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Mar 24 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2019-000454

Brandon Moore, Appellant.

v.

State of South Carolina, Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Brandon Moore petitions for rehearing because this Court overlooked or misapprehended the points set forth in this petition.

Question I

Did the trial judge punish Brandon Moore, who does not have a prior criminal record, for exercising his constitutional right to a jury trial, by imposing what is commonly referred to as a “trial tax,” when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore’s jury trial, at least one of which had a record for a prior drug offences?

This Court held “the sentencing court did not err because the sentence given was within statutory limits, and nothing in the record suggests the sentencing court considered Moore’s decision to proceed to trial.” *State v. Moore*, No. 2019-000454, 2022 WL 702583, at *1 (S.C. Ct. App. Mar. 9, 2022). This Court, however, overlooked the arguments

presented in Mr. Moore's Brief of Appellant and the evidence contained in the record on appeal.

That the trial judge imposed a "trial tax" is the only explanation for the maximum sentence the trial court imposed on Brandon Moore. *See* S.C. Code Ann. § 44-53-375(A); *see also* Sentencing Sheet, R. 3. Here, the Solicitor argued "it's pretty clear that Mr. Moore is a trafficker of methamphetamine." R. 561. The jurors, however, did not find this fact. The trial judge observed, "Methamphetamine is a destructive force," adding, "I don't know what – what's going to become of us if we can't get a handle on the methamphetamine that just surging through our society." R. 562. The trial judge then sentenced Mr. Moore as if he is "a trafficker of methamphetamine" responsible for that drug "surging through our society" by imposing the maximum penalty, rather than sentencing him as "a user of methamphetamine" as acknowledged by the jurors' verdict and trial counsel during sentencing. R. 561.

A person sentenced for first offense possession of methamphetamine ordinarily receives a suspended sentence with appropriate conditions of probation. *See* S.C. Code Ann. § 24-21-410 (power to suspend sentence and impose probation). Indeed, during the same Term of General Sessions Court as Mr. Moore's jury trial, the same judge sentenced Debra H. Batson (R. 25-35), Charles Lee Owens (R. 84-89), Nathanal W. Sorrow (R. 122-27), Kenneth Lee Thomason (R. 140-41) to suspended sentences with appropriate conditions of probation for first offense possession of methamphetamine. The same judge sentenced Thomas Eugen Hadden, Jr. for first offense possession of methamphetamine to ninety days in the county jail without any probation to follow. R. 69-70. The same trial judge sentenced Joshua Henry Gambrell for possession of less than one gram of

methamphetamine or cocaine base, third or subsequent offense, to ten years, provided on the service of twenty-three days (time served) the balance is suspended with probation for five years with substance abuse counseling and random drug and alcohol testing. The State dismissed charges for driving under the influence, third or subsequent offense, and unlawful carrying of a pistol. R. 58-64. This disproportional sentencing by the same trial judge during the same term of court is evidence the trial judge considered Mr. Moore's decision to have a jury trial when imposing sentence. This Court's opinion did not consider any of this circumstantial evidence argued in the brief and contained in the record on appeal.

Brandon Moore's had a constitutional right to a jury trial. U.S. Const. Am. VI; S.C. Const. Art. I, § 14; *see also* S.C. Code Ann. § 17-23-80. As Mr. Moore argued in his motion to reconsider the sentence, R. 17, "a trial judge abuses his or her discretion when he or she *considers* the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant." *Castro*, 417 S.C. at 83, 789 S.E.2d at 47 (emphasis supplied by the Court); *see also Davis, Hazel, Brouwer*. Our Supreme Court in *Castro* reminded the bench and bar:

[A]lthough evidence from the record of other, valid reasons for a sentence might aid an appellate court in determining whether the trial court improperly considered a defendant's decision to proceed to trial during sentencing, those other sentencing factors 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.

417 S.C. at 83, 789 S.E.2d at 47.

In *Davis*, "defense counsel argued to the trial court that similarly situated defendants had received lower sentences than" *Davis*, and this Court held the sentencing

judge “improperly considered [Davis’] decision to proceed with a jury trial.” 336 S.C. at 333, 520 S.E.2d at 803.

