

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

MAY 03 2019

S.C. SUPREME COURT

Honorable J. Mark Hayes, II, Circuit Court Judge

App. Case No.: 2018-0266

MICHAEL C. KENNEDY,

RESPONDENT,

V.

THE STATE,

PETITIONER.

BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

WHETHER THE LOWER COURT'S RECONSIDERATION OF RESPONDENT'S SENTENCE AMOUNTED TO AN ABUSE OF DISCRETION.

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Barnwell County Clerk of Court. Respondent was indicted during the May 2007 term of the Barnwell County Grand Jury for Armed Robbery Degree (2007-GS-06-0144) and Assault and Battery with Intent to Kill (ABWIK) (2007-GS-06-0145).

On May 7, 2007, Respondent appeared in front of the Honorable Thomas A. Russo for a bond reduction hearing. Respondent was represented by Franchot A. Brown, Esquire. Judge Russo denied Respondent's request for bond reduction.

Later the same day, Respondent appeared in front of the Honorable Thomas A. Russo and entered a plea as indicted. Respondent was sentenced to a term of thirty years for armed robbery and a consecutive term of twenty years, suspended to a probation term of three years following the service of ninety days, for ABWIK.

Respondent filed for reconsideration, and a reconsideration hearing was held on January 26, 2007. At the conclusion of the hearing, Judge Russo denied Respondent's request for reconsideration.

Thereafter, a timely Notice of Appeal was filed, and the appeal was perfected by M. Celia Robinson, Esquire, of the South Carolina Office of Appellate Defense. After the filing of an Anders brief, the South Carolina Court of Appeals dismissed the appeal by Order dated January 25, 2011. The Remittitur was issued on February 10, 2011.

On February 22, 2011, Respondent filed an Application for Post Conviction Relief in Barnwell County (2011-CP-06-0088). Petitioner filed a Return on August 4, 2011. On July 8, 2013, Respondent appeared in front of the Honorable R. Ferrell Cothran, Jr. for an evidentiary

hearing. Respondent was represented by Melissa J. Armstrong, Esquire. Respondent testified, along with Franchot A. Brown, Esquire. By written order filed August 23, 2013, Judge Cothran denied and dismissed the Application.

A timely Notice of Appeal was filed. The appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense. A Petition for Writ of Certiorari was filed on September 10, 2014. Petitioner filed a Return on November 26, 2014. By Order dated January 22, 2015, the South Carolina Supreme Court held: "We grant the petition, dispense with further briefing, reverse the order denying the PCR Application, and grant petitioner a new sentencing hearing." App. p. 146.

Following the issuance of the Order, a hearing was held in front of the Honorable Thomas A. Russo on May 14, 2015 in Saluda County. Respondent was present and represented by Franchot A. Brown, Esquire. At the conclusion of the hearing, Judge Russo ordered Respondent's sentences were to be run concurrently, removing the term of probation and suspended sentence.

Respondent filed an Application for Post Conviction Relief on May 16, 2016. On June 8, 2017, Respondent, through counsel, submitted an Amendment to Application for Post Conviction Relief, which was made to clarify his Application, and alleged as follows:

1. Applicant was denied the relief granted by the South Carolina Supreme Court, "a new sentencing hearing," when prior plea counsel represented Applicant and the Honorable Thomas A. Russo resided over Applicant's mere resentencing, which failed to cure the bias that tainted the prior sentencing hearing.
2. Ineffective assistance of resentencing hearing counsel (Franchot Brown, Esquire) for failing to address the conflict that resulted from Applicant successfully getting PCR relief from his prior representation, failing to prepare with Applicant prior to his resentencing hearing, and failing to make any meaningful argument on Applicant's behalf.

The State filed a Return and Partial Motion to Dismiss on August 31, 2007. In response, Applicant filed an additional Amendment to Application for Post Conviction Relief on September 8, 2017, which stated:

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations:

1. Applicant was denied effective assistance of counsel and a new sentencing hearing as ordered by the South Carolina Supreme Court when prior plea counsel represented Applicant and the Honorable Thomas A. Russo resided over Applicant's mere resentencing, which failed to cure the issue raised on appeal that resulted in the order for a new sentencing hearing.¹
2. Ineffective assistance of resentencing hearing counsel (Franchot Brown, Esquire) for failing to address the conflict that resulted from Applicant successfully getting PCR relief from his prior representation, failing to prepare with Applicant prior to his resentencing hearing, failing to make meaningful argument on Applicant's behalf, and failure to file an appeal.

