STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDMOND A. PINCKNEY,

APPELLANT

APPELLATE CASE NO 2019-001563

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the plea court erred when it denied appellant's motion to reconsider his sentence where he pled guilty to two counts of shoplifting in exchange for the state recommending a time served sentence and the court sentenced appellant to ten years imprisonment instead, since this draconian sentence was imposed because the court was impermissibly influenced by the fact appellant was acquitted of armed robbery and other serious charges involving the same story where the shoplifting occurred just before appellant pled guilty, and this sentence should therefore be vacated?

STATEMENT OF THE CASE

During the September 2017 term the Greenville County Grand Jury indicted Appellant for two counts of shoplifting. R.269-272. During the September 2017 term, the Greenville County Grand Jury indicted Appellant for armed robbery, assault and battery of a high and aggravated nature, assault and battery in the first degree, and possession of a weapon during the commission of a violent crime. R. 273-276.

On February 6-7, 2019, Appellant proceeded to trial for armed robbery, assault and battery of a high and aggravated nature, assault and battery in the first degree, and possession of a weapon during the commission of a violent crime before the Honorable Edward W. Miller, and a jury. R. 1. Thomas J. Quinn represented Appellant. Id. L. Mark Moyer represented the state. Id. Appellant was found not guilty on all charges. R. 252, l.8 – 253, l. 2.

Immediately after the conclusion of the trial on February 7, 2019, Appellant pled guilty to two counts of shoplifting before the Honorable Edward W. Miller. R. 256. Thomas J. Quinn represented Appellant. Id. Mark Moyer represented the state. Id.

The state recommended a time served sentence, totaling 771 days. R. 258, ll. 13 – 14. Judge Miller declined to follow the state's recommendation and sentenced Appellant to ten years' imprisonment, run concurrently, for each count of shoplifting[1]. R. 262, ll. 19 – 21.

On February 7, 2019, Appellant filed a motion to reconsider his sentence because "the court may have been inappropriately swayed by considering the accusations on which [Appellant] was found not guilty." R. 264.

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[1] Appellant was sentenced pursuant to § 16-1-57 which classifies shoplifting third offense as a Class E felony punishable with a sentence up to ten years' imprisonment. S.C. Code Ann. § 16-1-57; § 16-1-20.

Judge Miller denied the motion to reconsider. Order Denying Motion to Reconsider, p. 3. Judge Miller stated that regarding sentencing he took into consideration Appellant's age, employment, marital status, criminal record, education level, and any mitigation factors. Order Denying Motion to Reconsider, R. 266-267. He concluded the sentence was proper because the sentence was within the statutory limitations and Appellant was warned that the court did not need to follow the state's recommendation. Order Denying Motion to Reconsider, R. 268.

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 plea court erred when it denied appellant's motion to reconsider his sentence where he pled guilty to two counts of shoplifting in exchange for the state recommending a time served sentence and the court sentenced appellant to ten years imprisonment instead, since this draconian sentence was imposed because the court was impermissibly influenced by the fact appellant was acquitted of armed robbery and other serious charges involving the same story where the shoplifting occurred just before appellant pled guilty, and this sentence should therefore be vacated.

Relevant Facts

On December 26 and 27, 2017, Appellant allegedly stole beer from a Li'l Cricket by picking up the beer and running out the door before the clerk could stop him, otherwise known as a "beer grab." R. 261, ll. 4 – 15. Appellant pled guilty to two counts of shoplifting and the state recommended a time served sentence where Appellant already served 771 days imprisonment. R. 258, ll. 13 – 14.

Plea counsel asked the court to follow the state's recommendation. R. 262, ll. 10 – 14. The plea judge informed Appellant that he was not required to follow the state's recommendation, and sentenced Appellant to ten years' imprisonment. R. 259, ll. 20 – 23; R. 262, ll. 19 – 21.

Just prior to pleading guilty, Appellant was acquitted of armed robbery, assault and battery of a high and aggravated nature (ABHAN), assault and battery in the first degree, and possession of a weapon during the commission of a violent crime. R. 252, l.8 – 253, l. 2. The judge that presided over the trial, also presided over the guilty plea. R. 1; R. 256. During sentencing, the plea court asked if the "beer grabs" happened at the same Li'l Cricket that Appellant was acquitted of armed robbing in his recently concluded trial. Guilty Plea Transcript, R 261, ll. 11 – 17.

Appellant's motion to reconsider argued, the plea court was reasonably likely to have been "inappropriately swayed" by the acquitted charges. Motion to Reconsider R. 264. First, the acquitted charges and the shoplifting charges were similar in nature in that they are theft crimes that occurred at the same L'il Cricket. Id. Moreover, it was reasonably likely that the plea judge sentenced Appellant so harshly because Appellant was just acquitted on the more serious charges. Id.

