

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

**RECEIVED**  
JAN 18 2019  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RUSTY ANTRON JONES,

APPELLANT

APPELLATE CASE NO. 2017-002257

\_\_\_\_\_  
FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred when it overruled trial counsel's objection during sentencing where Petitioner was convicted of distribution of cocaine base, third offense, but the record indicated that Petitioner had only been convicted of distribution of cocaine base, first offense as a result of his prior plea bargain?

## STATEMENT OF THE CASE

During the March 2015 term the Spartanburg County Grand Jury indicted Appellant for two counts of distribution of cocaine base. R. 223 – 224.

Appellant's trial was held on October 17, 2017, in front of the Honorable J. Mark Hayes, and a jury. R. 1. Michael Morin represented Appellant. Id. Edward Hunter represented the state.

Id.

Appellant was found guilty as indicted. R. 184, ll. 5 – 10. During the sentencing phase of Appellant's trial, trial counsel made a motion to have Appellant's conviction be distribution of cocaine base, second offense, rather than third offense. R. 186, ll. 13 – 23. Judge Hayes overruled trial counsel's objection reasoning Appellant's guilty plea on November 29, 2012 was based on two instances that occurred eleven days apart. R. 187, l. 18 – 188, l. 23; R. 188, l. 24 – 189, l. 8.

Judge Hayes sentenced Appellant to twenty-five years' imprisonment for distribution of cocaine base, third offense. R. 199, l. 22 – 200, l. 2.

This appeal follows.

## **STANDARD OF REVIEW**

“In criminal cases, the appellate court sits to review errors of law only.” State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009)(quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is “bound by the trial court’s factual findings unless they are clearly erroneous.” Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court “does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court’s ruling is supported by any evidence.” State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). “A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.” In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

## ARGUMENT

The trial court erred when it overruled trial counsel's objection during sentencing where Petitioner was convicted of distribution of cocaine base, third offense, but the record indicated that Petitioner had only been convicted of distribution of cocaine base, first offense as a result of his prior plea bargain.

### **Relevant Facts**

The state alleged the facts as follows. On June 25, 2014, police officers planned an undercover drug buy with Willie Robinson, a confidential informant, to buy crack cocaine from Appellant. R. 48, ll. 23 – 25.

Robinson testified that he met with Investigator McWhite and Sergeant Blackwell and that they put “a camera system” on him to record him buying drugs from Appellant. R. 87, ll. 3 – 16. Robinson testified that the police officers gave him one hundred dollars to buy fifty dollars' worth of crack cocaine. R. 89, l. 25 – 90, l. 4.

After McWhite finished searching Robinson and his car, Robinson went to meet Appellant at an auto-repair shop. R. 90, l. 14 – 91, l. 6; R. 92, ll. 4 – 9. Robinson testified that he went there because he “needed to buy some dope... for the City of Greer,” from Appellant. R. 91, ll. 17 – 24.

Robinson called Appellant to meet him, “at the shop,” and the phone call was recorded by the police. R. 95, ll. 16 – 23; R. 97, ll. 11 – 20. Robinson testified that he bought fifty dollars' worth of “crack” from Appellant on June 25, 2014. R. 93, ll. 1 – 14; R. 101, ll. 16 – 18. He gave the drugs he bought to Investigator McWhite afterwards. R. 104, ll. 20 – 22.

Appellant was found guilty as indicted. R. 184, ll. 5 – 10.

At the sentencing phase of Appellant's trial, defense counsel objected to Appellant being convicted of distribution of cocaine, third offense. R. 186, ll. 13 – 23. Appellant pled guilty on November 29, 2012 to "two counts of distribution, first offense." R. 186, ll. 15 – 17. The sentencing sheets from his guilty plea indicated that both were a first offense. R. 186, l. 18. Defense counsel argued that the November 29, 2012 plea constituted one offense and that the current charges are a second offense. R. 186, ll. 21 – 22. Moreover, the sentencing sheets were signed by the state. R. 186, ll. 22 – 23.

Defense counsel further argued that the state, Appellant, and Appellant's attorney, on November 29, 2012, all agreed that the two counts of distribution of cocaine base that Appellant pled guilty to were to be treated as convictions of a first offense. R. 187, ll. 11 – 16.

