

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J.C. Buddy Nicholson, Jr., Circuit Court Judge

RECEIVED

JAN 11 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TIMOTHY JAMES WRIGHT,

APPELLANT

APPELLATE CASE NO. 2015-000636

INITIAL BRIEF OF APPELLANT

Kristy Goldberg
Attorney for Appellant

Law Office of Kristy Goldberg
1720 Main Street, Suite 303
Columbia, South Carolina 29201
(803) 667-6633

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion and violate the Appellant's due process rights by considering information presented in sentencing obtained from past incident reports that did not result in convictions when the defendant had no notice that these prior incidents would be addressed and no opportunity to rebut this information?

STATEMENT OF THE CASE

In June of 2013 the Charleston County Grand Jury indicted Wright for murder and possession of a weapon during the commission of a violent crime, indictments #2013-GS-10-03170 and 03172. On February 2, 2015 Wright proceeded to jury trial before the Honorable J.C. Buddy Nicholson, Jr. Attorneys Ted Smith and Martha Kent Runey represented Wright at trial. The jury returned verdicts of guilty as charged and Judge Nicholson sentenced Wright to a life sentence on the murder conviction and a concurrent term of five years on the weapon conviction. An order denying defendant's motion for new trial was filed on March 2, 2015 and a timely notice of intent to appeal was filed on March 11, 2015. This appeal follows.

STATEMENT OF FACTS

The Appellant proceeded to jury trial on February 2, 2015 and two days later the jury returned a verdict of guilty on both charges. The sentencing hearing was held on February 5, 2015. During sentencing the Solicitor provided the Court with Appellant's prior conviction history, including:

- 1998 Possession of Cocaine, (Tr. 528, ll. 17-19),
- 2001 Simple Assault from striking his girlfriend in the face with his fist (Tr. 528, ll. 19-25 – 529 ll. 1-14),
- June 2, 2012 Assault and Battery 3rd Degree from striking his wife's daughter, (Tr. 530, ll. 12-15).

The Solicitor mentioned her intent to address only prior convictions and not "just incident reports" which "either did not issue arrest warrants or the victim backed out." (Tr. 529, ll. 16-18 – Tr. 530, ll. 1-2). The Judge responded that he wanted to hear this additional information regarding incidents that did not result in conviction. (Tr. 530, l. 3). At the Court's request the State presented information on the following incidents:

- In July, 2001 Mr. Wright's girlfriend called police during an argument and asked for assistance diffusing the situation "out of fear of where it was leading." No charges were filed against anyone. (Tr. 531, ll. 9-11).
- In September, 2003 Mr. Wright was charged Criminal Domestic Violence after he assaulted his child's mother by grabbing her hair and punching her in the face. (Tr. 531, ll. 12-15).
- June 4, 2012 Mr. Wright filed an incident report when his wife removed his handgun from his vehicle. (Tr. 530, ll. 12-19). The State argued that this was "suggestive" of the fact that his wife was scared for him to have a gun. (Tr. 530, ll. 18-19).

It appears that none of the complaining parties were present in Court to verify whether or not these incident reports were accurate summations of what occurred or not.

The State argued the information in the incident reports showed a “pattern of abusive behavior on the part of Mr. Wright towards females, towards those that he is in a relationship with, an even the children of those that he was in a relationship with.” (Tr. 531, ll. 17-20). Further; the State used these incidents to argue that there existed multiple “episodes of violence in the defendant’s background” that “appear to be of a domestic nature, *even though he and Ms. Ford had no prior violence in their relationship prior to the day in question*¹.” (Tr. 531, ll. 3-7)(emphasis added).

