

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Dillon County

Howard P. King, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ISAIAH MARCUS BROWN,

APPELLANT

APPELLATE CASE NO. 2012-210406

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUE ON APPEAL

Whether the judge erred by refusing to reconsider appellant's sentence for murder, and lower his sentence from forty-five years to thirty years, where the state, after sentencing, had offered appellant a thirty-year sentence if he testified against his co-defendant in his future trial, but insisted the inequity of his disparate sentence not be changed unless he testified against the co-defendant since it was error to punish appellant for exercising his right to remain silent?

STATEMENT OF THE CASE

Appellant was indicted by the Dillon County Grand Jury for the offenses of murder, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. R. 63 – R. 70. Appellant appeared on August 8, 2011, before the Honorable Howard P. King. Appellant was represented by William Grove. Daniel Shipp was the assistant solicitor. Supp. Tr. p. 1. Appellant pled “straight up” to all four charges. Supp. Tr. 4, l. 18 – 12, l. 25.

Judge King sentenced appellant to forty-five years’ imprisonment for murder, thirty years concurrent for armed robbery, five years concurrent for possession of a weapon during the commission of a violent crime, and five years imprisonment for conspiracy. Supp. Tr. 33, l. 6 – 24.

Appellant appeared on March 7, 2012, before the Judge King for a hearing on his written motion to withdraw his guilty plea, and his oral motion for reconsideration of his sentence. Tr. 1. At the conclusion of the hearing, the judge refused to allow appellant to withdraw his guilty plea, and he also refused to reconsider appellant’s sentence. Tr. 25, l. 17 – 26, l. 23.

This appeal follows.

ARGUMENT

The judge erred by refusing to reconsider appellant's sentence for murder, and lower his sentence from forty-five years to thirty years, where the state, after sentencing, had offered appellant a thirty-year sentence if he testified against his co-defendant in his future trial, but insisted the inequity of his disparate sentence not be changed unless he testified against the co-defendant since it was error to punish appellant for exercising his right to remain silent

Relevant facts

At the guilty plea proceeding, the assistant solicitor maintained that appellant Isaiah Brown conspired with two other men, Mikal Bethea and Matthew Cade, to rob a drug dealer at the Dover Village Apartment. The plan was for Matthew Cade, who the drug dealer knew well, to knock on the drug dealer's apartment door. When the drug dealer answered the door, Bethea and appellant were then supposed to barge into the apartment. However, the drug dealer did not answer the door. Supp. Tr. 16, ll. 5 – 19.

At that point, the victim pulled into the apartment complex in a nice car "with rims on it." Bethea came up with an idea then to rob the victim in the car. The victim gave up his wallet, and Bethea ordered the victim to get out of his car. The victim refused and Bethea shot him twice, killing him. Supp. Tr. 16, l. 20 – 18, l. 12.

As seen, appellant received forty-five years' imprisonment. He was neither the triggerman nor the "mastermind" of the robbery. At the motion to reconsider hearing, defense counsel Grove noted that co-defendant Bethea did not make any statements to the police nor did he attempt to help them solve the crime. Yet, Bethea, the killer, received a sentence of fifteen years, where the strikingly less culpable appellant received a forty-five

year sentence for murder. Tr. 9, l. 7 – 11, l. 7. Grove argued based on “equity” that appellant’s disparate sentence should be reduced.

The assistant solicitor, Daniel argued that appellant’s sentence should not be reconsidered. He told the judge the authorities went to appellant before the Bethea trial and requested his cooperation by testifying against Bethea during his trial. If he would testify for the state, they would make a motion, based on his cooperation, and have his sentence reduced from forty-five years to thirty years. Tr. 15, l. 6 – 17.

Daniel informed the court that appellant refused to cooperate. He rejected the state’s offer of sentencing equity if he would testify against Bethea where the state had “some evidentiary problems with regard to Mr. Bethea’s case.” Tr. 15, l. 6 – 21, l. 23. The judge ruled that appellant had the opportunity to have his sentence reconsidered or reduced to thirty years by cooperating with the state and testifying against Bethea. However, because appellant refused to cooperate with the state by testifying, the judge ruled he was denying the motion to reconsider appellant’s forty-five year prison sentence. Tr. 22, l. 13 – 26, l. 23.

Discussion:

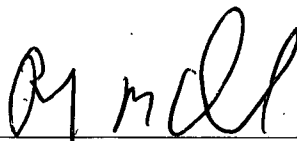
In Minnesota v. Murphy, 465 U.S. 420 (1984), the Supreme Court held, in the context of a probation revocation hearing, that a state may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself. It is elementary that a criminal defendant has the right to remain silent and using that constitutional right against him is impermissible. See, State v. Williams, 399 S.C. 281, 731 S.E.2d 338 (Ct.App. 2012). See, also, State v. Hill, 362 S.C. 360, 675 S.E.2d 764 (Ct.App. 2009).

Here, it should be apparent that there was a sentencing disparity where the less culpable appellant received forty five years imprisonment for murder under the theory of accomplice liability where the triggerman, Bethea, was sentenced to only fifteen years imprisonment. Tr. 9, l. 19 – 10, l. 3. Appellant's submission to this Court is straightforward – that his request for sentencing reconsideration should have been decided on its merits and not on the basis that he refused to testify against his co-defendant Bethea. Respectfully, the inequities of the motion for reconsideration were impermissibly lost upon the sentencing judge based on the state's argument that appellant's failure to testify for the state forfeited any right to reconsideration of his sentence. That ruling was a penalty, and it is impermissible punishment in the denial of a legitimate post-trial motion.

CONCLUSION

By reason of the foregoing arguments, the denial of appellant's motion for reconsideration should be reversed, and this case remanded for another reconsideration hearing in the Dillon County Court of General Sessions consistent with this Court's opinion.

Respectfully submitted,

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 3rd day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ISAAH MARCUS BROWN,

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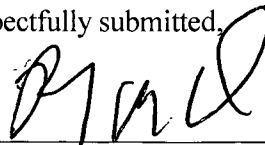
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Isaiah Marcus Brown 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 before Judge Howard P. King, which was held on August 8, 2012, and his sentencing hearing held on March 7, 2012, 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 Isaiah Marcus Brown.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of October, 2013.

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IN THE COURT OF APPEALS

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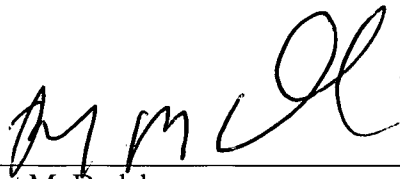
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Guilty Plea Hearing Transcript (August 8, 2011)
- (3) Entire Motion Hearing Transcript (March 7, 2012)

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

October 3rd, 2013



Robert M. Dudek
Chief Appellate Defender

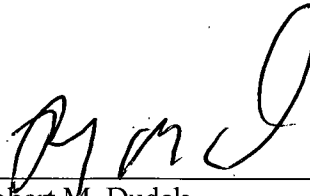
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 3, 2013

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

Robert M. Dudek
Chief Appellate Defender

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THE STATE,

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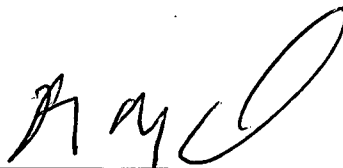
V.

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CERTIFICATE OF SERVICE

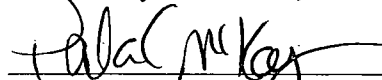
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Isaiah Marcus Brown, #347241, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 3rd day of October, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of October, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.