

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Florence County

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Honorable William H. Seals, Circuit Court Judge

FEB 02 2021

TARRANCE L. JORDAN,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001341

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel filed a Motion to Reconsider Petitioner's sentence but failed to object following sentencing, where the Court of Appeals held the issue was unpreserved, and where Petitioner received a sentence of thirty years compared to sentences of ten years and fifteen years for his co-defendants who pleaded guilty?

STATEMENT

Petitioner was indicted by a Florence County grand jury in November 2008 on fourteen different charges: five counts of armed robbery, three counts of kidnapping, three counts of burglary in the first degree, and three counts of possession of weapon during the commission of a violent crime. App. 584 – App. 593. The charges followed a string of alleged robberies at various hotels in Florence spanning a three-day timeframe in July 2008. Four men participated in the robberies: Johnny Johnson, Shakeem Williams, and Louis Williams. Shakeem and Petitioner were allegedly the two individuals who went into the hotels each time while Johnson and Louis stayed in the car. Testimony from each of the hotel guests indicated that the bigger man, Shakeem, was armed with a gun; Petitioner was unarmed.

After his co-defendants agreed to cooperate with the state, Petitioner proceeded to a trial before the Honorable Ralph King Anderson, Jr. and a jury on April 19, 2010. App. 1. Patrick J. McLaughlin represented Petitioner; Patricia Parr and David Richardson appeared on behalf of the state. After a four day trial, the jury found Petitioner guilty on all counts. App. 474 l. 16 – App. 477 l. 3. Before sentencing, trial counsel indicated he “would like to reserve the right to file written motions within ten days” for the trial judge’s consideration. App. 481 ll. 3 – 5. The trial judge denied this request, and trial counsel made oral post-trial motions. App. 481 l. 6 – App. App. 490 l. 22. All of the motions were denied. App. 490 ll. 23 – 25.

The state did not offer a sentencing recommendation. Two of Petitioner’s co-defendants had already been sentenced. App. 491 l. 14 – 25. One received a sentence of ten years; the other received a sentence of fifteen years. Id. The trial judge sentenced Petitioner as follows: thirty years on one armed robbery charge, thirty years on one kidnapping charge, thirty years on one kidnapping charge, five years on the possession of a weapon charge, thirty years on the second

kidnapping charge, thirty years on the first burglary charge, thirty years on the second burglary charge, five years on the second possession of a weapon charge, thirty years on the third kidnapping charge, thirty years on the second armed robbery charge, thirty years on the third armed robbery charge, thirty years on the fourth armed robbery charge, thirty years on the third burglary charge, and five years on the next possession of a weapon charge. App. 498 l. 15 – App. 502 l. 6. All of the sentences were crafted concurrent to one another.

Trial counsel filed a Motion to Reconsider on April 29, 2010. App. 544 – App. 549. He noted that Albert Meyer, one of the witnesses who claimed Petitioner robbed him, contacted trial counsel the day after trial concluded. App. 545. Meyer informed counsel that “while he was very satisfied with the overall result of the trial, he did not feel the sentence that [Petitioner] had received was just. Specifically, Mr. Meyer informed defense counsel that he did not think the Defendant should have received such a longer sentence than his co-defendants.” Id.

Meyer signed an affidavit to that effect; his affidavit was submitted as an exhibit with the Motion to Reconsider. App. 548 – 549. The affidavit contained Meyer’s firsthand account of trial and his thoughts on sentencing:

After learning of the sentence, I contacted Mr. Jordan’s attorney, Patrick J. McLaughlin. Upon contacting Mr. McLaughlin, we discussed the case and I informed Mr. McLaughlin that while I fully supported the jury’s verdict and thought that his client deserved significant jail time, I did not think it was fair that Mr. Jordan receive so much more jail time than his co-defendants, whom I understand have or will receive approximately 15-year sentences. I informed Mr. McLaughlin that if there was a way to assist him in possibly lowering Mr. Jordan’s sentence, I would like to assist. Mr. McLaughlin explained the procedure for a motion to reconsider and asked if I would be willing to execute an affidavit to express my support for reconsideration of Mr. Jordan’s sentence. This affidavit follows.

