THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Court of General Sessions

Paul Burch, Circuit Court Judge

Case No.2012-210570

THE STATE

Respondent,

vs.

WILLIE RITTER

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The Trial Judge erred in denying Appellant's Motion to Vacate Guilty Plea where the plea was not knowingly and voluntarily given.

STATEMENT OF THE CASE

This action was filed formally on or about September 21, 2009 as a Motion to Vacate Guilty Plea and Motion to Reconsider, pursuant to SCRCrimP 29.

The matter was heard by motion before the Honorable Paul Burch on October 31, 2011. The Appellant made an argument that he was not fully informed when he entered his guilty plea and therefore it was not voluntary.

On March 5, 2012 the Honorable Paul Burch denied the relief requested by the Appellant.

Thereafter, Appellant filed a timely Notice of Appeal.

The Appellant was represented by Jan Strifling, of the Richland County Bar, at the plea hearing. Jan Strifling continued the representation of the Appellant at his sentencing hearing.

The Appellant was sentenced to a period of 20 years incarceration. Mr. Ritter appeals to this Court for the reasons contained in this brief.

This appeal follows.

STATEMENT OF THE FACTS

On July 20, 2009, the Appellant entered a guilty plea to the crime of homicide by child abuse. (R.pp. 8-36). While informing the Appellant of the potential sentence, the trial court advised, "[f]or that particular offense, the maximum possible penalty is up to life imprisonment with a minimum sentence of 20 years. **However, that is not what we term a mandatory minimum sentence.**" (emphasis added) (R. p.9). The court further clarified this statement. (R. p.9). The court stated, "we will have further discussion about that in a few minutes, but for right now I'm advising you of when I say it's not a mandatory minimum sentence, **that means that that minimum sentence portion of the statute can be suspended**, as I understand the law." (emphasis added) (R. pp.9-10).

Appellant's attorney, Jan Strifling, stated, "[s]o we—we also enter this plea, Your Honor, with the understanding that the Court, as you have stated, believes that the statute under which my client is pleading is a suspendible statute." (R.p.11). Appellant's attorney further stated, "[i]n other words, he's facing 20 to life, and Your Honor can give him a

suspended sentence, you, give him some committed sentence which you can suspend all or part of it." (R. p.11).

On September 21, 2009 a sentencing hearing was held before the Honorable Paul Burch. During the sentencing hearing several individuals spoke on the behalf of the Appellant. (R. pp.37-74). At the conclusion of the hearing, the trial court ordered that the Appellant be confined for a period of 20 years within the South Carolina Department of Corrections. (R. p.70).

On September 25, 2009, Appellant's attorney, Jan Strifling, filed a timely Motion to Reconsider. (R. p.93). The matter was taken before the court on October 31, 2012. (R.pp.75-92). Appellant was represented by new counsel, William B. von Herrmann. (R. p.77). At the hearing, Appellant also moved to Vacate the Plea. (R. p.78).

On March 5, 2012, the Honorable Paul Burch denied both the Motion to Reconsider and the Motion to Vacate the Plea. (R. p.1-7). Thereafter, a timely Notice of Appeal was filed by Appellant.

ARGUMENT

I. The Trial Court created reversible error when it denied the Appellant's Motion to Vacate his Guilty Plea.

The controlling issue in this case is whether the plea entered by the Appellant was knowingly and voluntarily given. The Supreme Court of the United States has held any plea taken must be made knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

The South Carolina Supreme Court has held, "[i]n order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea." *Roddy v. State*, 339 S.C. 29,34 (2000) (citing *Dover v. State*, 304 S.C. 433, (1991) (citing *State v. Hazel*, 287 S.C. 392 (1980). A plea is involuntary if the Judge does not tell the defendant of the maximum and mandatory minimum sentence. The Court has further held, "[a]lthough the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of the guilty plea." *Id.* (citing *State v. Lambert*, 266 S.C. 574 (1976).

"The test for determining the validity of a guilty plea is: (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases; and (2) whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." *Ray v. State*, 303 S.C. 374, 376 (1991)(citing *Hill v. Lockhart*, 474 U.S. 52 (1985).

Under current South Carolina law, "[a]fter conviction or plea for any offense, *except a crime punishable by death or life imprisonment*, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation." S.C. Code Ann. §24-21-410(2011)(emphasis added). The legislature clearly mandated that crimes which carry a possible life sentence cannot be suspended. *Id.*

The Appellant pled guilty to, and was sentenced under, SC Code Ann. §16-3-85 (A)(1)(B)(1)(2011). The sentencing range for this statute reads as follows, "[h]omicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse:(1) under subsection (A)(1) may be imprisoned for *life* but not less than a term of twenty years."

(emphasis added)

This Court has held, "[m]oreover, words should be given their plain and ordinary meaning, and we should not look for or try to impose another meaning." *State v. Johnson*, 343 S.C. 693, 695 (Ct.App.2001)(citing *State v. Smith*, 330 S.C. 237, 240 (Ct.App.1998).

As the South Carolina Supreme Court stated in *Roddy*, the Appellant did not enter into a voluntary plea because he did not have a full understanding of the consequences. As stated above, the Appellant believed his sentence could be suspended if so desired by the court. It was error by the court in this instance to inform Appellant of the possibility of a suspendible sentence which was not, in actuality, available to him. This false belief in the potential sentencing range induced the defendant to enter into a plea which he would not otherwise have entered into. The South Carolina Legislature has made clear that any sentence punishable by death or a life sentence could not be suspended. At the Appellant's age, a 20 year sentence equates, in all likelihood, to a life sentence.

