THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Honorable J.C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No. 2010GS1007730, 2010GS1007731
Appellate Case No. 2013-000179

The State of South Carolina,

Respondent,

v.

Venancio Diaz Perez,

Appellant.

PETITION FOR REHEARING

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Pursuant to Rule 221, SCACR, Respondent respectfully petitions this Court for rehearing and reversal of its decision that the trial court's sentence was vindictive and violated Appellant's Due Process rights requiring reversal in part and remand. In support of this request, the undersigned counsel sets forth the following points of fact and/or law overlooked or misapprehended by this Court.

I.

In its opinion (2015-UP-217; originally issued on April 29, 2015; substituted opinion issued on May 8, 2015), this Court agreed with Appellant's claim of vindictiveness by the trial court in sentencing him.

> We find there is a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. Further, the record suggests a basis for the sentence was the fact that the trial court thought Perez was guilty of the first-degree criminal sexual conduct offense for which he was not convicted. The trial court's comments justifying the increased sentence do not convince us that the sentence was imposed free of an underlying punishment for Perez going to trial. Accordingly, we remand for resentencing. *See State v. Brouwer*, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) ("[W]e believe the mere disavowal of wrongful intent cannot remove the taint inherent in the court's commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence.").

State v. Perez, *supra* at 5.

II.

In reaching its decision on this issue, this Court overlooked or misapprehended the appellate record. Appellant was indicted for the offenses of lewd act on a minor, which carried a sentence of up to 25 years, and criminal sexual conduct with a minor in the first degree (hereinafter "CSC with a minor first degree"), which carried a sentence of up to 15 years. (R. p. 553, lines 6-10; see also S.C. Code Section 16-3-655).

Prior to the trial of the case (and prior to hearing the witnesses testify), the parties discussed a guilty plea with the trial court. During that discussion, inferably after a discussion of what evidence would be presented, the trial court told counsel that if he were to try Appellant without a jury, he would find him guilty of lewd act and assault and battery of a high and aggravated nature (hereinafter "ABHAN"). The trial court also indicated to counsel that if Appellant were to plead guilty on the indictment for lewd act (with the other charge being dismissed), the trial court would impose a sentence in the 10-15 year range. (R. p. 554, line 16 – p. 555, line 22.)

III.

This Court overlooked or misapprehended the circumstances surrounding Appellant's sentencing. At the conclusion of his jury trial at which the victim and others testified, Appellant was found guilty of lewd act on a minor and assault and battery of a high and aggravated nature, as a lesser-included offense of CSC with a minor first degree. (R. p. 535, line 2 – p. 536, line 12; p. 537, lines 11-19.)

Thereafter, the defense argued for a sentence of time served (918 days) and presented the following grounds as supporting such a sentence:

- Appellant's lack of a prior criminal record;
- the fact that the conduct at issue was so contrary to Appellant's past conduct;
- the fact that Appellant was a hard worker and has worked hard to provide for his family;
- the fact that he and his children love and will miss each other;
- the fact that he was a family man who put his concern for his friends and family above his own;
- the fact that he has carried himself well and showed a great deal of restraint, self-control and kindness since his arrest;
- his imminent deportation back home to Mexico as a result of the convictions and

how that may be considered punishment in and of itself;

- the fact that he, as a convicted child molester, will have a "rough time" in prison; and
- the fact that Appellant's beautiful family would be wrecked by his conviction and sentence.

(R. p. 540, line 21 – p. 546, line 9; p. 550, lines 6-24.) Defense counsel also argued that, because there were no specific findings by the jury, the trial court should, under *Apprendi v. New Jersey*, assume the jury only found the least serious possible acts necessary to convict Appellant of lewd act upon a minor to have been proved. (R. p. 546, lines 10-24.)

The trial court then heard from the victim's mother, who spoke about the impact Appellant's assaults upon her daughter and her. She talked about Minor 1's nightmares and counseling, as well as about her guilt over not only placing Minor 1 in Appellant's home where she was assaulted and her failure to see what was going on, but also her guilt about recommending the daycare services of Appellant's wife and another little girl being assaulted as a result of that. (R. p. 551, line 5 – p. 552, line 2.)

The Assistant Solicitor then addressed the trial court. She said that, while the defense had spoken about the possibility that Appellant might be harmed if sent to prison, Appellant had taken advantage of very vulnerable, young children and had showed them no mercy. She stated that, in terms of lewd acts, this case involved very serious acts – acts that were repetitive and involved a lot more in terms of the ABHAN and indecent liberties. While she expressed her sorrow for Appellant's family, the Assistant Solicitor pointed out that their suffering was the result of Appellant's behavior. (R. p. 552, line 14 – p. 553, line 5.) The Assistant Solicitor ended her argument on sentencing by asking the trial court to impose consecutive sentences to reflect the repetitive and long-term nature of the crimes. (R. p. 552, line 25 – p. 553, line 3.)

