STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Paul M. Burch, Circuit Court Judge

THE STATE,

Respondent,

vs.

WILLIE RITTER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The plea was not rendered involuntary where all parties were proceeding under the belief that a sentence for homicide by child abuse could be suspended when Appellant pled guilty in 2009 and Appellant was advised the conviction carried a sentence of twenty years' imprisonment to life imprisonment, and the trial court determined that a suspended sentence was not appropriate under the facts of the case; further, the issue is not preserved for review and the motion to set aside the guilty plea was not timely raised; any issues concerning ineffective assistance of counsel are not proper on direct review.

STATEMENT OF THE CASE

Appellant Ritter pled guilty to homicide by child abuse[1] on July 20, 2009 and was represented by Jan S. Strifling, Esquire. The Honorable Paul M. Burch accepted his guilty plea. Sentencing was deferred until September 21, 2009, at which time Judge Burch sentenced Ritter to twenty years' imprisonment. Ritter, through Attorney Strifling, filed a timely motion to reconsider the sentence. Subsequently, William B. Von Herrmann, Esquire was substituted as counsel. A hearing was held on October 31, 2011 before Judge Burch, where for the first time Ritter raised the issue of the plea being involuntary and moved to vacate the guilty plea. Judge Burch denied the motions by written order signed March 5, 2012.

Ritter appeals his guilty plea conviction and sentence and filed his brief. Respondent's brief follows.

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[1] S.C. Code §16-3-85 (A)(1).

ARGUMENT

The plea was not rendered involuntary where all parties were proceeding under the belief that a sentence for homicide by child abuse could be suspended when Appellant pled guilty in 2009 and Appellant was advised that the conviction carried a sentence of twenty years' imprisonment to life imprisonment; further, the issue is not preserved for review and the motion to set aside the guilty plea was not timely raised; any issues concerning ineffective assistance of counsel are not proper on direct review.

Ritter was sixty-five years old at the time of the guilty plea. He has a master's degree and is a retired Army colonel. Judge Burch advised Ritter during the guilty plea proceeding that the offense carries a minimum twenty years' imprisonment and up to life imprisonment, but further advised that a sentence could be suspended. Plea transcript dated July 20, 2009 (ROA.) pp. 10-12. Ritter advised Judge Burch that he had not been promised anything in exchange for his guilty plea and that he was pleading guilty of his own free will. ROA. pp. 14-15.

Ritter's counsel advised Judge Burch that the plea was being entered with the understanding that a sentence under the statute may be suspended but clarified there was no discussion "as to what, if any suspended sentence you give." ROA. p. 34, lines 12-14. Further, Ritter's counsel advised Judge Burch there was no agreement with the solicitor's office or the court. ROA. p. 34, lines 15-20.

Sentencing was deferred until September 21, 2009 to allow for a sentencing report to be prepared. In pronouncing his sentence, Judge Burch noted he was going to sentence Ritter to less time than he originally thought at the beginning of the hearing. Judge Burch then indicated he was following the prosecution's recommendation of the minimum sentence of twenty years' imprisonment. ROA. pp. 49-50.

During the motion to vacate the guilty plea, counsel argued the plea was involuntary because the sentence for a crime carrying a potential life sentence cannot be suspended. However, Ritter's counsel frankly noted the following:

> As the court is quite aware, I'm sure, and having been a prosecutor for quite some years and tried many of these cases, it was our position or at least an unchallenged position that we believe that the homicide by child abuse statute could be suspended in spite of the fact that it did carry the potential life in prison without parole.

ROA. p. 55, lines 8-13.

Judge Burch noted at the close of arguments that it was the understanding of most judges at that time that the sentence for Homicide by Child Abuse could be suspended. Further, Judge Burch aptly noted the following:

> But if I had suspended the sentence down somewhat – I don't think there's any question about that. The Department of Corrections would have gone along with it, whatever that particular sentence was, would probably not even be questioned here today.

ROA. p. 66, lines 15-19.

