STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VINCENTE PINEDA GARCIA,

APPELLANT

APPELLATE CASE NO. 2021-001238

ANDERS BRIEF OF APPELLANT

JESSICA M. SAXON
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the plea court abused its discretion where the court did not consider Appellant's immigration status when sentencing Appellant?

STATEMENT OF THE CASE

In March of 2020, Appellant was indicted by the Colleton County grand jury for one count of felony driving under the influence, death resulting. R. 42-43. On September 20, 2021, Appellant appeared before the Honorable H. Steven DeBerry, IV, to enter a guilty plea. The State was represented by Reed Evans. Appellant was represented by Christopher D. Lizzi. R. 1.

Appellant pled guilty as indicted and was sentenced to seventeen years imprisonment. R. 23; R. 44-45. On September 20, 2021, Counsel Lizzi filed a motion to reconsider Appellant's sentence. R. 25-27. A hearing was held on the motion via WebEx before Judge DeBerry on September 29, 2021. The State was represented by Reed Evans. Appellant was represented by Counsel Lizzi. R. 28. At the end of the hearing, Judge DeBerry took the matter under advisement. R. 37, ll. 12-14. Judge DeBerry denied the motion to reconsider Appellant's sentence in an email to the parties dated October 18, 2021. R. 41.

This appeal 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 authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing Wasman v. United States, 468 U.S. 559, 563 (1984)). "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 plea court abused its discretion where the court did not consider Appellant's immigration status when sentencing Appellant.

Relevant Facts

On March 30, 2019, Appellant was driving on Highway 17A in Colleton County when he crossed the center line. Gene Tomashpolsky swerved to avoid a head on collision with Appellant, but his Jeep was struck by Appellant in the driver's side rear panel. Unfortunately, the second car, a Toyota Corolla driven by Crystal Crosby, did not have time to swerve and collided with Appellant's truck head on. R. 11, l. 16-R. 13, l. 13. Crosby's four-year-old granddaughter was injured in the accident and tragically succumbed to those injuries a few days later. R. 13, l. 19-20; R. 14, ll. 14-R. 15, l. 5.

Troopers with the South Carolina Highway Patrol investigated the accident. App. 13, l. 21. At the scene of the accident, officers observed open beer cans around Appellant's truck and could smell an odor of alcohol coming from inside the truck. R. 13, ll. 21-23. An officer requested a blood sample from Appellant, but he declined to provide one. Appellant told the trooper that he could not remember what had happened or when he had last had a drink. The trooper obtained a search warrant to collect Appellant's blood. The toxicology results of the sample showed Appellant's blood alcohol level at 0.194. R. 14, ll. 1-8.

Appellant accepted responsibility and pled guilty to driving under the influence, death resulting. R. 15, ll. 17-22. During the plea, defense counsel informed the court that there was an immigration hold on Appellant which had been in place since his arrest. Appellant would be deported at the end of his sentence, leaving his children in the United States, and would never be

allowed to re-enter this country. R. 20, ll. 14-20. Appellant was ultimately sentenced to seventeen years imprisonment. R. 23, ll. 18-23.

Counsel for Appellant filed a motion to reconsider the sentence. R. 25-27. At a hearing on the motion, the court stated one of the reasons it agreed to hear the motion to reconsider was to clarify that it did not consider Appellant's nationality or immigration status in fashioning a sentence. R. 36, ll. 16-19. The court said

> I know it was on the record that he would be deported from this country after he's satisfied any sentence...I don't think considering any of that and what may or may not happen would be fair to either side. So, I really wanted to take this opportunity to let everybody know that, that I just didn't consider that at all in my ruling in the benefit of the state or in the benefit of your client.

R. 36, l. 20-R. 37, l. 4.

The court took the matter under advisement. Before the hearing ended, Appellant requested that the court sign an order of deportation so that he could be sent back to Mexico. R. 38, ll. 13-15. The court denied the motion to reconsider in an email dated October 18, 2021. R. 41.

Discussion

During the original plea hearing, and at the motion to reconsider, it was made clear to the court that Appellant was subject to an immigration hold and would be deported upon completion of any sentence. However, the court chose not to consider Appellant's immigration status because it did not think it would be "fair to either side." This was a failure of the court to exercise its discretion.