The trial court thereafter sentenced Appellant to a 15-year term of incarceration on the

lewd act conviction and a consecutive 10 year sentence on the ABHAN conviction. The trial court also ordered, on the lewd act conviction, that Appellant was to be placed on the Central Registry of Child Abuse and Neglect. (R. p. 553, line 6 – p. 554, line 5.)

IV.

This Court overlooked the fact that Appellant's ***only*** objection at trial to the sentences was to the fact that they were ordered to run consecutively. The objection was based upon the claim that the consecutive sentences were "vindictive and punishing [Appellant] for going to trial." In making the objection, defense counsel referred to the plea negotiations that occurred prior to the trial. (R. p. 554, lines 7 – p. 556, line 4.)

V.

This Court overlooked that "[a] trial judge is given wide discretion in determining what sentence should be imposed. Likewise, whether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial judge. Absent partiality, prejudice, oppression, or corrupt motive, this Court lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute." (Citations omitted.) *State v. Barton*, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

VI.

Without setting forth the factual basis, this Court concluded there was a reasonable likelihood the trial court sentenced Perez on the improper basis of Perez exercising his right to go to trial. In doing so, this Court has misapprehended the appellate record. The record is absolutely devoid of any evidence that the trial court based any part of its sentence on Appellant exercising his right to go to trial.

Rather than supporting a finding that the trial court acted with partiality, prejudice,

oppression, or corrupt motive in imposing the consecutive sentences, the record supports a finding that the trial court sentenced Appellant based upon what actually happened at his trial:

- guilty verdicts for both lewd act and ABHAN, ***and***
- trial testimony from the victim as to what Appellant had done to her, ***and***
- the oral victim impact statement of the victim's mother, ***and***
- the defense's proffered mitigation and justification for lower sentences, ***and***
- the State's proffered justification and request for high and consecutive sentences.

The appellate record also establishes the 15 year sentence imposed upon Appellant for his lewd act conviction *was within the 10-15 year range mentioned during plea discussions for that same offense*. Therefore, the fact the trial court imposed a 15-year sentence on the lewd act conviction clearly does not establish vindictiveness for Appellant's exercise of his right to trial.

This Court has overlooked the fact that the only "increase" in sentencing, from what was mentioned during plea discussions, was due to Appellant's conviction of an additional offense ***not considered as part of the plea discussions***. For the second conviction – of ABHAN – the trial court imposed a 10 year consecutive sentence.

This Court has further overlooked the fact that the imposition of the consecutive 10 years on this second conviction does not, by itself, indicate any vindictiveness due to Appellant's exercise of his right to trial, there is nothing in the record upon which to base such a motive, and there is not and should not be a presumption of vindictiveness. *See Alabama v. Smith*, 490 U.S 794 (1989) (because of greater amount of sentencing information that trial generally affords as compared to guilty plea, there is no basis for presumption of vindictiveness where second sentence imposed after trial is heavier than first sentence imposed after guilty plea). Instead, in addition to the evidence presented throughout the trial, the record reflects that circumstances in

both mitigation and aggravation were thoroughly presented by counsel prior to imposing sentence. (R. p. 540, line 21 – p. 553, line 3 *summarized in III above.*)

VII.

This Court also concluded there was a second improper basis for the trial court's sentence, *i.e.*, the trial court's belief that the victim was digitally penetrated by Appellant even though the jury convicted him of the lesser-included offense of ABHAN on the CSC with a minor first degree indictment. In reaching this conclusion, this Court, overlooking the context in which the statement was made, focused on a single comment made by the trial court after Appellant had been sentenced and when the trial court was ruling on Appellant's objection to the consecutive sentencing based on alleged vindictiveness.

> This Court is of the opinion that the little girl was abused. *This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony.* The jury has found her not guilty.
>
> The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

(R. p. 556, lines 5-12).

