STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge
Appellate Case No. 2014-001150

THE STATE,

Respondent,

vs.

WALTER JACOB MERKA,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUES ON APPEAL

I.

The plea court did not err in finding that a discovery violation did not occur and Appellant was not prejudiced as the plea court could consider the alleged information during the motion to reconsider.

II.

The plea court did not err in denying the motion to withdraw the guilty plea based on Appellant's alleged but unproven mental health history. Appellant was aware of his own mental health history, and his self-protective act of fleeing decries an excused crime based on legal insanity. Merka's counsel was in a position to bring any issues as to Merka's competency to stand trial to the plea court's attention.

STATEMENT OF THE CASE

Appellant Merka was charged with kidnapping, assault and battery, and carjacking. Merka pled guilty to carjacking and assault and battery of a high and aggravated nature (ABHAN) on December 11, 2014. The prosecution recommended ten years' imprisonment, but the Honorable Letitia H. Verdin sentenced Merka to only eight years' imprisonment.

The next day, Merka, though his counsel, filed a motion to reconsider and alleged newly discovered evidence. A hearing on the motion was heard before Judge Verdin on January 9, 2014. Judge Verdin held the record open for Merka to submit any additional documentation of Merka's alleged mental health history. After Merka submitted some documents with a proposed order, Judge Verdin denied the motion by written order dated May 15, 2014.

STATEMENT OF FACTS

It is extremely disturbing that Merka attempts to downplay the violent and egregious nature of his brutal kidnapping by claiming the following: "This is a case about a lover's spat that unintentionally became too filled with passion and elevated emotions that unfortunately resulted in erratic behavior." Br. of Appellant, p. 11.

The solicitor's recitation of facts at the guilty plea presents a far more harrowing experience for the victim. Merka confronted Victim, his co-worker and former girlfriend, at their place of employment, a home improvement store in Greenville County. Victim attempted to leave work to avoid confrontation with Merka and headed for the parking lot. Merka followed her, harassing her and blocking her from shutting the door to her vehicle. Victim told Merka she was calling the police. Merka responded, "Get back here, you fucking

bitch." Guilty plea transcript (GP Tr.) pp. 12-13 (direct quote, p. 13, lines 5-6).

Merka pushed and pulled Victim into her car and got in himself. Victim was crying and trying to escape out the passenger side door. Merka put the car in gear and drove onto Wade Hampton Boulevard with Victim hanging out the open passenger side door. Merka grabbed Victim's pants and was hanging on to her while her feet dragged on the pavement. Merka drove to Interstate 85 and threatened to kill them both by driving into a tree. Merka claimed he had nothing to live for. When Victim tried to flag down another vehicle for help, Merka rolled up the window on Victim's arm so that her wrist became stuck. GP Tr. p. 13. Merka drove Victim back to his apartment, screaming at Victim that she was "a piece of shit that never was going to amount to anything and would never be anybody because there was a reason no one wanted to be with her." Merka made fun of Victim when she began to cry. GP Tr. p. 14, lines 1-7.

When they arrived at Merka's apartment complex, Merka ordered Victim to come to his apartment. Victim refused, and Merka threatened to take them back to the interstate. Victim was concerned because she believed Merka had a firearm in his apartment. However, she got out of the car and ran to a neighbor, asking him to call the police. Merka left in Victim's car and returned to the home improvement store where he was placed under arrest. GP Tr. p. 14.

To be clear, the facts demonstrate Merka became too filled with emotion, chiefly malice, and Merka became erratic. This incident is far worse than Merka intimates. As Victim stated at the guilty plea, she did not ask "for the fear and the memories and the nightmares and the depression that's never going to go away." GP Tr. p. 15, lines 18-22.

During sentencing, the prosecutor advised the plea court: "I just want to make it clear to the court that the State's recommendation is the State's recommendation. The victim should not bear any kind of burden or responsibility for the recommendation the State's made." GP Tr. p. 16, lines 1-5. The plea court agreed. GP Tr. p. 16, lines 6-15.

Subsequently, during the motion for reconsideration, the trial court explained its rationale for going below the State's recommendation of ten years' imprisonment and sentencing Merka to only eight years' imprisonment, noting the following:

> [W]hen the Solicitor made his recommendation, I thought it was more than a fair recommendation of ten years. I gave – I gave you some credit because you had such a small, almost non-existent criminal record as I remember. I knocked it down to eight. Not really knowing, in all honesty, if I should.
>
> But I just want to say right now, if we're talking about what you deserve for what you did, you deserve more than eight. I will say that.

