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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort and Hampton Counties
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2023-001493

THE STATE,

Respondent,

vs.

CORY HOWERTON FLEMING,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

"The circuit court judge abused his discretion when he refused to consider or even read relevant mitigation evidence that was offered by Fleming."

II.

"Fleming's sentence violates his due process rights because it was the product of the circuit court judge's bias as evidenced by his failure to consider relevant mitigation evidence and his comments during the sentencing proceeding."

COUNTER-STATEMENT OF ISSUE ON APPEAL

Is Fleming's appellate challenge to his aggregate ten-year sentence, which was imposed after he pled guilty to and was convicted of twenty-three separate and distinct South Carolina criminal charges, properly preserved for appellate review when Fleming neither raised any objections during the sentencing proceedings nor sought reconsideration of his sentence after it was imposed?

STATEMENT OF THE CASE

For years, Appellant Cory Howerton Fleming, who—at the time—was a licensed attorney, engaged in "deplorable misconduct and shocking abuse of the legal system in South Carolina" in order to steal from his clients. In re Fleming, 441 S.C. 512, 513, 895 S.E.2d 672, 672 (2023). Once his nefarious scheming came to light, the State Grand Jury of South Carolina issued multi-count indictments charging Fleming with twenty-three separate and distinct criminal offenses that were committed in Beaufort and Hampton Counties. Specifically, through March 2022 and April 2022 indictments, Fleming was charged with (1) two counts of criminal conspiracy; (2) one count of first-degree computer crime; (3) three counts of making a false statement or misrepresentation resulting in the receipt of an economic benefit or advantage of $50,000 or more; (4) three counts of money laundering in an amount of $100,000 or more; (5) three counts of money laundering in an amount between $300 and $20,000; (6) five counts of breach of trust in an amount greater than $10,000; (7) five counts of breach of trust in an amount between $2,000 and $10,000; and (8) one count of breach of trust in an amount of $2,000 or less.

On August 23, 2023, Fleming appeared before the Honorable Clifton Newman, circuit court judge, in the Williamsburg County Court of General Sessions and—after waiving any venue issues—pled guilty to all his state charges, which collectively carried a maximum possible sentence of over 195 years of imprisonment along with potential monetary fines. Sentencing was deferred until September 14, 2023. On that date, Fleming appeared before Judge Newman in the Beaufort County Court of General Sessions, and, at the conclusion of the hearing, Judge Newman imposed an aggregate ten-year term of imprisonment that was to be served consecutively to a forty-six-month prison sentence Fleming had already received for a federal conviction. Additionally, Judge Newman deferred any hearings or rulings on the matter of

restitution to a later date. Thereafter, before the restitution issue was resolved, Fleming initiated an appeal of his convictions and aggregate sentence through the filing of a notice of appeal on September 21, 2023.

After the appeal was initiated, the Court of Appeals notified Fleming of a number of issues with his filing, and he responded by submitting an amended notice of appeal.[1] Through that amended notice, Fleming identified multiple issues he potentially intended to raise on appeal but conceded none had actually been raised to or ruled upon by Judge Newman. Following that, the Court of Appeals—at the request of the State and over objection from Fleming, who maintained the issue of restitution had been waived in this case because it was not addressed before he initiated his appeal—held the appeal in abeyance and remanded the matter to the circuit court to address restitution.

Thereafter, on December 18, 2024, a hearing was held before the Honorable Heath P. Taylor, circuit court judge, in the Calhoun County Court of General Sessions. On April 17, 2025, Judge Taylor issued an order setting restitution in an amount concurrent to the restitution ordered in the federal proceedings. With the issue of restitution now resolved, the Court of Appeals subsequently permitted Fleming's appeal to proceed.

[1] The appellate records associated with Fleming's appeal are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Cory Howerton Fleming, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=79239.

STATEMENT OF FACTS

As has already been thoroughly detailed by our Supreme Court, Fleming—over the course of roughly a decade—used his state law license and role as an advocate on behalf of others to steal from his clients. Fleming, 441 S.C. at 513, 895 S.E.2d at 672. Some of Fleming's dishonest, fraudulent, and criminal acts were perpetrated in an independent fashion. Id. Meanwhile, other Fleming crimes were committed alongside and with the assistance of Richard Alexander Murdaugh, who—at least at the time—was also a licensed attorney.[2] Id.