An evidentiary hearing was conducted on September 22, 2017 in front of the Honorable J. Mark Hayes, II, at the Aiken County Courthouse. Respondent was present and represented by Tricia A. Blanchette, Esquire. Petitioner was represented by Julie A. Coleman, Esquire. Respondent testified, and his counsel also called Franchot A. Brown, Esquire, to the stand. The lower court had before him a copy of the filings from the underlying Application, Respondent's SCDC records, the transcript from the May 14, 2015 hearing, and the following records from Appellate Case No. 2013-002334: the Petition for Writ of Certiorari, Return, Appendix,

¹ Issue raised on PCR appeal: Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at all three of petitioner's court proceedings and acted in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

Supplemental Appendix and Order of the South Carolina Supreme Court dated January 22, 2015.

After hearing argument from both sides, Judge Hayes took the matter under advisement.

On October 25, 2017, Judge Hayes issued an Order Granting Application for Post Conviction Relief, which was filed on November 3, 2017. Thereafter, Petitioner filed a Motion Pursuant to Rule 59(e), SCRPC, on November 27, 2017. At the lower court's request, Respondent filed a response on January 3, 2018. Judge Hayes issued an Order denying Petitioner's motion on January 22, 2018, which was filed on February 5, 2018.

On February 21, 2018, Petitioner filed a Notice of Intent to Appeal. On April 30, 2018, Tricia A. Blanchette moved for substitution and was substituted in as counsel via Order of this Court dated June 12, 2018. On October 17, 2018, the Petition for Writ of Certiorari and Appendix were filed. On October 25, 2018, a Motion Regarding Cross-Appeal was filed, and an Order granting Respondent's Motion was issued on January 11, 2019. On February 12, 2019, Petitioner filed a Supplemental Appendix. On April 4, 2019, Petitioner filed a Second Supplemental Appendix, from which this Brief and a Return to Petition for Writ of Certiorari follow.

ARGUMENT

- I. The lower court's reconsideration of Respondent's sentence amounted to an abuse of discretion.

In State v. Hicks, 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008), this Court noted that the authority to change a sentence rests exclusively within the discretion of the trial court, and the trial court's ruling will not be disturbed absent an abuse of discretion. See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202, (1981), State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law or when it is grounded in factual conclusions without evidentiary support. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Here, the lower court's decision at the hearing held on May 14, 2015 amounted to an abuse of discretion since he erroneously relied upon the prejudicial and inflammatory remarks contained in the transcripts from the prior proceedings that caused this Court to order a "new sentencing hearing." App. p. 146. The lower court's abuse of discretion denied Respondent the new sentencing hearing ordered by this Court and denied him fundamental due process.

In State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001), Judge Anderson, in dissent, addressed the goals and objectives of sentencing and he explained that the State has a legitimate interest in encouraging the entry of guilty pleas. Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492 (1978), Gajdos v. State, 462 N.E.2d 1017 (Ind. 1984). A defendant who enters a guilty plea has extended a substantial benefit to the State and deserves to have a substantial benefit extended to him in return. Gajdos, 462 N.E.2d at 1025.

The United States Supreme Court has held a State may encourage a guilty plea by offering substantial benefits in return for the plea. Corbitt, 439 U.S. at 219, 99 S. Ct. at 497. The plea may obtain for the defendant not only the possibility or certainty of a lesser penalty than the

sentence that could be imposed after a trial and a verdict of guilty but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury. Id. at 219-20, 99 S. Ct. at 497-98. It is well established that a trial court has broad discretion in imposing a sentence within statutory limits and has an obligation to consider information material to punishment. Brooks v. State, 325 S.C. 269, 481 S.E.2d 712 (1997), Hayden v. State, 283 S.C. 121, 322 S.E.2d 14 (1984).

At the beginning of the hearing held on May 14, 2015, the lower court explained his understanding of the proceeding, as follows: “The Supreme Court overturned the denial of the post-conviction relief petition and sent the case back to this court for another sentencing hearing.” App. p. 152, lns. 1-4. Before revising Respondent’s sentence by removing the suspended probationary term and merely running the sentences concurrently, the lower court made it clear that he had relied upon the transcript of the prior proceedings that this Court reviewed and found required a new sentencing hearing. The lower court stated:

And so – and, again, I’m going to go back. I read the transcript. I read it twice. I went over and I heard everything from both the State and the victims as well as from the defense. And, there’s nothing in that record that causes me to question why I sentenced as I did. There was a passionate presentation of aggravating circumstances from the Plaintiffs – not the Plaintiffs, the victims. There was a passionate recitation of mitigation on behalf of the defense. Both sides, I heard both sides completely and fully.

...So I have reconsidered the matter.

App. p. 162, lns. 14-25, p. 163, ln. 22.

Following the submission of the Petition for Writ of Certiorari (hereinafter “Petition) and Return, this Court ordered a new sentencing hearing. By way of the Petition, the following issue was raised:

Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at all three of petitioner’s court proceedings and acted

in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

App. p. 126.

