

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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ORIGINAL

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

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MAR 29 2018

WILLIAM ANDREW LEE,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002238

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

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**ISSUE PRESENTED**

Whether Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated by counsel's failure to petition the court for a motion to reconsider when the trial judge stated he was taking into consideration that he believed Petitioner was not the shooter in his decision to sentence Petitioner to forty-five years of incarceration, and two days later sentenced Petitioner's co-defendant (the shooter) to thirty years of incarceration?

## STATEMENT

A Spartanburg County Grand Jury indicted Petitioner at the May 2008 term for murder and attempted armed robbery. App. 481-486. Petitioner was represented by S. Frank Adams and the state was represented by Derrick Balsa. App. 1. Petitioner was tried before the Honorable Thomas A. Russo, and a jury February 2 – February 3, 2009. Petitioner was convicted and sentenced to imprisonment for thirty-five years for murder and a consecutive term of ten years for attempted armed robbery. App. 325, ll. 17-25. The South Carolina Court of Appeals affirmed the conviction in *State v. Lee*, Op. No. 2011-UP-369 (S.C. App. Filed July 14, 2011). App. 356-357. App. 358.

On February 27, 2012, Petitioner filed his first application for post-conviction relief (PCR). App. 359. The state filed a return to this application on February 26, 2013. App. 369. The matter proceeded to an evidentiary hearing on June 27, 2013, before the Honorable R. Lawson McIntosh. App. 377. Suzanne White represented the state, and Kenneth Shabel represented Petitioner. App. 377. By order dated September 25, 2013, Judge McIntosh denied Petitioner relief. App. 428-436. PCR counsel did not file a notice of appeal.

On June 23, 2014, Petitioner filed a second application for post-conviction relief seeking the right to a belated appeal of the denial of his original application. App. 437-443. The state filed a return to this application and partial motion to dismiss on November 22, 2016. App. 450-455. The matter proceeded to an evidentiary hearing on February 1, 2017, before the Honorable Edward W. Miller. App. 456-472. Alicia Olive represented the state, and Rodney Richey represented Petitioner. App. 456. By order dated September 28, 2017, Judge Miller granted Petitioner a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 473-477.

This petition for writ of certiorari pursuant to *Austin v. State* follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated by counsel's failure to petition the court for a motion to reconsider when the judge stated that he was taking into consideration that he believed Petitioner was not the shooter in his decision to sentence Petitioner to forty-five years of incarceration, and two days later sentenced Petitioner's co-defendant (the shooter) to thirty years of incarceration.

### *Statement of facts*

Darrell Ray (Petitioner's co-defendant) attempted a robbery armed with a pistol; he shot and killed Harvey Wells (Decedent) at a carwash. App. 195-198. The state alleged Petitioner assisted Ray in the attempt, and was guilty under the law that the hand of one is the hand of all. App. 82, l. 18 – 83, l. 1. Ray claimed Petitioner aided him in the robbery attempt and hit Decedent. App. 195-198. Petitioner admitted to being at the scene, but his defense was one of mere presence. App. 86, l. 5 – 86, l. 10.

When sentencing Petitioner, Judge Russo stated that although the hand of one is the hand of all, "I am going to take into consideration the facts that were presented during the course of this trial. And I am going to consider the fact that, at least as far as the evidence presented, that – that **you were not armed yourself when this occurred, and that you did not fire the – the shots which killed [Decedent].**" App. 324, ll. 4-12. Judge Russo said: "I do believe that it wasn't your intention for somebody to be killed." App. 325, ll. 3-4. "**I'm going to take into consideration that you didn't fire the fatal shot, nor were you armed during the commission of the crime.** And that's the only thing that – that prevents me from – from just giving you a straight life sentence." App. 325, ll. 12-16. The court then pronounced Petitioner's

sentences of incarceration for thirty-five years and ten years, to run consecutively. App. 325, l. 17 – 326, l. 3.