In making this request to the court, I would point out that I had the opportunity to observe Mr. Jordan for three (3) days during trial. I observed him interacting with his attorney, paying attention to the proceedings, writing notes, and, in general, participating with his defense. Mr. McLaughlin shared with me the general ideas

related to the court by one of Mr. Jordan's former teachers, Mrs. Sharon Abraham. The thoughts expressed by Mrs. Abraham, along with by observations of Mr. Jordan, lead me to think that it may be possible for Mr. Jordan to learn from this experience. If that is possible, I would like to think that Mr. Jordan could serve his time and leave incarceration a better person than the one who entered.

I believe that Mr. Jordan has, in essence, received a longer sentence than his co-defendants because he made a stubborn and poor choice to go to trial. I would like to believe that this is a product of the same immaturity that led him to put himself in this situation to begin with. While I believe Mr. Jordan should be held responsible for the acts his immaturity brought on, I personally don't feel that justice is served by allowing that immaturity to result in his receiving significantly more jail time than his co-defendants.

Even though his actions were traumatic for both myself and my son, it is my hope that the court would reconsider Mr. Jordan's sentence and reduce that sentence to a sentence more in line with his co-defendants. I make this request in the hopes that Mr. Jordan is able to overcome his immaturity, take the good character of someone like Mrs. Abraham saw in him during his scholastic career, stay out of trouble while incarcerated and return to society at a young enough age to reclaim the life he wasted by participating in these heinous acts.

App. 549. The Motion to Reconsider was denied; no reason was given, and no argument was allowed. App. 544.

Through a direct appeal, Petitioner averred that the trial court erred in denying his Motion to Reconsider. The Court of Appeals held that this argument was unpreserved. State v. Jordan, Op. No. 2012-UP-537 (S.C. Ct. App. filed October 3, 2012); App. 564.

Soon thereafter, Petitioner filed an application for post-conviction relief. App. 504. It contained allegations of ineffective assistance of counsel. The state made its Return on or about May 2, 2014. App. 511 – 515.

An evidentiary hearing was held before the Honorable William H. Seals, Jr. on August 8, 2016. App. 515. Tristan Shaffer represented Petitioner; Jessica Kinard appeared on behalf of the state. The PCR court heard testimony from Petitioner and trial counsel. The PCR judge took the

matter under advisement and indicated that he would let the parties know of his decision by the end of the week. App. 540 ll. 20 – 22.

Almost three years later, on June 18, 2019, an Order of Dismissal was signed. App. 565 – App. 583. Regarding the failure to object at sentencing, the PCR court ruled in summary fashion that trial counsel was “not ineffective for any alleged failure to object to the sentence imposed upon Applicant,” the Court of Appeals’ holding seemingly notwithstanding.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel filed a Motion to Reconsider Petitioner’s sentence but failed to object following sentencing, where the Court of Appeals held the issue was unpreserved, and where Petitioner received a sentence of thirty years compared to sentences of ten years and fifteen years for his co-defendants who pleaded guilty.

Relevant facts

It is undisputed that trial counsel did not object after Petitioner’s sentences was imposed. App. 502 ll. 1 – 6. The trial judge handed down the sentences, thanked the individuals in attendance, and the proceedings were adjourned. The Motion to Reconsider was filed on April 29, 2010, within ten days of the conclusion of trial and imposition of the sentence, in accordance with Rule 29, SCRCrimP. App. 544 – 549. However, because trial counsel failed to object at sentencing, that issue was determined to be unpreserved by the Court of Appeals. Because trial counsel failed to preserve that issue, Petitioner was deprived of the right to have an appellate court review a decision made by the judge at the trial level. Stated differently, but for trial counsel’s failure to preserve the issue, the Court of Appeals could have analyzed the issue on the merits and likely would have reversed the trial court’s decision to deny the motion to reconsider.

Trial counsel was appointed to represent Petitioner. App. 524 ll. 2 – 12. After receiving the file, counsel met with Petitioner. App. 524 ll. 13 – 20. At the evidentiary hearing, trial counsel admitted he did not lodge any objections at the time of sentencing. App. 530 l. 16 – App. 531 l. 3. Counsel indicated that he did not think to make an objection to the sentence on either the basis that it was disproportionate or that Petitioner was being punished for going to trial. App. 531 ll. 15 – 21; App. 537 ll. 6 – 16.

