

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

R. Keith Kelly, Circuit Court Judge

Opinion No. 2015-UP-478 (S.C. Ct. App. filed 10/7/2015)

14-GS-11-00694-695

THE STATE,

RESPONDENT,

V.

MICHAEL D. CAMP,

Petitioner

APPELLATE CASE NO. 2014-002074

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on November 19, 2015.

QUESTION PRESENTED

Did the plea judge abuse his discretion by amending Appellant's sentence to eliminate his suspension and probation merely because the judge became aware that Appellant was re-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. 17. 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. R.1. 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. R.5, line 17—R.6, line 11. Appellant pled guilty as charged, and the judge accepted the plea and sentenced Appellant to concurrent sentences of five years' incarceration suspended to time served with the remainder on probation. R.4, lines 8-12; R.7, lines 11-13; R.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. R. 12. At the beginning of the hearing, Judge Kelly stated, "This Court is still in session and your sentence was handed down earlier this week and this Court has reconsidered your sentence after a mature reflection. . . . The Court has now **amended** your sentence" R.13, lines 5-13 (emphasis added). Counsel for Appellant objected to the amendment on grounds that the only new information the judge had before him regarding Appellant was that Appellant was reportedly re-arrested between the two hearings. R.14, line 23—R.14, 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." R.14, line 25—R.15, 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." R.15, lines 8-11. Judge Kelly then withdrew both sentence suspensions and probations. Sept. 19 R.13, lines 13-21.

On May 21, 2015, Appellant timely submitted to the South Carolina Court of Appeals a final brief of Appellant, arguing the Judge Kelly's amendment of the sentence constituted an abuse of discretion. Final Brief of Appellant. The State filed its final response brief on April 23, 2015. Final Brief of Respondent. On October 7, 2015, the Court of Appeals affirmed Appellant's sentences without oral argument, ruling under *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) that it did not have jurisdiction to review Appellant's sentence because it is within the limits provided by statute for the discretion of the trial court and was not the result of prejudice, oppression or corrupt motive. Appx 1. On October 12, 2015, Appellant filed a petition for rehearing arguing that the court applied the wrong standard of review to the issue presented. Appx. 3. The Court of Appeals denied the petition on November 19, 2015. Appx. 6.

ARGUMENT

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

The plea judge abused his discretion in amending appellant's sentence because the record does not support the finding that Appellant's conduct in connection with 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. *See State v. Arthur*, 290 S.C. 291, 297, 350 S.E.2d 187, 190 (1986) ("While information concerning a prior criminal conviction is admissible as additional evidence during the sentencing phase, . . . information regarding a formal charge that was ultimately dismissed by the prosecutor is irrelevant. Moreover, a hearsay affidavit is not admissible evidence in a criminal case." (citations omitted)).

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 decision 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). In *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981), this Court emphasized to the judicial

community that a trial judge's authority for discretionary decision-making entails a duty of candor:

It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. We call to the attention of the bench and bar that the 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.

Id. at 498, 280 S.E.2d at 202.

In this case, the record does not support Judge Kelly's enhancement of Appellant's sentence based on conduct increasing his culpability. The only new information in the record was that Appellant was re-arrested on an allegation of some other misconduct. As alluded to in *State v. Arthur*, any arrest and allegations of Petitioner's conduct standing alone amounted only to speculation of culpable conduct and were not proper considerations material to punishment. A fortiori, Counsel for the State could only state that she had heard allegations of the arrest, and she had no clue as to the source of the information or how it could have reached the court. Nevertheless, Judge Kelly's response was both dismissive and privileged, in effect stating that the decision and the reasons therefor belonged to the court as an off-the-record matter and to no one else. By failing to be transparent in his decision making, he violated his duty of candor. 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.

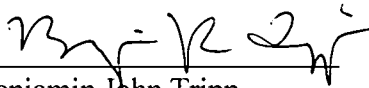
In affirming Appellant's sentence, the Court of Appeals applied the wrong standard of review to the issue presented. Citing *State v. Franklin*, the Court of Appeals ruled that it had no jurisdiction to review Appellant's sentence because it was within the limits provided by statute

for the discretion of the trial court and not the result of prejudice, oppression or corrupt motive. However; Appellant did not appeal the issue of whether Judge Kelly's initial sentence was proper; he appealed the issue of whether Judge Kelly abused his discretion in changing the sentence. As explained above, he changed the sentence contrary to the established facts and settled law and in a manner inconsistent with basic judicial discretion, and this Court should reverse his ruling.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the petition for certiorari to allow full briefing.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER.

This 24th day of November, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

R. Keith Kelly, Circuit Court Judge

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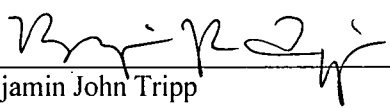
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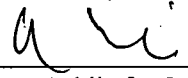
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Megan Harrigan Jameson, Esquire, and the S.C. Court of Appeals this 24th day of November, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of November, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025