

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY ODEL KANIPE,

APPELLANT

APPELLATE CASE NO. 2017-001411

ANDERS BRIEF OF APPELLANT

RECEIVED
MAY 31 2018
SC Court of Appeals

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by denying appellant's motion to withdraw his guilty plea where the state before the guilty plea promised its only recommendation was concurrent time, and during the plea proceeding, the solicitor told the judge that the victim wanted appellant to receive the maximum sentence, and that she cried every time he talked to her, since appellant would not have pled guilty had he been aware the solicitor would tell the judge that the victim wanted appellant to receive the maximum sentence?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County Grand Jury for the offense of grand larceny between \$2,000 and \$10,000. Appellant was also indicted by the Lexington County Grand Jury for the offense of possession of a stolen vehicle between \$2,000 and \$10,000. R. 34.

Appellant appeared on April 25, 2017, before the Honorable William P. Keesley in Lexington County. R. 10 – 11. Appellant was represented by Jessica Sturgill from Richland County, and Hallie Willm from Lexington County. R. 11.

Appellant waived venue on the Richland charge, and he entered pleas of guilty to use of a vehicle without permission with the intent to deprive on the Richland County indictment, and he pled guilty to the Lexington County indictment for possession of a stolen vehicle between \$2,000 and \$10,000. R. 13, ll. 3-12.

Solicitor Melanie Graham told the judge that the state's only recommendation was that appellant receive concurrent time. R. 20, ll. 15-21. As will be seen infra, the solicitor also told the sentencing judge that the victim cried every time she talked to the solicitor because appellant had allegedly repeated stolen from her, and that the victim wanted appellant to receive the maximum sentence for that reason. R. 20, l. 19 – 21, l. 6.

Judge Keesley sentenced appellant to five years imprisonment on the Lexington County case, and sentenced appellant to three years imprisonment, concurrent, on the Richland County case. R. 28, ll. 14-19. Judge Keesley ordered that there be a restitution hearing in the future. R. 28, l. 2 – 29, l. 7.

Appellant, through counsel, on May 5, 2017, filed a motion to withdraw the plea, or, in the alternative, reconsider the sentence. R. 31 – 32. A hearing on the motion was held on June 8, 2017, before the Honorable William P. Keesley. Jessica Sturgill and Hallie M. Willm both

appeared as appellant's counsel. Melanie Graham and Lamar Fylall were the assistant solicitors.

R. 1.

Defense counsel Sturgill told the judge that she was not aware that the solicitor was going to tell the judge the victim "wanted a significant amount of time." Defense counsel said she was also unaware the state was going to allege appellant had stolen items from the same victim on other occasions. Counsel argued if she had known these allegations were going to be put before the sentencing judge, she would have investigated them and tried to offer evidence in mitigation.

R. 4, l. 4 – 5, l. 9.

Assistant Solicitor Graham agreed "this would be a straight up plea." She told the judge she kept her promise in not asking for a specific amount of time, and she argued that she had the right to convey the victim's sentencing wishes to the judge. R. 6, l. 1 – 7, l. 11.

Defense counsel Sturgill said that she knew the victim had the right to speak but she did not know specifically in this case that the state was going to allege appellant had stolen from the victims on prior occasions, and her desire for a maximum sentence. R. 7, l. 13 – 8, l. 7. Defense alleged appellant did not make a knowing and voluntary plea because he was not aware this information was going to be conveyed to the sentencing judge. The judge took the matter under advisement. R. 8, ll. 2 – 19.

That same day, June 8, 2017, the sentencing judge issued a one page order denying the motion to withdraw the plea, finding an "insufficient reason" to grant such relief. R. 33. This appeal follows.

STANDARD OF REVIEW

A guilty plea may not be accepted unless it is voluntarily entered with the understanding of the nature and consequences of the charge *and the plea*. Brady v. United States, 397 U.S. 742 (1970); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

When a motion to withdraw the plea is made after sentencing, granting or refusal of the motion is within the discretion of the trial judge. See State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); State v. Cantrell, 250 S.C. 376, 158 S.E.2d 189 (1967).

