

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ORIN JERRELL KEMP,

APPELLANT

APPELLATE CASE NO. 2018-000161

AMENDED INITIAL BRIEF OF APPELLANT

VICTOR R. SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the plea court abused its discretion when it refused to order an amount of time served credit, since the court and not the Department of Corrections had the obligation to “award” that credit?

STATEMENT OF THE CASE

In 2016 the Pickens County Grand Jury indicted Appellant for Petit Larceny, \$2,000 or less, and Breaking and Entering a Motor Vehicle.¹ R. *.

On January 24, 2018, Appellant pled guilty to petit larceny, breaking and entering into a motor vehicle, possession of burglary tools, and financial transaction card theft before the Honorable Edward W. Miller. Tr. 1; Tr. 3, ll. 17 – 22. Christopher Brumback represented Appellant. Tr. 1. Britni McCall represented the state. Id.

Judge Miller accepted Appellant's guilty plea. Tr. 12, ll. 2 – 14. As part of a negotiated agreement between Appellant and the state, Appellant was supposed to “receive credit for all time served between August 3, 2015 and September 30, 2016, as well as the time Appellant spent in pretrial detention in Pickens County leading up to his January 24, 2018 guilty plea, a total of Seven Hundred Six (706) days... [and] Appellant would agree to an additional Ninety (90) days in the Stockade in Pickens County.” R.*.

The state appeared to argue against the terms of the agreed upon plea negotiations when the solicitor stated that she did not believe Appellant was entitled to the full time served credit contemplated by the agreement between Appellant and the state. Tr. 23, ll. 2 – 14.

Judge Miller stated he was, “not going along with the recommendation.”² Tr. 21, ll. 17 – 18. Plea counsel explained why and how the state and Appellant came to their agreement and requested the judge, “go along with the deal – the offer that has been negotiated with the state.” Tr. 21, l. 25 – 22, l. 15; Tr. 22, ll. 20 – 23.

¹ Appellant waived presentment of the two additional charges of Financial Transaction Card Theft and Possession of Burglary Tools. R. *.

² There was nothing put on the record at the guilty plea that shows the agreement between Appellant and the state was a “recommendation.” However, during the plea hearing, plea counsel repeatedly referred to the state and Appellant's “negotiations” and that the plea was a negotiated offer from the state. Tr. 22, ll. 20 – 23.

The plea court declined plea counsel's request and sentenced Appellant to, "Ten years provided upon the service of five years, the balance is suspended with three years' probation." Tr. 27, ll. 6 – 14.

During sentencing, regarding time served credit, the plea court stated, "I don't know what he's entitled to, but I'll let the Department of Corrections figure it out." Tr. 27, ll. 6 – 13.

This appeal follows.

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). “The failure to exercise discretion, however, is itself an abuse of discretion.” State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) (citing Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)).

ARGUMENT

The plea court abused its discretion when it refused to order an amount of time served credit, since the court and not the Department of Corrections had the obligation to “award” that credit.

Relevant Facts

The facts alleged by the state are as follows. On July 30, 2015, Appellant stole Melissa Bland’s purse and all of its contents. Tr. 10, ll. 8 – 13. Also, on July 30, 2015, Appellant broke into a “Dodge Nitro” belonging to Melissa Bland. Tr. 10, l. 23 – 11, l. 2.

On January 21, 2017, Appellant unlawfully took a Discover credit card belonging to Audre Acroday. Tr. 11, ll. 11 – 15.

On April 17, 2017, Appellant possessed a “flathead screwdriver” or other implements used in burglaries under circumstances of an attempt to so use them. Tr. 11, ll. 5 – 10.

Appellant pled guilty under the impression he and the state negotiated his sentence. Tr. 21, l. 25 – 22, l. 15. Plea counsel explained the agreement to the plea court in detail.

“There were a lot of - - various legal issues which I think resulted in the state and my office negotiating what we both believe to be an appropriate deal. *Particularly, based on the extensive time served that [Appellant] has served already. The no credit is shown because that was negotiated as part of the offer where he would not get credit for 700 plus something days that he has served. And that is why we had negotiated a deal where by he would go to the stockade, with no credit for time served, and serve 90 days there.*”

Id. The court asked plea counsel for an exact number of days of time served Appellant was owed and plea counsel responded, “706 days.” Tr. 22, l. 24 – 23, l. 1.

