

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Aiken County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL TYRONE QUARLES,

APPELLANT

APPELLATE CASE NO 2018-000452

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

At the re-sentencing hearing following the grant of post-conviction relief based on trial counsel's failure to object when the original sentencing judge considered the fact that Petitioner exercised his constitutional right to a jury trial in imposing a twenty-eight year sentence, did the new sentencing judge abuse his discretion in imposing a twenty-five year reduced sentence, refusing to consider the fact that the State's evidence only established Petitioner as the look out and the person who planned the armed robbery and kidnapping, purchased the BB guns and taser and actually went into the store armed and committed the crimes only received a thirteen year sentence?

STATEMENT OF THE CASE

In May of 2013, the Aiken County Grand Jury indicted Appellant, Michael Tyrone Quarles, for armed robbery and kidnapping, indictments #13-GS-02-760, 761. (R. pp. 404-407). On May 14, 2013, Appellant proceeded to jury trial before the Honorable Doyet A. Early, III. Michael Chesser represented Appellant at trial. Nicholas McCarley and Kevin Maloney prosecuted the case. The jury returned verdicts of guilty as charged. Judge Early sentenced Appellant to twenty-eight (28) years concurrent for each charge. (R. pp. 408-409). Appellant filed a timely notice of intent to appeal and the direct appeal was perfected. The South Carolina Court of Appeals affirmed the sentences and convictions. State v. Quarles, 2015-UP-317 (S.C.Ct.App. filed July 1, 2015). (R. pp. 280-281).

Appellant filed an application for post-conviction relief [PCR] on August 6, 2015. (R. pp. 282- 303). The State filed a return and motion to dismiss for more definite statement on November 17, 2015. (R. pp. 304-309). On December 7, 2015, Appellant filed an amended PCR application. (R. p. 310-311). On May 25, 2016, an evidentiary hearing was held before the Honorable Diane S. Goodstein. Lance S. Boozer represented Appellant at the PCR hearing. Julie A. Coleman represented the State. In a written order filed on September 2, 2016, Judge Goodstein granted relief and ordered a new trial. (R. pp. 359-367). On September 13, 2016, the State filed a motion to reconsider pursuant to Rule 59(e). (R. p. 368-371). On September 14, 2016, Appellant filed a return to the State's motion to reconsider. (R. p. 372).

On May 24, 2017, a hearing was held before Judge Goodstein in regard to the motion to reconsider. Lance S. Boozer again represented Appellant and Julie A. Coleman again represented the State. On June 30, 2017, Judge Goodstein filed an amended order granting re-sentencing rather than a new trial. (R. p. 380-386). On March 2, 2018, Appellant appeared

before the Honorable William P. Keesley for re-sentencing. C. David Hayes represented Appellant. J. William Weeks represented the State. Judge Keesley re-sentenced Appellant to twenty-five (25) years concurrent for each charge. (R. p. 410-415). A timely notice of intent to appeal was served on March 6, 2018. This appeal follows.

STANDARD OF REVIEW

“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

At the re-sentencing hearing following the grant of post-conviction relief based on trial counsel's failure to object when the original sentencing judge considered the fact that Petitioner exercised his constitutional right to a jury trial in imposing a twenty-eight year sentence, the new sentencing judge abused his discretion in imposing a twenty-five year reduced sentence, refusing to consider the fact that the State's evidence only established Petitioner as the look out and the person who planned the armed robbery and kidnapping, purchased the BB guns and taser and actually went into the store armed and committed the crimes only received a thirteen year sentence.

On February 19, 2013, Carlos Williams and Jamarques Salley, armed with BB guns and a taser, robbed the Quick Cash on Richland Road in Aiken, South Carolina. (R. pp. 141-144). Williams testified against Appellant at trial. According to Williams, Appellant was the lookout man. (R. p. 148, line 21). Williams testified that about a week before the robbery he and Salley discussed robbing the Quick Cash. (R. p. 119, lines 8-21). Williams testified that he and Salley purchased the BB guns from WalMart prior to the robbery. (R. p. 120, line 19 – p. 121, lines 1-3). Williams also testified that Salley purchased the taser from the flea market in Augusta. (R. p. 122, line 12 – p. 123, lines 1-11). Williams pled guilty to armed robbery and kidnapping and received two thirteen (13) year concurrent sentences. (R. p. 400 lines 4-5). After exercising his right to a trial by jury, Appellant was sentenced to two concurrent twenty-eight (28) years sentences. (R. p. 408-409).