However, in this case on October 17, 2017, the state argued that the November 29, 2012, guilty plea represented two separate charges, despite what the sentencing sheets stated, because the incidents that gave rise to the guilty plea occurred eleven days apart. R. 187, l. 18 – 188, l. 23.

The court agreed with the state and found that the two distribution charges Appellant pled to on November 29, 2012 constituted two separate offenses. R. 188, l. 24 – 189, l. 8. Therefore, Appellant's current conviction was a third offense. Id.

Judge Hayes sentenced Appellant to twenty-five years for distribution of cocaine base, third offense. R. 199, l. 22 – 200, l. 2.

## **Discussion**

Appellant's sentence was wrongfully enhanced to distribution of cocaine base, third offense. That enhancement breached the prior guilty plea agreement Appellant and the state had

for his November 29, 2012 conviction, where Appellant and the state came to a bargained for agreement that Appellant would be convicted of two distribution of cocaine base, first offenses.

“The central question about [a] plea agreement is what are its terms, which is a legal question.” State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). “A constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” Santobello v. New York, 404 U.S. 257, 262 (1971). (see also: United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993) holding that plea bargains rest on contractual principles, and each party should receive the benefit of its bargain.)<sup>1</sup>

In Smith v. State, 413 S.C. 194 (2015) the South Carolina Supreme Court affirmed the Court of Appeals reversal of Smith’s post-conviction relief hearing denial. Id. at 195. The Court held that the state breached the plea agreement with Smith when it recommended the maximum sentence at the plea hearing, after the state promised Smith it would remain silent during sentencing. Id. Defense counsel’s failure to object to the breach of the guilty plea agreement constituted reversible error. Id. at 196.

In Jordan v. State, 297 S.C. 52 (1988) our Supreme Court held that the solicitor reneging on his promise to neither recommend nor oppose a probationary sentence breached the plea agreement Jordan had with the state and entitled Jordan to either specific performance of the plea agreement or a new trial. Id. at 53. The Court gave no credence to the trial court’s explanation that it did not consider the state’s opposition to Jordan receiving a probationary sentence when it sentenced Jordan to a term of imprisonment. Id. at 52 – 53.

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<sup>1</sup> Other jurisdictions have ruled that a court must decide whether the government’s conduct is consistent with the parties’ reasonable understanding of the agreement. See: United States v. Roman, 121 F.3d 136 (3rd Cir. 1997); United States v. Chavful, 781 F.3d 758 (5th Cir. 2015); United States v. Taylor, 77 F.3d 368 (11th Cir. 1996).

In United States v. Tucker, 404 U.S. 443 (1972) the United States Supreme Court affirmed the Appellate Court's decision that the lower court's reliance on Tucker's prior convictions, that were later found to be obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), during sentencing, required a remand for reconsideration of the sentence imposed. Id. The Court held that, "we deal here... with a sentence founded at least in part upon misinformation." Id. at 447.

In Tucker, the Court relied on its decision in Townsend v. Burke, 334 U.S. 736 (1948) which stated that a "prisoner... sentenced on the basis of assumptions concerning his criminal record [that] were materially untrue... is inconsistent with due process of law, and such a conviction cannot stand." Id. at 740 – 741. Accordingly, the Tucker Court stated, "the record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous [unconstitutional] convictions before imposing the sentence upon him." Tucker, at 447.

In the instant case, Appellant was sentenced "on the basis of assumptions concerning his criminal record that were materially untrue." He should not have been convicted and sentenced for distribution of cocaine base, third offense because his criminal record indicated that he had only been convicted of distribution of cocaine base, first offense.

The distribution of cocaine base statute states, "a person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony." S.C. Code Ann. § 44-53-375(B). There is nothing in the statute that indicates two first offenses are the equivalent to a second offense.

Defense counsel objected to the state's attempt to sentence Appellant of distribution of cocaine base, third offense because the, "sentencing sheets... indicat[ed] that on November 29<sup>th</sup>, 2012 [Appellant] pled to two counts of distribution, first offense. The sentencing sheets both indicated a first offense." R. 186, ll. 13 – 23. Moreover, defense counsel pointed out that, "[t]hose sentencing sheets were signed by the state." R. 186, ll. 22 – 23.