ARGUMENT

The court erred by denying appellant's motion to withdraw his guilty plea where the state before the guilty plea promised its only recommendation was concurrent time, and during the plea proceeding, the solicitor told the judge that the victim wanted appellant to receive the maximum sentence, and that she cried every time he talked to her, since appellant would not have pled guilty had he been aware the solicitor would tell the judge that the victim wanted appellant to receive the maximum sentence

Relevant Facts

As seen, defense counsel informed appellant that the state's only recommendation would be that he receive concurrent time. However, at the time of the guilty plea, the solicitor conveyed to the judge that the victim wanted the maximum sentence. The solicitor also told the sentencing judge that appellant and his girlfriend were living with her, and that he had stolen other items from her. Appellant allegedly told her not to go to law enforcement about the thefts. Moreover, the victim's automobile was damaged by appellant. R. 20, l. 19 – 21, l. 23. The victim was purportedly so traumatized by appellant's actions that she could not stop crying when she talked to the solicitor.

Appellant did receive concurrent time totaling five years, which both defense attorneys agreed was the result of the victim wanting the maximum sentence, and the aggravating evidence of appellant having stolen from the victim in the past, and the victim impact evidence that the victim was so traumatized she cried every time she talked with the solicitor about these cases.

Discussion

A guilty plea may not be accepted unless it is voluntarily entered with the understanding of the nature and consequences of the charge *and the plea*. Brady v. United States, 397 U.S. 742 (1970); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

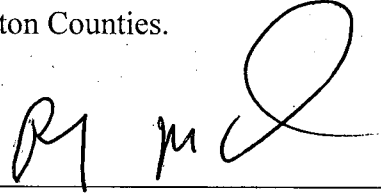
When a motion to withdraw the plea is made after sentencing, granting or refusal of the motion is within the discretion of the trial judge. See State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); State v. Cantrell, 250 S.C. 376, 158 S.E.2d 189 (1967).

Here, the solicitor promised to only tell the judge the state's sentencing recommendation was for appellant to receive concurrent time. Yet, the solicitor added that appellant allegedly had stolen from the same fragile victim on other occasions, and he told her not to report these thefts to law enforcement.

The solicitor also told the sentencing judge that the victim was so traumatized that she cried every time she talked to the solicitor about these cases. These were **material factors** that appellant did not think would be brought to the attention of the sentencing judge, or he would not have pled guilty. The state injected highly prejudicial material game changing prejudicial information into the plea that appellant did not know would be alleged. The sentencing court respectfully abused its discretion under the unusual facts of this case by denying appellant's motion to withdraw his guilty plea. See Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); State v. Cantrell, 250 S.C. 376, 158 S.E.2d 189 (1967).

CONCLUSION

By reason of the foregoing arguments, appellant's guilty plea should be vacated, and this case remanded for new trials in Richland and Lexington Counties.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable William P. Keesley, Circuit Court Judge

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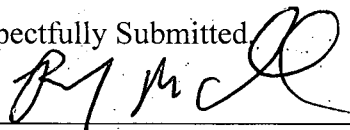
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jimmy Odel Kanipe 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, and motion to withdraw the plea before Judge William P. Keesley, which were held on April 25, 2017 and June 8, 2017, 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 Jimmy Odel Kanipe.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 31st day of May, 2018.

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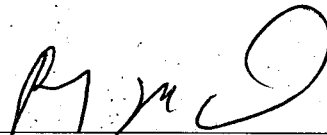
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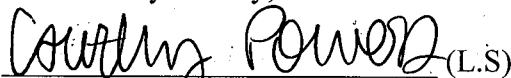
CERTIFICATE OF SERVICE

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 Jimmy Odel Kanipe, 324252, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 31st day of May, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of May, 2018.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.