STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dillon County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL ANTWAN ROGERS,

APPELLANT

APPELLATE CASE NO 2019-000704

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the sentencing court abused its discretion when it refused to exercise discretion over the imposition of Appellant's sentence, where the sentencing court was on notice that it had the option to allow Appellant to continue in the drug court program and where the sentencing court stated it was only there to impose Appellant's full fifteen-year suspended imprisonment sentence?

STATEMENT OF THE CASE

During the July 2016 term the Dillon County Grand Jury indicted Appellant for possession of contraband while incarcerated. R. 62; S.C. Code Ann. § 24-3-965. During the September 2018 term the Dillon County Grand Jury indicted Appellant for possession of a controlled substance. R. 64. During the January 2017 term the Dillon County Grand Jury indicted Appellant for distribution of methamphetamine. R. 66.

Appellant pled guilty as indicted before the Honorable Roger E. Henderson on October 24, 2018. R. 1; R. 4, ll. 10 – 15. Nathan Scales represented Appellant. Id. Shipp Daniel represented the state. Id.

Appellant had a negotiated sentence of fifteen years' imprisonment suspended upon the completion of the drug court program. R. 10, ll. 9 – 12. Judge Henderson sentenced Appellant pursuant to the negotiated agreement. R. 21, ll. 8 – 24.

On April 16, 2019, Appellant's drug court termination hearing was held before the Honorable Robert Stanton. R. 23. Michael Stephens represented Appellant. Id. Elizabeth Munnerlyn represented the state. Id. Judge Stanton terminated Appellant from the drug court program. R. 31, ll. 19 – 20.

Appellant's sentencing hearing was held before the Honorable Roger E. Henderson. R. 34. Nathan Scales represented Appellant. Id. Daniel Shipp represented the state. Id.

Judge Henderson stated that the "matter has been… adjudicated by the drug court judge" and that he had *no* discretion in sentencing. R. 38, ll. 4 – 15; R. 44, ll. 7 – 16. Judge Henderson stated "we [are] here to impose [the] sentence and that's what I intend to do." Id. Appellant's full sentence of fifteen years' imprisonment was imposed. R. 45, ll. 8 – 10.

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). "The failure to exercise discretion, however, is itself an abuse of discretion." State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) (citing Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)).

ARGUMENT

The sentencing court abused its discretion when it refused to exercise discretion over the imposition of Appellant's sentence, where the sentencing court was on notice that it had the option to allow Appellant to continue in the drug court program and where the sentencing court stated it was only there to impose Appellant's full fifteen-year suspended imprisonment sentence.

Relevant Facts

On October 24, 2018, Appellant pled guilty to possession of a controlled substance, possession of contraband, and distribution of methamphetamine. R. 7, ll. 10 – 15. Appellant was sentenced to fifteen years' imprisonment. R. 21, ll. 8 – 24. Appellant's sentences ran concurrent and were suspended upon the completion of the drug court program. Id.

Appellant was arrested for allegedly driving a stolen vehicle on November 28, 2018. R.49 Due to that arrest, a drug court program termination hearing was held before the Honorable Judge Robert A. Stanton on April 16, 2019 in Marlboro County. R. 23. Judge Stanton, a magistrate court judge, terminated Appellant from the drug court program. R. 31, ll. 19 – 20. However, Judge Stanton informed Appellant that he was "welcome to argue" for mitigation at the sentencing hearing, implying that the sentencing court would have discretion over the length of the sentence. R. 31, ll. 23 – 24. Judge Stanton also told Appellant, that if he was found not guilty on the possession of a stolen vehicle charge, and he was recommended back for drug court, Judge Stanton would be "glad to – to let [Appellant] come back into drug court." R. 32, ll. 2 – 9.

At the sentencing hearing, Appellant attempted to explain to the court that Judge Stanton told him during the termination hearing that the sentencing court had the discretion to impose the

sentence it deemed proper, which included allowing Appellant to stay in the drug court program. R. 41, l. 8 – 42, l. 17. The sentencing court responded by saying it did not have any discretion in sentencing and was only there to impose the full fifteen-year suspended imprisonment sentence. R. 44, ll. 10 – 22.

Discussion

The sentencing court failed to fulfill its duty to exercise discretion in this case. "The failure to exercise discretion… is itself an abuse of discretion." State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) (citing Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)). The court should have considered Appellant's arguments in mitigation during the sentencing hearing and exercised its discretion before imposing the original fifteen-year suspended imprisonment sentence. R. 41, l. 8 – 42, l. 17.

Appellant stated that Judge Stanton told him on the record, during the termination hearing, that if the sentencing court found it proper to allow Appellant back into drug court "they would happily allow [Appellant] back in drug court." Id. However, the sentencing court stated Appellant's argument "[fell] on deaf ears." R. 45, ll. 3 – 10.