The trial court found that, notwithstanding that the sentencing sheets from November 29, 2012 unambiguously evinced that Appellant had only ever been convicted of distribution of cocaine base, first offense, Appellant was eligible to be convicted for distribution of cocaine base, third offense because, "[the two charges Appellant pled to on November 29, 2012] were to be counted separately, even though they occurred close in time, they were separate offenses." R. 189, ll. 3 – 5.<sup>2</sup>

An order is defined as, "a written direction or command delivered by a government official, esp. a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands." ORDER, Black's Law Dictionary (10th ed. 2014). Order is also termed a "court order" or "judicial order." *Id.* A sentence issued in open court and unambiguously recorded on a sentencing sheet constitutes a written direction or command delivered by a judge. Therefore, the sentencing sheet in Appellant's case was a court order.

In Travelers Idem. Co. v. Bailey, 557 U.S. 137 (2009), the United States Supreme Court held that, "where the plain terms of a court order unambiguously apply... they are entitled to

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<sup>2</sup> The trial judge stated that he tried a case similar to this one where he was the post-conviction relief judge and his decision was overturned. While the trial judge did not specify the case to which he referred, undersigned counsel believes the trial judge was referring to Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007). Koon was decided purely on an interpretation of the recidivist statute. S.C. Code Ann. § 17-25-50. Unlike in the present case, in Koon there was no unambiguous court order that showed the court how it was required to treat Appellant regarding sentencing.

their effect.” Id. at 151; See Negron-Almeda v. Santiago, 528 F.3d 15, (1st Cir. 2008). Moreover, “a court must carry out and enforce an order that is clear and unambiguous on its face.” United States v. Spallone, 399 F.3d 415, 421 (2d Cir. 2005).

In Tant v. South Carolina Dept. of Corrections, 408 S.C. 334, 759 S.E.2d 398 (2014) the Supreme Court of South Carolina held that where a sentencing sheet is unambiguous, signed by the judge and both attorneys without objection, it is, “assumed to memorialize the judge’s intention.” Id. at 344, 759 S.E.2d at 403.<sup>3</sup> Moreover, the Court also held that, “[w]e see no reason why the Department [of Corrections] should not be able to rely on unambiguous sentencing sheets as indicative of the intended sentence.” Id.

In the instant case, the trial court’s reason for ruling in favor of the state did not address crux of the matter. The court relied on South Carolina’s recidivist statute to determine that the two charges constituted two separate offenses. S.C. Code Ann. § 17-25-50. While that analysis may be correct it does not control here.

Appellant, his attorney, and the state came to a bargained for agreement on November 29, 2012 that Appellant would plead guilty to two counts of distribution of cocaine base, first offense. The intention that both of Appellant’s convictions would be considered first offenses was clearly memorialized in the unambiguous sentencing sheets. There is nothing in the record that called into question that intention.

The fact that the two incidents that gave rise to Appellant’s November 29, 2012 guilty plea happened eleven days apart is of no consequence. The bargained for agreement that the state

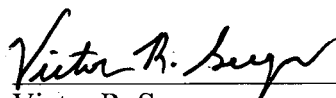
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<sup>3</sup> While the guilty plea transcript from November 29, 2012 was not on the record in front of the trial judge, there is nothing in that transcript that contradicted the unambiguous written statements on the signed sentencing sheets that order Appellant to be convicted only of distribution of cocaine, first offense. Moreover, the plea judge explained to Appellant for each charge that he was pleading guilty to distribution of cocaine, first offense. R. 202 – 222; R. 209, l. 8 – 210, l. 7.

and Appellant came to, and the unambiguous court order issued by the plea court on November 29, 2012, should not have been disturbed by the trial court. Therefore, Appellant should not have been sentenced for distribution of cocaine base, third offense.

**CONCLUSION**

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate Appellant's sentence and remand to the circuit court for resentencing to distribution of cocaine base, second offense.



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Victor R. Seeger  
Appellate Defender

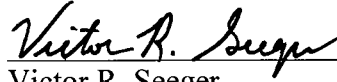
ATTORNEY FOR APPELLANT

This 18th day of January, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Final 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."

January 18, 2019.



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