Co-defendant Ray, the man who shot and killed Decedent, was sentenced by Judge Russo two days after Petitioner, and received concurrent terms of thirty and twenty years' incarceration. App. 489-490. During pre-trial motions, trial counsel moved that the state disclose "any and all consideration made on – on behalf of any government witness." App. 12, ll. 3-4. Trial counsel anticipated Ray testifying against Petitioner, noted that Ray had pleaded guilty, and that his sentence would be subsequent to Petitioner's trial. App. 12, ll. 5-11. Ray did testify in Petitioner's trial. App. 188, ll. 3-4. Trial counsel asked the state disclose "any promises, assurances, or other deals made with this co-defendant concerning his upcoming testimony against my client." App. 12, ll. 12-15. The state said on the record that there had been no deals, and that "there's not been any promises or assurances to – to Mr. Ray." App. 12, l. 17 – 13, l. 1.

Petitioner asserted at his PCR hearing that trial counsel was deficient in failing to file a motion to reconsider after his more culpable co-defendant was sentenced to a lesser term of incarceration. App. 421, ll. 5-25. Petitioner testified he was unaware that asking trial counsel to file a motion to reconsider his sentence was an option. App. 404, ll. 11-20.

Petitioner's trial counsel, S. Frank Adams, testified at the PCR hearing and acknowledged he knew co-defendant Ray had pleaded guilty and that his "sentence would be subsequent to the completion of [Petitioner's] trial." App. 12, ll. 8-10. Trial counsel could not remember when he filed the notice of intent to appeal. App. 414, l. 24 – 415, l. 1. However, trial counsel admitted that he did not make any efforts to inquire whether Ray had been sentenced during the time in which he could have filed a motion for reconsideration. App. 415, ll. 6-10. Trial counsel did not attempt to contact the solicitor's office to find out when Ray was going to

be sentenced. App. 415, ll. 11-16. Ray was sentenced two days after Petitioner by Judge Russo, the same judge who sentenced Petitioner. App. 489-490.

Ray's sentencing sheets were introduced at the PCR hearing, and reflect that Ray received concurrent terms of thirty and twenty years' incarceration. App. 388, l. 21 – 389, l. 22; App. 489-490. Because Ray was sentenced to concurrent terms and Petitioner was sentenced to consecutive terms, Ray in effect received thirty years' imprisonment while Petitioner received forty-five years' imprisonment. Trial counsel testified at the PCR hearing that the disparity in the two men's sentences "bothers me tremendously." App. 415, ll. 17-20. Trial counsel said it was "quite clear that . . . Mr. Ray was the active party in this," and additionally ran from the police. App. 415, l. 22 – 416, l. 1. Trial counsel added that Petitioner "had gone to the police" and helped authorities locate Ray's vehicle. App. 416, ll. 2-4.

PCR counsel argued it was evident from the record that it was the judge's "intent to give him that break based on the fact that he was not the shooter . . ." App. 422, ll. 16-18. Shabel argued that during the ten-day time frame in which trial counsel could have filed a motion for sentencing reconsideration, the "same judge does the exact opposite of what he says he's gonna do which is he says he's gonna cut him a break but he ends up givin' more time than the shooter." App. 421, ll. 22-25. The PCR court had before it the sentence sheets of both Ray and Petitioner. App. 379; App. 428. The sentence sheets reflect that when the sentences were imposed, Petitioner was twenty-two years old, while Ray was twenty-four years old.

In its order of dismissal, the PCR court recognized that Petitioner "was sentenced by the Honorable Thomas A. Russo to confinement for thirty-five years for murder and a consecutive term of ten years for attempted armed robbery," and Petitioner's co-defendant "Ray received thirty years for murder and a concurrent sentence of twenty years for attempted armed robbery."

App. 429; App. 431. The PCR court said Petitioner “testified that because his co-defendant was sentenced less than ten days after his sentencing, he believes that Counsel should have filed a motion for reconsideration based upon the co-defendant’s sentence.” App. 431.

The PCR court determined that Petitioner failed to meet his burden of proof as to “the claim that Counsel was ineffective for failing to file a motion for reconsideration following the sentencing of [Petitioner’s] co-defendant.” App. 433. The PCR court determined counsel was not required to file a motion for reconsideration after a trial, and that even if counsel “were deficient for failing to file the motion, the [Petitioner] failed to establish any prejudice. To grant this would require this Court to engage in rank speculation based on the fact that judges have a myriad of factors that they consider when sentencing.” App. 433.