In one matter, Fleming stole from a client named Pamela Pinckney after she and her son, Hakeem Pinckney, were involved in a catastrophic car accident along with other family members and she placed her trust in Fleming to help. Id. at 514-515, 895 S.E.2d at 673. Despite the fiduciary duty he unmistakably owed to Ms. Pinckney, Fleming illegally converted substantial sums held in trust for her to his own use, including to finance a trip to the 2012 College World Series via a private charter flight for himself and Murdaugh. Id. at 515-516, 895 S.E.2d at 673.

In another matter, Fleming purported to represent the estate of Gloria Satterfield, Murdaugh's longtime housekeeper, after she died from injuries sustained in a fall at Murdaugh's home. Id. at 516, 895 S.E.2d at 674. However, instead of doing so in an honest manner and looking out for the interests of Satterfield's surviving children, Fleming "conspired together" with Murdaugh to get Murdaugh's insurance carriers to settle wrongful death and survival claims in order to steal the proceeds. Id. Ultimately, a total sum of $4,305,000 was recovered on behalf of the estate. Id. at 519, 895 S.E.2d at 675. However, Murdaugh stole virtually all the recovered

[2] Much like Fleming, Murdaugh has since been disbarred from the practice of law in South Carolina and convicted of numerous criminal offenses. In re Murdaugh, 437 S.C. 15, 16, 875 S.E.2d 625, 626 (2022). At present, an appeal related to some of Murdaugh's convictions remains pending at the South Carolina Supreme Court. Appellate Records for State v. Richard Alexander Murdaugh, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=78062.

funds that were not collected as attorney's fees. Id. at 518-519, 895 S.E.2d at 675. And, significantly, he was able to do so because Fleming directed those funds be sent to a bank account that Murdaugh had created using the name "Forge" to make it falsely appear client funds were being transferred into legitimate structured settlements.[3] Id. In addition to that, Fleming personally stole $26,200 of the recovered funds for himself by claiming fraudulent expenses. Id. at 519, 895 S.E.2d at 675.

Ultimately, through an investigation spearheaded by the South Carolina State Law Enforcement Division ("SLED"), the State Grand Jury Division of the Attorney General's Office, and the State Grand Jury, Fleming's years of crimes were brought to light. (Plea Tr. pp. 6-41; St. Sent. Memo. pp. 14-15). Once exposed, Fleming was indicted for twenty-three state offenses, including twenty-two felonies. (Plea Tr. p. 3; Multi-Count Indictments). In addition to that, the federal government also pursued criminal charges, and Fleming was permitted to plead guilty in federal district court to a single federal charge of conspiracy to defraud the United States. (Sent. Tr. p. 89; p. 93; Def. Sent. Memo. pp. 4-5). For that offense, he received a federal prison sentence of forty-six months[4] and was also ordered to pay $102,221.90 in restitution. (Sent. Tr. p. 89; Def. Sent. Memo. p. 4).

After pleading guilty in federal court, Fleming—in August of 2023—knowingly, intelligently, and voluntarily pled guilty to all twenty-three of his state charges. (Plea Tr. pp. 3-

[3] As our Supreme Court has aptly noted, Fleming "repeatedly claimed he did not know the imitation Forge bank account was an illegitimate vehicle through which Murdaugh stole millions from unsuspecting clients" but "the State's evidence proves otherwise." Fleming, 441 S.C. at 513-514, 895 S.E.2d at 672.

[4] The maximum potential term of imprisonment for Fleming's federal offense was five years. (Sent. Tr. p. 93).

6; pp. 41-44). The plea judge accepted Fleming's guilty pleas, and sentencing was deferred. (Plea Tr. pp. 44-45).

Thereafter, during the ensuing sentencing hearing in September of 2023, the prosecutor recounted the details of Fleming's many crimes and presented remarks from and on behalf of the Satterfields and Ms. Pinckney. (Sent. Tr. pp. 3-40). After doing so, the prosecutor requested the imposition of a consecutive term of imprisonment in order for there to be independent accountability for Fleming's state crimes. (Sent. Tr. pp. 41-43; pp. 92-93).