This Court has overlooked other reasonable interpretations of or explanations for this comment supported by the context within which it was made, and has instead chosen to conclude the trial court meant that, in sentencing Appellant on the ABHAN conviction, it took into account its own belief that Appellant was guilty of CSC with a minor first degree despite the fact the jury found Appellant not guilty of criminal sexual conduct and guilty of ABHAN. It is at least as reasonable, if not more reasonable, to conclude that the trial court was saying (1) it believed the victim was truthful in testifying that Appellant had digitally penetrated her, but that the jury had chosen to find him not guilty of the greater offense and guilty of the lesser, and (2)

the evidence supported the jury's guilty verdicts. Under this interpretation of the trial court's comments, they would not be improper.

And, assuming *arguendo*, the trial court's comment did mean that it considered its view of the evidence when imposing sentence on the ABHAN charge, such was not necessarily improper inasmuch as the consideration of evidence presented before it did not result in a sentence exceeding that allowed.[1] *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) (any fact that *increases penalty beyond statutory maximum* must submitted to jury and proved beyond a reasonable doubt). Moreover, even if consideration of this evidence were to be improper, it would be immaterial or nonprejudicial if there were a sufficient basis in the record for the trial court's exercise of discretion in imposing the sentence it did. This Court overlooked that here, as

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[1] As noted by the Michigan Supreme Court, the fact that a jury finds a defendant guilty of a lesser-included offense does not necessarily mean that the jury did not find the State had failed to prove the elements of the greater offense beyond a reasonable doubt.

> Juries in criminal cases often find defendants not guilty or find persons who have committed the charged greater offense guilty of only a lesser offense in the face of the evidence for reasons satisfactory to them. 'The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.' *United States v. Dougherty*, 154 U.S.App.D.C. 76, 105, 473 F.2d 1113, 1142 (1972) (Bazelon, C.J., dissenting). The observation was made by the United States Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968) that:
>
> > 'the most recent and exhaustive study of the jury (Kalven and Zeisel, The American Jury (1966)) in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.'

People v. Chamblis, 395 Mich. 408, 426, 236 N.W.2d 473, 482 (1975), *overruled on other grounds*, *People v. Cornell*, 466 Mich. 335, 646 N.W.2d 127 (2002), and *People v. Stephens*, 416 Mich. 252, 330 N.W.2d 675 (1982).

the appellate record establishes, in addition to having presided over the trial and heard the complete and full presentation of evidence, the trial court had the benefit of counsel's sentencing requests and arguments. The grounds for high and consecutive sentences presented by the State, as summarized in III above, were legitimate, factually supported, and more than sufficient to justify the sentences imposed in this case.

VIII.

In addition, this Court overlooked the fact that Appellant's only objection at trial to the sentences were that they were consecutive and that the consecutive nature of the sentences indicated the trial court was being vindictive and punishing Appellant for exercising his right to a jury trial. This Court may have overlooked precedent that limits appellate review to issues preserved for appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691 (2003). Therefore, assuming *arguendo*, this Court should remain steadfast in its conclusion that the trial court acted inappropriately in sentencing Appellant, the prison sentence on each conviction should not be disturbed. Rather, this Court should remand to the trial court for the limited purpose of reconsidering whether the sentences should run concurrently or consecutively and providing a basis for whichever decision is made.

WHEREFORE, for all of the foregoing reasons, the undersigned respectfully requests this Court to rehear and reverse its decision to set aside Appellant's sentence and remand this case for resentencing; affirm the sentences imposed by the trial court and/or, if it determines that remand is necessary, remand this case only for the purpose of having the trial court address and explain whether Appellant's sentences should run concurrently or consecutively; and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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BY: _____
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May 13, 2015

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
J.C. Nicholson, Circuit Court Judge

Court of Appeals Case No. 2013-000179

The State of South Carolina,

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Venancio Diaz Perez,

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PROOF OF SERVICE

I certify that I have today served a copy of the Petition for Rehearing on Appellant, Venancio Diaz Perez, by depositing such in the United States Mail, first class postage prepaid, addressed to his attorney of record, Jason Scott Luck, Esquire, Seibels Law Firm, P.A. 127 King Street, Suite 100, Charleston, South Carolina 29401, and by depositing one copy of each in the United States Mail, first class postage prepaid, addressed to his co-counsel, Robert M. Dudek, Chief Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

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May 13, 2015
Columbia, South Carolina

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SC Court of Appeals

May 13, 2015

Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *State v. Venancio Diaz Perez* (Appellate Case No. 2013-000179)

Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the State's Petition for Rehearing served on Appellant in the above-referenced appeal. I have also enclosed the original Proof of Service indicating service of the Motion.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

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Encosures

cc: Jason Scott Luck, Esquire, and Robert M. Dudek, Chief Appellate Defender
Counsel for Appellant
(with enclosure)
Assistant Deputy Attorney General Salley W. Elliott