

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY CHARLES MALMISTER (2),

APPELLANT

APPELLATE CASE NO. 2018-000333

ANDERS BRIEF OF APPELLANT

VICTOR R. SEEGER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the reconsideration court erred when it denied Appellant's motion to reconsider his sentence, without a hearing, where the sentence imposed on the Appellant violated the Eighth Amendment in that such sentence was grossly disproportionate to the crimes he committed and disregarded his assistance to the state in convicting a co-defendant?

STATEMENT OF THE CASE

During the February 2017 term, the Anderson County Grand Jury indicted Appellant for two counts of murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. 58 – 66.

On April 25, 2017, Appellant pled guilty to armed robbery and two counts of voluntary manslaughter before the Honorable Donald B. Hocker. R. 1; R. 3, ll. 11 – 19. William E. Phillips represented Appellant. R. 1. Lucas C. Marchant represented the state. Id. Appellant's sentencing was deferred to a later date because Appellant agreed to testify against a co-defendant in a subsequent trial. R. 3, ll. 20 – 23. Judge Hocker accepted Appellant's guilty plea as freely, voluntarily, and intelligently made. R. 19, ll. 8 – 16.

Appellant's sentencing hearing was held on May 16, 2017 in front of the Honorable R. Scott Sprouse. R. 22. William E. Phillips represented Appellant. Id. Lucas C. Marchant represented the state. Id. Judge R. Scott Sprouse sentenced Appellant to twenty-five years' imprisonment on both counts of voluntary manslaughter and twenty years' imprisonment for armed robbery, to run concurrent. R. 49, ll. 5 – 10.

On May 22, 2017, Appellant filed a Motion to Reconsider his sentence. R. 51. On February 6, 2018 Judge Sprouse denied Appellant's Motion to Reconsider on the filings. R. 52. Appellant filed a notice of appeal which stated the denial of his Motion to Reconsider on the was in error because, "the sentence imposed on the Appellant violates the Eighth Amendment to the U.S. Constitution in that such sentence was not proportionate to the crimes committed." R. 53 – 55.

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 reconsideration court erred when it denied Appellant's motion to reconsider his sentence, without a hearing, where the sentence imposed on the Appellant violated the Eighth Amendment in that such sentence was grossly disproportionate to the crimes he committed and disregarded his assistance to the state in convicting a co-defendant.

Relevant Facts

The state alleged the facts as follows: on January 9, 2016, Appellant drove he and his co-defendants drove to, the decedent, Justin Ray Williams' residence. R. 9, ll. 14 – 20. A co-defendant, Tabitha Roberts, called the decedent to set up a methamphetamine deal. R. 9, l. 25 – 10, l. 7.

When they arrived at the decedent's residence, Roberts went into the residence alone for a few moments. R. 10, ll. 9 – 11. Then Casey Wadell, another co-defendant and the leader of the group, told Appellant and the other co-defendants, "All right, fellows, let's go." R. 10, ll. 11 – 12.

They exited the vehicle and Wadell, armed with an assault rifle, opened the door to the residence. Wadell told the decedent to, "give it up." R. 10, ll. 13 – 19. Decedent, who also had a fire arm, shot one shot at Wadell hitting him in the head and killing him. R. 10, ll. 20 – 23. After that shot was fired, a third co-defendant, Randy Simpson entered the residence armed with a firearm, and shot and killed Williams. R. 10, l. 23 – 11, l. 3.

Appellant, Roberts, and a third co-defendant, Brandon Scott Davis, pled guilty and agreed to testify against Randy Simpson. R. 11, l. 18 – 12, l. 6. Judge Hocker accepted Appellant's guilty plea, but sentencing was deferred until after Simpson's trial. R. 19, ll. 8 – 16.

Appellant's sentencing hearing was held on May 16, 2017 because Simpson decided to plead guilty the day prior. R. 22. Judge Sprouse was aware that Appellant and his co-defendants were going to testify against Simpson. R. 24, ll. 9 – 13. Judge Sprouse asked the solicitor if the information Appellant provided the state was useful in Simpson's case, to which the solicitor responded, "absolutely." R. 32, ll. 14 – 17. Judge Sprouse further inquired if Appellant and his co-defendants were necessary witnesses that the state needed if Simpson's case went to trial, and the solicitor responded in the affirmative. R. 32, ll. 18 – 21.

In spite of the aid that Appellant provided the state in Simpson's case, the sentencing court sentenced Appellant to twenty-five years' imprisonment on both counts of voluntary manslaughter and twenty years' imprisonment for armed robbery. R. 49, ll. 5 – 10. The sentencing court disregarded Appellant's aid to the state in the case against Simpson, such that Appellant's sentence was disproportionate to the crimes committed which violated the Eighth Amendment to the United States Constitution.