Trial counsel for the Appellant attempted to object and requested that the Court disregard the un-substantiated and inflammatory information presented. In doing so he said “[o]bviously I would ask the court not to take into consideration any of the incident reports that didn’t result in a conviction. We are not prepared to cross-examine those witnesses or to find out more about ---.” (Tr. 543, ll. 8-11). The Judge interrupted trial counsel mid-way through his objection and proceeded to inform trial counsel that, while this information would be clearly inadmissible at trial, it was appropriate for consideration in sentencing. (Tr. 543, ll. 12-21). The Judge ultimately said “I’m going to consider it” and “don’t sit there and tell me I can’t consider it.” (Tr. 543, l. 23 – Tr. 544, l. 3-4).

While the Judge continued to say that he understood that these incidents did not result in convictions, he also added that non-convictions happen “so frequently in domestic violence cases where the victim refuses to prosecute and the prosecutor doesn’t have any independent evidence of it.” (Tr. 544, ll. 8-11). This statement by the Judge reflects an assumption that the Defendant was likely at fault in these situations. The Court did not have any witness with personal knowledge to

¹ The Judge verified this information by asking the deceased’s daughter if she had observed any arguments or physical altercations between the Applicant and the deceased during the four months they lived together prior to this incident. (Tr. 534, ll. 21-23). She explained that she only heard the Applicant yell at the deceased on one occasion. (Tr. 535, ll. 1-13).

verify what actually happened when the incident reports were written, yet it appears he considered this information as if it were reliable.

ARGUMENT

The trial judge abused his discretion and violated the Appellant's due process rights by considering information presented in sentencing obtained from prior unrelated incident reports that did not result in convictions when the defendant had no notice that these prior incidents would be addressed and no opportunity to rebut this information.

“At sentencing, a judge has an obligation to consider information material to punishment. A sentencing judge ‘may appropriately conduct an inquiry broad in scope, largely unlimited as to either the kind of information he may consider, or the source from which it may come.’” Hayden v. State, 283 S.C. 121, 123, 322 S.E.2d 14, 15 (1984), *citing* State v. Sullivan, 367 S.C. 610, 230 S.E.2d 621 (1976), United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), *and* State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976).

While it is true that evidentiary rules do not apply in sentencing hearings pursuant to 1101(d)(3) SCRE, a minimal standard for reliability should be required regarding any information presented in a court of law that may directly impact an individual's liberty. Our Courts have held that such a due process standard applies in restitution hearings where, despite the fact that it is still just a sentencing hearing, the defendant must be placed on notice of the hearing and given the opportunity to be heard and the opportunity to cross-examine witnesses. State v. Gulledege, 326 S.C. 220, 487 S.E.2d 590, 595 (1997).

In State v. Franklin, the Applicant complained that the Judge considered “unauthenticated and prejudicial matters” in imposing his sentence, including 1) the existence of pending charges, 2)

prison infractions with contested resolutions. 267 S.C. 240, 226 S.E.2d 896 (1976). In reviewing this matter Supreme Court reasoned, “[I]f 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. If a defendant's record, as publicly disclosed, is incorrectly reported, defendant should have an opportunity to explain any discrepancy and inform the court concerning the alleged errors.” *Id.* at 245, 897. In upholding Franklin’s sentence, the Court noted “the appellant was given an opportunity to explain each of the alleged incidents, which were not denied by him, but rather explained. Under these circumstances, we find that the facts which were divulged to the court were fully disclosed to the appellant in such a manner that he had an opportunity to explain any misapprehension the court may have had.” *Id.* at 246, 898. (*see also*, State v. Sullivan, where the Defendant argued that the municipal court had no authority to impose fines for prior convictions and therefore they couldn’t be used against him in sentencing for a new conviction. 267 S.C. 610, 230 S.E.2d 621 (1976). In Sullivan the Court explained, “[A]ppellant had the opportunity to explain any discrepancies and the sentencing judge has the obligation to consider information material to punishment.” *Id.* at 618, 625.) (*See also*, State v. Rich, where the appellate court remanded the case for resentencing because trial judge improperly considered criminal charges which appeared on defendant’s criminal record but did not have dispositions. 269 S.C. 701, 239 S.E.2d 731 (1977).)