Conversely, defense counsel requested a sentence concurrent to Fleming's forty-six-month federal sentence while asserting such a sentence would constitute "sufficient" punishment that would serve all the penological goals of criminal sentencing. (Sent. Tr. pp. 51-52; p. 88). In addition to that, defense counsel offered remarks from a number of individuals[5] on Fleming's behalf, and Fleming personally addressed the court, admitting he made "terrible decisions," broke the law, and betrayed the legal system in a way that damaged the public's confidence in it. (Sent. Tr. pp. 70-88).

At the conclusion of the State's and defense's presentations, the plea judge noted the parties had both made lengthy presentations and offered extensive arguments during the proceedings. (Sent. Tr. p. 94). He further noted he had been presented with "voluminous materials to review"[6] prior to the hearing, and he confirmed he reviewed everything *except* "Judge Gergel's transcript." (Sent. Tr. p. 94). As to why he did not review that particular

[5] One of those individuals specifically noted Ms. Pinckney stated she forgave Fleming during the federal sentencing hearing. (Sent. Tr. pp. 70-71).

[6] Prior to the sentencing hearing, both the State and the defense submitted sentencing memoranda to the plea judge. (Def. Sent. Memo. pp. 1-19; Def. Supp. Sent. Memo. pp. 1-14; St. Sent. Memo. pp. 1-22). Notably, defense counsel attached a copy of the transcript from the federal sentencing hearing to one memorandum *and* thoroughly discussed what occurred during that hearing in the body of that memorandum. (Def. Sent. Memo. pp. 1-19).

matter, the plea judge explained he did not "defer to the federal court system for -- in making [his] decisions." (Sent. Tr. p. 94). The plea judge then explained he viewed Fleming's crimes—which were sufficiently grievous such that Fleming was "[f]acing 195 years in prison"—as unprecedented, unimaginable, and "as bad as it gets . . . for a lawyer who has a prior record," which the plea judge explained was a reference not to the existence of some prior conviction but to the years-long nature of Fleming's criminal acts. (Sent. Tr. pp. 94-98).

After making those remarks, the plea judge asked counsel if there was "[a]nything else before [he] impose[d] [his] sentence." (Sent. Tr. p. 98). Defense counsel responded, "No, Your Honor." (Sent. Tr. p. 98). Hearing no objections, the plea judge proceeded to impose sentence and, for Fleming's twenty-three convictions for state charges, sentenced him to an aggregate ten-year term of imprisonment, which was roughly 185 years shorter than the maximum sentence that could have been imposed for Fleming's crimes. (Sent. Tr. pp. 99-100). Furthermore, the plea judge ordered all the sentences to run concurrently aside from one, which he directed to be served consecutively to the federal sentence Fleming was already serving. (Sent. Tr. pp. 99-100).

Following that, defense counsel did not move for reconsideration of the sentence imposed or raise any objections or allegations of error whatsoever. (Sent. Tr. pp. 98-100). Instead, with full awareness no objections had been presented to the plea judge, defense counsel swiftly initiated an appeal before the matter of restitution, which had been expressly deferred by the plea judge, was resolved. (Sent. Tr. p. 100; Notice of Appeal, pp. 1-2; Amended Notice of Appeal, pp. 1-4). And, in doing so, defense counsel directly conceded—correctly—*none* of the various issues Fleming intended to pursue on appeal were ever raised to or ruled upon by the plea judge. (Amended Notice of Appeal, pp. 1-4).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review *preserved* errors of law. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). When reviewing a properly-preserved sentencing issue on appeal, an appellate court will only interfere with a circuit court judge's sentencing decision in rare and unusual circumstances in light of the broad discretion afforded to the circuit court judge on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose."). Furthermore, appellate courts in South Carolina have "no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the [sentencing] judge, and is not the result of partiality, prejudice, oppression or corrupt motive." State v. Scates, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948); cf. State v. Davis, 88 S.C. 229, __, 70 S.E. 811, 814 (1911) ("It is excepted that imprisonment for five years in this case is excessive. We have repeatedly held that we have no jurisdiction to correct a sentence on this ground, provided it is within the limits prescribed by law for the discretion of the trial court, and is not the result of partiality, prejudice, oppression, or corrupt motive."). Meanwhile, when reviewing a sentence to determine whether it is constitutionally proper, an appellate court will not disturb the sentencing judge's findings absent an abuse of discretion or the commission of an error of law. State v. Finley, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019).