### ***Discussion***

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). A two-prong test for determining effective assistance of counsel was set forth by the U.S. Supreme Court in *Strickland*. The first prong requires a defendant show that counsel’s performance was deficient; the second prong requires a showing that the deficient performance prejudiced the defendant to the extent there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

“A judge is allowed broad discretion in sentencing within statutory limits.” *Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). However, the trial court’s discretion in sentencing may not be exercised arbitrarily, or for reasons clearly untenable or unreasonable. *State v. Goodall*, 221 S.C. 175, 178, 69 S.E.2d 915, 916 (1952). Additionally, a trial judge may

not consider the fact that a defendant exercised his constitutional right to a jury trial as a factor in sentencing. *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016).

Trial counsel has a duty to protect his client's interest in obtaining a lower sentence. In *Boan v. State*, "the trial judge orally pronounced a twenty-year sentence from the bench, but signed a sentencing sheet ordering a thirty-year sentence." *Boan v. State*, 388 S.C. 272, 276, 695 S.E.2d 850, 852 (2010). Reasoning that due process requires the judge's oral pronouncement control over a conflicting written sentencing order, this Court found that trial counsel provided ineffective assistance of counsel in failing to file a motion regarding the discrepancy. *Id.* at 276-277, 695 S.E.2d at 852. Determining that Boan "clearly was prejudiced by this mistake because an additional ten years was added onto his sentence," there was a "reasonable probability Petitioner would not have been sentenced to an additional ten years if counsel properly had brought the discrepancy to the trial court's attention." *Id.*

"The authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). Rule 29, SCRCrimP, allows post-trial motions (except motions for new trials based on after-discovered evidence) to be made within ten days after the imposition of the sentence. A motion to reconsider sentencing is subject to the ten-day time period prescribed in Rule 29. *State v. Warren*, 392 S.C. 235, 240, 708 S.E.2d 234, 236 (Ct. App. 2011).

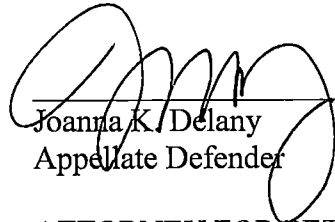
Here, counsel was deficient in his failure to protect Petitioner's interests regarding a significantly lower sentence. The record reflects that Petitioner was sentenced to fifteen years of incarceration beyond that of his co-defendant, who was the shooter. The trial judge said he was taking into consideration that Petitioner was not the shooter in sentencing him to forty-five years instead of life. Two days later the same judge sentenced Ray, the shooter, to a markedly shorter

term of imprisonment than Petitioner, when he could have sentenced Ray to life. There is no indication in the record that Ray was given a break for testifying against Petitioner. In fact, the state specifically avowed that Ray had not been offered any deals, promises, or assurances in return for his testimony. The court could not sentence Petitioner to a lengthier sentence based on his exercise of the right to a trial by jury. Moreover, Petitioner was both younger and less culpable than his co-defendant.

Respectfully, Petitioner asserts that the trial court's discretion was exercised arbitrarily, or for reasons clearly untenable or unreasonable. Therefore, trial counsel was deficient in his failure to file a motion to reconsider sentencing and bring the sentencing disparity to the judge's attention. This deficiency prejudiced Petitioner, as he received a longer term of imprisonment than his co-defendant, who shot and killed Decedent. Petitioner is in a similar situation as the defendant in *Boan v. State*. The court's statements about its intent to confer leniency on Petitioner because he was not the shooter create a reasonable probability that Petitioner's sentence would be different had counsel properly brought the sentencing discrepancy to the trial court's attention.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari pursuant to *Austin v. State* and permit full briefing on the issues presented.

  
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Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 29th day of March, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge  
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WILLIAM ANDREW LEE,

PETITIONER


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

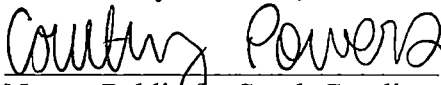
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State and a copy of the Appendix in the above referenced case has been served upon Megan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari pursuant to Austin v. State and a copy of the Appendix have been served on William Andrew Lee, #313779, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 29th day of March, 2018.

  
—————  
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 29th day of March, 2018.

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