As was argued in the Petition, Circuit Court Judge Rodney Peebles (hereinafter "Judge Peebles") was present and actively involved at Respondent's bond reduction hearing, plea proceeding and resentencing hearing in front of the Honorable Thomas A. Russo. At the bond reduction hearing, Judge Peebles seemed to take over the proceeding by questioning the police officer before strongly voicing his objection to the request for a lower bond. App. p. 12 - 16. The hearing ended with the reduction being denied and Judge Peebles recommending that the case be called to trial that week. App. p. 21.

Somehow, later the same day, Respondent appeared in front of Judge Russo to enter a plea to all charges. As was addressed in the Petition, Judge Peebles "argued solicitor style to the effect that petitioner should receive a stiff sentence for the crimes perpetrated upon Richardson, who was their community icon, as proper retribution and as a way to send a message to the community that such conduct would not be tolerated." App. pp. 49-53, 126.

Immediately after Judge Peebles' extensive comments, the court handed down a sentence of thirty years for armed robbery and a consecutive term of twenty years, suspended to a probation term of three years following the service of ninety days, for ABWIK. App. pp. 54-59. The court stated: "I can just tell you that what Judge Peebles asked me to do is what I have to do and that is do what I believe is right.. for the community, for the individuals who are standing before me, and just, you know, hope and pray that that ends up being right." App. p. 54, lns. 10-16.

Thereafter, counsel filed a motion for reconsideration. App. p. 61. At the hearing held on June 26, 2007, Judge Peeples was present. When Attorney Brown began speaking he was interrupted by Judge Peeples. 2nd Supp. p. 13. Attorney Brown provided argument regarding the sentence received by an attorney in Richland County and provided the federal sentencing guidelines. 2nd Supp. p. 18. He was again interrupted by Judge Peeples who stated the argument was “highly inappropriate and irrelevant.” 2nd Supp. p. 19. Thereafter, counsel stated that he respected Judge Peeples and noted his representation of the family at no cost. 2nd Supp. p. 22. After a brief response from the Solicitor, Judge Peeples again took over the proceeding. 2nd Supp. pp. 24-33. The court refused counsel’s request to respond to Judge Peeples comments. 2nd Supp. p. 33. In making his ruling denying Respondent’s motion for reconsideration, the court noted that “people” would say that Judge Peeples influenced his decision, and he clarified that he respected him, along with defense counsel, but he was not influenced. 2nd Supp. p. 36, lns. 1-6. It is apparent that this Court’s prior ruling shows lack of satisfaction with this explanation and that the court, himself, was recognizing the impropriety of the proceedings, whereby he issued a sentence and denied reconsideration following Judge Peeples’ improper involvement and based upon Judge Peeples’ factual conclusions that lacked evidentiary support.

At the 2011 PCR hearing, Attorney Brown explained his belief that Respondent’s sentence should have been between ten to fifteen years and his reasoning for filing the motion for reconsideration. Supp. App. p. 30, lns. 10-15, p. 33, lns. 17-20, p. 34, ln. 9. Attorney Brown also made it clear that he was greatly concerned with Judge Peeples’ involvement and comments, and he should have objected. Supp. App. p. 36, ln. 14 – p. 37, ln. 5.

Following the denial of the PCR Application, as addressed above, the Petition for Writ of Certiorari contained the following argument:

Had trial counsel objected to Judge Peeples' personal request for severe sentencing for petitioner as redemption for Richardson and his rally cry per the conscious of the community goal at petitioner's sentencing, then a reasonable probability exists that the sentence petitioner received would have been different. Counsel was aware that his inaction resulted in petitioner's receipt of an unfair sentence, which is why he filed a sentencing reconsideration motion, after which time a sentencing reconsideration hearing was held in the case.

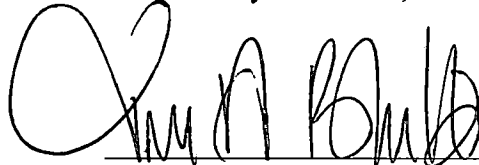
App. p. 131. The Petition further addressed how Judge Peeples "sales pitch became flat-out inflammatory and laced with character attacks" at the reconsideration hearing. App. p. 131.

It is clear from the comments made by the lower court at the hearing held on May 14, 2015 that he reviewed and relied upon the inflammatory and prejudicial comments contained in the transcripts of the prior proceedings. As stated above, the lower court admitted he sentenced exactly as Judge Peeples requested at the plea, and it is clear he relied upon the transcripts of the prior proceedings again when he rendered his decision on Respondent's sentence. An abuse of discretion occurs when the trial court's ruling is based on an error of law or when it is grounded in factual conclusions without evidentiary support. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Here, an abuse of discretion has occurred and Respondent was denied the new the sentencing hearing ordered by this Court, which ultimately is a denial of due process.

CONCLUSION

Alternatively to the relief granted by the Honorable J. Mark Hayes, II, Respondent respectfully requests that this Court find that relief is warranted resulting from the reconsideration of Respondent's sentence by the lower court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

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