ARGUMENT

Fleming's appellate challenge to his aggregate ten-year sentence, which was imposed after he pled guilty to and was convicted of twenty-three separate and distinct South Carolina criminal charges, is not properly preserved for appellate review because Fleming neither raised any objections during the sentencing proceedings nor sought reconsideration of his sentence after it was imposed and, therefore, cannot appropriately raise any objections to that sentence for the first time on appeal under well-established South Carolina law.

Fleming contends the plea judge reversibly erred by sentencing him to an aggregate ten-year term of imprisonment for his twenty-three state convictions. In support of that contention, Fleming—for the first time on appeal—raises a wide variety of arguments. Specifically, Fleming maintains: (1) the plea judge committed reversible error and violated his constitutional rights by failing to review the transcript from the federal sentencing proceedings because the information contained within in, including the thoughts and reasoning of the federal district court judge, constituted "powerful mitigation evidence" that was relevant to his case; (2) the sentence imposed by the plea judge was improper because it was "clearly excessive"; (3) the plea judge's recusal was necessary because he demonstrated "extreme judicial bias"; and (4) his aggregate ten-year sentence on the state charges violated the constitutional prohibition against cruel and unusual punishment because "it [wa]s the result of partiality, prejudice, oppression, or corrupt motive." (App. Br. pp. 1-26). Importantly though, *none* of those arguments were ever at any point raised to the plea judge. Instead, during the sentencing hearing, defense counsel did not raise any objections, including to the plea judge's refusal to review the federal district court judge's remarks from the federal sentencing proceedings, either before or after Fleming's sentence was imposed. Likewise, defense counsel did not move for reconsideration of the sentence imposed or raise any challenges—constitutional or otherwise—to it on any grounds, including on the ones Fleming has elected to assert for the first time on appeal. Similarly,

defense counsel did not raise any arguments alleging bias on the part of the plea judge or suggesting recusal was necessary or warranted based on anything the plea judge said or did. Critically, because Fleming's appellate arguments were never presented to the plea judge, the plea judge was wholly deprived of any opportunity to ever consider them, rule upon them, or respond to them in any fashion. Under such circumstances, Fleming's issues with his sentence are not properly preserved for appellate review and cannot appropriately be addressed for the first time on appeal. Fleming's convictions and aggregate sentence should be affirmed.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and *arguments*." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added); cf. Unemployment Compensation Comm'n of Alaska v. Aragan, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

For an issue to be preserved for appellate review pursuant to our state's issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient

specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). If an issue—including a constitutional one—is not presented to and ruled upon by the circuit court judge, it cannot appropriately be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal."). Critically, on appeal, an appellant is limited solely to the grounds raised at trial. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

In light of those fundamental issue preservation requirements, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review.[7] State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998); see State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). Importantly, an appellant's failure to timely object to or seek modification of a sentence in the trial court *precludes* him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) ("No objection to sentencing was raised at trial and this issue is not properly before the court."); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288

[7] Notably, our Supreme Court has recognized an exception to our state's issue preservation requirements concerning challenges to a criminal sentence, but it is only applicable "when a trial court imposes what the State concedes is an illegal sentence" that exceeds the maximum permitted by law. State v. Plumer, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023); see State v. Davis-Kocsis, 443 S.C. 127, 135, 903 S.E.2d 491, 495 (2024) (reiterating "the issue-preservation standard for illegal sentences is the standard set forth in Plumer").

(1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant's contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal." (citations omitted)).

In the case sub judice, Fleming was convicted of twenty-three separate and distinct criminal offenses, including *twenty-two felonies*. Amongst his offenses, Fleming was convicted of five counts of the "serious"[8] offense of breach of trust in an amount greater than $10,000, and each individual count was punishable by up to ten years in prison. S.C. Code Ann. § 16-13-230(B)(3); S.C. Code Ann. § 17-25-45(C)(2)(b). Beyond that, Fleming's other seventeen felony convictions authorized the imposition of terms of imprisonment of up to twenty years for money laundering in an amount of $100,000 or more, up to ten years for making a false statement or misrepresentation resulting in the receipt of an economic benefit or advantage of $50,000 or more, and up to five years for all the remaining ones. S.C. Code Ann. § 16-13-230(B)(2); S.C. Code Ann. § 16-16-20(2); S.C. Code Ann. § 16-17-410; S.C. Code Ann. § 35-11-740(A)(1); S.C. Code Ann. § 38-55-540(4); see S.C. Code Ann. § 16-1-20 (authorizing a sentence of up to twenty years for a "Class C" felony and up to five years for a "Class F" felony). Further still, Fleming's lone misdemeanor offense was punishable by up to thirty days. S.C. Code Ann. § 16-13-230(B)(1). Thus, in total, Fleming was facing a combined potential sentence of *more than* 195 years of incarceration for his many crimes along with substantial monetary fines. See State