Petitioner testified at his evidentiary hearing as well. He had graduated high school and begun working at Zaxby's the month before his arrest. App. 539 ll. 2 – 18. Prior to graduating, he had enlisted in the National Guard and completed basic training at Fort Leonard Wood. Id. He testified that counsel's main strategy at trial was to attack the statements of his co-defendants as well as the legality of the show-up identification that occurred in his case. App. 539 l. 19 – App. 540 l. 2.

The Order of Dismissal's finding on this issue was limited in both its discussion of applicable case law as well as application to the facts. App. 581 – 582. The Order of Dismissal suggested that “[c]ounsel proffered his belief there was no reason to object to the sentence Applicant received.” App. 581. The Motion to Reconsider would suggest otherwise. App. 544 – 549. Meyer, who provided an affidavit, informed counsel “that he did not think [Petitioner] should have received such a longer sentence than his co-defendants.” App. 545. Such a contention existed at the time of sentencing; all of the parties involved were aware of the differences in sentencing. Counsel should have objected. But for his failure to object, the Court of Appeals could have considered the disparity. As such, Petitioner received ineffective assistance of counsel, and was prejudiced by his inability to be heard on a meritorious issue on appeal.

Discussion

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State” U.S. Const. amend. VI. When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion. See Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999) (holding counsel was ineffective in failing to object when the trial judge

indicated the reason he sentenced Davis more harshly than two similarly-situated offenders who, unlike Davis, had pled guilty was because those offenders admitted their guilt); State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995) (holding the trial judge abused his discretion when the judge considered the fact that Hazel did not plead guilty in declining to grant Hazel's request for sentencing under the Youthful Offender Act).

As noted, the Court of Appeals held that the issue was unpreserved. State v. Jordan, Op. No. 2012-UP-537 (S.C. Ct. App. filed October 3, 2012). The court relied State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) which held that when “an appellant fails to object to his sentence at the time of its imposition, he waives the issue on appeal.” Further, the court cited Rule 29, SCRCrimP which provides that parties to criminal actions may file post-trial motions within ten days after the trial court imposes a sentence. Additionally, the court referred to State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) for the notion that “it is improper to argue new matter in a motion for reconsideration.”

In Garner, the defendant was convicted of trafficking cocaine. 304 S.C. at 221, 403 S.E.2d at 631. Two SLED agents purchased cocaine from Garner and paid him \$1,200 for one ounce of cocaine. Id. At his trial, Garner moved to exclude tape recordings from a “body transmitter” carried by one of the agents. Id. at 221, 403 S.E.2d at 632. Although this Court agreed that the prejudicial effect of the evidence outweighed its probative value, it found the error harmless based on alleged overwhelming guilt. Id. at 222, 403 S.E.2d at 532. Additionally, Garner contended on appeal that he should have been sentenced under S.C. Code Ann. § 44-53-420 which at the time provided that a person convicted of conspiracy be sentenced to half the penalty of the planned offense. Id. Notably, and as applied to the matter at hand, this

Court held: “No objection to sentencing was raised at trial and this issue is not properly before the court.” Id. (citing State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981)).

In State v. Shumate, the defendant was convicted of forgery. 276 S.C. at 46, 275 S.E.2d at 288. He was sentenced under the Youthful Offender Act to a term of six years’ incarceration, suspended to five years of probation. Id. at 47, 275 S.E.2d at 288. Three years later, he pleaded guilty to additional forgery charges, and his probation was revoked. Id. At the probation revocation hearing, after the trial judge revoked his probation, Shumate’s only response was “Thank you, Your Honor.” Id. This Court reasoned:

A defendant’s failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. ... Appellant’s contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal.

Id. (internal citations omitted). Shumate was decided seven years before the South Carolina Rules of Criminal Procedure took effect. Rule 40, SCRCrimP.

Johnny Johnson, one of Petitioner’s codefendants, testified at Petitioner’s trial that he had a plea deal for fifteen years. App. 359 l. 2 – App. 365 l. 20. His charges mirrored Petitioner’s. Id. At the time of trial, he had not yet pleaded or been sentenced. Id.

In State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995), this Court held that the trial judge abused his discretion by considering the fact that the defendant exercised his right to a jury trial in sentencing and remanded for a new sentencing hearing. A similar outcome was the result in State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001) where the Court of Appeals remanded for resentencing after the trial judge stated a codefendant who pleaded received a lighter sentence following an admission of guilt.

