STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL G. STROTHER,

APPELLANT

APPELLATE CASE NO 2019-001328

FINAL BRIEF OF APPELLANT

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Whether the plea court erred by denying Appellant's motion to reconsider the sentence or to vacate Appellant's guilty plea, where the state breached its plea agreement by allowing unsubstantiated allegations to be discussed by a witness after informing Appellant that the allegations would not be brought up at the plea, where the plea judge took those remarks into consideration when sentencing Appellant, and where the plea judge failed to consider an expert mental health evaluation?

STATEMENT OF THE CASE

Appellant was indicted for sexual exploitation of a minor in the first degree, five counts of sexual exploitation of a minor, third degree, and one count of voyeurism on or about May 31, 2017. R. 40. He proceeded to plead before the Honorable R. Lawton McIntosh on January 10, 2019. Teal Johnson represented Appellant; R. Kyle Senn appeared on behalf of the state. He pleaded guilty as indicted. R. 7, ll. 15 – 18. Judge McIntosh sentenced Appellant to fifteen years' incarceration. R. 29, ll. 12 – 15.

Counsel for Appellant filed a motion to reconsider the sentence or to vacate the guilty plea on January 18, 2019. R. 33. An Order denying the motion without a hearing was filed on August 5, 2019. R. 39.

This appeal follows.

STANDARD OF REVIEW

"Once a defendant enters a plea of guilty, the decision whether to allow withdrawal of the plea is left to the trial court's sound discretion." State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002) (citing State v. Riddle, 278 S.C. 148, 292, S.E.2d 795 (1982); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. (citing State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001)). "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 plea court erred by denying Appellant's motion to reconsider the sentence or to vacate Appellant's guilty plea, where the state breached its plea agreement by allowing unsubstantiated allegations to be discussed by a witness after informing Appellant that the allegations would not be brought up at the plea, where the plea judge took those remarks into consideration when sentencing Appellant, and where the plea judge failed to consider an expert mental health evaluation.

Relevant facts

Appellant was sixty-five years old at the time of the plea. R. 3, ll. 18 – 24. He served twenty years in the United States Navy and did not have a criminal record. R. 4, ll. 6 – 10; R. 11, ll. 4 – 6. The facts as alleged by the prosecution at the plea were that Appellant possessed child pornography and recorded an adult female and a minor female in his house without their knowledge. R. 9, l. 4 – R. 11, l. 10. Appellant signed a consent order to forfeit all of the devices with improper images on them. R. 11, ll. 7 – 10.

The adult female spoke at the plea. R. 12. L. 1 – R. 14 l. 25. During the course of her comments, she stated "[t]his is not the first time he's done this." Id. Following that contention, the plea judge, seeking additional information outside the scope of the plea, inquired what she meant by that. R. 12, ll. 23 – 24. Counsel for Appellant attempted to object, but the plea judge responded that he is not limited to the testimony he can hear during a plea. Id. Nonetheless, he noted the objection for the record. Immediately thereafter, the adult female continued discussing prior allegations, even going as far as saying that "[t]his has been a pattern with him, and in his prior marriage to my mother, he had a stepdaughter that he molested repeatedly." Id. These

allegations were beyond the scope of the indictments. She requested the maximum sentence for Appellant. Id.

The plea judge noted Appellant's objection a second time and seemed to suggest that he was considering giving Appellant the maximum sentence. Id. Counsel remarked that the baseless allegations prejudiced Appellant:

> I don't know anything about these prior allegations, and I'm here today to defend my client.
>
> …
>
> And, you know, when somebody comes into court and makes accusations that I'm not able to defend, that puts my client at a huge disadvantage, so I would object to that.

R. 14, ll. 11 – 21.

The plea judge described the facts as "extremely disturbing" and asked counsel to speak in mitigation. R. 14, ll. 22 – 24. Counsel provided a psychological report drafted by Dr. Karl Bodtorf to the plea court. R. 15, ll. 13 – 24. Counsel highlighted how the report indicated that Appellant's risk to the community is generally low, and Appellant was not considered to be a "classic pedophile or predator." R. 16, ll. 9 – 12.

Appellant's brother spoke on his behalf after counsel's presentation. R. 19, l. 10 – R. 22, l. 17. The state then indicated its intent to address Dr. Bodtoft's report. Without hearing any of the substance of the state's position, the plea judge candidly stated that he was unwilling to accept the expert's opinions:

> I don't give it much credit, to be honest with you. I know this doctor. I generally do, but I don't buy a whole lot what he's selling in that report in this case. I don't give it much credit.

R. 23, ll. 16 – 19. These remarks followed the adult female's comments. The state requested "a substantial active sentence." R. 25, ll. 5 – 6.