[8] Significantly, due to the "serious" nature of that particular offense, Fleming could potentially have been facing a mandatory, non-discretionary sentence of life without parole if the State had elected to prosecute his breach of trust offenses in a one-by-one manner. See S.C. Code Ann. § 17-25-45(B) (instructing a person convicted of a "serious" offense in South Carolina "must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions" for—amongst other things—"serious" offenses).

v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997) ("[W]hether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial judge.").

Despite having the discretionary authority to sentence Fleming to nearly two centuries of incarceration for the numerous criminal acts he had self-admittedly engaged in over the years, the plea judge—mercifully for Fleming—elected not to do so. Instead, the plea judge imposed a *substantially* shorter aggregate sentence of just ten years' imprisonment, which was a period of years that fell squarely within the permissible sentencing limits for Fleming's crimes as set by our legislature. See State v. Bass, 242 S.C. 193, 197, 130 S.E.2d 481, 483-484 (1963) ("This Court has no jurisdiction to correct a sentence alleged to be excessive when it is within the limits prescribed by law."); see also Scates, 212 S.C. at 154, 46 S.E.2d at 694 ("[I]f the statute fixing the punishment for an offense is not unconstitutional, a sentence within the limits fixed by the statute will be regarded as cruel or unusual."); cf. State v. Fleming, 228 S.C. 129, 133-134, 89 S.E.2d 104, 106 (1955) ("In this question, appellants complain of the sentence in that their accomplice received a sentence of 18 months while they received a sentence of 10 years. This Court has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the trial Judge and is not the result of partiality, prejudice, oppressive or corrupt motive."). Indeed, Fleming's total ten-year sentence for his state charges was half the length of the maximum permissible punishment for just one of his crimes, it equaled just five percent of the maximum aggregate sentence authorized by law for his collective offenses, and, on average, he received *less than* six months of incarceration per conviction. S.C. Code Ann. § 16-1-20; S.C. Code Ann. § 35-11-740(A)(1); cf. State v. Slocumb, 426 S.C. 297,

310, 827 S.E.2d 148, 155 (2019) ("For these crimes, Slocumb received an average per-crime sentence of twenty-six years' imprisonment.").

Apparently unsatisfied with the substantial leniency extended to him by the plea judge, Fleming now argues this Court should strike down his aggregate ten-year sentence and remand for resentencing by someone other than the plea judge. In support that request, Fleming—as previously noted—has raised a litany of arguments as to how the plea judge purportedly erred in imposing the sentence and why that sentence was supposedly illegal, improper, and unconstitutional.

However, during the sentencing hearing, defense counsel did *not* raise any of the arguments Fleming has now raised for the first time on appeal. More specifically, defense counsel did not contend to the plea judge he was absolutely required to read the transcript from the federal sentencing proceedings and did not explain—or even attempt to explain—how the thoughts and reasoning of a federal district court judge concerning sentencing could constitute actual mitigation evidence[9] in Fleming's state case. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (recognizing an issue will be procedurally barred on appeal when a party fails to timely object because the absence of a contemporaneous objection denies the trial judge an opportunity to cure the alleged error); cf. State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228

[9] Now, on appeal, Fleming characterizes the federal district court judge's views as "powerful mitigation evidence" on his behalf because the federal district court judge purportedly "wished to share his thoughts about the *appropriate* sentence" out of concern Fleming might be "over-sentenced in the state court system." (App. Br. p. 15) (emphasis added). Significantly, that assertion does not actually make it clear how another judge's unsolicited thoughts on an appropriate sentence would constitute mitigation evidence in a South Carolina state court or how such "evidence" would even be admissible at all. See, e.g., Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (instructing testimony from a criminal defense attorney on whether another attorney's performance had been deficient was not admissible expert opinion testimony because it was not "factual evidence" and, instead, "was legal argument" that was not admissible under our state's evidentiary rules).