Reconsideration motion hearing transcript (H. Tr.) p. 13, lines 9-19.

ARGUMENT

I.

The plea court did not err in finding that a discovery violation did not occur and Appellant was not prejudiced as the plea court could consider the alleged information during the motion to reconsider.

Merka alleges Victim told the prosecution she did not want Merka to receive any prison time and further alleges that not disclosing this to Merka before the plea constitutes a Brady violation. Evidence in the record indicates such a discussion did not occur and further, the prosecution is under no duty to disclose such information. Additionally, the plea court could reconsider the information, for what little it might be worth, during the motion for reconsideration. At the plea, the Victim noted she did not know what punishment was appropriate for Merka.

Brady v. Maryland, 373 U.S. 83 (1963) is based on the requirement of due process. To succeed on a Brady claim, the defendant must show: 1) the evidence was favorable to the accused, 2) it was in possession of or known to the prosecution, 3) it was suppressed by the prosecution, and 4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

The mere possibility that an item of undisclosed information may be helpful to the defense in its own investigation is insufficient to establish constitutional materiality under Brady. United States, v. Agurs, 427 U.S. 97, 109-10 (1976). "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Porter v. State, 368 S.C. 378,

384, 629 S.E.2d 353, 356 (2006). For Brady purposes, the court's function is to determine whether the appellant's right to a fair trial has been impaired, when viewing the non-disclosed evidence in the context of the entire record. State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987).

Initially, Respondent finds it troubling that Merka is willing to make disparaging accusations regarding the prosecution's duties without citing one case where a court found that a prosecutor has a duty to disclose a victim's apprehensions about the severity of a potential sentence.

The Victim's fleeting thoughts on an appropriate sentence for her quondam boyfriend and attacker are simply not material to guilt or punishment. Reed v. Becka, 333 S.C. 676, 683, 511 S.E.2d 396 (Ct. App. 1999) (finding victim's constitutional rights to be notified of proceedings, to be heard, and to consult with prosecutor did not give victim right to veto proposed plea agreement); see Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012) ("To the extent Petitioner argues . . . that a criminal defendant may never enter a plea voluntarily without the State first disclosing all of the evidence in its possession, we disagree . . ."). Note Victim did have the opportunity to comment on a potential sentence at the plea hearing. When Victim was given the opportunity to speak, she commented, "I don't know what should happen." Tr. p. 15, lines 17-18. There is no reason a victim should know.

Further, the trial court was presented with the opportunity to reconsider the sentence in light of the "new" information, so no further sanction or reconsideration of the sentence was necessary. See Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 470 (2004) (finding where the statement was made available to the defense at the end of the State's direct

examination and the defense chose not to further impeach the State's witness with the statement, new trial on the basis of Brady was not warranted).

Also note Merka made no attempt at the hearing on his motion to call Victim as a witness to testify as to her discussions with the State. Accordingly, Merka's claim he could not complete a full record to support his motion on this issue is simply without merit.

Further, regardless of the rank hearsay Merka's counsel might have been relaying to the plea court, the allegation is simply not true. The prosecutor explained: "It . . . has never been my understanding that, uh, the victim in this case was in contradiction to the state's recommendation." H. Tr. p. 22, lines 11-14. The prosecutor noted that he sent an e-mail to Merka's counsel that he had agreed with Victim "that a substantial amount of incarceration is appropriate in this case." GP Tr. p, 22, line 23 – p. 23, line 7.

Given the plea court had the ability to determine the materiality of the alleged "discovery" violation, and found it was not material, the plea court did not err in denying the motion for reconsideration.

Additionally, Merka claims he should get a new trial. However, Victim's thoughts on an appropriate punishment have no bearing on Merka's guilt or innocence, so his conviction should remain intact regardless of the merits of the issue raised. See Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983) (finding a defendant alleging after-discovered evidence must show the evidence (1) would probably change the result if a new trial was had; (2) was discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching).

II.

The plea court did not err in denying the motion to withdraw the guilty plea based on Appellant's alleged but unproven mental health history. Appellant was aware of his own mental health history, and his self-protective act of fleeing decries an excused crime based on legal insanity. Merka's counsel was in a position to bring any issues as to Merka's competency to stand trial to the plea court's attention.

