ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2014-000303

THE STATE,

Respondent,

vs.

WILLIAM E. FRITZ,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUE ON APPEAL

Appellant's claims that the trial court erred in allowing the victim of a crime that was being dismissed pursuant to the plea, to speak during the sentencing portion of that plea, is not preserved for appellate review. Furthermore, the trial court properly allowed the comments and there is no evidence Appellant was prejudiced.

STATEMENT OF THE CASE

Appellant was indicted during the December 2013 term of the Berkeley County Grand Jury for Receiving Stolen Goods (2013-GS-08-01788). He was represented by Cody Groeber, Esquire. On February 7, 2014, Appellant and counsel appeared before the Honorable Roger M. Young, Sr., where Appellant pled guilty as indicted. The State was represented by Assistant Solicitor Kendra Wilson. Judge Young sentenced Appellant to six years imprisonment, as well as a concurrent four years imprisonment for a probation violation. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On January 14, 2013, Santee Cooper security guards discovered that a large amount of cooper wiring had been stolen from one of its pumping stations on Dock Road in Moncks Corner. As part of their investigation, Santee Cooper security guards went to Berkeley Scrap Metal, where they found Appellant selling the stolen copper wiring for scrap. Appellant gave a statement that he knew that the wiring was stolen. (R. p. 5.)

Appellant was subsequently indicted for receiving stolen goods. On February 7, 2014, he appeared before the Honorable Roger M. Young, Sr. to plead guilty. He testified that he understood that he could receive a sentence of up to ten years imprisonment. Appellant also testified that he was on probation, he understood that his guilty plea would result in a probation violation, and he could possibly receive an additional four year sentence for this probation violation. After hearing the foregoing, Appellant testified that he wanted to proceed with his guilty plea (R. p. 2).

Appellant testified that he was pleading guilty because he was guilty and that he wanted to waive his constitutional rights to a jury trial and to challenge the State's evidence against him. (R. p. 3). Appellant acknowledged that the State was dismissing two additional charges (Burglary in the Third Degree and Malicious Injury to Telephone Equipment) in exchange for his guilty plea (R. p. 4). Appellant also acknowledged that the State was recommending that he receive a sentence of active incarceration. (R. p. 4).

Following a recitation of the facts, the State informed the plea court of Appellant's prior record, including: "1989 assault and battery; 1990 kidnapping and robbery out of Florida; 2000, a probation violation; 2006, attempt to violate drug laws, 2010, false pretenses, four counts; and a grand larceny, as well as 2012 giving false

information to law enforcement." (R. p. 5). Neither Appellant nor his counsel disputed his prior record as recited by the State.

Thereafter, Allyn Aksomitas, the victim of a burglary in the third degree charge that the State was dismissing, was allowed to address the court over Appellant's objection. (R. p. 6). Mr. Aksomitas addressed the court with the following comments:

> "Thank you, Your Honor, for letting me address you. I'm a disabled retired military veteran. I've come up here numerous times to follow up with Mr. Fritz to ask you for a harsh sentence.
>
> I'm the victim on another crime, one of many other crimes, and I'm very familiar with his activity. I challenge his statement that he's had a job. All he did was wander around the neighborhood looking for victims, me being one. He went into my house, with his sister, to haul my copper, made the house uninhabitable at a great financial loss to me.
>
> He had no job, no car, no driver's license. The only source of income was an occasional scrapping permit. He was living with his sister, and they lived nearby my rental property. He got her involved at this particular -- on this particular event. He got her involved with this crime, and she already pled guilty earlier this year.
>
> He has never shown any remorse, apology, anything, nor has his sister with this. He's not a productive member of society, as you can see from his record. I don't think he'll ever change. I think he'll continue to prey on neighbors such as myself.
>
> I'm asking you for a harsh sentence for this particular one time, and I do realize that the other crimes are going to be dismissed, and thank you for listening to me."

(R. pp. 6-7). The court thanked Mr. Aksomitas for coming. (R. p. 7). In response, Appellant's counsel stated "First, as to the burglary, [Appellant], of course, denies that he did it, and there is a reason that it's being dismissed. It's not just a dismissal because he's pleading to something else but because there are significant evidentiary problems, and so

I would ask that you not consider that victim's desires as to his sentence in an unrelated charge." (R. pp. 7-8). Counsel went on to offer mitigation in support of his client, citing Appellant's desire to receive substance abuse counseling, his family commitments, his willingness to assist law enforcement (R. p. 8). Counsel informed the court that Appellant had rejected the State's previous plea offer of three years imprisonment because he hoped that the court would sentence him to less time and requested that the court sentence Appellant to two years imprisonment followed by a period of probation. (R. p. 9). Next, Appellant addressed the court, elaborated on his addiction to crack cocaine, thanked his probation agents and family for their support, and asked for the court for mercy so that he could return to his family. (R. pp. 9-10).

In response, the court stated: "Well, you misjudged on thinking you would be getting less than what they offered you. Looking at your record, all I see is a professional thief. You were on probation for stealing at the time you did this." (R. p. 11). The court sentenced Appellant to six years imprisonment and revoked his probation in full, with the sentenced to be served concurrently. (R. p. 11). Appellant did not object to the sentence or make any argument that the sentence was prejudicially based on Aksomitas' comments to the court.