(Ct. App. 2003) (finding any issue resulting from the trial judge's failure to take a particular action was not preserved for appellate review because Vang did not ask the trial judge during trial to take the action Vang contended on appeal should have been taken). Defense counsel similarly did not contend the transcript from the federal sentencing proceedings contained *other* mitigating evidence that the plea judge was legally obliged to consider separate and apart from the information discussed in the defense's sentencing memoranda[10] and offered up during the sentencing hearing, *including* when the plea judge afforded defense counsel an opportunity to object by directly asking her if there was "[a]nything else" just before imposing the sentence.[11] (Sent. Tr. p. 98). Likewise, defense counsel neither objected to Fleming's sentence—on excessiveness grounds, constitutional grounds, or any other grounds—after it was imposed nor sought reconsideration or modification of that sentence. Cf. State v. Dial, 405 S.C. 247, 262, 746 S.E.2d 495, 503 (Ct. App. 2013) (concluding Dial's appellate contention the trial judge—amongst other things—erred by failing to accord weight to the mitigating factors he presented was not preserved for appellate review because no objection was raised during or after sentencing). Additionally, defense counsel did not raise any allegations of bias[12] on the plea

[10] Notably, those sentencing memoranda, which were presented to and considered by the plea judge, contained—amongst other things—a thorough synopsis of what occurred in the federal proceedings and included lengthy quotations making it unmistakably clear the federal district court judge considered the sentence he imposed to be a "full" sentence for Fleming's crimes. (Sent. Tr. pp. 45-47; p. 49; pp. 51-52; p. 56; p. 66; p. 68; p. 94; Def. Sent. Memo. pp. 1-19; Def. Supp. Sent. Memo. pp. 1-14).

[11] Confusingly, despite the plea judge expressly affording defense counsel an unmistakable opportunity to raise any objections she may have had before the sentence was imposed, Fleming now maintains—quite incorrectly—the plea judge "did not even allow counsel an opportunity to object to his decision not to review the mitigation." (App. Br. p. 15).

[12] Interestingly, Fleming's appellate claim of improper bias on the part of the plea judge follows defense counsel's earlier proclamation during the sentencing proceedings she *knew* the experienced plea judge took "genuine care" when sentencing someone. (Sent. Tr. p. 61).

judge's part, which wholly deprived the plea judge of any opportunity to respond to or address such allegations. See Gaddy, 359 S.C. at 350, 597 S.E.2d at 23 (recognizing our state's issue preservation requirements are applicable to a claim a judge was not impartial and should have been recused); Thomason, 355 S.C. at 288, 584 S.E.2d at 148 ("Generally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision. For an appellate court to review an issue, a contemporaneous objection at the trial level is required." (citations and internal quotations omitted)); see also State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); cf. State v. Charron, 351 S.C. 319, 328, 569 S.E.2d 388, 393 (Ct. App. 2002) ("The Charrons assert the trial judge became 'prosecutor and inquisitor' and demonstrated such a degree of bias as to totally destroy any appearance of impartially. Again, this issue is not properly before us because the Charrons did not raise the issue of the trial judge's partiality at any point during the trial."); Bryan v. Bryan, 296 S.C. 305, 311, 372 S.E.2d 116, 120 (Ct. App. 1988) (finding an issue involving an allegation of judicial bias was waived because "the issue of bias was not raised in the family court" and "[t]he wife made no motion for the judge to recuse himself prior to the submission of the case for his decision"). Instead of doing so, defense counsel waited to see what sentence was actually imposed without raising any objections, continued to refrain from objecting even after the ten-year aggregate sentence was announced, and swiftly initiated an appeal without having lodged a single objection on any grounds to Fleming's sentence and without attempting to get the plea judge to reconsider his sentencing decisions in any fashion.[13]

[13] Again, it is worth reiterating the first time a specific contention was raised on Fleming's behalf suggesting his sentence was improper in any way was in his *amended* notice of appeal. (Amended Notice of Appeal, pp. 1-4).

[14] See I'On, 338 S.C. at 422, 526 S.E.2d at 724 (instructing our state's issue preservation requirement prevent a party "from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity").