The sentencing court told Appellant that Judge Stanton needed to "stand here and tell me that." R. 42, ll. 13 – 17. The sentencing court repeatedly asserted that *it did not have any discretion* in sentencing Appellant. R. 42, ll. 10 – 22. The court specifically stated its "hands [were] tied" and "we [are] here to impose [the] sentence and that's what I intend to do." R. 38, ll. 4 – 13.

In State v. Perkins, 378 S.C. 57, 661 S.E.2d 366 (2008) our Supreme Court explained the process for drug court program terminations. Perkins, at 60 – 61, 661 S.E.2d at 368. A drug court "program administrator" can *only* recommend the termination of a drug court program

enrollee. Id. The program administrators, which include "social worker[s], *magistrate[s]*, or Drug Court team member[s]," lack the authority to impose the suspended sentence. Id. (emphasis added) Thus, the Perkins Court held that "program administrators" can only recommend termination and "the decision of whether a defendant has violated a condition of his suspended sentence rests within the sound discretion of the trial court." Id. at 61, 661 S.E.2d at 368. (citing State v. Miller, 122 S.C. 468, 474 – 475, 115 S.E. 742, 754 (1923)) (see also State v. Allen, 379 S.C. 88, 94, 634 S.E.2d 653, 655 (2006)). Accordingly, since the trial court had the discretion to impose the suspended sentence, the trial court also possessed the discretion to determine how much of the suspended sentence should be imposed.

In State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981), our Supreme Court held that a trial judge who does not exercise discretion regarding a motion to modify or vacate a sentence, abused their discretion. Smith was convicted in his absence for a third offense of driving under the influence. Smith, at 496, 280 S.E.2d at 201. On a motion to modify or vacate Smith's sentence, the trial judge in Smith ruled that he had no jurisdiction to change the sentence. Id. at 497, 280 S.E.2d at 201. The Supreme Court held that the authority to change a sentence rests in the hands of the sentencing judge, within the exercise of discretion, and that the trial judge in Smith abused that discretion when he failed to exercise it. Id. at 498, 280 S.E.2d at 202.

In State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), Hughes was indicted for two counts of criminal sexual conduct with a minor in the second degree. During the trial, an expert in child sex abuse treatment testified that the victim's behavior was consistent with sexual abuse. Hughes, at 341, 552 S.E.2d at 36. However, on cross examination Hughes asked the expert if she reviewed her notes to refresh her memory prior to testifying. Id. After the expert responded in the affirmative, Hughes asked to inspect her notes. Id. The trial court refused to

allow inspection of the expert's notes because they were in Columbia and the trial was taking place in a different county, Orangeburg. Id. The jury convicted Hughes as indicted. Id.

This Court held that the trial court in Hughes erred when it refused to allow Hughes to access the expert's notes under Rule 612, SCRE. Hughes, at 343 – 344, 552 S.E.2d at 37. The trial court believed it could not order the production of the expert's notes because they were not located inside the courtroom. Id. at 343, 552 S.E.2d at 37. This Court determined that the trial court erred because, "[U]nder the plain language of [Rule 612, SCRE] the trial court has the discretion to allow or refuse examination by an adverse party of writings used by a witness prior to trial to refresh her memory." Id.; Rule 612, SCRE. The Hughes Court held that the trial judge abused his discretion when "his ruling revealed that no discretion was, in fact, exercised." Id. at 342, 552 S.E.2d at 36 (quoting Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987)).

As in Hughes, the sentencing court in this case had the discretion to impose whatever sentence it deemed proper, including keeping Appellant in the drug court program. Hughes, at 343, 552 S.E.2d at 37. Also, as in Hughes, the sentencing court's ruling revealed that no discretion was exercised. Id. at 342, 552 S.E.2d at 36; R. 38, ll. 4 – 13.

Appellant informed the sentencing court that Judge Stanton told him the sentencing court had discretion when sentencing to allow him to stay in the drug court program. R. 41, l. 8 – 42, l. 12. Judge Stanton's statements in the termination hearing indicated that Appellant would be allowed to make arguments during the sentencing hearing and that the sentencing court would have discretion to impose whatever sentence it deemed proper. R. 31, ll. 19 – 22. This on the record discussion put the sentencing court on notice that it could exercise its own discretion when sentencing Appellant in this case. Accordingly, sentencing court erred when it failed in its

duty to exercise discretion during sentencing, and Appellant's case should be remanded to the sentencing court for resentencing.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate Appellant's sentence, and remand his case to the Dillon County Court of General Sessions for resentencing.

s/ Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of June, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

s/ Victor R. Seeger

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This 9th day of June, 2020.