Discussion

The Eighth Amendment prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277, 284 (1983). Appellant's sentence of twenty-five years' imprisonment was disproportionate to the crime committed because the sentencing court did not properly take into account Appellant's cooperation with, and aid to, the state's case against Simpson.

The preeminent case recognizing the "proportionality principle," was in Weems v. United States, 217 U.S. 349 (1910) where the defendant was convicted of falsifying public document and sentenced to fifteen years of, "cadena temporal," or hard labor in chains, and to permanent

civil penalties. Id. at 367. The United States Supreme Court held that punishment was cruel and unusual because it was not graduated and proportioned to the offense. Id.

In State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948), the South Carolina Supreme Court held that Kimbrough's sentence of thirty years' imprisonment for burglary was "manifestly too severe," and violated Kimbrough's Constitutional rights against cruel and unusual punishment. Id. at 357, 46 S.E.2d at 277. The jury found Kimbrough guilty of burglary with a recommendation to mercy. Id. at 352, 46 S.E.2d at 275.

The Kimbrough Court stated, "everyone concedes that burglary is one of the worst crimes and the offender should be severely punished, but still it, like every other crime, has its grades of aggravation and enormity... [however] upon the facts heretofore reviewed... show no particular circumstances of aggravation." Id. at 356, 46 S.E.2d at 277. Evidenced by the recommendation of mercy, the jury did not think sentencing Kimbrough to life in prison was proper. Id. at 356, 46 S.E.2d at 277. Therefore, because the judge imposed a term that exceeded the, "ordinary expectancy of life," the sentence of thirty years' imprisonment was unconstitutional. Id. at 355, 46 S.E.2d at 276.

In State v. Blackmon, 260 N.C. 352 (1963) the North Carolina Supreme Court held that a sentence for possession of burglary tools violated the North Carolina Constitution's prohibition against cruel and unusual punishment because the sentence was disproportionately severe compared to the offense committed. Id. at 357. The sentence for possession of burglary tools at the time of the conviction was between twenty- and thirty-years' imprisonment. Id. at 352. The North Carolina Supreme Court held that although the legislature passed a statute that allowed for the trial judge to have discretion over the sentence imposed, the legislature could not have intended to allow a defendant convicted of possession of burglary tools to be sentenced to, "three

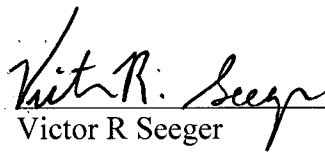
times as long as could be legally imposed for the actual commission of the crime of house breaking,” which carried a maximum sentence of ten years’ imprisonment. Id. at 357. Therefore, the sentence violated the state Constitution’s prohibition on cruel and unusual punishment.

Appellant’s sentence was disproportionate to the crime he committed, in light of the cooperation with the state and the valuable information he provided in their conviction of Randy Simpson. The solicitor at his sentencing hearing stated the information that Appellant provided was “absolutely useful.” R. 32, ll. 14 – 17. Most importantly the solicitor stated that Appellant’s cooperation was “necessary” to Randy Simpson’s conviction. R. 32, ll. 18 – 21.

Therefore, the sentencing court disproportionately sentenced Appellant to twenty-five years’ imprisonment.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests that this Court vacate his guilty plea and remand his case for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of April, 2019.

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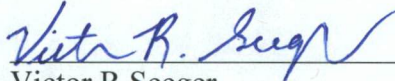
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Wesley Charles Malmister states:

1. He is 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 trial before Judge R. Scott Sprouse, which was held on April 25, 2017 and May 16, 2017, 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 Wesley Charles Malmister.

Respectfully Submitted,



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 3rd day of April, 2019.

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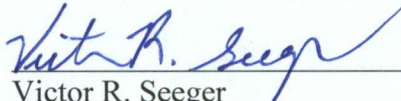
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments;
- (2) Plea hearing transcript dated April 25, 2017;
- (3) Sentencing hearing transcript dated May 16, 2017;
- (4) Motion to Reconsider;
- (5) Order Denying Defendant's Motion for Reconsideration;
- (6) Notice of Appeal;
- (7) Sentence Sheets.

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

April 3, 2019.


Victor R. Seeger
Appellate Defender

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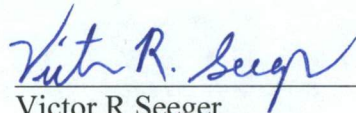
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CERTIFICATE OF COUNSEL

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."

April 3, 2019.



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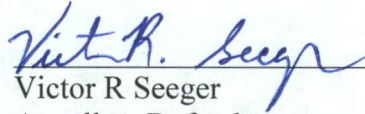
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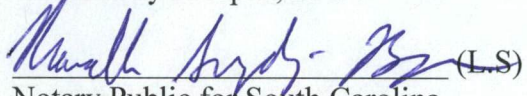
APPELLANT

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 Wesley Charles Malmister, 351960, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of April, 2019.


Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of April, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028