Because defense counsel did not raise any of the arguments Fleming is now attempting to raise on appeal, the plea judge was wholly denied an opportunity to consider, address, or rule upon those arguments when imposing Fleming's sentence. See Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)); cf. State v. Sheppard, 391 S.C. 415, 424, 706 S.E.2d 16, 20 (2011) ("Sheppard argues the circuit court erred in sentencing him to twenty years total imprisonment because his sentence was disproportionately greater than those of his co-conspirators. This argument, however, was not raised to the trial judge; therefore, the issue is not preserved for appellate review."). Critically, without first giving the plea judge an opportunity to address his claims—including his newly-conceived constitutional ones—regarding the propriety of his sentence or the sentencing proceedings themselves, Fleming is precluded from raising those claims for the first time on appeal.[15] See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing

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[14] Notably, Fleming even initiated his appeal before the plea judge finally ruled on restitution despite the fact the plea judge had expressly stated he was deferring the matter of restitution to a later date. (Sent. Tr. p. 100).

[15] Moreover, nothing the plea judge said at any point in the sentencing hearing suggested Fleming was not free to object or would have been at risk of peril if he had actually attempted to alert the plea judge via objection of his belief, for example, it constituted legal error for the plea judge to refuse to read the federal sentencing hearing transcript. Cf. State v. Higgenbottom, 337 S.C. 637, 640, 525 S.E.2d 250, 251 (Ct. App. 1999) (concluding Higgenbottom's failure to object was excused because it was clear from the record an objection "surely" would have placed

party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); cf. State v. McCray, 222 S.C. 391, 394, 73 S.E.2d 1, 2 (1952) (finding McCray's appellate contention the sentence imposed was "cruel and excessive" was unavailable to him on appeal because that particular contention was not raised to the circuit court judge). As a result, Fleming's appellate challenge to his sentence is not properly preserved for appellate review and cannot appropriately be considered or addressed for the first time on appeal. See Johnston, 333 S.C. at 462, 510 S.E.2d at 425 ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."); State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969)

Higgenbottom "in a perilous posture" based on the plea judge's remarks), rev'd on other grounds, 344 S.C. 11, 542 S.E.2d 718 (2001); State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) ("As to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks *concerning her gender and conduct* were such that any objection would have been futile. Accordingly, we find no waiver of this issue." (emphasis added)). Therefore, there are no legitimate grounds upon which Fleming's failure to object could be excused or ignored on appeal. See Sheppard, 391 S.C. at 421, 706 S.E.2d at 19 ("[T]he plain error rule does not apply in South Carolina state courts."); cf. Stone v. State, 419 S.C. 370, 386-387, 798 S.E.2d 561, 570 (2017) ("This was not a situation in which trial counsel made several unsuccessful objections and then decided further objections were futile. Instead, the transcript reveals trial counsel did not make a single objection . . . . Under these circumstances, counsel's belief the trial court would overrule his objection does not justify the decision not to make it."); Moses v. State, 442 S.C. 263, 271, 898 S.E.2d 174, 178 (Ct. App. 2024) ("Softening preservation rules for Moses' claim would be tantamount to employing the plain error rule. Although—as discussed—our jurisprudence sometimes permits reaching unpreserved issues to avoid hyper-technical applications of preservation rules, the case at hand is not one in which preservation rules must be tortured or even construed strictly in order to function as a bar to Moses' claim. Rather, Moses did not object during the DNA testing hearing. In short, the issues Moses brings on appeal were neither raised to nor ruled on by the circuit court. The State had no opportunity to address any of the arguments about the circuit court's order that Moses makes on appeal because this appeal is the first time he has raised them. The same can be said about the circuit court. Thus, Moses failed to preserve the errors he assigns for appellate review and no extraordinary circumstances warrant this court to set aside preservation rules and reach the issues." (citations omitted)).

(declining to address Walker's appellate contention the sentence he received could not have properly been imposed "on the elementary ground that the question was not raised below"); cf. State v. Gulledge, 321 S.C. 399, 404-405, 468 S.E.2d 665, 669 (Ct. App. 1996) ("Gulledge . . . argues the State did not prove she had the resources to pay $210,000.00 in restitution and the trial court failed to state its findings and the underlying facts and circumstances of them. Because this argument was neither raised to nor addressed by the trial court, we need not deal with it." (citation omitted)). Fleming's convictions and aggregate sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

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