In the Appellant's mind at the time of the plea, there was a real possibility of his receiving a suspended sentence. The

absence of that possibility negates his ability to knowingly and intelligently enter into the plea. The fact that the sentence is a "legal" sentence has no bearing on the subjective determination of the defendant to voluntarily and knowingly give up his right to a trial and enter a guilty plea. But for the incorrect information with regard to sentencing, the defendant would not have entered into the guilty plea.

During the plea, the Appellant was incorrectly advised by the trial court. Both the trial court and Appellant's attorney believed that his sentence could be suspended and advised the defendant of the same. Clearly, the defendant relied on the information provided to him by the trial court in his decision to go forward with the plea. At the same time, it is clear that the trial court was incorrect in his belief as to the sentencing range as the statute specifically excludes crimes in which the defendant can be sentenced to life in prison. As such, there was no possibility of defendant receiving a suspendible or even split sentence although the judge told him that he could. Again, voluntariness is subjective and in this case was based upon a false belief as to the potential sentencing range due to the judge's error.

Furthermore, as the Supreme Court of South Carolina stated in *Ray*, there are two questions that must be answered. First, was the Appellant's counsel at his plea hearing competent. In this case, he was not. The Appellant was advised by his counsel and the trial court that any sentence he received could be suspended. (R.pp.9-11). It was this belief which caused him to plead guilty. Second, but for the error, would the Appellant have pled guilty. In this case, Appellant would not have pled guilty. On the date of his plea, the Appellant advised the court he was 65 years old. Because the appellant believed his sentence could be suspended, he decided to plead guilty. If the Appellant believed he would receive a mandatory minimum of 20 years, he would never have pled guilty. As stated above, the Appellant was 65 years old at the time of sentencing. The sentence received by the Appellant equates, functionally, to a life sentence without the possibility of parole. The trial court recognized this fact when it stated, "Also, because of his health and age, I'm going to recommend specialized placement for him." (R. p.73).

The Appellant did not enter into a voluntary plea after

being made aware of all the consequences. Furthermore, the Appellant's counsel was ineffective. Counsel was incompetent when it failed to advise the Appellant that his sentence could not be suspended and this failure resulted in a plea of guilty that would not have occurred if the Appellant was aware of the full consequences of his plea.

The State argues that this matter should be brought in a post-conviction relief application and not on direct appeal. This is contrary to past rulings of the Supreme Court of South Carolina. The Supreme Court has held an error, which could be reviewed on direct appeal, should be brought forward at that time and not in an application for post-conviction relief. *Peeler v. State*, 283 S.E.2d 826 (S.C. 1981). In this instance, the error was committed by the trial court and compounded by Appellant's attorney's affirmation of that error. As the error was made by both trial judge and counsel, this appeal is proper.

The State next argues that this matter is not properly before this Court because no objection was made. While Mr. Ritter was entering his plea, counsel advised the trial court, "[s]o we—we also enter this plea, Your Honor, with the understanding that the Court, as you have stated, believes that

the statute under which my client is pleading is a suspendible statute." (R. p.11). After the trial court sentenced Mr. Ritter on September 21, 2009, Mr. Ritter's attorney filed a Motion to Reconsider on September 25, 2009. (R. p.93). The trial court listened to arguments based on this motion on October 31, 2012. (R.pp.75-92). Mr. Ritter advised the trial court that he was seeking a reduction in his sentence or asking for the court to vacate his sentence. (R. p.78). The State is incorrect in its contention that no objection was made. As the Supreme Court of South Carolina has held, the word objection is not even required to place the court on notice of error. *State v. Byers*, 710 S.E.2d 55, 59 (S.C. 2011). The Court stated, "[t]he rationale behind the requirement of a contemporaneous objection is to 'enable trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition.'" *Id.* at 58 (quoting *State v. Torrance*, 406 S.E.2d 315, 327 (S.C. 1991)).

Mr. Ritter timely made his objections in this case. (R. 93. Furthermore, Mr. Ritter is only required to place the trial court on notice of their error and allow them an opportunity to correct said error. In this case, Mr. Ritter placed the trial

court on notice and the trial court had ample opportunity to correct the error.

In this case, the trial court was advised that Mr. Ritter did not enter into his plea voluntarily and knowingly. The trial court, the State, and previous defense counsel along with the defendant all believed this sentence could be suspended. The false information as to the sentencing range provided to Defendant induced him into a plea which he would not have entered into had he been properly informed of the consequences of his plea. A plea cannot be voluntarily, knowingly and intelligently made where a defendant is not correctly informed of the potential consequences of the plea.

CONCLUSION

The Appellant hereby requests this Court reverse the Order of the Trial Court. Furthermore, the Appellant requests that the Court reverse his conviction and remand this matter consistent with the law and facts contained herein and all other relief or orders as this Court deems appropriate.

Respectfully Submitted,

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8/14, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 208.

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNT
Court of Common Pleas

Paul Burch, Circuit Court Judge

WILLIE RITTER Appellant,

vs.

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, William B. von Herrmann, certify that I have served the Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Spencer,Assistant Attorney General
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I further certify that all parties required by Rule to be served have been served.

This 14 day of Aug, 2013

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