After Appellant expressed his remorse and addressed the court, counsel on his behalf again sensed that the plea judge was not considering Dr. Bodtorf's report:

> Counsel: Your Honor, it sounds like you're not giving much credit to the expert here.
>
> Plea judge: **I'm not. And I will not.** Normally I do, but I read that report and I didn't buy anything he was selling to me in that report at all. I will make it a part of the Court's record and make it a court exhibit but I don't think it's credible at all.

R. 26, ll. 16 – 22. (emphasis added). The report was made Court's Exhibit 1. Counsel noted that Dr. Bodtorf has "been doing this since the 90's" and asked if the court would allow time for someone else to evaluate Appellant. R. 27, ll. 5 – 11. The plea judge responded: "We're going today." R. 27, l. 12.

Immediately prior to sentencing, the plea judge seemed to suggest that he was going to be basing his sentence on acts for which Appellant had not been indicted: "This is a horrible crime that has done on for a long time, I'm sure, not just this time that they found on your computer." R. 29, ll. 9 – 11.

Discussion

The plea court erred by failing to consider the report of a mental health expert and instead considered the inflammatory and unsubstantiated remarks by a witness which referenced unindicted allegations in violation of a plea agreement entered into with the state. The denial of Appellant's post-plea motion was an abuse of discretion, where information regarding the state's breach of the plea agreement constituted grounds to vacate the plea.

According to the Motion to Reconsider Sentence or in the Alternative Motion to Vacate Guilty Plea ("Motion"), the Attorney General's Office sent a plea offer to Appellant on October 9, 2018. R. 33. On the day of the plea before Judge McIntosh, Appellant met with the

prosecutor, Kyle Senn. R. 33. Senn "informed defense counsel that there were 'other allegations (that were sexual in nature) against the Defendant' from a different victim, and for which the Defendant was neither charged nor indicted who, according to Mr. Senn, had previously recanted." Id.

Counsel had not been made aware of these unfounded and uncharged allegations previously. Id. Senn "assured counsel that these allegations **would not be brought up during the guilty plea**." Id. (emphasis added). Based upon that assurance, counsel advised Appellant to continue with the plea agreement. Id. As previously noted, the new allegations were, in violation of the agreement, nonetheless presented to the plea judge. Senn did not speak up or instruct the witness to avoid discussing the allegations. Id.

As correctly asserted in the Motion, the state "was aware of the new allegations" and "failed to properly prepare and/or advise the victim about inadmissible and highly prejudicial testimony." Id. Further, the remarks offered were not "relevant to the charge to which Mr. Strother was pleading," and were neither agreed upon by Appellant nor present in the indictments.

The remarks were highly prejudicial, inflammatory, and excessive. The plea judge should not have asked the witness to elaborate, and the remarks should not have been taken into consideration. In order to protect the validity and integrity of the plea agreement, and based upon the prior understanding with counsel, the state should have spoken up and asked that the comments be struck. At the very least, the state should have advised the plea judge that an agreement was in place such that the remarks should not have been offered.

Rather than sticking to the previously established confines of the plea agreement, the state sat silent and allowed the plea to be tainted by unsubstantiated allegations beyond the

indictments. The state did not file any responsive pleadings following Appellant's post-plea motion, either.

Although the South Carolina Supreme Court's analysis of a similar issue took place within the context of a post-conviction relief appeal wherein it affirmed this Court, the Supreme Court held in Smith v. State that the state breached a plea agreement with the defendant. 413 S.C. 194, 775 S.E.2d 696 (2015). In that instance, Smith alleged his attorney was deficient for failing to object after the state violated its agreement to stay silent during sentencing. Id. At 195, 775 S.E.2d at 696. The Court found that the proper remedy for the breach was invalidation of the entire agreement, because Smith would not have entered into the plea agreement had he known the state was going to breach the agreement. Id. at 195-6, 775 S.E.2d at 696-7.

It has long been established that state prosecutors "are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty." Sprouse v. State, 355 S.C. 335, 338, 585 S.E.2d 278, 279 (2003) (citing Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)).

In Santobello, the United States Supreme Court established that state prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In Santobello, the Assistant District Attorney negotiated with the defendant and agreed to permit him to plead guilty to a lesser-included offense, conviction of which would result in a maximum prison sentence of one year. 404 U.S. at 258, 92 S.Ct. at 497, 30 L.Ed.2d at 431. In addition, the prosecutor agreed to make no sentence recommendation. Id. The court accepted the guilty plea and set a date for sentencing. Id. At the sentencing, another prosecutor appeared for the state, and the prosecutor that originally negotiated the plea was not present. Id. at 259, 92 S.Ct. at 497, 30

L.Ed.2d at 431. This new prosecutor recommended that the judge impose the one-year maximum sentence in violation of the defendant's plea agreement with the original prosecutor. Id.

Recognizing the fundamental rights that a defendant forfeits when he pleads guilty, the Supreme Court made the following statements:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but 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 of consideration, such promise must be fulfilled.

