THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

v.

SHYKIEM UNIVERSAL SMITH,

Appellant.

APPELLATE CASE NO 2018-001219

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the plea judge err by not holding a reconsideration hearing to properly reconsider Appellant's sentence in light of his cooperation with the State in the prosecution of his codefendant?

STATEMENT OF THE CASE

In 2015, the Richland County Grand Jury indicted Shykiem Universal Smith (Appellant) for murder and attempted armed robbery. On December 11, 2017, Appellant pled guilty under *North Carolina v. Alford*[1] before the Honorable R. Knox McMahon. Bea Hightower represented Appellant at the plea proceeding. Assistant Solicitor Meghan Walker prosecuted the case. Judge McMahon sentenced Appellant to twelve (12) years' imprisonment. On December 21, 2017, Appellant filed a Motion to Reconsider Sentence, which Judge McMahon denied without a hearing on June 11, 2018. Appellant filed a Notice of Appeal of the Motion to Reconsider Sentencing. This appeal follows.

[1] 400 U.S. 25 (1970).

STANDARD OF REVIEW

"The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion." *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing *State v. Smith,* 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)). A judge is accorded very wide discretion in determining an appropriate sentence and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. *Id.* (citing *Wasman v. United States,* 468 U.S. 559, 563 (1984)).

ARGUMENT

The plea judge erred by not holding a reconsideration hearing to properly reconsider Appellant's sentence in light of his cooperation with the State in the prosecution of his codefendant.

Relevant Facts

Appellant was indicted for murder and attempted armed robbery. On December 11, 2017, he pled guilty under *North Carolina v. Alford* to voluntary manslaughter and attempted armed robbery. At the beginning of the plea proceeding, plea counsel made the court aware that Appellant had been evaluated by the S.C. Department of Mental Health under *M'Naghten*[2] and found competent to stand trial. R. 5, lines 1–7; Court's Exhibit 1. Additionally, defense counsel had an independent evaluation conducted by Dr. Thomas Martin, and he also concluded that Appellant was competent to stand trial. R. 5, lines 8–18.

The State handed the court the mental health report, and the court asked defense counsel to confirm that her independent evaluator came to the same conclusion. R. 6, line 14–R. 7, line 8. Defense counsel explained that she did not receive a written report from Dr. Martin but that he concurred that Appellant understood what he was doing, was taking responsibility for his part in the actions, and was ready to go forward. R. 7, lines 9–15. The plea judge adopted the findings and conclusions of the mental health report, marked it as a court's exhibit, and found Appellant competent to stand trial and competent under *M'Naghten* as to criminal responsibility. R. 7, lines 21–25.

After going through Appellant's rights with him, the plea judge asked about plea negotiations. R. 15, lines 21–24. The State recommended a cap of twelve years and defense counsel clarified the agreement was between two and twelve years' imprisonment. R. 15, line

[2] *Queen v. M'Naghten*, 8 Eng. Rep. 718 (1843).

22–R. 16, line 5. The assistant solicitor recited the facts of the case, during which she mentioned that Appellant had been willing to testify against his codefendant. R. 19, line 18–R. 21, line 20.

The court accepted the plea under *North Carolina v. Alford.* R. 26, lines 8–19. Defense counsel stressed that not only was Appellant prepared to testify at his codefendant's trial, he also received deaths threats while he was in the jail from his codefendant threatening him about testifying. R. 30, lines 3–14. She pointed out to the court that Appellant cooperated fully and that because of him, his codefendant was now serving a forty-year sentence. She also emphasized that Appellant was not the shooter. R. 31, lines 1–11. Further into the plea process, defense counsel told the court that law enforcement got the identification of Appellant's codefendant from Appellant. R. 38, lines 23–25.

After hearing from both sides, including from family members of the victim and the defendant, the plea judge went through the mental evaluation, Appellant's history, the statement of a witness who saw and heard some of the altercation that led to the death of the victim, and the statements from the women who were with the codefendants at the time. R. 24, line 10–R. 45, line 2. He further considered the potential sentences the original charges carried, the recommendation of the State, Appellant's cooperation and willingness to testify, and his lack of a prior criminal record. R. 45, lines 3–20. Basing his decision on the totality of the circumstances, the plea judge sentenced Appellant to twelve years' imprisonment. R. 46, lines 11–17.

On December 21, 2017, Appellant filed a Motion to Reconsider Sentence, the grounds of which were "the Court did not give sufficient consideration to [Appellant]'s cooperation with the State in the prosecution of [his codefendant]." R. 72 Motion to Reconsider Sentence. The plea judge did not conduct a hearing on the matter; rather, after an almost six-month delay, he wrote on the Motion on June 11, 2018: "After consideration of all facts & circumstances and

Defendant's file; Defendant's Motion to Reconsider is Denied." R. 72 Motion to Reconsider Sentence.

Discussion

Rule 29(a) of the South Carolina Rules of Criminal Procedure provides:

> The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action **for the purpose of hearing and disposing of the motion** if not heard and disposed of during the term. Except by consent of the parties, **argument on the motion shall be heard** in the circuit where the trial or hearing was held. **The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.**

Rule 29(a), SCRCrimP (emphasis added).

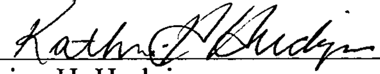
It is clear from the above rule that when a party makes a post-trial motion, the judge shall **hear** the motion. Only when the parties file briefs may a decision of the court be made without oral argument. Here, no briefs were filed and no oral argument was heard. Thus, the judge erred. Not only did the judge decide the motion without hearing argument, he waited nearly six months to rule. Moreover, because he ruled the way he did by simply writing a sentence on the corner of the Motion, he gave no details of his ruling nor what his considerations were.

When looking at changing a sentence, "[a] judge is accorded very wide discretion in determining an appropriate sentence **and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant,** given the crime committed." *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (emphasis added) (citing *Wasman v. United States,* 468 U.S. 559, 563 (1984)). Here, the court did not consider any and all information because it did not ask for briefs or oral argument. Rather, it made its decision based on nothing more than the grounds listed in the

Motion that "the Court did not give sufficient consideration to [Appellant]'s cooperation with the State in the prosecution of [the codefendant]." This did not give any "information that reasonably might bear on the proper sentence." Accordingly, the plea judge erred.

CONCLUSION

Based on the above arguments, the court should hold a hearing to reconsider Appellant's sentence.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of July, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,

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This 15th day of July, 2019.