ARGUMENT

Appellant's claims that the trial court erred in allowing the victim of a crime that was being dismissed pursuant to the plea, to speak during the sentencing portion of that plea, is not preserved for appellate review. Furthermore, the trial court properly allowed the comments and there is no evidence Appellant was prejudiced.

Appellant argues that the trial court erred in allowing Allyn Aksomitas, the victim of the Burglary in the Third Degree charge that was dismissed pursuant to Appellant's guilty plea, to give victim impact testimony during sentencing. Appellant asserts that the court erred because his sentence should not be contingent on what the victim of an unrelated charge not before the court says and that this victim did not have standing to speak at Appellant's sentencing. In support of his argument, Appellant cites State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976) (a sentencing judge should know all material facts independent of surmise or suspicion) and S.C. Code Ann. § 16-3-1514 (E), which he interprets as only allowing the victim of the offense to be sentenced to speak at a sentencing proceeding. However, Appellant has failed to preserve this issue for appellate review. Additionally, Appellant's argument fails, as it was not improper for the court to hear from Aksomitas during sentencing and Appellant was not prejudiced by Aksomitas' comments.

Standard of Review

The trial court has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and **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." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App.

2008)(emphasis added). This court has held that it is "not concerned with balancing prejudicial impact with probative value when reviewing evidence used in the sentencing phase of a non-capital crime because evidentiary rules are inapplicable in a sentencing proceeding." State v. Hutto, 356 S.C. 384, 389, 589 S.E.2d 202, 204 (Ct. App. 2003) citing Rule 1101(d)(3), SCRE; State v. Gulledge, 326 S.C. 220, 228-29, 487 S.E.2d 590, 594 (1997). "In sentencing a convicted defendant a trial court is only limited by constitutional provisions that require the evidence to be relevant, reliable and trustworthy." See Hutto, supra.

The sentencing court may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information it may consider or the source from which it may come before imposing a sentence. Franklin, supra; see also State v. Cantrell, 250 S.C. 376, 379-80, 158 S.E.2d 189, 191 (1967) ("A sentencing judge is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant, if not essential, to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.")

Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limits prescribed by statute." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

Analysis and Discussion

In the present case, Appellant failed to preserve this issue for appellate review. Additionally, the comments by Aksomitas were neither improper nor prejudicial to Appellant.

Addressing preservation first, Appellant has failed to preserve this issue for review by an appellant entity. Following the court's sentence pronouncement, Appellant failed to object to the sentence, renew his previous objection, or otherwise assert that his sentence was improperly influenced by Aksomitas' comments. Without such an objection, Appellant's assertion that his sentence was improperly influenced by Aksomitas is based on mere speculation and conjecture. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Because Appellant did not object following the court's announcement of his sentence, renew his previous objection, or receive a ruling from the court ton this issue, it is not preserved for appellate review.

Turning to the merits of Appellant's argument, it was not improper for the trial court to allow Aksomitas to address the court. Aksomitas is the victim of a crime which the State dismissed pursuant to Appellant's plea. Therefore, the information Aksomitas provided to the court was relevant to Appellant's conduct while he was on probation and the charges he was currently facing when he entered his guilty plea. Additionally, the information provided by Aksomitas was relevant to Appellant's life and characteristics. See Cantrell, supra. Appellant was given a chance to respond to these comments and his counsel addressed several problems with those charges and urged the court not to allow

Aksomitas' comments to impact Appellant's sentence length. As the court is allowed to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider or the source from which it may come," it was not improper for the court to allow Aksomitas to speak at Appellant's sentencing proceeding. Franklin, supra. To hold otherwise would also lead to an absurd situation where a defendant and his attorney could offer "surmise and suspicion" about crimes that were dismissed, but the State and victim could not respond.

Furthermore, Appellant cannot show any reversible error, as no "partiality, prejudice, oppression, or corrupt motive" on behalf of the sentencing court can be established. Barton, supra. The court sentenced Appellant well within the ten year sentencing range. See S.C. Code Ann. §§ 16-1-57, 16-13-180. Appellant acknowledged during the court's plea colloquy that he understood he could receive a sentence of up to ten years imprisonment for Receiving Stolen Goods, as well as four additional years for violating his probation. (R. p. 2). Moreover, the court placed its exact reasons for Appellant's sentence on the record: Appellant's lengthy criminal record (which the court characterized as showing Appellant was "a professional thief") and that he was on probation for another property offense when this crime took place. (R. p. 11). Based on these comments from the court, it is clear that Aksomitas' comments had no impact on Appellant's sentence.

CONCLUSION

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

Respectfully submitted,

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November 14, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2014-000303

THE STATE,

Respondent,

vs.

WILLIAM E. FRITZ,

Appellant.

PROOF OF SERVICE

I, Megan E. Harrigan, 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:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 14th day of November, 2014.

Megan E. Harrigan

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Appeal from Pickens County
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THE STATE,

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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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November 14, 2014

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SC Court of Appeals

November 14, 2014

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RE: State v. William E. Fritz – Appellate Case No. 2014-000303

Dear Mr. Pachak:

I am enclosing two (2) copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Megan E. Harrigan
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MEH/erd
Enclosures

cc: The Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services