STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MCDANIELS,

APPELLANT

APPELLATE CASE NO. 2018-000070

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred when it failed to award Appellant the time-served credit he was entitled to where Appellant and the state agreed Appellant would receive credit for time-served from the beginning of his federal sentence, and where the plea judge pronounced on the record that he would get credit for that time-served?

STATEMENT OF THE CASE

In March of 2008, the Spartanburg County Grand Jury indicted Petitioner McDaniels for one count of burglary first degree, one count of burglary second degree, and two counts of grand larceny, indictments #2008-GS-42-1743, 1744, 1745, 1746. R. 51 – 58.

On August 26, 2008, Petitioner appeared before the Honorable R. Markley Dennis, Jr. and entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to all four charges. R. 1; R. 2, ll. 7 – 8. Robert Hall represented Petitioner. Id. Barry Barnette and Marie Thompson represented the state. Id.

Pursuant to negotiations with the state, Judge Dennis sentenced Petitioner to fifteen years' imprisonment for burglary first degree, fifteen years' imprisonment for burglary second degree, and five years' imprisonment concurrent for each grand larceny charge. R. 19, l. 17 – 20, l. 11. These charges were to run concurrent with Appellant's federal sentence. Id. Also pursuant to the negotiated agreement with the state, Judge Dennis awarded Appellant time-served credit to begin when his federal sentence commenced. Id.; R. 5, l. 17 – 7, l. 9.

However, Appellant was not granted the time-served credit that judge promised him he would receive. R. 5, l. 17 – 6, l. 2; R. 37.

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).

ARGUMENT

The lower court erred when it failed to award Appellant the time-served credit he was entitled to where Appellant and the state agreed Appellant would receive credit for time-served from the beginning of his federal sentence, and where the plea judge pronounced on the record that he would get credit for that time-served.

Relevant Facts

Appellant pled pursuant to Alford, after negotiating his sentence with the state. R. 2, ll. 14 – 15; R. 5, ll. 12 – 25. Appellant was particularly concerned that his sentence for the aforementioned charges would run concurrent with his federal sentence, and that he received time-served credit for the period he served on his federal sentence already. R. 3, ll. 17 – 21; R. 5, ll. 7 – 10. Plea counsel expressed to the plea court Appellant's unwillingness to accept the state's plea offer until the day of the trial. R. 7, l. 17 – 8, l. 2.

Judge Dennis found Appellant understood the significance of an Alford plea. R. 16, ll. 12 – 20. Judge Dennis accepted Appellant's Alford plea and negotiated sentence. R. 19, l. 15 – 20, l. 11.

During the colloquy, Appellant explained the time-served credit portion of his negotiated plea agreement. R. 6, ll. 1 – 2. On indictment 2008-1743, for first degree burglary, Appellant stated the time-served credit he and the state agreed that he was entitled to, without objection. R. 5, l. 17 – 6, l. 2.

> THE COURT: Understanding [you are charged with] burglary in the first degree, that if I accepted [Appellant's Alford plea], I would sentence you to fifteen years, place on the sentencing sheet that it is to run concurrently with your federal sentence, *give you credit for time that you've served*, what is your plea? Guilty under Alford? (emphasis added)
>
> Appellant: Yes, sir Your Honor. North Carolina v. Alford, supra.

THE COURT: Okay.

Appellant: I've served approximately two and a half years already, your honor. Id.

A nearly identical exchange took place regarding Appellant's Alford plea to second degree burglary as well. R. 6, ll. 3 – 12. Specifically, Judge Dennis explicitly gave Appellant credit for time served. Id.

Judge Dennis further implicitly assured Appellant that his time-served credit was a condition contained within the negotiated sentence and put on the record, when Judge Dennis, after explicitly stating Appellant would get his time-served credit, asked Appellant if there were any other promises made outside the record of the plea hearing that induced Appellant to make an Alford plea. R. 12, ll. 19 – 23. Since the details of Appellant's time-served credit were put on the record of the plea hearing, the time-served credit was made part of the negotiated sentence. R. 5, l. 17 – 6, l. 2. Thus, Appellant was entitled to the "two and a half years" of "time that [Appellant had] served," because that was explicitly stated on the record as a condition of the negotiated plea agreement. R. 6, ll. 1 – 25.

