

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2013-000338

THE STATE,

Respondent,

v.

BORIS PHILLIPS,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's argument is not preserved for review. Even if the issue was preserved, Appellant's case should not be remanded for resentencing where there is no evidence that the trial court considered evidence of Appellant's two additional pending charges for which no disposition had yet been made. Rather, evidence shows the court properly considered Appellant's considerable prior record, including 13 prior enhancing property offenses beginning in 2001, and other relevant circumstances.

STATEMENT OF THE CASE

Appellant Boris Phillips was indicted for shoplifting, third or subsequent offense. (2012-GS-26-4960). Appellant proceeded to a jury trial on February 6, 2013. Petitioner was convicted and sentenced to seven years imprisonment.

ARGUMENT

Appellant's argument is not preserved for review. Even if the issue was preserved, Appellant's case should not be remanded for resentencing where there is no evidence that the trial court considered evidence of Appellant's two additional pending charges for which no disposition had yet been made. Rather, evidence shows the court properly considered Appellant's considerable prior record, including 13 prior enhancing property offenses beginning in 2001, and other relevant circumstances.

The present charge stems from an incident at a Sears in the Myrtle Beach Coastal Grand Mall. On August 5, 2012, store video showed a man walking into the store, getting a shopping cart, and proceeding to the tools section. (R. p. 36, lines 8-9.) The man selected a Craftsman tool set and an assortment of tools, and he appeared to photograph some items with a phone. (R. p. 36, lines 9-10; p. 50, lines 18-23; p. 52, lines 18-22.) Appellant ultimately pushed the cart out of the store, failing to pay for any of the merchandise. (R. p. 36, lines 10-11; p. 51, lines 2-15; p. 53, lines 8-24; p. 54, lines 12-13.) A loss prevention officer from the Florence store, William McKenzie, recognized Appellant as the man in the video from McKenzie's prior employment in an auto shop. (R. p. 36, lines 13-15; p. 71, line 20 – p. 75, line 8.) Appellant was also seen in the same Sears store the following day. (R. p. 62, line 19 – p. 65, line 11.) The stolen property was not recovered. (R. p. 43, lines 6-7.)

At sentencing, the solicitor recited Appellant's significant prior record:

Your Honor, starting in 1996 I have convictions for DUS; 2000 CDV; 2001 petit larceny, bribing an officer; 2004, petit larceny; 2004, shoplifting; 2005, petit larceny and shoplifting; 2006, forgery 1000 to 5000; 2007, grand larceny 1000 to 5000; 2008, shoplifting, two other shopliftings, a shoplifting third or subsequent; simple assault and battery; 2009, shoplifting and shoplifting third or subsequent; 2011, breach of trust less than 2000.

(R. p. 106, line 20 – p. 107, line 2.) Appellant had a total of thirteen property offenses for enhancement purposes. (R. p. 107, lines 5-6.) The thirteen offenses amassed beginning in 2001, meaning that Appellant was convicted of the thirteen offenses in less than twelve years, a steady record. The solicitor stated that Appellant also had two additional shoplifting offenses pending: one at the same Sears store occurring August 6, 2012, the day after this incident, and another from Walmart. (R. p. 112, line 16 – p. 113, line 1.) Appellant now argues that it was improper for the court to consider information about pending charges.

Appellant's argument is not preserved for review. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Our courts have "consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). No objection was made to the solicitor's mention of the additional pending charges, and Appellant made no motion to reconsider his sentence. Therefore, the matter is not preserved for appellate review.

Even if an objection had been made, Appellant's argument would be without merit. "A broad discretion is allowed the trial judge in imposing sentence within the legal limits." State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). "A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against respondent." Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995)(citing Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979)). Relying on U.S. v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), in State v. Rich, 269 S.C. 701, 704, 239 S.E.2d 731, 732 (1977), the South Carolina Supreme Court noted, "despite the broad discretion left to the trial judge in assessing background information for sentencing purposes, a defendant retains the rights not to be sentenced on

the basis of invalid premises.” (citing U.S. v. Espinoza, 481 F.2d 553 (5th Cir. 1973); State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976)).

The present case is distinguishable from State v. Rich, *supra*. In Rich, the trial judge considered Rich’s rap sheet which reflected arrests for assault and battery with intent to ravish and indecent exposure. The first charge was discharged, and no disposition was shown as to the second charge. These were the only sexual offenses on the rap sheet. The trial judge remarked during a motion to reconsider sentence that Rich was “an habitual sex offender” who “doesn’t have any business being out on the street a’tall.” *Id.* at 703, 732. Based on these remarks, the inference arose that the trial judge considered these arrests in pronouncing his sentence.

In the present case, the trial judge’s comments prior to pronouncing sentence reflect consideration of Appellant’s considerable, consistent history of property offenses:

Mr. Phillips, you have an extensive record of essentially stealing from people. You’ve shown absolutely no acceptance of responsibility in this case. Now you tell me you did it and you put the State to a trial to prove that you did. I don’t think you want any help and I don’t think that you’re going to stop stealing. The sentence of the court is that you be confined for a period of 7 years. Thank you, sir.

(R. p. 113, lines 7-14.) Prior to pronouncing sentence, the trial judge also asked Appellant about the thirteen “other times you stole.” (R. p. 108, lines 2-4.) The trial judge also expressed concern over the facts of the case tried before him, particularly Appellant’s having been photographing merchandise. (R. p. 108, line 11 – p. 109, line 2.)

Unlike Rich where the Appellant had only arrests, not convictions, for sexual offenses and the trial court appeared to consider those arrests in pronouncing sentence, Appellant’s record is replete with property offenses, thirteen in sum, upon which the trial judge clearly based his perception of Appellant’s “extensive record.” It cannot be inferred

from the record that Appellant's two additional pending charges factored in to the judge's decision in light of Appellant's criminal record, and surely the presiding trial judge followed his own entreaty to the jury that Appellant be considered innocent until proven guilty. (R. p. 94, line 25 – p. 96, line 23.) Further, Appellant does not contend that any matter presented was "materially untrue." There is no basis to believe that the trial judge pronounced his sentence as a result of partiality, prejudice, oppression, or corrupt motive. See State v. Benning, 338 S.C. 59, 524 S.E.2d 852 (1999). The sentence pronounced was clearly warranted based on the circumstances proper for consideration by the court, and there is no evidence that the court considered Appellant's arrests in pronouncing sentence.

Finally, Appellant references Robinson v. State, 380 S.C. 201, 699 S.E.2d 588 (2008) in support of his position. In that case, a defense attorney failed to challenge the use of a prior uncounseled conviction (as opposed to an arrest) as an enhancing drug offense. This was important in the case of a drug offense because penalties vary based on whether the offense charged is a first, second, or third. In the present case, it is undisputed that Appellant's conviction is for a third or subsequent offense, and there is no misinformation as to Appellant's prior record.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed and Appellant's request for a new sentencing hearing be denied.

Respectfully submitted,

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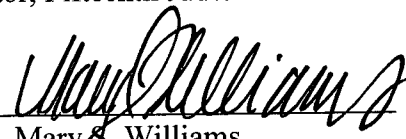
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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May 1, 2014

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PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Final Brief of Respondent, with proof of service, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 1st day of May, 2014.

Ellen DuBois
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