After the plea court declared for a second time it was “not going along with the recommendation,” the plea court entirely abdicated its responsibility, as seen below, to

dictate to the department of corrections the amount of time served credit that should be given. Tr. 27, ll. 6 – 9.

Discussion

“The central question about [a] plea agreement is what are its terms, which is a legal question.” State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). “A constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” Santobello v. New York, 404 U.S. 257, 262 (1971). (see also: United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993) holding that plea bargains rest on contractual principles, and each party should receive the benefit of its bargain.)³

Appellant’s case was an intricate one. Tr. 25, ll. 17 – 18. A total of nineteen charges were being resolved at his guilty plea. Tr. 23, ll. 2 – 4. Plea counsel put the plea court on notice that Appellant’s time served credit calculation was complicated. Tr. 22, ll. 1 – 8. The state opined that the issue of time served credit, “gets confusing.” Tr. 23, ll. 2 – 4. Appellant had time served credit of varying amounts built up from incarceration in three different facilities. Tr. 23, ll. 4 – 9.

In Appellant’s case there were “significant negotiations” between Appellant and the state before they came to an agreement. Tr. 22, ll. 3 – 6; Tr. 25, ll. 18 – 21. Plea counsel explained to the Court that Appellant was entitled to 706 days of time served credit. Tr. 22, l. 24 – 23, l. 1. However, plea counsel further explained that, “the no credit is shown because that was negotiated as part of the offer where [Appellant] would not get credit for 700 plus something

³ Other jurisdictions have ruled that a court must decide whether the government’s conduct is consistent with the parties’ reasonable understanding of the agreement. See: United States v. Roman, 121 F.3d 136 (3rd Cir. 1997); United States v. Chavful, 781 F.3d 758 (5th Cir. 2015); United States v. Taylor, 77 F.3d 368 (11th Cir. 1996).

days that he served and that's why we had negotiated a deal whereby [Appellant] would go to the stockade, with no credit for time served, and serve 90 days there." Tr. 22, ll. 8 – 14.

Therefore, it was Appellant's understanding of the agreement with the state that he would forego his 706 days of time served credit in exchange for the 90-day sentence in the "stockade" in Pickens County. Thus, when the plea court declined to sentence Appellant to the "stockade," it was incumbent upon the plea court to exercise its discretion and determine the amount of time served credit to which Appellant was entitled.

The plea court failed to exercise its discretion over Appellant's time served credit after refusing to accept the state's recommended sentence that waived Appellant's 706 days of time served credit in exchange for a 90-day sentence in the "stockade" in Pickens County. Tr. 22, ll. 8 – 14; Tr. 27, ll. 7 – 9. The plea court stated, "I don't know what he's entitled to but *I'll let the Department of Corrections figure it out.*" *Id.* (emphasis added) "The failure to exercise discretion... is itself an abuse of discretion." *State v. Mansfield*, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) (citing *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)).

In *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981), the South Carolina Supreme Court held that a trial judge who does not exercise discretion regarding a motion to modify or vacate a sentence, abused their discretion. Smith was convicted in his absence for a third offense of driving under the influence. *Smith*, at 496, 280 S.E.2d at 201. On a motion to modify or vacate Smith's sentence, the trial judge in *Smith* ruled that he had no jurisdiction to change the sentence. *Id.* at 497, 280 S.E.2d at 201. The Supreme Court held that the authority to change a sentence rests in the hands of the sentencing judge, within the exercise of discretion, and that the

trial judge in Smith abused that discretion when he failed to exercise it. Id. at 498, 280 S.E.2d at 202.

In State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), Hughes was indicted for two counts of criminal sexual conduct with a minor in the second degree. During the trial, an expert in child sex abuse treatment testified that the victim's behavior was consistent with sexual abuse. Hughes, at 341, 552 S.E.2d at 36. However, on cross examination Hughes asked the expert if she reviewed her notes to refresh her memory prior to testifying. Id. After the expert responded in the affirmative, Hughes asked to inspect her notes. Id. The trial court refused to allow inspection of the expert's notes because they were in Columbia and the trial was taking place in a different county, Orangeburg. Id. The jury convicted Hughes as indicted. Id.

