STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PENDRAL COAKLEY,

APPELLANT

APPELLATE CASE NO. 2014-001229

FINAL BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the judge abuse her discretion in denying Appellant's motion to reconsider his sentence where she based her denial on her false recollection of a colloquy with Appellant about the facts of the case that never took place?

STATEMENT OF THE CASE

During the September term of 2013, Appellant Pendral Coakley waived presentment of a charge of first degree burglary to the Orangeburg County Grand Jury. R. 32-33. On April 23, 2014, Appellant appeared at a plea hearing before The Honorable Kristi Lea Harrington. Breen Stevens represented Appellant and Sarah Ford represented the State. R. 1. Pursuant to a deal with the State, Appellant pled guilty to second degree burglary. R. 2, lines 10-16. Judge Harrington sentenced Appellant to eight years' incarceration. R. 13, lines 23-25.

On June 5, 2014, Appellant, represented by Breen Stevens, again appeared before Judge Harrington; Sara Ford again represented the State. R. 16. Appellant made a motion to reconsider his sentence, R. 18, lines 10-13, and Judge Harrington denied the Motion. R. 29, lines 17-20.

ARGUMENT

THE JUDGE ABUSED HER DISCRETION IN DENYING APPELLANT'S MOTION TO RECONSIDER HIS SENTENCE BECAUSE SHE BASED HER DECISION ON HER FALSE RECOLLECTION OF A COLLOQUY WITH APPELLANT ABOUT THE FACTS OF THE CASE THAT NEVER TOOK PLACE.

STATEMENT OF FACTS

At Appellant's plea hearing the State alleged that on June 29th, 2013, Appellant entered a home in Holly Hill during the nighttime. A lady occupying the home ran outside and called police. She later identified Appellant in a photo lineup. R. 4, line 12—R. 5, line 14. The State recommended a sentence of ten years' incarceration suspended to three years with probation. R. 5, lines 16-17. Counsel for Appellant informed Judge Harrington that Appellant, then about thirty-seven years old, lived with his wife and cared for their five children. He also cared for two of her children from a prior marriage. He had a high school diploma and previous jobs at an IGA grocery store, a janitorial service company, a boat manufacturer, and a cement plant. R. 9, line 17—R. 10, line 14. In a colloquy with Appellant, Judge Harrington sought his mentality at the time of the offense:

> Court: How did you pick that house?
>
> Defendant: Just happened by, just gone by and it happened.
>
> Court: Just driving by and you decided or were you walking?
>
> Defendant: Walking.
>
> Court: Were you by yourself?
>
> Defendant: Yes, ma'am.
>
> Court: Do you live close to that house?
>
> Defendant: Yes, ma'am.

Court: Did you walk by there before?

Defendant: Yeah.

Court: And so you decided that you were going to break in at that time?

Defendant: Yes, ma'am.

Court: What were you intending to do?

Defendant: At the moment, I just wasn't thinking at the right time. I wasn't in my mind.

Court: Had you been drinking or using drugs?

Defendant: No, ma'am.

Court: What were you going to do once you got in the house?

Defendant: Try to get some money or something.

Court: Did you know that individual may have money or something in the house?

Defendant: No, ma'am.

Court: Did you know somebody was in the house?

Defendant: No ma'am.

R. 6, line 10—R. 7, line 12.

Court: Tell me what was going through your mind when you walked into that house or attempted to get in that house?

Defendant: At that present time, Your Honor, I can't even say what was going through my mind. I just was reacting, not thinking.

Court: Where had you been?

Defendant: I was just strolling down the street, just walking down the road.

Court: What time of day was it?

Defendant: I believe it was about two or three in the morning.

Court: Strolling down the road at two in the morning? Where had you been?

Defendant: I think I come from my house. I don't even live too far from there.

Court: And where were you headed?

Defendant: I was actually just going for a walk.

Court: At two in the morning?

Defendant: Yeah.

R. 12, lines 4-24.

In responding to Appellants' comments and issuing a sentence greater than the State's recommendation, Judge Harrington specifically stated, "I can imagine nothing more frightening that what that victim must have been going through when you were there in her house at whatever darkness. And you can offer me no explanation as to what you were doing other than some nefarious reason for you being there." R. 13, lines 20-22.