Id. at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433. The Court found that the state had promised to abstain from making a sentencing recommendation, and that the promise of one prosecutor in the office bound all prosecutors in the office. Id. The Court found it unnecessary to engage in a prejudice analysis, concluding that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the jury for further consideration." Id. at 262-63, 92 S.Ct. at 499, 30 L.Ed.2d at 433.

"Although the Government has a duty to provide the sentencing court with relevant factual information and to correct misstatements, it may not hide behind this duty to advocate a position that contradicts its promises in a plea agreement." United States v. Munoz, 408 F.3d 222, 227 (5th Cir. 2005). Instead, the government must carefully balance its duty of candor to the sentencing court with the sometimes competing — but equally solemn — duty to honor its commitments under a plea agreement. See United States v. Saxena, 229 F.3d 1, 5 (1st Cir. 2000).

"[W]hen 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, 92 S.Ct. 495, 30 L.Ed.2d 427

(1971). "It is well-established that the interpretation of plea agreements is rooted in contract law, and that each party should receive the benefit of its bargain." United States v. Peglera, 33 F.3d 412, 413 (4th Cir.1994) (citation and internal quotation marks omitted). "A central tenet of contract law is that no party is obligated to provide more than is specified in the agreement itself." Id. "Accordingly, in enforcing plea agreements, the government is held only to those promises that it actually made," and "the government's duty in carrying out its obligations under a plea agreement is no greater than that of fidelity to the agreement." Id. (citation and internal quotation marks omitted).

The state's failure at sentencing to stand by its prior agreement denied Appellant a central benefit of his bargain. It follows that the state breached its plea agreement. Because the duties were sufficiently clear—namely, to avoid extraneous comments and prevent discussion of unindicted allegations—the failure to abide by the plea agreement should result in a new trial for Appellant.

In addition to the state's breach of the plea agreement, Appellant was denied due process by being punished for unproven allegations for which he was presumed innocent. A breach of a plea agreement affects a defendant's substantial rights only if it prejudices the defendant. Puckett v. United States, 556 U.S. 129, 143, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). A noticeable shift in the tone of the plea can be gleaned following the prejudicial and improper remarks about prior alleged conduct. The plea judge's interest was piqued, and the comments regarding previous alleged acts appeared to have marked a change in the plea. The comments were inflammatory, improper, and in violation of the plea agreement.

It was only after the witness's improper suggestion that Appellant had committed similar acts in the past that the plea judge refused to consider a report drafted by a reputable, credible,

and unbiased doctor. Prejudice manifested itself in that moment, wherein the plea judge completely and outright disregarded Dr. Bodtorf's report. Seemingly convinced that the allegations of prior conduct may have some merit, the plea judge advised counsel that he was ignoring the mitigation materials provided in the report. It was error to disregard the expert report, and it was error not to allow Appellant to be evaluated by a different doctor.

Neither the state nor the plea judge suggested that prejudice would arise had Appellant been evaluated by a different doctor. Rather than allowing additional unbiased information from an expert to help inform the court's decision, the plea judge "summarily rejected this proposal and ruled that the plea would be done that day." R. 33.

Dr. Bodtort's report offered a significant amount of mitigation:

> The results from the Personality Assessment Inventory would suggest that Mr. Strother was experiencing much in the way of psychological distress at the time of this assessment. He reports elevated levels of dissatisfaction with his life and is quite pessimistic about his future. His difficulties with depression, as noted above, would appear to have been exacerbated by the different circumstances in which he finds himself at the present time. Test findings reflect considerable social withdrawal/isolation.
>
> …
>
> The following stressors would appear to have been precursors to his offense: wife's chronic illness (advances stage Parkinson), wife's grown daughter's relationship/financial instability combined with substance abuse (allegedly two DUI's) that led to her moving in with the Strothers, and eventually requiring Mr. Strother to assume legal custody for a time or her three children (as DSS had intervened).

R. 30. Dr. Bodtorf found that Appellant "is an appropriate candidate for involvement in sexual offender specific treatment (i.e. an outpatient counseling program designed for individuals who have come to the attention of the authorities for computer related crimes). Id. The state did

not offer any expert report to dispute Dr. Bodtorf's findings. Dr. Bodtorf has routinely offered his expertise, as seen in at least two published opinions.[1]

The plea court suggested that it "get[s] to listen to anything [it] want[s] to." R. 13, ll. 2 – 5. However, in Appellant's case, it improperly considered unfounded allegations which, subject to a plea agreement, should not have been mentioned at the plea. These otherwise inadmissible comments colored the plea court's opinion of Appellant and resulted in a lack of consideration of a reliable and credible report by an expert doctor. The plea court erred in failing to strike the witness testimony at the plea, failing to consider Dr. Bodtorf's report, and by denying Appellant's post-plea motion.

[1] State v. Thompson, 329 S.C. 72, 495 S.E.2d 437 (1998); In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003).

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that his conviction be reversed and his case be remanded for a new trial.

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of November, 2020.

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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 16, 2020

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