On December 14, 2017, Appellant had a sentencing hearing in front of the Honorable J. Mark Hayes. R. 22. Derrick Bruce Bulsa represented the state. Id. Robert B. Hall represented Appellant. Id. Appellant argued that he was entitled to credit for time served from March 31st, 2006. R. 31.

Judge Hayes filed an order that denied Appellant's sentencing motion. Judge Hayes stated, "Due to the circumstances surrounding the reduced plea and lack of information or explanation of the negotiations the Court lacks confidence to not interfere with the original intent of the parties." R. 37.

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.)[1]

In Smith v. State, 413 S.C. 194 (2015) the South Carolina Supreme Court affirmed the Court of Appeals reversal of Smith's post-conviction relief hearing denial. Id. at 195. The Court held that the state breached the plea agreement with Smith when it recommended the maximum sentence at the plea hearing, after the state promised Smith it would remain silent during sentencing. Id. Defense counsel's failure to object to the breach of the guilty plea agreement constituted reversible error. Id. at 196.

In Jordan v. State, 297 S.C. 52 (1988) our Supreme Court held that the solicitor reneging on his promise to neither recommend nor oppose a probationary sentence breached the plea agreement Jordan had with the state and entitled Jordan to either specific performance of the plea agreement or a new trial. Id. at 53. The Court gave no credence to the trial court's explanation that it did not consider the state's opposition to Jordan receiving a probationary sentence when it sentenced Jordan to a term of imprisonment. Id. at 52 – 53.

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[1] 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).

In United States v. Tucker, 404 U.S. 443 (1972) the United States Supreme Court affirmed the Appellate Court's decision that the lower court's reliance on Tucker's prior convictions, that were later found to be obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), during sentencing, required a remand for reconsideration of the sentence imposed. Id. The Court held that, "we deal here... with a sentence founded at least in part upon misinformation." Id. at 447.

In Tucker, the Court relied on its decision in Townsend v. Burke, 334 U.S. 736 (1948) which stated that a "prisoner... sentenced on the basis of assumptions concerning his criminal record [that] were materially untrue... is inconsistent with due process of law, and such a conviction cannot stand." Id. at 740 – 741. Accordingly, the Tucker Court stated, "the record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous [unconstitutional] convictions before imposing the sentence upon him." Tucker, at 447.

In Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010) our Supreme Court held that an unambiguous pronouncement of a sentence in open court controls over a written sentencing order. Id. at 276, 695 S.E.2d at 852. The Court held, "a trial's fairness is compromised when a trial judge increases a defendant's sentence outside his presence." Id. at 277, 695 S.E.2d at 852.

An order is defined as, "a written direction or command delivered by a government official, esp. a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands." ORDER, Black's Law Dictionary (10th ed. 2014). Order is also termed a "court order" or "judicial order." Id. A sentence issued in open constitutes a written direction or command delivered by a judge. Therefore, the court's oral pronouncement that Appellant was

entitled to "credit for the time [he] served," during Appellant's guilty plea hearing constituted an unambiguous court order. Tr. 5, l. 17 – 6, l. 13 (August 26, 2008 plea hearing).

In Travelers Idem. Co. v. Bailey, 557 U.S. 137 (2009), the United States Supreme Court held that, "where the plain terms of a court order unambiguously apply... they are entitled to their effect." Id. at 151; See Negron-Almeda v. Santiago, 528 F.3d 15, (1st Cir. 2008). Moreover, "a court must carry out and enforce an order that is clear and unambiguous on its face." United States v. Spallone, 399 F.3d 415, 421 (2d Cir. 2005).

In the instant case, the reason for ruling in against Appellant's sentencing motion did not address the dispositive issue in Appellant's case, namely the parties' intention regarding the negotiated sentence at the time of the plea hearing. Judge Dennis made an explicit pronouncement in open court during Appellant's guilty plea hearing that Appellant was entitled to time-served credit. R. 5, l. 17 – 6, l. 13. Appellant explicitly referred to the time-served credit that he and the state negotiated when he stated, "I've served approximately two and a half years already." R. 6, ll. 1 – 2. That amount of time-served credit was not objected to by the state.

Therefore, the sentencing hearing court erred when it denied Appellant's motion to alter his sentence to reflect the proper sentence that was intended by Appellant, the state, and the plea hearing judge.

CONCLUSION

By reason of the foregoing arguments, Appellant requests that this court vacate his current sentence and remand his case to the circuit court for resentencing.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of January, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and 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."

January 24, 2019.

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