This Court held that the trial court in Hughes erred when it refused to allow Hughes to access the expert's notes under Rule 612, SCRE. Hughes, at 343 – 344, 552 S.E.2d at 37. The trial court believed it could not order the production of the expert's notes because they were not located inside the courtroom. Id. at 343, 552 S.E.2d at 37. This Court held that the trial court erred because, “[U]nder the plain language of [Rule 612, SCRE] the trial court has the discretion to allow or refuse examination by an adverse party of writings used by a witness prior to trial to refresh her memory.” Id.; Rule 612, SCRE. The Hughes Court held that the trial judge abused his discretion when “his ruling revealed that no discretion was, in fact, exercised.” Id. at 342, 552 S.E.2d at 342 (quoting Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987)).

Here, the plea court abused its discretion because it failed to exercise discretion. Tr. 27, ll. 7– 9. Plea counsel accurately and thoroughly described the negotiations that the state and Appellant entered into, that induced Appellant to plead guilty, to the plea court. Tr. 22, ll. 1 – 23.

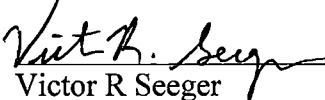
Plea counsel explained the complicated nature of the negotiations and of the calculation of Appellant's time served credit. Id.

The Department of Corrections does not, "figure it out" in regards to how much time served credit Appellant would receive. Tr. 27, ll. 7 – 9. SCDC is forced to go by the statements from the trial courts or the county detention centers' records. Since, Appellant's time served credit was accumulated in various different facilities, collaborating to accurately determine Appellant's time served credit is an inherently complicated matter.

Thus, the plea court had the duty to order a specific amount of time served when requested to do so. As in Hughes, the plea court's ruling revealed that no discretion was exercised. The plea court had all the information necessary to make a determination in front of it. Plea counsel provided the exact amount of time served credit that Appellant was entitled to and the reasons behind that calculation. Tr. 22, l. 1 – 23; 23, l. 16 – 24, l. 2. The state disputed certain points of time served credit that Appellant should receive, and also mentioned that the time served issue "gets confusing." Tr. 23, ll. 2 – 15. This elaborate discussion of the time served issue at the plea hearing presented the plea court with a detailed and reasoned analysis from both sides. This put the plea court in the best position to determine the calculation of time credit for Appellant. Therefore, trial court failed in its duty to exercise its discretion, and Appellant should be entitled to relief.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court award him credit for the full amount of time served he has accumulated, 706 days; or in the alternative, remand Appellant's case for a hearing to determine how much time served credit Appellant deserves.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

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THE STATE,

RESPONDENT,

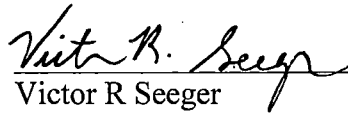
v.

ORIN JERRELL KEMP,

APPELLANT

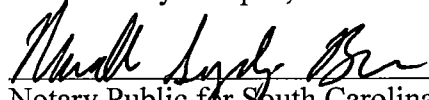
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial 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 Initial Brief of Appellant and Designation of Matter have been served on Orin Jerrell Kemp, #281528, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 12th day of April, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of April, 2019.

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



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 12, 2019

RECEIVED
APR 12 2019
SC Court of Appeals

Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State v. Orin Jerrell Kemp, Appellate Case No. 2018-000161

Dear Ms. Kitchings:

Attached is the Amended Initial Brief of Appellant for Orin Jerrell Kemp. This Amended Initial Brief was filed pursuant to the Order issued by this Court on March 14, 2019 granting the state's motion to strike the "Email from Christine Bigelow to Christopher Brumback." The Amended Initial Brief does not contain any reference to the stricken email, nor will the email be included in the record on appeal.

Please contact me if you have any questions.

Sincerely,

Victor R Seeger
Appellate Defender

VRS/csb