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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO O. SIMMONS,

APPELLANT

APPELLATE CASE NO 2020-00088

AMENDED INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

1. Appellant's motion to withdraw his guilty plea was properly made at his resentencing hearing because the original negotiated sentence was ruled invalid where Appellant only plead guilty because he was promised he would receive a negotiated sentence, but now that he could not receive that sentence Appellant should have been allowed to move to withdraw his guilty plea.

Appellant's motion to withdraw his guilty plea was properly made at his resentencing hearing. At Appellant's guilty plea hearing on March 20, 2018, Appellant pled guilty because he was promised a negotiated sentence between seventeen and twenty-eight years' imprisonment. Tr. 4, ll. 9 – 19. The plea court specifically recognized that Appellant was pleading guilty pursuant to the promise of the negotiated sentence. Tr. 29, ll. 2 – 7. Appellant was sentenced to thirty years' imprisonment suspended upon eighteen years' imprisonment and twelve years' probation, with the probationary sentence terminated upon two years of counseling and regularly taking his medication. Tr. 37, l. 4 – 39, l. 21.

After the guilty plea hearing, Appellant successfully challenged the legality of his sentence at his post-conviction relief (PCR) hearing. The PCR court found that Appellant's sentence was invalid because no portion of the sentence could be suspended and remanded his case to the lower court for resentencing. PCR Order, p. 11 – 12, R, p. *. At the resentencing hearing on January 10, 2020, Appellant moved to withdraw his guilty plea now that the negotiated sentence was no longer promised. Resentencing hearing, p. 11, l. 13 – 12, l. 13. Since Appellant's guilty plea was induced by the promise of a negotiated sentence and it was not until the resentencing hearing that Appellant learned he was not going to be resentenced pursuant to the negotiated range, he should have been allowed to withdraw his guilty plea at the resentencing hearing.

Guilty pleas operate under contract law principles. See Puckett v. U.S., 556 U.S. 129, 136 – 37 (2009). When a defendant pleads guilty because he was promised a particular sentence, he or she is allowed to move to withdraw their guilty plea if the plea court will not accept the negotiated sentence or will sentence the defendant outside the negotiated range. Id.

Respondent's argument that Appellant's withdrawal of his guilty plea was not timely made was incorrect. BOR, at 10 – 11. The fact that Appellant's motion to withdraw his guilty plea was two years later in time from the guilty plea hearing was of no consequence in this context.

Appellant's guilty plea was induced by the state's promise that he would be sentenced pursuant to the negotiated range. Tr. 29, ll. 2 – 7. It was only after the PCR court determined that the sentence imposed was invalid and after the resentencing court decided to not resentence Appellant pursuant to the negotiated range, that Appellant could withdraw his guilty plea. Other than at his resentencing hearing, there was no opportunity for Appellant to withdraw his guilty plea. In effect, Appellant was forced to uphold his end of the guilty plea bargain while the state was not bound by their agreement to sentence him pursuant to the negotiated sentencing range. Accordingly, since Appellant's guilty plea was induced by the promise of a negotiated sentencing range and the resentencing court stated it was not going to follow the negotiated range, Appellant properly moved to withdraw his guilty plea at that time and the resentencing court should not have failed to exercise its discretion over the withdrawal motion. Harden v. State, 276 S.C. 249, 255 – 56, 277 S.E.2d 692, 695 (1981) (“Where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include... sentence concessions, withdrawal of the plea may be permitted in the discretion of the judge.”)

2. The severity of Appellant’s sentence drastically increased after his resentencing hearing and Appellant’s challenge to the increased sentence was preserved for review as defense counsel warned the resentencing court about the presumption of vindictiveness when a defendant receives a more severe sentence after resentencing.

Defense counsel raised the issue of Appellant’s dramatically increased sentence at the resentencing hearing such that the issue was properly preserved for review by this Court. Resentencing hearing, p. 5, ll. 4 – 10. Appellant was initially sentenced to thirty years’ imprisonment suspended upon eighteen years’ imprisonment and twelve years’ probation, with the probationary sentence terminated upon two years of counseling and regularly taking his medication. Tr. 37, l. 4 – 39, l. 21.

