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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON AND BEAUFORT COUNTIES
Court of General Sessions

Clifton B. Newman, Circuit Court Judge

Indictment No. 2021-GS-47-30
Indictment No. 2022-GS-47-02

The State,

Respondent,

v.

Cory Howerton Fleming,

Appellant.

AMENDED NOTICE OF APPEAL

Cory Howerton Fleming appeals his conviction and sentences in these cases. The sentences were imposed by the Honorable Clifton B. Newman on September 14, 2023.

Pursuant to Rule 203(d)(B)(iv), SCAR appellant intends to raise the following issues for this Court's consideration:

- 1) Appellant's sentences violated the Eighth amendment. The Eighth Amendment to the United States Constitution mandates: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII The incorporated prohibition against "cruel and unusual punishments" safeguards an individual's right to protection from excessive sanctions, highlighting the essential principle that courts must consider "the human attributes even of those who have committed serious crimes." *Graham v. Florida*, 560 U.S. 48, 59 (2010). Sentences that are grossly out of proportion to the severity of the crime are unconstitutional. *See id.*

The circuit court compared Appellant's conduct and victims to a recent murder

case where a mother was sentenced to 37 years for the death of her child. (State Sentencing Tr. 97:1-15). He also referred to sentencing defendants convicted of other offenses, such as grand larceny, who faced ten years in prison. He repeatedly stated that this case was “unprecedented” and that “there’s no way there is a case in this state where the amount of thievery exceeded what’s occurred in this case.” (Sentencing Tr. 95:15-18). The circuit court referred to this case as “unimaginable” and “the greatest crime for a lawyer in the history of the State of South Carolina, certainly in the number of years being faced and the impact of the crimes on the citizens of the State.” (State Sentencing Tr. 95:3-6).

- 2) Appellant’s sentencing was effected by the bias of the circuit court.

The notoriety of the related case of *State v. Murdaugh*, which the circuit judge also presided over, created spill-over bias in this case.

The circuit court referred to this case as “unimaginable” and “unprecedented” and “the greatest crime for a lawyer in the history of the State of South Carolina, certainly in the number of years being faced and the impact of the crimes on the citizens of the State.” (State Sentencing Tr. 95:3-6).

He referred to this case as being as bad as it gets for a lawyer who has a prior record.” (State Sentencing Tr. 97: 23-25). He then stated that although Mr. Fleming has not prior convictions – when “you carry on a scheme of over a decade, that’s a record, a record that did not result in charges or convictions but a record of his life.” (State Sentencing Tr. 97:-98:2). Additionally, the circuit court made repeated extra-judicial remarks about the case. Not only were these statements inappropriate and evidenced bias against the defendant but they were not disclosed to plea counsel.

- 3) The Circuit Court erred by failing to read and/or consider the filings submitted by Appellant. An abuse of discretion occurs when the circuit court’s finding is based on an error of law or grounded in factual conclusions without evidentiary support. *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015).

Among other things, Appellant relied on the federal sentencing proceeding in arguing that he had been held accountable for the Pinckney matter in the federal prosecution because the federal government had determined that the Pinckney matter was relevant conduct that was considered in sentencing.

The federal judge recognized that he had no control over the state court. (Federal Sentencing Tr. 17:4-6; 18:2-3). However, the federal judge asked that defense counsel provide the state circuit court with a copy of the federal sentencing proceedings. *Id.* at 80:8-10.

At the state sentencing hearing, the circuit court stated that he had received voluminous materials and that he had not reviewed the federal court's sentencing hearing because he did not "defer to the federal court system for -- in making his decisions." (State Sentencing Tr. 94:5-8). Although he then said in regard to the character witnesses, that "most folks reminded me of what was said in federal court." (State Sentencing Tr. 96:2-3). Yet, he reiterated that he did not read Judge Gergel's transcript" and that he's "never deferred to a federal court to guide [his] sentence as a state court Judge." *Id.* 96:4-6.

- 4) Appellant's sentencing violated his due process rights. Without any uniform guidelines, his sentence resulted in a gross sentencing disparity.

The circuit court compared Appellant's conduct and victims to a recent murder case where a mother was sentenced to 37 years for the death of her child. (State Sentencing Tr. 97:1-15). He also referred to sentencing defendants convicted of other offenses, such as grand larceny, who faced ten years in prison. He repeatedly stated that this case was "unprecedented" and that "there's no way there is a case in this state where the amount of thievery exceeded what's occurred in this case." (Sentencing Tr. 95:15-18). The circuit court referred to this case as "unimaginable" and "the greatest crime for a lawyer in the history of the State of South Carolina, certainly in the number of years being faced and the impact of the crimes on the citizens of the State." (State Sentencing Tr. 95:3-6).

These issues were not raised to and ruled on by the lower court. However, any objections would have been futile. *See State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding appellant did not waive an objection by not presenting it to circuit court because it would have been futile to do so); *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct.App.1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again." (internal quotation marks omitted)). *See also Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) ("We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical

manner.”); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (Toal, C.J., concurring in result and dissenting in part) (regarding two-issue rule) (“[A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice”).

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September 25, 2023

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CERTIFICATE OF SERVICE

Counsel hereby certifies she has served copies of this notice of appeal on Creighton Waters of the South Carolina Attorney General’s Office on this date by sending a copy first

class postage pre-paid to the address listed above. A copy has also been sent first class postage pre-paid to Margaret J. Self of the Clerk of Court for the State Grand Jury at:

Office of the Clerk of Court for the State Grand Jury
1000 Assembly Street
Rembert Dennis Building
Suite 101
Columbia, South Carolina 29201

On this date, September 25, 2023.

/s/ Elizabeth Franklin-Best