

SUPREME COURT OF SOUTH CAROLINA

Boan v. State, 388 S.C. 272

695 S.E.2d 850 (2010) · No. No. 26832 · Decided July 12, 2010

SUMMARY

The Supreme Court of South Carolina held that trial counsel was ineffective for failing to challenge the discrepancy between the defendant’s oral sentence and the conflicting written sentencing order. The court held that due process requires the oral sentencing pronouncement, made in the defendant’s presence, to control over a later conflicting written order. The court reversed the denial of post-conviction relief and remanded for resentencing on the first-degree criminal sexual conduct offense.

CASE DETAILS

|                       |                                                                                                                                                                                              |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of South Carolina                                                                                                                                                              |
| WRITING FOR THE COURT | Chief Justice Toal; Justice Beatty; Justice Hearn; Justice Kittredge; Justice Pleicones                                                                                                      |
| JURISDICTION          | South Carolina                                                                                                                                                                               |
| DECIDED               | July 12, 2010                                                                                                                                                                                |
| DOCKET                | No. 26832                                                                                                                                                                                    |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                        |
| PROCEDURAL POSTURE    | Petitioner appealed the denial of his application for post-conviction relief; the South Carolina Supreme Court granted certiorari.                                                           |
| STANDARD OF REVIEW    | The PCR applicant bears the burden of proving the allegations in the application. On appeal, the PCR court's ruling is upheld if supported by any evidence of probative value in the record. |
| PRECEDENTIAL VALUE    | binding                                                                                                                                                                                      |
| PARTIES               | Nicholas Boan v. State of South Carolina                                                                                                                                                     |

TOPICS

- state post-conviction relief
- ineffective assistance
- sentencing
- due process
- right to counsel

PRACTICE AREAS

- post-conviction relief
- criminal procedure
- ineffective assistance of counsel
- sentencing
- constitutional law

## QUESTIONS PRESENTED

1. Whether trial counsel rendered ineffective assistance by failing to move to correct or clarify the discrepancy between the trial court's oral sentence and its conflicting written sentencing order.
2. Whether due process requires the oral pronouncement of a sentence, made in the defendant's presence, to control over a conflicting written sentencing order.
3. Whether post-conviction relief should be tailored to require resentencing only on the offense affected by the sentencing discrepancy.

## HOLDINGS

1. Trial counsel provided ineffective assistance by failing to file an appropriate motion to clarify the discrepancy or conform the written sentencing order to the trial court's oral pronouncement. Boan established both deficient performance and prejudice because the discrepancy added ten years to his sentence.
2. When a trial judge orally pronounces a sentence in the defendant's presence and later enters a conflicting written sentencing order that increases the sentence, due process requires the oral pronouncement to control.
3. Post-conviction relief should be tailored to remedy the precise prejudice caused by counsel's deficient performance; therefore, Boan was entitled to resentencing only on the first-degree criminal sexual conduct offense affected by the discrepancy.

## KEY QUOTATIONS

*“Accordingly, in a situation such as the one on appeal, due process requires the judge's oral pronouncement control over a conflicting written sentencing order.” (277)*

*“If trial counsel had made the appropriate motion regarding the sentencing discrepancy, the oral pronouncement would have controlled and Petitioner would have received the twenty-year sentence.” (277)*

## FACTUAL BACKGROUND

Boan was convicted of criminal sexual conduct with a minor in the first degree and two counts of lewd act upon a child. The trial judge orally pronounced a twenty-year sentence for the first offense, but the written sentencing order stated that Boan was to serve thirty years. Trial counsel did not object or move to clarify or conform the written order to the oral sentence, and Boan consequently received an additional ten years on that offense.

## PROCEDURAL HISTORY

Boan was convicted of criminal sexual conduct with a minor in the first degree and two counts of lewd act upon a child. The trial court orally imposed a twenty-year sentence for the first offense, but the written sentencing order imposed thirty years for that offense. After Boan's direct appeal was dismissed, he sought post-conviction relief, which the PCR court denied on all grounds, concluding that the written sentencing order controlled. The Supreme Court granted certiorari, reversed, and remanded for resentencing on the first-degree criminal sexual conduct offense.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

Remand for resentencing on the offense of criminal sexual conduct with a minor in the first degree. The case was to be reassigned to another circuit court judge because Judge John M. Milling had retired.

## CASES CITED

- Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)
- Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)
- Strickland v. Washington, 466 U.S. 668 (1984)
- Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008)
- United States v. Osborne, 345 F.3d 281 (4th Cir. 2003)
- Plourde v. State, 975 So. 2d 558 (Fla. Dist. Ct. App. 2008)
- Bradley v. State, 109 Nev. 1090, 864 P.2d 1272 (1993)
- United States v. Turner, 532 F. Supp. 913 (D. Cal. 1982)
- United States v. Martinez, 250 F.3d 941 (5th Cir. 2001)
- United States v. Gagnon, 470 U.S. 522 (1985)
- Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009)
- United States v. Morrison, 449 U.S. 361 (1981)
- Dervin v. State, 386 S.C. 164, 687 S.E.2d 712 (2009)
- Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009)

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