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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVAJAY R. STEVENS,

APPELLANT

APPELLATE CASE NO. 2022-000902

ANDERS BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the plea court err in denying Appellant's motion to reconsider his sentence where the court did not articulate any basis for denying the motion?

STATEMENT OF THE CASE

Appellant was indicted for two counts of criminal sexual conduct with a minor second degree, two counts of incest, and one count of criminal sexual conduct with a minor third degree during the May 2022 term of the Barnwell County grand jury. R. 22-23. On May 31, 2022, Appellant appeared before the Honorable Courtney Clyburn-Pope to enter a guilty plea to one count of criminal sexual conduct with a minor second degree. R. 1.; R. 3. The State was represented by Leigh Staggs. Appellant was represented by David Hayes. R. 1.

Pursuant to the plea agreement, the State dismissed the four other indictments and negotiated a cap of ten years incarceration. Additionally, the State agreed to not take a position on sentencing. R. 3, ll. 8-12; R. 35. Judge Clyburn-Pope sentenced Appellant to ten years incarceration provided upon the service of eight years, the balance would be suspended to two years of probation. R. 19, ll. 16-19; R. 24.

Counsel Hayes filed a timely motion to reconsider Appellant's sentence with supporting documentation, including letters from the complaint expressing her desire that Appellant receive a lesser sentence. R. 26. By written order filed September 1, 2022, the plea court denied Appellant's motion to reconsider. R. 35.

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 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 erred in denying Appellant's motion to reconsider his sentence where the court did not articulate the basis for denying the motion.

Relevant Facts

In early November of 2019, Appellant moved into his mother's home in Barnwell County. Also living in the home was his then fifteen-year-old half-sister, L.S. On December 6, 2019, police responded to the Stevens's home to investigate a report of sexual abuse of a minor. L.S. had indicated that Appellant had sexually assaulted her numerous times since he had moved into the home with the most recent time being the prior evening. Police collected the sheets that had been on L.S.'s bed and the shorts that she had been wearing that evening. DNA testing revealed Appellant's semen on both items. Appellant initially denied any sexual contact with L.S. but eventually stated that L.S. masturbated him during the night and he had ejaculated. R. 5, l. 10-R. 6, l. 15.

During the plea hearing, Counsel Hayes informed the court that in October of 2020, L.S. recanted¹ her allegations, stating that she fabricated the charges to avoid getting into trouble after she was caught with liquor at school. He also informed the court that the State had initially agreed to dismiss the charges if Appellant received counseling but that he was unable to find a provider willing to treat him while living in McCormick. However, Appellant had recently begun counseling in North Augusta and had only been diagnosed with anxiety related to the

¹ L.S. stated in her affidavit that she had told Appellant she liked him, asked to give him a "hand job" and then masturbated Appellant. She stated everything else she said occurred was a lie. R. 31-33.

prosecution of the charges. R. 9, l. 17-R.12, l. 5. L.S. also spoke at the plea hearing and stated that she did not want her brother to spend any more time² incarcerated. R. 7, ll. 4-13.

Counsel Hayes filed a motion to reconsider Appellant's sentence on June 2, 2022. The memorandum supporting the motion to reconsider contained information that had not been before the court at the time of sentencing. Of note was that Appellant had tried to stop L.S. from masturbating him, that when she was caught with the liquor at school she was also intoxicated, and that Appellant had spent the ages of two to four in foster care. R. 26-30. Counsel Hayes provided proof that Appellant was seeing a licensed professional counselor. R. 34. Counsel Hayes also included two affidavits from L.S., one from before and one from after the plea, stating that she did not want Appellant to serve any more time and confirming that she fabricated what had happened between them. R. 31-33. On September 1, 2022, the court issued a written order denying Appellant's motion to reconsider. After succinctly setting forth the procedural history of the case, the order concluded that "Defendant's motion was DENIED on June 13, 2022, and the State and Defendant were notified of the Court's decision via email." R. 35.

Discussion

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). "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." Wasman v. United States, 468 U.S. 559, 563-564 (1984).

² At the time of his plea, Appellant had credit for 289 days. R. 13, l. 24.