Merka alleges the trial court should have considered his mental health history. Merka raised a belated, questionable issue as to his mental health history. Nothing presented to the plea court required the plea court to allow Merka to withdraw the guilty plea or reconsider Merka's sentence.

Merka's competency at the guilty plea hearing is not at all at issue. Consider Merka's plea for mercy at the conclusion of the guilty plea:

> I am extremely sorry for all of my actions. I'm extremely embarrassed of myself. I am currently going on 103 days sober. I – with everything going on, I must say, I'm physically free from everything. Sobriety and – alcohol and drugs have been a big part of my life for many, many years. . .
> .

GP Tr. p. 20, lines 9-15. Merka explained alcohol and drugs drove him to the point where his anger was out of control. Note that he was making excuses for what he did. GP Tr. p. 20, lines 16-19. Merka assured the judge that he feels a whole lot better, his anger has gone down so much that Merka declared, "it amazes me even to today." GP Tr. p. 20, lines 21-24. He apologized to the Victim to show the judge he was sorry. GP Tr. p. 20, line 25 – p. 21, line 1. Merka pled for mercy. GP Tr. p. 21. So Merka was fine at the guilty plea, which is what the plea court found. Order dated May 14, 2014, p. 2.

Of course, nothing in the facts of the horrific crime suggests an issue of mental illness. It was, just like Merka explained at the guilty plea hearing, him unable to control his anger over a relationship ending and him letting anger, like his use of drugs, overtake him. He took self-protective measures like escaping when Victim found a neighbor to assist her and attempting to return her stolen car to the home improvement store. The nature of Merka's argument about how his ADHD affected him at the time of the crime suggests he is asserting a diminished capacity defense, which is not a valid defense. See State v. Sanitago, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App. 2006) (noting that diminished capacity is not a recognized defense in South Carolina).

To show after discovered evidence, the defendant must show the evidence: (1) would probably change the result if a new trial was had; (2) was discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983). Obviously, the evidence could have been "discovered" before trial since it was within Merka's knowledge. There is no showing the evidence is material beyond being merely mitigating evidence, at best, for sentencing purposes, and considering the plea court could have considered the evidence, and did not find it persuasive, it would not have affected the outcome of the sentencing phase of the plea and would not be useful for trial.

The withdrawal of a guilty plea is within the sound discretion of the plea judge. State v. Bickham, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009). The motion was based on the premise that counsel did not discover Merka's mental health history until after the plea. But

Merka would be well aware of his own mental health history.

Further, the plea court acted within its discretion in discounting the evidentiary value of family members' affidavits and medical journal articles to determine whether Merka's purported mental illnesses played a part in the crime committed, as opposed to alcohol, drug, and anger control issues as described by Merka himself at the guilty plea hearing. Merka failed to offer any relevant medical records to convincingly establish his recent mental health history. Merka admits in his brief that documentation of the supposed history of mental illness was limited; Merka claims it was because the family moved frequently. The plea court found this explanation for the lack of records to not be compelling. Order dated May 14, 2014, pp. 3-4.

Authority to change a sentence rests with the sentencing judge and the judge's decision will not be reversed absent an abuse of discretion. State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). The instant case reveals that the plea court did not abuse its discretion in declining to alter the sentence based on the skimpy evidence of recent mental illness and in light of the horrific acts committed by Merka.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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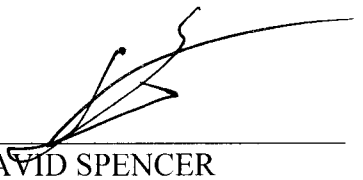
BY: 
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March 13, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

STATE OF SOUTH CAROLINA, Respondent

v.

Appellant.

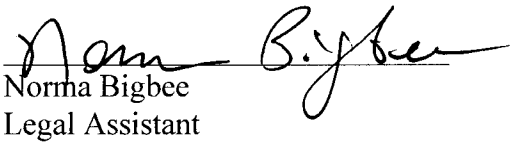
WALTER JACOB MERKA,

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: William G. Yarborough, III, Esquire, 522 North Church St., Greenville, SC 29601.

I further certify that all parties required by Rule to be served have been served.

This 13th day of March, 2015.



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March 13, 2015

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: **State v. Walter Jacob Merka**
Appellate Case No: 2014-001150

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: William G. Yarborough, III, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)