Brouwer was a 2-1 decision; Judge Anderson authored a dissent. 346 S.C. 375, 550 S.E.2d 915. The dissent largely relied on an opinion from the Court of Appeals in Virginia, Merritt v. Commonwealth, 32 Va. App. 506, 528 S.E.2d 743 (2000) which was overruled four years later by Jaccard v. Commonwealth, 268 Va. 56, 597 S.E.2d 30 (2004). Judge Anderson posited that there is no requirement that defendants charged with similar offenses be given the same punishment. Id. at 389, 550 S.E.2d 915, 923 (citing State v. Garris, 265 N.C. 711, 144 S.E.2d 901 (1965)). Notably, he also reserved a portion of his dissent for the discussion of guilty pleas and how “[t]he State has a legitimate interest in encouraging the entry of guilty pleas.” Id. at 390, 550 S.E.2d at 923 (citing Corbitt v. New Jersey, 439 U.S. 212, 9 S.Ct. 492, 58 L.Ed.2d 466 (1978)). Further, he referred to Gajdos v. State, 462 N.E.2d 1017 (Ind. 1984) for the notion that “[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.” Id. Neither Corbitt nor Gajdos have been cited by either of South Carolina’s appellate courts outside of the dissent.

Seemingly in contravention to Hazel, supra, Judge Anderson wrote:

Although a heavier sentence for one who has been convicted after trial and a lighter sentence for one who pleads guilty are in a sense two sides of the same coin, it is within proper bounds for the court to preserve some leeway so that it is able to extend leniency in consideration of the cooperation and at least superficial penitence evidence by one who pleads guilty.

Id. at 393-4, 550 S.E.2d at 925.

In Castro v. State, this Court held that comments made by the trial judge revealed he improperly considered the petitioner’s decision to exercise his right to a jury trial in sentencing. 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016). In that instance, the trial judge stated to the defendant: “You are different from these other defendants in that they have cooperated and they have acknowledged their responsibility for the crimes that they have committed.” Id. at 81, 789

S.E.2d at 46. This Court reversed the PCR court's denial of relief and remanded for resentencing.

At the conclusion of Petitioner's trial, after the jury's verdict had been read, trial counsel requested the standard ten days to file written motions. App. 481 ll. 3 – 11. When that was denied, counsel was on notice that he needed to preserve all of his objections and motions, including sentencing concerns. The Garner opinion had come out almost two decades prior; trial counsel should have been aware of the law and recognized that a failure to object to Petitioner's sentence prevented him from contesting it in any way in the Motion to Reconsider. At the minimum, counsel should have recognized that because the trial judge denied him the customary ten days envisioned by Rule 29, SCRCrimP, he should have acted to preserve a potential post-trial motion such as the Motion to Reconsider.

The PCR court's finding on the "Failure to Object to Sentencing" portion of the Order of Dismissal cited to two opinions: State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974) and Davis v. State, 336 S.C. 329, 332, 520 S.E.2d 801, 802 (1999). Sidell was referenced for the notion that "[j]udges have discretion in sentencing within the statutory limits." App. 581. Petitioner never contended that his sentence was anything more than allowed by statute. Davis was cited as an example of a case where "[c]ounsel can be ineffective where they fail to object when a judge considers the fact that a defendant exercised the right to a jury trial." App. 581. Although the trial judge did not explicitly state such a thing, trial counsel failed to object to preserve any arguments regarding sentencing. Based upon the trial judge's dissent in Brouwer, an argument could have been advanced on appeal that the trial judge punished Petitioner for his decision to go to trial.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 685–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the presumption that counsel has rendered adequate assistance, the defendant must show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

Notably, the Order of Dismissal found that “Counsel credibly testified a reconsideration motion was mainly a source to put the affidavit on the record for preservation.” App. 582. The Court of Appeals held otherwise. Trial counsel was deficient in failing to object to the trial judge’s sentence and failing to preserve any argument for appeal. Had the objection been preserved for appeal, an appellate court would have held that the trial judge abused his discretion. As such, the PCR court erred in denying the PCR application.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issue raised herein.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of February, 2020.

STATE OF SOUTH CAROLINA
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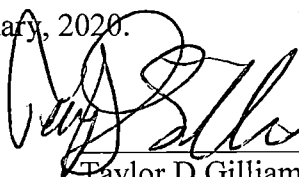
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Tarrance L Jordan, #340469, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of February, 2020.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 3rd day of February, 2020.

Marcy Allgood (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.