Appellant was later granted post-conviction relief based on the fact that trial counsel failed to object when the trial judge considered the fact that Appellant exercised his right to a jury trial in imposing the twenty-eight (28) year sentences. (R. p. 380-386). At sentencing the judge stated:

I begged – not begged – but I certainly told you that I would give him considerable consideration for his accepting responsibility, and what the range of my sentence would be. And if he came out and I thought he was going to accept

responsibility to plead guilty and then we turned, and I even gave you another chance last night this morning. I don't know why he would not follow your advice. I assume that was your advice. I know you. I mean, it's his decision. But I'm sure – and, you know, if he is not going to accept responsibility then the sentence is a different situation and what it would have been had he accepted responsibility. So, you know, it's pitiful.

But, you know, this poor lady taser gun stuck in her back. I bet she thought she was dead. And it's such a senseless, ill planned robbery that anybody could solve it the way it happened. I just don't understand. The more I sit up here, the more I don't understand with human nature. I just do not understand.

(R. p. 244, line 16 – p. 245, lines 1-10). The judge went on to state, “Even with his prior record if he would have accepted responsibility I was willing to, you know, give him considerable consideration. All right. Taking into consideration the nature and severity of the offense, the overwhelming evidence, the fact that he has three prior burglaries, the fact that he would not accept responsibility for these acts” (R. p. 245, lines 13-19). The judge then imposed the twenty-eight (28) year sentences. The judge's comments reflect his frustration that Appellant exercised his right to a trial by jury and the sentence includes a hefty trial tax.

Based on the judge's comments and trial counsel's failure to object, the case was remanded for re-sentencing. After hearing from both the State and the defense, the new sentencing judge made a specific finding that the kidnapping did not involve a sexual assault, gave credit for time served but only reduced the sentence by three years, imposing two twenty-five year (25) sentences. The new sentencing judge abused his discretion. The sentence imposed is without evidentiary support. The judge failed to consider that Appellant was less culpable than Williams and the disparity between the sentences imposed on Williams, thirteen (13) years, compared to the twenty-five (25) year sentences imposed on Appellant reflect that the new sentence still improperly imposes a trial tax. The purpose of the remand was to remove the

trial tax from the sentence imposed. The new sentence imposed still contains an improper trial tax.

In State v. Hazel, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995), the South Carolina Supreme Court wrote:

“[C]ourts have long adhered to the principle forbidding a trial court from improperly considering the defendant's exercise of his constitutional right to a jury trial as an influential factor in determining the appropriate sentence.” State v. Pavone, 104 N.C.App. 442, 410 S.E.2d 1 (1991). Accord Pasley v. State, 559 So.2d 1167 (Fla. Dist. Ct. App. 1990) (“No extended citation of authority is necessary to show that the court may not punish a defendant for going to trial as opposed to ‘pleading out.’ ”); Fermo v. State, 370 So.2d 930 (Miss. 1979) (sentencing court cannot base sentence, either in whole or part, upon defendant's exercise of constitutional right to a jury trial). We hold the trial judge abused his discretion by considering the fact that appellant exercised his right to a jury trial. Accordingly, appellant is entitled to a resentencing hearing.

In Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999), the South Carolina Supreme Court found that Davis was entitled to post conviction relief based on trial counsel's failure to object when the judge considered Davis's exercise of his constitutional right to a jury trial in imposing sentence. As in Davis, the PCR judge in the present case correctly granted relief.

In State v. Brouwer, 346 S.C. 375, 395, 550 S.E.2d 915, 926 (Ct. App. 2001), the South Carolina Court of Appeals wrote:

A trial court may not impose a greater sentence on a defendant because the defendant exercised his constitutional right to stand trial rather than plead guilty. See Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Article III, Section 2, Clause 3 and the Sixth Amendment to the United States Constitution, along with Article I, Section 14 of the South Carolina Constitution, grant every criminal defendant the absolute right to plead not guilty and to be tried by a jury.

In the present case both the original and the second sentencing judge imposed a greater sentence on Appellant who exercised his constitutional right to stand trial.

