(5)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
DEC 08 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000044

The State, Respondent

v.

James Bryson Munn, Appellant

APPELLANT'S FINAL REPLY BRIEF

William G. Yarborough, III
Attorney for Appellant
522 N. Church Street
Greenville SC, 29601
Telephone (864) 331-1612
Fax (864) 370 0022

JENNIFER ELLIS ROBERTS
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 20401

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....1

ARGUMENT IN REPLY

I. THE PLEA COURT ERRED IN ITS DISCRETION BY FAILING TO CONSIDER THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITIES WHEN CONSIDERING APPELLANT'S MOTION FOR RECONSIDERATION OF SENTENCING, AND THIS FAILURE EFFECTUATES AN ERROR OF LAW.....2-3

II. THE PLEA COURT ERRED IN FAILING TO CONSIDER REHABILITATION AS A FACTOR WHEN CONTEMPLATING APPELLANT'S MOTION FOR RECONSIDERATION OF SENTENCE.....4-5

CONCLUSION.....6

TABLE OF AUTHORITIES

CASES

U.S. v. Hampton, 4441 F.3d 284, 287 (4th Cir. 2006)..5

Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)...................7

Tapia v. U.S., 564 U.S. 319 (2011)..7

State v. Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999)..........................7

STATUTES

18 U.S.C. § 3553(a)(6) (2012)..5

ARGUMENT IN REPLY

I. THE PLEA COURT ERRED IN ITS DISCRETION BY FAILING TO CONSIDER THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITIES WHEN CONSIDERING APPELLANT'S MOTION FOR RECONSIDERATION OF SENTENCING, AND THIS FAILURE EFFECTUATES AN ERROR OF LAW.

The Appellant initially argued that the judge erred in refusing to reconsider appellant's sentence in order to address the unwarranted sentence disparities with similar defendants. Respondent argues that "the plea judge considered the sentencing disparities presented to him during the plea and again at the reconsideration hearing and acted within his discretion to decide to uphold his original sentence . . ." However, the Appellant's sentence does not reflect that the plea judge considered the need to avoid sentence disparities among similar defendants. Instead, Appellants sentence is excessively disproportional to sentence terms for similar defendants. The average sentence in Charleston over the 6 years preceding appellant's sentencing was just 8.22 years, and the average active sentence was only 5.72 years. (R. 66, lines 3-10). Appellant's disproportional sentence length reflects a failure by the plea judge to properly consider the sentencing disparities with similar defendants.

Respondent argues "the fact that the plea judge sentenced Appellant to the same amount as the state average could indicate he did consider the average presented to him." However, the state average of 14 years is not applicable to the Appellant, because this number does not reflect the sentences of similar defendants. (R. 66, lines 21-25, 67, line 10). Instead, the 14 years cited as the state average includes all defendants charged with felony DUI with death in the state. *Id.* Although the charges are the same, the state average does not account for the defendants' ages, criminal records, or any other factors that may distinguish other defendant's from Appellant. *Id.* This number cannot be applied to Appellant's case because it does not account for similar defendants, but rather takes the average for all defendants with those charges, regardless of age or prior

convictions. *Id.* Among similar defendants, those who were under the age of 25, the average sentence statewide is only 7.75 years, just over half the length of the sentence imposed upon appellant. (R. 67, lines 1-10). Consequently, the Appellant's sentence of 14 years creates an unwarranted sentence disparity between the Appellant's sentence and those of similar defendants.

The Respondent focuses on the fact that one defendant, Austin Shackelford, was sentenced to twenty-five years. However, Shackelford should not be considered a similar defendant for the purposes of sentencing. Shackelford plead guilty to eight counts, including two deaths, in his felony DUI case. (R. 67, lines 10-13). Appellant only plead guilty to one count of felony DUI with death. Appellant's one count should not be considered similar to Shackelford's eight counts. Consequently, these two defendants should not be considered similar for purposes of avoiding disparities among similar defendants.

The Fourth Circuit ruled that the reasonableness of a sentence depends in part on the court's consideration and application of the factors laid out in § 3553(a). *U.S. v. Hampton,* 441 F.3d 284, 287 (4th Cir. 2006). Therefore, a reasonable sentence should be made with consideration for the need to avoid unwarranted sentence disparity. Appellant's sentence of nearly double the state average sentence for similar defendants does not reflect any consideration of this factor by the court.

II. THE PLEA COURT ERRED IN FAILING TO CONSIDER REHABILITATION AS A FACTOR WHEN CONTEMPLATING APPELLANT'S MOTION FOR RECONSIDERATION OF SENTENCE.

The plea court failed to consider rehabilitation as a factor when contemplating Appellant's motion for reconsideration of sentence. As the Respondent stated in the Initial Brief of Respondent, "[providing] the defendant with needed care or treatment" is one of the goals of sentencing. The Respondent goes on to argue that the plea court properly considered the goals of sentencing before denying Appellant's motion for reconsideration. However, during the motion hearing, the plea judge stated "You know, I have long given up on prison being a place where you can get rehabilitation." (R. 106, lines 4-6). The judge then denied the Appellant's Motion for Reconsideration of a Sentence, reaffirming Appellant's 14-year prison sentence. The judge's own statement, paired with Appellant's sentence, reflects a failure to consider the Appellant's rehabilitation in sentencing.

