Appeals dismissed Petitioner's appeal on February 25, 2015. Supp. App. 13. The remittitur was returned to the circuit court on March 13, 2015. Supp. App. 15.

On June 5, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 23. In the application, Petitioner alleged she was being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
 - a. "Attorney failed to comply with 4 rules of court"
2. "Coerced into a plea"
 - a. "[Petitioner] was told if [she] took the plea [she would] get accessory before and after instead of armed robbery"
3. "Lack of knowledge about criminal law"
 - a. "[Petitioner] could plead to lesser charge receive lesser time [sic]"
4. "Lack of evidence"
 - a. "No evidence was presented"

App. 30-31.

Respondent filed its return and partial motion to dismiss on October 29, 2015. App. 35. An evidentiary hearing into the matter was convened on May 16, 2016, at the Dorchester County Courthouse before the Honorable Benjamin H. Culbertson. App. 37. Petitioner was present at the hearing and was represented by Jonathan D. Waller, Esquire. App. 37-67. J. Clayton Mitchell, III, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Id. On

October 27, 2016, Judge Culbertson issued the order of dismissal denying Petitioner's application for post-conviction relief on all allegations, but granted Petitioner's request for a belated appeal. App. 68-75. A belated review of direct appeal issues pursuant to White v. State².

² White, 263 S.C. 110, 208 S.E.2d 35.

STATEMENT OF THE FACTS

On January 10, 2014, officers responded to a report of armed robbery in Orangeburg County. App. 11. The officers arrived at Water's Edge Rentals and met with the victim, Allen Keith. App. 11. The victim said that while he was assisting a customer, who was Petitioner, with a chainsaw, a white male entered the store wearing a green bandana over his face. App. 11. The man pulled a handgun and demanded that the victim give him all the money and for Petitioner to get on the ground. App. 11. The man struck the victim in the back of the head with the gun, causing the gun to go off, shooting into the floor. App. 11. The man took the money in the cash drawer and left the scene. App. 11. Petitioner stated that the man stole her black wallet from her vehicle. App. 12. The investigator got a statement from Petitioner at this time, as she was not a suspect. App. 12. Petitioner also handed the investigators the shell casing from when the man fired the weapon. App. 12.

On January 16, 2014, the owner of Water's Edge spoke with officers and stated that Petitioner had called the day of the armed robbery asking whether or not certain employees were working that day. App. 12.

On March 14, 2014, Tina Stone, Petitioner's mother, contacted officers and stated that she had reason to believe her daughter was responsible for the planning and execution of the armed robbery. App. 12. The father of Petitioner's eldest child told Stone that his brother, Michael Gleason, and Petitioner committed the crime. App. 12-13. Gleason, Petitioner's codefendant, gave a statement to law enforcement implicating Petitioner.

On March 21, 2014, Petitioner was taken into custody for unrelated charges. App. 13. Petitioner gave a full confession to law enforcement detailing her and her codefendants' involvement in the armed robbery. App. 13. She implicated Michael Gleason as the man with the gun and Jessica Rudd as the getaway driver. App. 13.

ARGUMENT

I. Counsel did not object nor did the plea judge make a ruling and, therefore, this issue was not preserved for review.

This issue is not preserved for the record because Counsel failed to object when the State referred to Petitioner as the “mastermind” of the armed robbery. App. 15. When Counsel fails to contemporaneously object and obtain a ruling from the judge, the issue is not preserved for appeal. “[W]e hold a contemporaneous objection is necessary in all trials beginning after the date of this opinion to properly preserve errors for our direct appellate review.” State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991). “The issue which is not properly preserved cannot be raised for the first time on appeal. A contemporaneous objection is required to properly preserve an error for appellate review.” State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (internal citations omitted). “A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal.” State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981). At the guilty plea hearing, Counsel argued the court should not consider Petitioner the mastermind in determining her sentence. Tr. 20. However, there was no objection on the record and the Court did not make a ruling. Therefore, this issue is not preserved for appellate review.

At the PCR hearing, Counsel admitted he did not object:

Q. Did you make any objections at the plea hearing?

A. No.

Q. So, there really wouldn't be anything preserved to...

A. No.

Q. ...appeal in your opinion?

A. No.

App. 61.

Therefore, this issue is not properly preserved for review on direct appeal because Counsel did not object. Accordingly, this appeal should be denied.

II. The plea judge properly considered relevant State's evidence in determining Petitioner's sentence, and this Court lacks the jurisdiction to disturb Petitioner's sentence, because the sentence was within the limits prescribed by statute and there was no prejudice, oppression, or corrupt motive.