At the resentencing hearing, plea counsel pointed out to the lower court that the department of corrections would have treated Appellant’s initial sentence as “a eighteen year sentence” and cited North Carolina v. Pearce, 395 U.S. 711 (1969) for the proposition that there must be a valid reason for imposing a harsher sentence after a reconsideration. Resentencing hearing, p. 5, ll. 15 – 22. In effect, defense counsel was putting the resentencing court on notice that imposing an active sentence longer than eighteen years of imprisonment must not motivated by a desire to punish Appellant for being successful at post-conviction relief (PCR). Accordingly, Appellant’s current challenge to his twenty-eight-year imprisonment sentence was preserved for review.

Moreover, in the initial brief of respondent, the state’s argument that the issue was not properly raised before the resentencing court was undermined by its other argument that the “plea judge repeatedly explained – he did not revise the sentence to punish Appellant.” BOR, p. 22 – 23, 30 – 31. The fact that the resentencing judge needed to “repeatedly” explain that he was not

increasing Appellant's sentence to punish him for being successful at PCR showed that the issue was raised at the resentencing hearing.

Furthermore, the fact that the resentencing judge felt the need to explain the reasons for revising Appellant's sentence showed that his new sentence was more severe. Resentencing hearing, p. 11, l. 14 – 12, l. 13. The new sentence of twenty-eight years' imprisonment was undoubtedly a substantial increase in severity. The fact that the "aggregate" sentence of thirty years' imprisonment suspended upon eighteen years' imprisonment and twelve years' probation, was "longer" was of no consequence in this context. It should go without saying that a day on probation is not equivalent to a day in prison. Gall v. U.S., 552 U.S. 38, 48 (2007) (recognizing that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms).

Tellingly, the South Carolina Code categorizes probation as "a form of clemency." S.C. Code Ann. § 24-21-410. Moreover, our Courts have held that probationary sentences are an "act of grace" from the sentencing court. State v. Ross, 423 S.C. 504, 510 – 11, 815 S.E.2d 754, 757 (2018); see State v. Spare, 374 S.C. 264, 268, 647 S.E.2d 706, 708 (Ct. App. 2007) (citing State v. Hamilton, 333 S.C. 642, 684, 511 S.E.2d 94, 97 (Ct. App. 1999)). There can be no doubt that the twenty-eight years' imprisonment that Appellant received after resentencing was a far harsher punishment than the thirty years' imprisonment suspended upon eighteen years' imprisonment and twelve years' probation initially imposed. Tr. 37, l. 4 – 39, l. 21

Despite the resentencing court's purported explanation as to why he was resentencing Appellant more harshly, the rest of the record showed that Appellant was being punished for being successful at PCR. Resentencing hearing, p. 8, ll. 13 – 18; Resentencing hearing, p. 9, l. 21 – 10, l. 6. Notably, the initial brief of respondent failed to mention that the resentencing court expressed

annoyance at Appellant for successfully challenging the original sentence at PCR. Resentencing hearing, p. 8, ll. 13 – 18. The resentencing court specifically stated it was “trying to give Appellant a break” with the original suspended sentence and complained about Appellant challenging a negotiated sentence. Id.

The resentencing court saying that the original sentence was an attempt at giving Appellant “a break,” illustrated the vindictive nature of the much harsher current sentence of twenty-eight years’ imprisonment. Evinced by the resentencing court’s own admission, the initial sentence was much more lenient than the near maximum sentence Appellant received after resentencing. Accordingly, the issue of Appellant’s sentence being improperly increased as a means to punish him for being successful at PCR was preserved for review.

CONCLUSION

Appellant respectfully requests this Court vacate his guilty plea and remand his case for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of August, 2021.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Amended Initial Reply Brief in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Amended Initial Reply Brief of Appellant has been served on Antonio O. Simmons, #279418, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of August, 2021.



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