This Court should vacate the Brandon Moore’s sentence and “remand for resentencing.” *Brouwer*, 346 S.C. at 388, 550 S.E.2d at 922; *see also Hazel*.

Question II

Did the trial judge impermissibly consider that the State initially charged Brandon Moore, who does not have a prior criminal record, with trafficking 28 to 100 grams of methamphetamine, by imposing what is commonly referred to as a “trial tax,” after a jury acquitted Mr. Moore of this charge, when the trial judge imposed the maximum sentence for first offense possession of methamphetamine, and when the same judge imposed probationary sentences on people who pleaded guilty to possession of methamphetamine during the same Term of General Sessions Court as Mr. Moore’s jury trial, at least one of which had a records for a prior drug offences?

This Court held “the sentencing court did not err because no evidence in the record suggests the sentencing court improperly considered Moore's original charge of trafficking methamphetamine.” *Moore*, at *1. This Court, however, overlooked the arguments presented in Mr. Moore’s Brief of Appellant and the evidence contained in the record on appeal.

As seen in Question I above, that the trial judge imposed a “trial tax” is the only explanation for the maximum sentence the trial court imposed on Brandon Moore. The Solicitor argued “it’s pretty clear that Mr. Moore is a trafficker of methamphetamine.” R. 561. The jurors, however, did not find this fact. The trial judge observed, “Methamphetamine is a destructive force,” adding, “I don’t know what – what’s going to become of us if we can’t get a handle on the methamphetamine that just surging through our society.” R. 562. The trial judge then sentenced Mr. Moore as if he is “a trafficker of methamphetamine” responsible for that drug “surging through our society” by imposing the maximum penalty, rather than sentencing him as “a user of methamphetamine” as

acknowledged by the jurors' verdict and trial counsel during sentencing. R. 561. The Solicitor's sentencing argument, combined with the sentencing judge's statements is evidence the court below considered the original charge.

As argued in Mr. Moore's motion to reconsider the sentence, R. 17-18, the trial court impermissibly considered the fact that Mr. Moore was originally charged with trafficking. In *Boggs*, the sentencing judge wrote on the sentencing sheet that the defendant "not be given credit for time served as charge dropped from" armed robbery to strong arm robbery. 388 S.C. at 316, 696 S.E.2d at 598. This Court held the sentencing "judge committed an error of law when he denied Boggs credit for time served based upon the State's decision to drop the charge from armed robbery to strong arm robbery." 388 S.C. at 316, 696 S.E.2d at 598.

This Court should vacate the Brandon Moore's sentence and "remand for resentencing." *Brouwer*, 346 S.C. at 388, 550 S.E.2d at 922; *see also Hazel*.

CONCLUSION

For the forgoing reasons, this Court should grant rehearing. This Court failed to consider the arguments in Brandon Moore's brief and the evidence in the Record on Appeal.

IT IS SO MOVED.

(signature on next page)

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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March 24, 2022
Greenwood, South Carolina

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Certificate of Service

I certify that I served this pleading on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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March 24, 2022
Greenwood, South Carolina

Subject: State of South Carolina v. Brandon Moore, Appellate Case No. 2019-000454
Date: Thursday, March 24, 2022 at 3:58:42 PM Eastern Daylight Time
From: Charles Grose
To: Mark Farthing
Attachments: 2022 03 24 Grose to Court of Appeals.pdf, 2022 03 23 - Moore - Petition for Rehearing.pdf

Hope you are well.

Attached please find Mr. Moore's petition for rehearing, along with a certificate of service and cover letter, that I am about to file electronically with the SC Court of Appeals, along with a copy of this email.

Thank you for your attention to this matter. Please let me know if you have any questions.

Best,
Charles

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *State of South Carolina v. Brandon Moore*
Appellate Case No. 2019-000454

Dear Ms. Kitchings:

Enclosed please find Mr. Moore's Petition for Rehearing, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: Mark R. Farthing, Esquire