Under S.C. Code § 24-21-410, a judge may suspend the sentence for a conviction or plea to any offense "except a crime punishable by death or life imprisonment". The Supreme Court found that this express language prohibited a judge from suspending the sentence for first degree burglary in State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011), just a few months prior to the hearing to vacate the guilty plea.

Ritter claims that his plea was rendered involuntary based on erroneous sentencing information. First, this issue is not appropriate on direct appeal and should be brought, if at all, in an application for post-conviction relief (PCR)[2]. State v. McKinney,

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[2] Indeed, recognizing the requirement to prove deficient performance and

278 S.C. 107, 292 S.E.2d 598 (1982) (absent timely objection at plea proceeding, unknowing and involuntary nature of guilty plea can be attacked only through the more appropriate channel of post-conviction relief). See also, State v. Felder, 290 S.C. 521, 351 S.E.2d 852 (1986) (issue of whether counsel was ineffective is more appropriate for PCR and not on direct appeal).

Further, the issue is not preserved for review, as no objection was raised at the guilty plea proceeding. Indeed, Ritter's counsel advocated that the sentence could potentially be suspended and the prosecutor acquiesced. State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (absent contemporaneous objection, challenge to sentencing is not preserved for appellate review). Ritter should not be allowed to change his legal position merely because he did not obtain a more favorable result. Had the sentence been suspended, the State would have not been able to appeal as it made no effort to correct Judge Burch on the error of law. An issue conceded in trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000).

Additionally, this Court should not consider the motion, because as Judge Burch found in his order, the motion to vacate the guilty plea was not timely raised. State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (2011) (finding, where a motion to vacate the guilty plea was timely raised, but a motion for reconsideration was raised by amended motion three years after the sentence, the motion for reconsideration was not timely

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prejudice, Ritter alleges he would not have pled guilty had he known he was not eligible to receive a suspended sentence. These are facts that are not in the record and would need to be developed through testimony subject to cross-examination at the PCR hearing. Further testimony from plea counsel also would be developed. However, it is apparent counsel was truly effective in creating a situation where a suspended sentence was possible and would have been unchallenged had the plea court been swayed to find sufficient mitigating circumstances warranting a suspended sentence.

raised).

Judge Burch found in his order that his original sentence was appropriate and denied the motion to reconsider the sentence. Such a determination was within his discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

In the instant case, Ritter picked up the victim and other children from their neighborhoods and brought them to the daycare center he ran. The other children were brought into the daycare, but the victim was left behind in the van for seven hours and would ultimately die from cardiac arrest due to hyperthermia.[3] Ritter went back to the van to pick up more children and while driving, it was brought to Ritter's attention by an eight year-old that there was a baby, the victim, in the van. Ritter stopped the van, checked to see if the child was breathing, then instead of going to the hospital, went to pick up another child and went back to the daycare center. He attempted to cover up the death and make it appear as if the child died in the day care center by having another employee say they found the baby in the crib. By the time EMS and law enforcement arrived, Ritter left in the van to pick up more children. When he first was in contact with law enforcement, Ritter claimed the death was at the daycare and he was not at the premises when the death occurred. Ritter attempted to leave the premises again to do payroll. He also asked for a moment with his staff to calm them down, but in fact, Ritter told them to not talk to the police anymore. He finally admitted to leaving the child in the van. ROA. pp. 15-28.

This set of egregious facts easily supports the trial court's statutory minimum sentence and it is clear from the record that Judge Burch considered himself capable of

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[3] It was seventy-five degrees outside that day and that the core temperature in the van would have increased forty degrees after an hour. ROA. pp. 26-27.

suspending a sentence for homicide by child abuse, but that in the instant case, a suspended sentence was not appropriate. The conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 11, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Paul M. Burch, Circuit Court Judge

THE STATE, Respondent,

vs.

WILLIE RITTER, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, William B. Von Herrmann, Esquire, 216 Elm St., Conway, South Carolina, 29526.

I further certify that all parties required by Rule to be served have been served.

This 11th day of October, 2013

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