

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Cherokee County

R. Keith Kelly, Circuit Court Judge

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**RECEIVED**

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**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

MICHAEL D. CAMP,

APPELLANT

APPELLATE CASE NO. 2014-002074

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INITIAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the plea judge abuse his discretion by amending Appellant's sentence to eliminate his suspension and probation where the judge became aware only that Appellant was arrested?

## STATEMENT OF THE CASE

On August 7, 2014, the Cherokee County Grand Jury indicted Appellant Michael Douglas Camp for breaking into a motor vehicle and third degree burglary. R. \*. On September 18, 2014, Appellant appeared at a plea hearing before The Honorable R. Keith Kelly. Michael Berry represented Appellant and Kim Leskanic represented the State. Sept. 18 Tr. 1. At the conclusion of the hearing, Judge Kelly sentenced Appellant to concurrent sentences of five years' incarceration suspended to time served with the remainder on probation. Sept. 18 Tr. 10, lines 9-17.

On September 19, 2014, Appellant again appeared before Judge Kelly. Michael Berry again represented Appellant, and Kim Leskanic again represented the State. Sept. 19 Tr. 1. Judge Kelly amended Appellant's sentences by withdrawing both sentence suspensions and probations. Sept. 19 Tr. 2, lines 13-21.

## ARGUMENT

**THE PLEA JUDGE ABUSED HIS DISCRETION IN AMENDING APPELLANT'S SENTENCE BECAUSE THE RECORD DOES NOT SUPPORT THE FINDING THAT APPELLANT'S CONDUCT UNDERLYING THE NEW CHARGE INCREASED HIS CULPABILITY.**

## STATEMENT OF FACTS

At the September 18, 2014 hearing, the State alleged that on the night of October 10, 2013, Appellant broke a window of a vehicle at a residence and stole valuables from inside and later broke into an outbuilding near a different residence and stole valuables. Sept. 18 Tr. 5, line 17—Sept. 18 Tr. 6, line 11. Appellant pled guilty as charged, and the judge accepted the plea and sentenced Appellant. Sept. 18 Tr. 4, lines 8-12; Sept. 18 Tr. 7, lines 11-13.

At the beginning of the September 19, 2014 hearing, the plea judge stated, “This Court is still in session and your sentence was handed down earlier this week and this Court has reconsidered [Appellant’s] sentence after a mature reflection. . . . The Court has now amended your sentence . . . .” Sept. 19 Tr. 2, lines 5-13. Counsel for Appellant objected to the re-sentencing on grounds that the only new information the judge had before him regarding Appellant was that Appellant was arrested on a new charge between the two hearings. Sept. 19 Tr. 2, line 23—Sept. 19 Tr. 3, line 20. Counsel for the State responded that she had heard allegations of the arrest but did not know “where the information came from or how the [c]ourt was made aware of that.” Sept. 19 Tr. 3, line 25—Sept. 19 Tr. 4, line 6. The judge responded, “Well, the Court is going to take that into consideration. The Court has reconsidered. It is the Court’s motion and the Court is issuing a new sentence.” Sept. 19 Tr. 4, lines 8-11.

## DISCUSSION

The plea judge abused his discretion in amending appellant's sentence because the record does not support the finding that Appellant's conduct underlying the new charge increased his culpability.

If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment.

*State v. Franklin*, 267 S.C. 240, 245-46, 226 S.E.2d 896, 897 (1976). An arrest warrant and supporting affidavit standing alone do not constitute competent information material to punishment. *State v. Arthur*, 290 S.C. 291, 297, 350 S.E.2d 187, 190 (1986).

The authority to timely amend a sentence rests in the discretion of the sentencing judge. *State v. Smith*, 276 S.C. 494, 497-98, 280 S.E.2d 200, 201-201 (1980). An abuse of discretion occurs when a judge's decisions is controlled by an error of law or based on a factual conclusion without evidentiary support. *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). "[T]he mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what bases the discretion was exercised." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

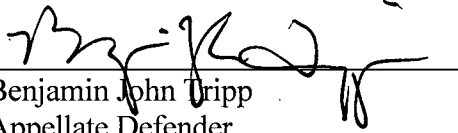
In this case, the record does not support the plea judge's enhancement of Appellant's sentence based on conduct increasing his culpability. The only new information the judge had was that Appellant was arrested on an allegation of some new offense. The arrest and allegation standing alone amounted only to suspicion of culpable conduct and were not proper considerations material to punishment. Moreover, the trial

judge did not state in his ruling what information about Appellant's conduct particularly supported an enhancement. His statements that "the Court has reconsidered [and] [i]ts the Court's motion" and that the amendment resulted from "mature reflection" were quintessentially recitations of discretion without an explanatory basis.

**CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Court reverse the ruling of the plea judge amending Appellant's sentence.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of March, 2015.

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Appeal from Cherokee County  
R. Keith Kelly, Circuit Court Judge

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THE STATE,

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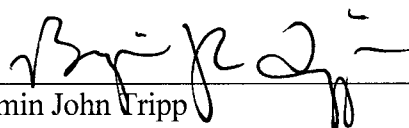
APPELLANT

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CERTIFICATE OF SERVICE

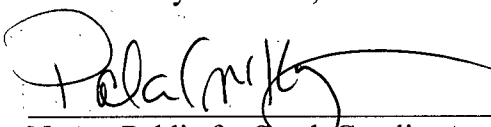
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The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of March, 2015.

  
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Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 19th day of March, 2015.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina

My Commission Expires: July 24, 2022 .