The Respondent argues that "it is clear it would have been highly improper for the plea judge to consider Appellant's guilty plea as a factor in his sentence and Judge Young was correct not to do so." While this is correct, the Respondent attempts to use this fact to address the Appellant's claim that acceptance of responsibility is the reason why persons who plead guilty often receive lesser sentences. *Id.* While a guilty plea does reflect an acceptance of responsibility, the two are not inherently equal. Appellant's acceptance of responsibility also reflects a level of remorse for his actions. Additionally, Appellant's acceptance of responsibility for his actions shows that he is unlikely to repeat those actions in the future, because he is aware of the dire consequences that may arise. Additionally, the Respondent cites *State v. Follin,* 352 S.C. 235, 257-58, 573 S.E.2d 812, 824 (Ct. App. 2002), in which the Court made it clear that a sentencing judge may not consider the fact that the defendant exercised the right to a jury trial. The Appellant

in the present case never exercised his right to a jury trial, so it is not clear how this statement in *Follin* is relevant. *Id.*

Respondent next discusses knowledge and intent as they relate to the crime of DUI. It is unclear why the Respondent addresses this issue, as the Appellant has already plead guilty to DUI, and this appeal concerns only the Appellant's sentencing following his guilty plea. Therefore, the elements of DUI are not at issue in this matter.

The plea court failed to consider Appellant's rehabilitation as a goal of sentencing and failed to address this factor when considering Appellant's motion to reconsider the sentence. The Supreme Court has ruled that imprisonment is not an appropriate means of promoting rehabilitation, and therefore the plea court's excessive prison sentence cannot serve any rehabilitative purpose for Appellant. *Tapia v. U.S.,* 564 U.S. 319, 320 (2011). Further, probation instead of imprisonment can serve rehabilitative purpose. *Hamilton*, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999)(citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)). The Court's failure to consider rehabilitation is a substantial error that resulted in an unreasonably severe prison sentence, and will result in poor rehabilitation, if any, for Appellant.

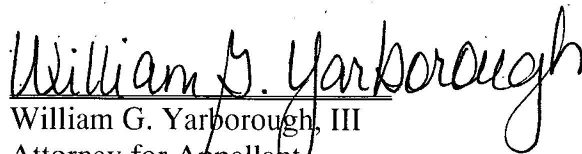
CONCLUSION

The plea court erred in sentencing Appellant to a prison term with unwarranted disparity among the sentences given to similar defendants. The excessive sentence given to appellant exemplifies a failure to consider similar defendants' sentences. The plea court's failure to consider these sentences affected appellant's outcome at sentencing, and this effectuates an error in the plea court's reasoning.

Additionally, the plea court erred when it failed to consider rehabilitation as one of the goals for sentencing. The court sentenced Appellant to 14 years in prison without regard to rehabilitation programs in lieu of such an excessive sentence. The plea court stated that rehabilitation was "almost a joke in this day and age," clearly indicating a failure to consider this goal of sentencing. This reflects the court's failure to consider Appellant's rehabilitation, and this failure expresses an error in the court's reasoning.

As a result of these sentencing errors, which are errors of law, Appellant's sentence should be reversed, and remanded for re-sentencing.

RESPECTFULLY SUBMITTED THIS ______ day of December 2016.



William G. Yarborough, III
Attorney for Appellant
522 North Church Street
Greenville, SC 29601
(864)331-1612 Office
(864) 370-0022 Fax
WGYarborough@gmail.com

Greenville, South Carolina

(3)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

RECEIVED
DEC 08 2016
SC Court of Appeals

Appellate Case No. 2016-000044

The State, Respondent,

v.

James Bryson Munn, Appellant.

Affidavit of Service

I, Traci Trouton-Burr, certify on December 5, 2016, I served the Final Reply Brief in this action on Jennifer Kneece Shealy, Ninth Judicial Circuit Assistant Solicitor, and Jennifer Ellis Roberts, South Carolina Attorney General's office, and the Honorable Julie J. Armstrong, Ninth Judicial Clerk of Court, by mailing it to him/her at his/her work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Hon. Julie J. Armstrong
Clerk of Court, Ninth Judicial Circuit
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Jennifer Kneece Shealy, Assistant Solicitor
Ninth Judicial Circuit
101 Meeting Street
Charleston, SC 29401

Jennifer Ellis Roberts
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Respectfully submitted,

Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 5
Day of December, 2016

Notary Public for South Carolina
My Commission expires: 4/9/24

RITY
IL ★

UNITED STATES POSTAL SERVICE. Retail

P

US POSTAGE PAID
$13.45

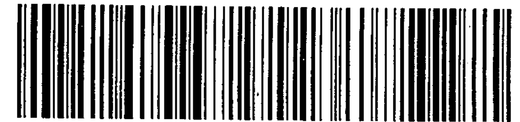
Origin: 29687
Destination: 29211
2 Lb 8.00 Oz
Dec 05, 16
4586800687-09

1024

PRIORITY MAIL ®2-Day

Expected Delivery Day: 12/08/2016 B012

USPS TRACKING NUMBER



9505 5114 1361 6340 0560 23

Law Office of William G. Yarborough III
522 North Church Street
Greenville, SC 29601

Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED
DEC 08 2016
SC Court of Appeals

E
IT

O-FRB2_July 2013
ID: 11.875 x 3.375 x 13.625
OD: 12 x 3.5 x 14.125
ODCUFT: 0.343

UNITED STATES
POSTAL SERVICE®