While the authority to change a sentence rests solely within the discretion of the sentencing judge, the judge is required to articulate on what basis their discretion was exercised. In State v. Smith, Smith had been tried in his absence, and his sentence was sealed. Smith, 276 S.C. 494, 496, 280 S.E.2d 200, 201 (1981). After his sentence was published, Smith moved for reconsideration. Id. The judge denied Smith's motion, stating he lacked the jurisdiction to change the sentence. Id. at 497, 280 S.E.2d at 201. This Court held that the motion, although heard later, was "made within the term of court at which the sentence became the judgment of the court, to the sentencing judge," and he therefore had the jurisdiction to alter, amend or modify the sentence. Id. at 498, 280 S.E.2d at 202. This Court found that the judge did not exercise any discretion at all but based his ruling on an erroneous view of the law. Id. The Court stated

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. We call to the attention of the bench and bar that **the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised.**

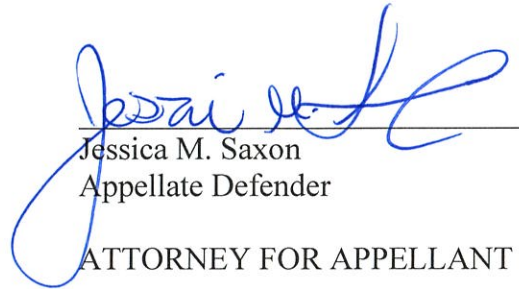
Id. (emphasis added).

In the motion to reconsider Appellant's sentence, Counsel Hayes not only reiterated the mitigating evidence provided during the plea hearing but presented the court with new mitigating information to consider. The motion also contained an additional request from L.S. to lessen the sentence that her brother had received. However, the written order contains no explanation for the denial of the motion to reconsider and did not state if the court considered the new information. The sparse order merely provided a brief procedural history before stating that the motion was denied.

A hearing was not held on the motion to reconsider and without a more detailed order it is impossible to discern why the court denied the motion. Where, as here, there is not an articulated reason for the denial, this Court is effectively precluded from reviewing the lower courts decision to determine if it was proper. The written order in Appellant's case was a mere recital of a discretionary decision. It did not support a finding that the court exercised its discretion as no basis for the denial is ever stated. The record supports a finding that discretion was not exercised in Appellant's case which constitutes an abuse of discretion. Accordingly, Appellant's case should be remanded back to the plea court for resentencing. See State v. Smith, supra.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court remand the case to the Court of General Session of Barnwell County for a full hearing on his motion to reconsider his sentence.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

This 19th day of May, 2023.

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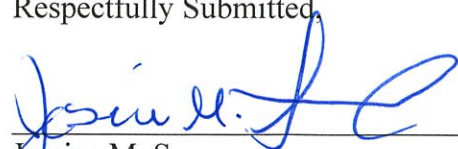
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Devajay R. Stevens 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 guilty plea before Judge Courtney Clyburn-Pope, which was held on May 31, 2022, 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 guilty plea.

Wherefore, she asks the Court to relieve her as counsel for Devajay R. Stevens.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2023.

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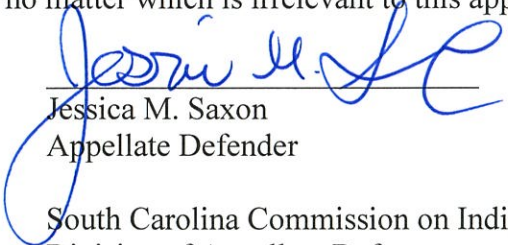
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s): 2022-GS-06-00085
- (2) Guilty Plea Transcript dated May 31, 2022
- (3) Sentencing Sheet dated May 31, 2022
- (4) Motion to Reconsider with Memorandum filed June 2, 2022
- (5) Affidavits of L.S.
- (6) Letter from Rachel Latham, LPC
- (7) Order Denying Motion to Reconsider filed September 1, 2022

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



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This 19th day of May, 2023.

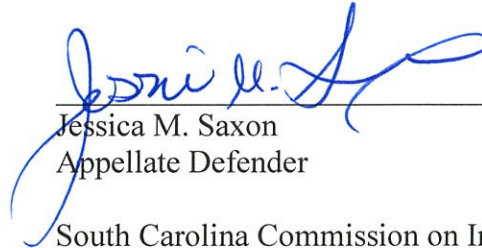
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CERTIFICATE OF COUNSEL

SC Court of Appeals

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."



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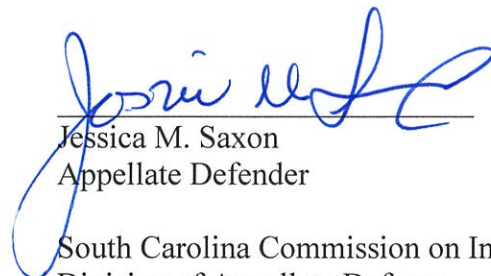
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APPELLATE CASE NO. 2022-000902

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blicht, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Devajay R. Stevens, #388056, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 19th day of May, 2023.



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