The sentencing and resentencing of an offender is entirely within the purview of the sentencing judge, with the only limits on a judge's sentencing discretion being the statutorily created maximum and minimum sentencing limits for certain offenses. Importantly, the

jurisprudence of our state sets forth the principle that, where it falls to the court to determine the appropriate punishment to be imposed and there is any discretion as to the punishment, it is the correct practice that the court hear and consider evidence in mitigation or aggravation of the punishment. See, State v. Adcock, 194 S.C. 234, 9 S.E.2d 730, 732 (1940); State v. Green, 220 S.C. 315, 318, 67 S.E.2d 509, 510 (1951). As Chief Justice Burger wrote in Wasman v. United States, 468 U.S. 559, 563-564,

> The sentencing court...must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Justice Black made this point when, writing for the Court in Williams v. New York,[1] he observed that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." Allowing consideration of such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant. Ibid.

Federal case law explicitly allows for the consideration of a defendant's immigration status when fashioning a sentence. Often, federal courts will use a defendant's deportable status as ground to depart below the advisory sentencing guidelines. See United States v. Farouil, 124 F.3d 838, 847 (7th Cir.1997) (concluding that "[t]he district court is thus free to consider " a defendant's alien status); United States v. Smith, 27 F.3d 649, 650 (D.C.Cir.1994) (holding a sentencing court may depart below the range indicated by the Sentencing Guidelines solely because the defendant is a deportable alien who faces the prospect of objectively more sever prison conditions than he would otherwise); United States v. Hyppolite, 65 F.3d 1151, 1159 (4th Cir.1995) (Implicitly concluded that district courts have the discretion to impose below-guidelines sentences based on the defendant's status as a deportable alien).

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[1] 337 U.S. 241, 247 (1949)

Consideration of a defendant's immigration status is permissible because a deportable inmate is often subjected to harsher conditions during incarceration than an otherwise identical citizen. For example, a deportable inmate would not be eligible for pre-release programs and would not ever actually be released from confinement at the end of their sentence. Instead a deportable inmate would be transferred into the custody of immigration to await deportation proceedings.

In the instant case, the court declined to consider Appellant's immigration status, stating any such consideration would not be fair to either side. However, Appellant's immigration status was offered as mitigating evidence that was necessary for the court to consider, as it was information concerning the defendant's life and characteristics which "reasonably might bear on the proper sentence" for Appellant. See Wasman, *supra.* Additionally, consideration of Appellant's immigration status would ensure that he was not subjected to harsher conditions during incarceration than a similar situated citizen would be. The court abdicated its duty to exercise discretion by failing to consider the important, relevant mitigating evidence of Appellant's immigration status presented during the plea. As our Supreme Court stated in State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202, "It is *an equal abuse of discretion to refuse to exercise discretionary authority* when it is warranted as it is to exercise the discretion improperly" (emphasis added)).

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vincente Pineda Garcia 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 H. Steven DeBerry IV, which was held on September 10, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Vincente Pineda Garcia.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of June, 2022.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Plea Transcript dated September 10, 2021;
(2) Motion to Reconsider Hearing Transcript dated September 29, 2021;
(3) Motion for Reconsideration;
(4) Email denying Motion for Reconsideration; and
(5) Indictment and Sentencing Sheet.

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

Jessica M. Saxon
Appellate Defender
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330
ATTORNEY FOR APPELLANT

This 30th day of June, 2022.

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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."

Jessica M. Saxon
Appellate Defender

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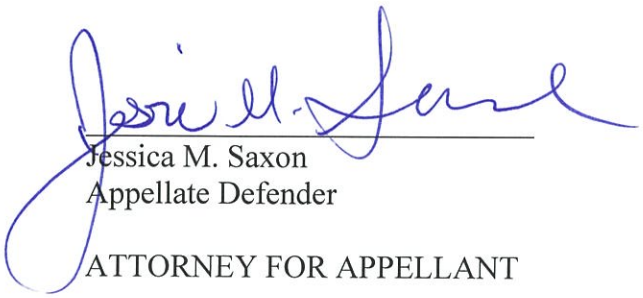
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 30th day of June, 2022.

CONCLUSION

By reason of the forgoing arguments, Appellant respectfully request this Court vacate his sentence and remand his case back to the General Sessions Court of Colleton County for a new sentencing proceeding.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of June, 2022.