

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Hon. R. Keith Kelly, Circuit Court Judge

Case No. 2014-GS-47-00006

The State,

Respondent,

v.

Joshua Ellsworth,

Appellant,

NOTICE OF APPEAL

Appellant Joshua Ellsworth appeals his judgment and sentence, and denial of Motion for Reconsideration of Sentence and Request for Hearing. The sentence was imposed by the Honorable Circuit Court Judge R. Keith Kelly on January 26, 2015. (See Sentencing Sheets attached hereto as Exhibit A.) On that same date, Joshua Ellsworth filed a Motion for Reconsideration and Request for Hearing. The State Grand Jury Clerk, for the Honorable Judge Kelly, sent an email to the Parties on January 26, 2015, advising Judge Kelly was denying the Motion for Reconsideration and not granting a further hearing, and requested the Deputy Attorney General prepare an Order denying said motion.¹

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SC Court of Appeals

¹ To date, the formal Order has not been executed. Upon receipt a copy of said Order will be furnished to this Court. In addition, transcripts of proceedings will be ordered in compliance with Rule 207 and record designated in compliance with Rules 209 and 210 with all matters relevant to this appeal.

This appeal is taken from the order of the Honorable Judge Kelly, dated January 26, 2015, and denial of reconsideration, which imposed Mr. Ellsworth's sentence including, a determinate term of 8 years on Count I, conspiracy to traffic 10-100 pounds of marijuana, a first offense, in violation of S.C. Code Ann. § 44-53-370(e)(1)(a); and five years on each of Counts 2 through 6, distribution of marijuana, a first offense, in violation of S.C. Code Ann. § 44-53-370(b)(2).²

The issue raised in this appeal is whether the court abused its discretion in sentencing Mr. Ellsworth to an excessive sentence of 8 years to be served in the Department of Corrections. This Court has jurisdiction on appeal to correct a sentence alleged to be excessive even when it is within the limits prescribed by law in the discretion of the trial judge but was the "result of partiality, prejudice, oppressive or corrupt motive." *State v. Scates*, 212 S.C. 150, 154 (1948). Here the lower court abused its discretion without the required "conscientious regard for what is just and proper under the circumstances," thus, reflecting "partiality, prejudice, oppressive or corrupt motive" in imposing said sentence. *See, Id.* at 155-156. "Excessive penalties are tyrannical in the court, and abhorrent to the public." *State v. Green*, 220 S.C. 315, 321 (1951) (citation omitted).

In imposing this excessive sentence, Judge Kelly failed to make any requisite record, including, weighing of mitigating factors or stating any grounds or reasons whatsoever for this excessive sentence. As the South Carolina Supreme Court requires, but is utterly absent from the record and decision, is whether Judge Kelly actually considered and weighed the vast mitigating information and circumstances concerning Mr. Ellsworth's history, character and circumstances.

² On September 12, 2014, Mr. Ellsworth pled guilty to these counts in open court without a written plea agreement. Unlike the vast majority of the codefendants he did not have a written plea agreement waiving his rights to appeal the conviction or sentence. The State agreed to a sentence cap of eight years on Count One with no recommendation; and further, to no recommendation on the distribution charges, with no objection to them running concurrent, and to not object to credit for the 262 days already served through pretrial house arrest.

State v. Cantrell, 250 S.C. 376, 379-380, 158 S.E.2d 189, 191 (1967) (“[h]ighly 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”)

Here, the sentencing court was presented with substantial relevant mitigating information about Mr. Ellsworth’s “life and characteristics,” including, for example, that at age 40 he had no prior convictions, that he performed exemplary for the 262 days he was on pretrial house arrest, and numerous character letters and a written statement from Mr. Ellsworth. Furthermore, to date, none of the numerous codefendants, many of whom have significant prior convictions and aggravating circumstances not present here, have been sentenced to this lengthy of a term; and most have been allowed to serve any further time under the home incarceration program with the exception of those who had prior criminal history. There is simply no justifiable basis for Joshua Ellsworth’s unduly excessive sentence. Even, assuming *arguendo*, there was a justification, Judge Kelly failed to articulate any reasons for imposing the harshest of sentences on this particular defendant.

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Based on the information presented, to be presented in Appellant's Opening Brief and supported by the record in the case, Mr. Ellsworth sentence should be respectfully set aside and the case remanded to the Court of General Sessions for re-sentencing.

Dated: February 5, 2015



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CERTIFICATE OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is 105 E. North Street, Suite 100 Greenville, SC 29601. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused a true copy of the within

NOTICE OF APPEAL

to be served on the following parties in the following manner:

Mail Overnight mail Personal service Fax Email

CLERK OF GENERAL SESSIONS COURT
State Grand Jury Clerk's Office
Hon. R. Keith Kelly, Circuit Court Judge
P.O. Box 11508
Columbia SC 29211

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on February 5, 2015.


MARK FOSTER, Esq.

JACKSON SQUARE LAW OFFICES
**BUSTAMANTE, GILG, RAHN,
SCHULTZ & MEIER**
A COMMUNITY OF SOLE PRACTITIONERS

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LISA B. MEIER
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February 5, 2015
Via Fax and First Class Mail

South Carolina Court of Appeal
P.O. Box 11629
Columbia, SC 29211
(803) 734-1839

**Re: State v. Joshua Ellsworth, Case No. 2014-GS-47-00006
Notice of Appeal**

Dear Clerk:

Enclosed please find a Notice of Appeal on behalf of our client, defendant/appellant Joshua Ellsworth. Also enclosed for your reference are copies of the Sentence Sheets from the Court of General Sessions. (Exhibit A of the Notice of Appeal)

In addition, we have enclosed the previously executed order granting permission to appear Pro Hac Vice by the Honorable Judge Robert E. Hood. Local counsel, who has and continues to associate on this case and is a regular member of the South Carolina Bar is: Mark Foster, State Bar Number 100305, 105 East North Street, Suite 100, Greenville, SC 29601. (See SC Judicial Department Rule 404(c)- Continuing effect of authority to appear Pro Hac Vice, including appellate proceedings.)

Thank you kindly for your assistance. Please contact me or Mr. Foster with any questions and concerns.

Sincerely,



JAMES BUSTAMANTE

Enclosure

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