In Castro v. State, 417 S.C. 77, 83–84, 789 S.E.2d 44, 47 (2016), a PCR case, the South Carolina Supreme Court wrote:


The PCR judge erred in concluding that, because the trial judge “articulated that [petitioner's] sentence was based on a number of factors,” petitioner failed to prove he was prejudiced by counsel's deficient performance. Rather, a trial judge abuses his or her discretion when he or she *considers* the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant. Thus, although evidence from the record of other, valid reasons for a sentence might aid an appellate court in determining whether the trial court improperly considered a defendant's decision to proceed to trial during sentencing, those other sentencing factors do not negate the abuse of discretion that occurs when one of the sentencing factors considered by the trial judge was the defendant's decision to proceed to trial. See Davis, *supra* (holding the trial judge abused his discretion by *considering* the fact that the defendant exercised his right to a jury trial in sentencing the defendant); Hazel, *supra* (same); State v. Follin, 352 S.C. 235, 257–58, 573 S.E.2d 812, 824 (Ct. App. 2002) (“We caution the Bench that a trial judge abuses his or her discretion in sentencing when the judge *considers* the fact that the defendant exercised the right to a jury trial.”) (emphasis added); see also State v. Brouwer, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) (remanding for a new sentencing hearing pursuant to Hazel, *supra*, stating, “Although the [trial judge] herein also stated it had never, and never would, ‘punish someone for exercising their right to a jury trial,’ we believe the mere disavowal of wrongful intent cannot remove the taint inherent in the [trial judge's] commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence.”). Accordingly, regardless of the fact that the trial judge considered the overwhelming evidence presented against petitioner, as well as his pending charges and immigration status, in sentencing petitioner, and, despite the fact that the trial judge stated he was not “punishing” petitioner for choosing to exercise his right to a jury trial, the trial judge unequivocally *considered* petitioner's decision to reject a plea offer and proceed to trial as a factor in sentencing petitioner. This was improper.

Castro v. State, 417 S.C. 77, 83–84, 789 S.E.2d 44, 47 (2016)

The original sentencing judge improperly considered the fact that Appellant elected to exercise his constitutional right to a jury trial when he imposed the twenty-eight (28) year sentences. The case was properly remanded for re-sentencing. The new sentencing judge, however, did not state his reason for only reducing the sentence by three years. As a result, the taint of the original judge's improper consideration was not removed from the new sentence. Appellant is entitled to a new sentencing hearing.

CONCLUSION

Based on the argument above, this Court should vacate the sentence imposed by Judge Keesley and remand the case for a new sentencing hearing.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of January, 2019.

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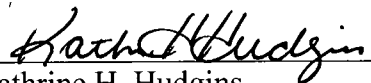
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Tyrone Quarles states:

1. She is 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 trial before Judge Doyet A. Early, which was held on May 14-15, 2013, 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 trial.

WHEREFORE, She asks the Court to relieve her as counsel for Michael Tyrone Quarles.

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 14th day of January, 2019.

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Honorable William P. Keesley, Circuit Court Judge

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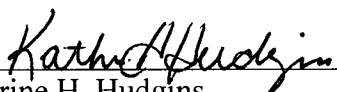
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and original sentencing sheets reflecting 28 year sentences;
- (2) May 14, 2013 Trial transcript;
- (3) Final Brief of Appellant 2015;
- (4) Final Brief of Respondent 2015;
- (5) Opinion – State v. Quarles, 2015-UP-317 (S.C.Ct.App. filed July 1, 2015);
- (6) Application for PCR – 2015-CP-02-01909;
- (7) Return and Motion for more Definite Statement;
- (8) Amended PCR Application;
- (9) May 25, 2016, PCR Transcript;
- (10) Order Granting PCR;
- (11) Motion to Reconsider pursuant to Rule 59(e);
- (12) Return to Respondent's Motion to Reconsider;
- (13) May 24, 2017, PCR Transcript;
- (14) Amended Order Granting PCR;
- (15) March 2, 2018 Sentencing Hearing Transcript;
- (16) New Sentencing Sheets reflecting 25 year sentences.

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

January 14, 2019


Kathrine H. Hudgins
Appellate Defender

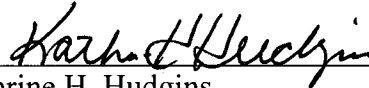
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ATTORNEY FOR APPELLANT

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."

January 14, 2019.



Kathrine H. Hudgins
Appellate Defender

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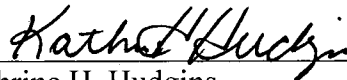
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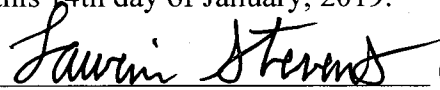
CERTIFICATE OF SERVICE

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 Michael Tyrone Quarles, 355492, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 14th day of January, 2019.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.