In the denial of the motion to reconsider, Judge Miller stated that he took into consideration Appellant's age, employment, marital status, criminal record, education level, and any mitigation factors at sentencing. Order Denying Motion to Reconsider. R. 266-267. He concluded the sentence was proper because the ten-year sentence was within the statutory limitation and Appellant was warned that the court was not required to follow the state's recommended sentence. Order Denying Motion to Reconsider. R. 268.

Discussion

The plea court should have reconsidered Appellant's sentence because the state's recommendation was for time served and the ten-year imprisonment sentence was not warranted given the mild nature of the crimes to which Appellant pled guilty. Moreover, it was reasonably likely that the plea court imposed such a harsh sentence as punishment for Appellant proceeding to trial and being acquitted for armed robbery, ABHAN, assault and battery in the first degree, and possession of a weapon during the commission of a violent crime.

The preeminent case recognizing the "proportionality principle," was in Weems v. United States, 217 U.S. 349 (1910) where the defendant was convicted of falsifying public document and sentenced to fifteen years of, "cadena temporal," or hard labor in chains, and to permanent civil

penalties. Id. at 367. The United States Supreme Court held that punishment was cruel and unusual because it was not graduated and proportioned to the offense. Id.

In State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (2001), Brouwer argued that the trial court improperly considered the fact that he exercised his right to a jury trial in determining his sentence. Brouwer, at 386 – 387, 559 S.E.2d at 921 – 922. After the jury returned its guilty verdict, Brouwer asked the court to impose a sentence comparable to the one given Wendy Kaplan, his co-worker and co-defendant, who pled guilty immediately before trial. Id.; See Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999) (holding the sentence imposed on Davis was improper because the trial judge's comments showed he imposed more lenient sentences on Davis's co-defendants because they pled guilty). Brouwer and Kaplan were similarly situated in that both were newly hired and trained store clerks with no prior criminal record, and both were convicted of disseminating the exact same material. Id. In light of their similar situation, Brouwer argued for a proportionate sentence. Id.

The trial court stated that Kaplan deserved a more lenient sentence because she pled guilty. Id. at 387, 550 S.E.2d at 922. The trial court explained that, "[T]here is no way in rhyme or reason for us to ever give a sentence for someone pleading guilty the same sentence for a jury trial." Id.

This Court held that the trial judge's comments were "indistinguishable" from those expressly disapproved in Davis. Id. at 388, 550 S.E.2d at 922. Although the trial court stated that it would never punish someone for exercising their right to a jury trial, "the mere disavowal of wrongful intent cannot remove the taint inherent in the trial court's commentary..." Id.

In State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995), the South Carolina Supreme Court held that the trial court improperly sentenced Hazel because it used Appellant's exercise of his right to a jury trial against him. Id. at 369 – 370, 453 S.E.2d at 879 – 880.

Hazel, who was nineteen at the time of the trial, was convicted of possession with intent to distribute crack cocaine and requested to be sentenced under the Youthful Offender Act (YOA). Id. The trial judge refused and sentenced Hazel to fifteen years' imprisonment and imposed a $25,000 fine. Id. In response to Hazel's request for sentencing under the YOA, the trial judge stated, "Well, it's one thing, if he'd pled guilty, I'd have considered that." Id.

The Court pointed out that the decision to sentence a defendant pursuant to the YOA was within the trial court's discretion. Id. 369 – 370, 453 S.E.2d at 879 – 880. However, the Court held that the trial court abused its discretion when it improperly considered the fact that Hazel exercised his right to a jury trial and remanded Appellant's case for resentencing. Id. at 370, 453 S.E.2d at 880.

In the present case the plea court punished Appellant with the maximum possible sentence because he was acquitted of much more serious charges immediately prior to pleading guilty to the two "beer grabs." The state recommended a sentence of time served, which recognized the relatively mild nature of the "beer grabs." R. 258, ll. 13 – 14. During sentencing, the plea judge specifically asked if the "beer grabs" happened at the same Li'l Cricket that Appellant was acquitted of armed robbing in his recently concluded trial. Guilty Plea Transcript, R. 261, ll. 11 – 17. This line of questioning by the plea court showed he considered the acquitted charges when he imposed the maximum sentence.

The vast difference between the state's recommended sentence and the imposed sentence, as well as the plea court highlighting the similarities between pleaded to charges and the acquitted charges showed that the plea court abused its discretion because it improperly considered the acquitted charges when it imposed the exceedingly harsh ten year sentence of imprisonment for each of Appellant's "beer grabs." Hazel, at 370, 453 S.E.2d at 880.

CONCLUSION

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

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of September, 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,

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This 28th day of September, 2020.