

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Roger M. Young, Circuit Court Judge

RECEIVED
Oct 06 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JASON S. SIMMONS,

APPELLANT

APPELLATE CASE NO. 2020-000090

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The trial judge improperly punished Appellant for exercising his right to a jury trial where the judge placed on the record that Appellant rejected the state’s offer of a ten-year sentence, warned Appellant that if he were convicted by a jury, he would likely never see outside of a prison again, and followed through by sentencing Appellant to forty years, which the judge acknowledged far exceeded Appellant’s life expectancy in light of his deteriorating health.4

Relevant Facts.....4

Discussion.....6

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL12

TABLE OF AUTHORITIES

Cases

Alabama v. Smith, 490 U.S. 794 (1989) 6

Bordenkircher v. Hayes, 434 U.S. 357 (1978)..... 6

Castro v. State, 417 S.C. 77, 789 S.E.2d 44 (2016)..... 9

Chaffin v. Stynchcombe, 412 U.S. 17, (1973)..... 6

Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999)..... 9

In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010)..... 3

Izaguirre v. Lee, 856 F. Supp. 2d 551 (E.D.N.Y. 2012)..... 8

North Carolina v. Alford, 400 U.S. 25 (1970)..... 4

North Carolina v. Pearce, 395 U.S. 711 (1969)..... 6

State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001)..... 8, 9

State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995) 9

State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2011)..... 7

State v. Slocumb, 412 S.C. 88, 770 S.E.2d 436 (Ct. App. 2015) 3

State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009)..... 3

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 3

Texas v. McCullough, 475 U.S. 134 (1986)..... 6

U.S. v. Jackson, 390 U.S. 570 (1968) 6

United States v. Capriola, 537 F.2d 319 (9th Cir. 1976)..... 8

United States v. Mazzaferro, 865 F.2d 450 (1st Cir. 1989) 8

United States v. Wiley, 278 F.2d 500 (7th Cir. 1960) 7

STATEMENT OF ISSUE ON APPEAL

Did the trial judge improperly punish Appellant for exercising his right to a jury trial where the judge placed on the record that Appellant rejected the state's offer of a ten-year sentence, warned Appellant that if he were convicted by a jury, he would likely never see outside of a prison again, and followed through by sentencing Appellant to forty years, which the judge acknowledged far exceeded Appellant's life expectancy in light of his deteriorating health?

STATEMENT OF THE CASE

On April 13, 2017, a Cherokee County grand jury indicted Appellant for criminal sexual conduct with a Minor in the first degree. R. 350 – R. 351. The state, represented by Matt Kendall and Kim Leskanic, called the case to trial before the Honorable Roger M. Young and a jury on January 8-10, 2020. R. 1. Michael Morin represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 344, ll. 5-8. Judge Young sentenced Appellant to forty years imprisonment. R. 348, ll. 14-5; R. 352.

Appellant served his notice of appeal on January 16, 2020. This brief 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 trial judge improperly punished Appellant for exercising his right to a jury trial where the judge placed on the record that Appellant rejected the state's offer of a ten-year sentence, warned Appellant that if he were convicted by a jury, he would likely never see outside of a prison again, and followed through by sentencing Appellant to forty years, which the judge acknowledged far exceeded Appellant's life expectancy in light of his deteriorating health.

Relevant facts

Prior to trial, Judge Young engaged in a personal colloquy with Appellant. Initially, he wanted "to put on the record that [Appellant was] looking at 25 years, minimum, if [he were] convicted of this charge." R. 6, ll. 5-9. According to the judge, he and others had engaged in "some discussions earlier about a plea that would be a plea to a substantially less term than that." R. 6, ll. 10-12. He elaborated that it was "for ten years, an *Alford*¹ plea." R. 6, ll. 12-13. The judge noted that Appellant did "not want to accept that plea," and that he was "not trying to convince [him], one way or the other, to except [sic] it." R. 6, ll. 13-14. He simply wanted "it to be on the record" that if Appellant were convicted "the minimum sentence of the Court will be 25 years." R. 6, ll. 14-16. The judge further explained Appellant "could get life on it." R. 6, ll. 18-19. While it was Appellant's "choice," the judge warned it was "a big old chunk of sentence right there" if Appellant lost. R. 6, ll. 19-20.