The plea judge properly considered the statement of Petitioner's codefendant that Petitioner was the "mastermind" of the armed robbery. A plea judge is allowed wide discretion in which facts to consider in determining what sentence to impose. "A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

Petitioner argues the State misrepresented her involvement in the armed robbery to the plea judge that Petitioner was the "mastermind." Petitioner argues this statement prejudiced the plea judge against her and negatively affected her sentence. Based on a codefendant's statement, the State asserted Petitioner was the "mastermind" of the crime and she provided the gun for the armed robbery. App. 14, l. 3-7. Petitioner claimed she did not give anyone a gun and had never owned a gun in her life. App. 15, l. 15-23; App. 16, l. 18-25. Petitioner also stated that she was not the mastermind of the plan. App. 16. Counsel expressed concern about Petitioner being portrayed as the mastermind of the crime. App. 20, l. 1-8. The statement by Petitioner's codefendant was part of the State's case against Petitioner. The State is required to disclose the material facts of the underlying case to the judge of the plea proceeding. "If justice is to be done, a sentencing judge should know all the material facts." Franklin, 267 S.C. at 246, 226 S.E.2d at

898. Therefore, the plea judge's consideration of the State's evidence was proper and within its sound discretion.

Petitioner has failed to show the plea judge's sentence was the result of prejudice, oppression, or corrupt motive. "This Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive." Id. Petitioner alleges she was prejudiced by the plea judge's consideration that she was the "mastermind." The plea judge sentenced Petitioner to the statutorily mandated minimum sentence of ten years' incarceration for armed robbery. App. 21. Petitioner has failed to show how she was prejudiced when the judge could not have given her a lesser sentence. Thus, this Court lacks the jurisdiction to review the plea court's sentence.

Additionally, Petitioner argues United States v. Tucker, 404 U.S. 443 (1972) relates to the case at hand. In Tucker, the trial court judge gave consideration to the defendant's previous criminal record where two of the convictions were later held constitutionally invalid. Id. The Supreme Court of the United States held that trial judges generally have wide discretion in sentencing. Id. at 446. Additionally, trial judges may conduct an inquiry to reach a determination in sentencing that is largely unlimited as in scope as to what kind of information is considered and what source the information comes from. Id. The court held the defendant in Tucker was sentenced based on unconstitutional convictions. Id. at 447. Here, the plea judge acknowledged Petitioner's prior criminal record, made an inquiry into Petitioner's involvement in the armed robbery, and sentenced Petitioner to the minimum sentence. Therefore, Tucker is inapplicable to this case.

Petitioner also argues State v. Rich, 269 S.C. 701, 239 S.E.2d 731 (1977) is similar to her case. In Rich, this Court remanded the case for resentencing where the trial judge improperly

considered certain charges on the defendant's criminal record, which served to enhance the defendant's sentence. Id. Here, the judge fulfilled his obligation to consider all the material facts of the case. Additionally, the judge did not enhance Petitioner's sentence, as Petitioner received the statutory minimum sentence. Therefore, Rich is inapplicable to this case.

Lastly, Petitioner argues Townsend v. Burke, 334 U.S. 736 (1948) relates to this case. In Townsend, the Supreme Court of the United States held that a trial judge can violate a defendant's right to due process when the judge sentences the defendant "on the basis of assumptions concerning his criminal record which were materially untrue." Id. at 741. Here, Petitioner does not allege the plea judge made any assumption about her criminal record. Petitioner alleges only that the court improperly considered the State's assertion that she was the mastermind of the armed robbery. Therefore, Townsend is inapplicable to this case.

Therefore, the plea judge properly considered relevant State's evidence, within the judge's wide discretion, in sentencing Petitioner. Accordingly, this appeal should be denied.

III. Any error by the plea judge was harmless because the judge sentenced Petitioner to the statutorily mandated minimum sentence for armed robbery.

Petitioner was sentenced to the statutorily mandated minimum sentence of ten years incarceration for armed robbery. App. 21; S.C. Code Ann. §16-11-330(A). When an error by the court does not detrimentally affect Petitioner, the error is harmless. See State v. Pressley, 288 S.C. 128, 132, 341 S.E.2d 626, 628 (1986). Here, the plea judge sentenced Petitioner to the minimum possible sentence. Therefore, the solicitor's remarks demonstrably did not prejudice the plea judge against Petitioner. Thus, any error in allowing the remarks was harmless.

Petitioner contends her portrayal as the "mastermind" prejudiced the plea judge and was improperly considered during Petitioner's sentencing. This contention is without merit. Petitioner was sentenced to ten years, the minimum possible sentence.

A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted.

S.C. Code Ann. § 16-11-330 (emphasis added)

Petitioner cannot have been prejudiced by a judge's adverse consideration when the result was the minimum possible sentence. Petitioner was not prejudiced by her mandatory minimum sentence and, thus, any error was harmless. Accordingly, this appeal should be denied.

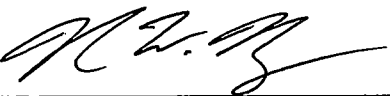
CONCLUSION

Therefore, this Court should deny the Petitioner's Petition for Writ of Certiorari because Petitioner's argument has no merit as the plea judge was not prejudiced by hearing Petitioner's co-defendant's statement concerning her mastermind status, any error was harmless, and this issue is not preserved for review. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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November 17, 2017.

STATE OF SOUTH CAROLINA
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The Honorable Benjamin H. Culbertson, Circuit Court Judge

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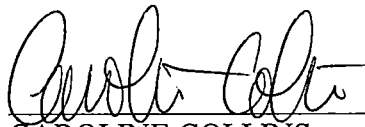
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent Pursuant to White v. State** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
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This 17th day of November, 2017



CAROLINE COLLINS
Administrative Coordinator