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Feb 13 2024

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT AND HAMPTON COUNTIES
Court of General Sessions

The Honorable Clifford Newman, Circuit Court Judge

Appellate Case No. 2023-001493

**RESPONSE TO ATTORNEY GENERAL’S MOTION TO DISMISS APPEAL WITHOUT
PREJUDICE AS PREMATURE OR TO HOLD IN ABEYANCE**

Undersigned counsel respectfully responds to the AG’s motion filed February 12, 2024.

Cory Fleming filed his notice of appeal on September 21, 2023 after an exhaustive four-hour sentencing proceeding that occurred September 14, 2023. At the end of the hearing, Judge Newman said he would defer any restitution hearing claiming it was “too convoluted” for him to rule on the issue. Tr. 100. He said he did not know if the State was even asking for it or whether the parties could agree on it. He was not sure if one was even necessary. Tr. 100. The State did not interpose any objection to the Court’s decision not to address the issue, nor did it indicate that it would be seeking restitution. Counsel has not received any notice the State is requesting a restitution hearing. Now, months later, and as Fleming prepares to file his brief, the State looks to delay appellate review of his case which raises a meritorious claim of judicial bias by claiming Fleming’s case is still properly before Judge Newman.

As an initial matter, the State’s argument is waived. The State did not object to the judge’s decision not to rule on the restitution matter nor did it file a notice of appeal to challenge that ruling. When counsel filed the Notice of Appeal, the State did not file an objection with this Court.

In order for an issue to be preserved for appellate review, a party must make a “contemporaneous objection that is ruled upon by the trial court.” *State v. Jones*, 435 S.C. 138, 866 S.E.2d 558 (2021) (quoting *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202, 205 (2007); Rule 220(b), SCACR (stating issues must be preserved in the record to be raised on appeal). The State apparently overlooked the restitution issue in its entirety as it was not prepared to address the issue at the sentencing hearing when it would have been appropriate to do so. It is waived. *See also State v. Morgan*, 417 S.C. 338, n.2 (2016) (recognizing that restitution issues are also subject to the rules of error preservation).

Fleming nevertheless agreed to pay restitution in this case and to accept full responsibility for the harm he has caused by his actions. However, the AG’s office did not timely pursue restitution. Instead, the AG’s office has chosen to manufacture yet another opportunity to generate media coverage of all-things-related-to-Alex-Murdaugh, by filing a motion seeking relief for a matter that surely could have been resolved by the parties. This Court should not allow the Attorney General’s Office to impede Fleming’s right to have this Court consider his meritorious claim that his sentence was the product of Judge Newman’s judicial bias as reflected by Judge Newman’s categorical refusal to consider mitigation that was provided to him by defense counsel, and his failure to disclose that fact to counsel prior to the hearing and which would have allowed for the judge’s independent assessment of materially misleading statements made by the Attorney General’s Office, at that hearing. This Court should deny the Attorney General’s motion.

To the extent the Court is inclined to grant a remand on the restitution issue, counsel respectfully requests this Court grant a *limited* remand of 10 days for this issue to be addressed so this Court can timely address Fleming’s appellate claims.

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Respectfully submitted, **SC Court of Appeals**

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February 13, 2024.

CERTIFICATE OF SERVICE

Counsel hereby certifies she has served a copy of this response on Mark Farthing of the Attorney General's Office via email at mfarthing@scag.gov on this date, February 13, 2024.

/s/ Elizabeth Franklin-Best