After a bench conference, Judge Young reminded Appellant he was "facing 25 to life." R. 7, ll. 11-12. He then advised Appellant of his rights, including his right to testify during the trial. R. 7, ll. 16-17. The judge explained, "You also have the right to not testify, if you don't want to. If you want to get up and tell your side of the story to the jury, you can do that. You'd

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

be placed under oath. You are obligated to tell the truth.” R. 7, ll. 18-21. Further, the judge noted that if Appellant did not want to testify, he would not be required to do so, and the judge would “instruct the jury that they are not to hold that against [Appellant] while they are deliberating the verdict.” R. 7, l. 24 – R. 8, l. 1. Finally, the judge explained that he would ask Appellant “at some point in the trial” about his decision regarding whether he would testify. R. 8, ll. 10-13. He implored Appellant to discuss the matter with his lawyer and his family. R. 8, ll. 12-16. Again, Judge Young noted Appellant was “facing 25 years,” and as a result, he should give the matter “serious thought.” R. 8, ll. 16-21. Thereafter, the judge warned, “Because the consequences are likely to be that if it goes against you, you’re never going to see the outside of a prison again.” R. 8, ll. 21-23.

Multiple witnesses testified about Appellant’s failing health. Dana Fortner, the complaining witness’s mother, noted that Appellant’s health was not good. R. 103, ll. 7-13; R. 114, ll. 2-8. Appellant explained that he suffered a debilitating stroke in 2012. R. 250, ll. 21-23. His wife, Melisa Simmons, told the jurors that she and Appellant were in Best Buy when Appellant had a stroke. R. 282, ll. 4-10. As a result of the stroke, Appellant was rendered disabled. R. 250, ll. 16-25. He had multiple surgeries on his brain following the stroke. R. 251, ll. 1-5. Every six months, his doctors examined scans of his brain in order to determine whether Appellant required additional surgeries to remove the growing tumors in his brain. R. 251, ll. 6-16. At the time of his trial, Appellant used a cane to assist with his mobility. R. 251, ll. 17-19. Appellant took numerous medications to control his seizures. R. 253, ll. 9-10.

During the sentencing proceeding, the judge remarked that twenty-five years, the minimum sentence, was “probably a life sentence” based upon Appellant’s deteriorating health. R. 348, ll. 10-12. He noted Appellant was “not doing very well.” R. 348, ll. 12-13.

“Nevertheless,” the judge thought “sentence of 40 years in the department of corrections [was] an appropriate sentence.” R. 348, ll. 14-15. He made one final observation: “You may or may not ever get out, but good luck to you.” R. 348, ll. 19-20.

Discussion

The Supreme Court of the United States has established that a defendant cannot be punished for exercising a constitutional right; to do so constitutes a violation of due process. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is ‘patently unconstitutional.’”) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32–33, n.20, (1973)); *U.S. v. Jackson*, 390 U.S. 570, 583 (1968) (holding that the government may not “penalize[] the assertion of a constitutional right”). More specifically, the Court held in *North Carolina v. Pearce*, 395 U.S. 711 (1969), that penalizing a defendant for pursuing a statutory right of appeal or collateral remedy violates due process. *Id.* at 724 (“[a] court is without right to put a price on an appeal;” a defendant’s “exercise of a right of appeal must free and unfettered.”).² Thus the Court created the following legal framework:

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a

² In *Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court explained that the evil the *Pearce* Court sought to prevent was not the imposition of longer sentences after a new trial but the vindictiveness of a sentencing judge. *Id.* at 799 (citing *Texas v. McCullough*, 475 U.S. 134, 138 (1986)). The Supreme Court explained that the *Pearce* presumption applies in situations where the relevant sentencing factors remained the same between the initial, shorter sentence—whether from a plea deal or a judge—and the later increased sentence: the same judge, the same facts, the same evidence, the same proceeding. Such a scenario creates a “reasonable likelihood” that the increased sentence was the product of actual vindictiveness on the part of the sentencing authority in part because a court was being asked to do over what it had already done correctly. *Id.* at 800.

new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

The South Carolina Supreme utilized the *Pearce* presumption in *State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2011). The judge extended Higgenbottom’s probationary sentence to twenty-four months when Higgenbottom filed a motion for reconsideration. *Id.* at 13, 542 S.E.2d at 719. The Supreme Court reversed, holding that “without objective evidence of a proper motivation to increase the sentence, the *Pearce* presumption applies to find a due process violation.” *Id.* at 15, 542 S.E.2d at 720. The Court held that without a record based and articulated justification, the trial court’s decision to extend the probationary sentence one day after the original sentence was imposed – where the only intervening event was the motion to reconsider – the *Pearce* vindictiveness presumption applied. The Court reversed and reinstated the 18-month probationary sentence. *Id.* at 17, 542 S.E.2d at 721.³

Other courts have recognized that the due process rule prohibiting penalizing defendants for exercising rights applies in other situations including claims of prosecutorial vindictiveness in connection with plea negotiations. *See e.g., Izaguirre v. Lee*, 856 F. Supp. 2d 551, 577

³ Prior to *Pearce*, the Seventh Circuit decided *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960). Wiley’s co-defendant was sentenced to two years and Wiley to three years. The Seventh Circuit set aside Wiley’s sentence and rejected “the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his efforts prove unsuccessful.” Finding that the record showed that the district court was fully informed as to the serious prior criminal records of convictions of all of Wiley’s co-defendants, and the district court’s own remarks show that it considered Wiley to be only “a minor participant who stood trial.” *Id.* at 503. Thus, the disparity between the sentence imposed by the district court on Wiley, an accessory, and his co-defendant, the principal, made it evident “that the punishment imposed by the district court on Wiley was – at least in part – a tax for availing himself of his right to a trial. *Id.* at 504.