It is clear in the Applicant’s transcript that he was denied a meaningful opportunity to explain or challenge the information presented during his sentencing hearing. First of all, when defense counsel attempted to object to consideration of these matters the Judge powerfully insisted

that they would be considered. Secondly, it is clear that the Appellant did not have notice that these matters would be presented to the Court. A review of the record reveals that the State did not intend on presenting information obtained from these prior incident reports and they were only discussed at the Judge's request. (Tr. 530, ll. 1-3). Therefore, it stands to reason that the State did not specifically inform the Applicant nor his trial counsel that un-charged incidents and allegations from 2001, 2003, and 2012 were going to be used against him in his 2015 sentencing hearing. Trial counsel would have had no reason to discuss these prior incidents in detail with his client or investigate them and accordingly had nothing to present in rebuttal.

Due process rights do not end when a verdict is imposed. Our code of laws very clearly provides for due process rights in sentencing when individuals are convicted of murder when the death penalty is sought by the State. See, South Carolina Code of Laws Ann. § 16-3-20. Due process rights also exist when financial restitution is sought by the State. State v. Gullede, 326 S.C. 220, 487 S.E.2d 590, 595 (1997). Why would our Courts allow a complete lack of due process rights when a possible life sentence sought by the State?

Applicant argues that, had a minimal standard for due process in sentencing been in effect, the State would not have been able to portray the Applicant as a *repeat offender* of domestic abuse. The record reflects that his actual convictions and history with the deceased did not reflect that type of behavior. It is further arguable that such a minimal due process standard would have prevented the Court from being exposed to the vast amount of unsubstantiated hearsay, gossip, and accusation provided by the deceased's cousin, Isis Frasier, when she provided the Court with a lengthy unsworn statement regarding what she has heard from others about the Applicant abusing other women. (Tr. 538, l. 7 - Tr. 542, l. 7.).

Certainly the appellant would submit that various types of information would be appropriate for a Judge to consider in any sentencing hearing, including prior convictions, aggravating factors related to the underlying incident, and victim impact. That information is fair, relevant, and has a modicum of reliability sufficient for the Court to comfortably rely on. However, the Appellant submits that information obtained from prior unrelated incident reports which did not result in conviction, and any other unsubstantiated information unrelated to the incident for which the individual is sentenced should not be presented to or considered by a sentencing judge. This information is unreliable and only used by the State when inflammatory in nature in an attempt to encourage the Judge to impose a higher sentence. A criminal defendant's due process rights are clearly violated when the State attempts to impact an individual's liberty with information that has not been vetted with any minimal standard of reliability and the defendant has not opportunity to object or rebut this information.

If this Court refuses to adopt a strict principal prohibiting certain information from being presented in sentencing hearings, the Appellant would suggest an alternative resolution to ensure due process for criminal defendants. This Court should adopt and impose a rule for sentencing hearings requiring that, if the State is going to present information obtained from prior unrelated incident reports which did not result in conviction or any other information unrelated to the incident for which the individual is sentenced, the State must provide the criminal defendant with reasonable notice as to what information will be presented and the Court must allow the defendant a meaningful opportunity to rebut the information presented.

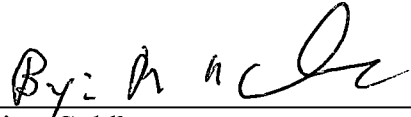
The Appellant's due process rights were violated because no procedural safeguard was in place to ensure that he had reasonable notice as to what would be presented during the sentencing hearing. Without such notice, the defendant was denied a meaningful opportunity to rebut the

unsubstantiated claims. Because the Appellant's due process rights were violated in his sentencing, this case should be remanded for a new sentencing hearing.

CONCLUSION

Based on the above argument, the sentence should be reversed and the case remanded for new sentencing.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "By: Kristy Goldberg", written over a horizontal line.

Kristy Goldberg
Attorney for Appellant

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 11th day of January, 2016.

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CERTIFICATE OF SERVICE

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 Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Timothy Wright, SCDC # 354842, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of January, 2016.

By: 
ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of January, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.