At the hearing for the motion for reconsideration of his sentence, Appellant attempted another explanation of his mentality:

Court: What were you intending to do in that house, do you know?

Defendant: I actually—

Court: Do you remember what you told me?

Defendant: I can't remember exactly what I told you, but at the time I was just—I was under the influence and we was going through some things, me and my wife, because we was in the process of getting evicted out of our house. I was just trying to make a quick come up to be able to put us somewhere else without my kids having to be on the street or something.

. . .

Court: Is there anything about [the motion to reconsider] that you wish to tell me before I enter my decision?

Defendant: I would like you to reconsider due to the fact I left my wife and my kids out there. I know I made a mistake and I regret I did it. I don't want my wife out there—I don't want to leave her out there struggling and going what she going through now. We got seven kids. . . .

. . .

Court: If I recall, the way [Appellant] describes it here today is that he was just out for a walk. It was very early or very late, but in the middle of the night.

. . .

Court: Do you know why I shared that with you?

. . .

Court: . . . . I'm telling you I remember you. That's why I'm sharing that with you, because that was one of the most frightening pleas that I took, because a person has a right to be safe in their own homes.

Defendant: Yes, ma'am.

Court: I think you and I talked about that you knew, at least know who lived in that home; right?

Defendant: Yes, ma'am.

Court: We had a discussion that that person probably would have given you food for your children if you would ask,

> that there were resources available and you made the decision at 2:00 in the morning to be intoxicated on whatever substance and go into somebody's home. That's what I meant . ....
>
> Counsel: . . . . I have not yet heard of the specific circumstances what lead [sic] to that. I have every inclination that it's actually taken to this point to actually say that. Personally, as a father myself, it is hard to –
>
> Court: Oh, I remember. He told me himself.
>
> Counsel: Yes, ma'am.
>
> Court: He told me everything.
>
> Counsel: Yes ma'am. I'm saying what he's saying to the Court today I had not heard that yet up until very recently and today. . . .

R. 23, line 25—R. 27, line 1.

DISCUSSION

Judge Harrington abused her discretion in denying Appellant's motion to reconsider his sentence because she based her decision on a previous colloquy with Appellant about the facts of the case that never took place.

> 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).

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). "This court's authority to review such a decision is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the circuit judge's decision was arbitrary

and capricious." *State v. Hamilton*, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999) (citing *State v. White*, 218 S.C. 130, 135-6, 61 S.E.2d 754, 756 (1950); *State v. Archie*, 322 S.C. 135, 137-8, 470 S.E.2d 380, 381 (Ct. App. 1996)).

In this case, the record did not support Judge Harrington's denial of the motion because the colloquy about the facts of the case that she relied on never occurred. At the plea Appellant told the judge he committed the burglary when he was walking near his house by himself. Without premeditation or reflection, he entered the victim's house. He had not been drinking or using drugs, and he did not say whether he knew the victim. However, at the motion for reconsideration, Judge Harrington made a point to declare to Appellant that she confidently recalled him describing different circumstances. She believed Appellant stated he knew the victim and that he "made the decision at 2:00 in the morning to be intoxicated on whatever substance." She also recalled a discussion that never occurred in the record that the victim probably would have given Appellant food for his children if he had asked her. Finally, she recalled Appellant being forthcoming in describing the circumstances, rebuking counsel, "He told me everything."

In attempting to reconsider Appellant's sentence with insight and understanding, Judge Harrington properly attempted to learn all the material facts. Still, her version of the facts was not supported by the record. Appellant was reticent and without overt reflection at the first hearing. He attempted to remedy his shortcoming at the second hearing in order to allow Judge Harrington to impose a better tailored sentence. However, rebuffed by her emphatic recrimination, Appellant complacently assented to an inaccurate report of the facts showing his culpability. Thus, Judge Harrington's determination that a better suited sentence had no basis in the record and was therefore arbitrary and capricious.

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 28th day of May, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

May 28, 2015

Benjamin John Tripp
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of May, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of May, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2015.