(E.D.N.Y. 2012) (holding that “[b]ecause the *Pearce* presumption applies to Petitioner at sentencing, the County Court was required to affirmatively state sufficient reasons for the sentence imposed in order to rebut the presumption that it was motivated by actual vindictiveness in imposing the maximum statutory sentence as promised); *United States v. Mazzaferro*, 865 F.2d 450, 458-460 (1st Cir. 1989) (holding the sentencing disparity between Mazzaferro’s twenty-year sentence and his co-defendants’ ten-year terms and the difference in culpability among the men was suggestive of vindictiveness for Mazzaferro exercising his right to trial); *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976) (explaining that “[w]hen there is substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation”).

This Court confronted a similar situation in *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001). Brouwer’s co-defendant entered a guilty plea immediately prior to what was to be a joint trial. *State v. Brouwer*, 346 S.C. 375, 378, 550 S.E.2d 915, 917 (Ct. App. 2001). The judge sentenced the co-defendant to “two years plus a \$5,000 fine, provided that upon payment of a fine of \$750 plus costs the balance of the sentence would be suspended. The court also placed [co-defendant] on probation for two years.” *Id.* After a jury convicted Brouwer, he requested a sentence comparable to his co-defendant. *Id.* at 387, 550 S.E.2d at 921-922. The judge declined, explaining the co-defendant received a more lenient sentence because she admitted guilt. *Id.* at 387, 550 S.E.2d at 922.

According to the judge there was no “rhyme or reason” to give the same sentence to someone who went to trial as someone who pled guilty. *Id.* Although the judge indicated he would never punish someone for exercising his right to a jury trial, this Court held “the mere

disavowal of wrongful intent cannot remove the taint inherent in the court’s commentary.” *Id.* at 388, 550 S.E.2d at 922. Thereafter, this Court held the record failed to reflect an “otherwise appropriate basis for Brouwer’s disparate sentence.” *Id.* Accordingly, this Court reversed Brouwer’s sentence and remanded for resentencing. *Id.* See also *Castro v. State*, 417 S.C. 77, 83-84, 789 S.E.2d 44, 47 (2016) (holding a trial judge improperly considered Castro’s decision to exercise his right to a jury trial in sentencing Castro and concluding that other, valid reasons for a sentence considered by the trial judge “do not negate the abuse of discretion that occurs when one of the sentencing factors considered by the trial judge was the defendant’s decision to proceed to trial); *Davis v. State*, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) (holding trial counsel provided ineffective assistance by failing to object to the trial judge’s statements at sentencing that he was not sentencing Davis to a sentence comparable to that received by similarly situated defendants because the other defendants had pled guilty and Davis had not, which showed the judge improperly considered Davis’s decision to proceed with a jury trial); *State v. Hazel*, 317 S.C. 368, 369-370, 453 S.E.2d 879, 879-880 (1995) (holding a trial judge abused his discretion in refusing to sentence Hazel under the Youthful Offender Act (YOA) where the judge relied heavily upon Hazel’s exercise of his right to a jury trial as weighing against sentencing under the YOA).

The trial judge improperly taxed Appellant for exercising his constitutional right to a jury trial. Prior to trial, the judge indicated he was willing to impose a sentence of ten years if Appellant were to enter a guilty plea. The judge warned Appellant that he would likely never see the outside of prison again if he were to be found guilty by a jury. When the jury returned with its guilty verdict, the judge was true to his word. Although he noted that the mandatory minimum sentence of twenty-five years was “probably a life sentence” for Appellant due to his

health, the judge imposed a forty-year term of imprisonment. The judge provided no reasoning for his exceptionally harsh sentence.

CONCLUSION

Appellant respectfully requests this Court vacate his sentence and remand for a new sentencing proceeding.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of October, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Roger M. Young, Circuit Court Judge

RECEIVED
Oct 06 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JASON S. SIMMONS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason S. Simmons states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Roger M. Young, which was held on January 8-10, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738, (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jason S. Simmons.

Respectfully Submitted,

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 6th day of October, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Oct 06 2020

SC Court of Appeals

Appeal from Chester County
Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON S. SIMMONS,

APPELLANT

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial transcript dated January 8-10, 2020;
- (2) True-billed indictment; and
- (3) Sentencing sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

October 6, 2020

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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.”

October 6, 2020.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

RECEIVED
Oct 06 2020
SC Court of Appeals

ATTORNEY FOR APPELLANT