STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2014-001229

THE STATE,

Respondent,

v.

PENDRAL COAKLEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's argument is not preserved, but even if preserved, the plea judge did not abuse her discretion in denying Appellant's motion to reconsider his sentence as it was well within the range of sentencing for second-degree burglary and was properly based upon his prior record and his admission of guilt at the plea proceeding.

STATEMENT OF THE CASE

An Orangeburg County Grand Jury indicted Appellant for first-degree burglary. (R. p.32-33.) On April 23, 2014, Appellant pled guilty to second-degree burglary (violent) before the Honorable Kristi Lea Harrington. Breen Stevens, Esquire, represented Appellant, and Assistant Solicitor Sarah Ford represented the State. Judge Harrington sentenced him to eight years' imprisonment with credit for time served. (R. p.13-14.) On June 5, 2014, Appellant appeared before Judge Harrington on a motion to withdraw his plea or, in the alternative, to reconsider his sentence. (R. p.18.) Judge Harrington denied his motion to reconsider, and Appellant withdrew his motion to withdraw his plea. (R. p.29.)

He filed a timely Notice of Appeal.

STATEMENT OF FACTS[1]

On June 29, 2013, Appellant entered a residence during nighttime hours, while the victim was home. (R. p.4, lines 21-25.) The victim was able to run to a neighbor's house and call law enforcement. (R. p.5, lines 3-5.) She told law enforcement she was familiar with the perpetrator but was not sure of his name. (R. p.5, lines 6-8.) Later, she gave law enforcement Appellant's name and identified him in a photo lineup. (R. p.5, lines 8-14.) Appellant was indicted on first-degree burglary charges and proceeded to a plea hearing on the reduced charge of second-degree burglary (violent). (R. p.32-33; R. p.2, lines 1-12.)

At the plea proceeding, the court conducted a standard colloquy establishing Respondent was freely, intelligently, and voluntarily pleading guilty to second-degree burglary (violent) and giving up certain rights. (R. p.3, line 1-R. p.4, line 14; R. p. 9, lines 11-12.) The State made a recommendation of ten years' imprisonment suspended to three years' imprisonment. (R. p.5, lines 15-24.) After Appellant agreed with the recitation of facts given by the State, the plea judge asked him specific questions about the crime and then accepted his plea. (R. p.6, line 4-R. p.9, line 15.) Defense counsel then requested the plea court accept the State's recommendation. (R. p.11, lines 9-11.) The plea judge asked Appellant whether he understood he was facing fifteen years' imprisonment, and he acknowledged that he did. (R. p.11, line 22-R. p.12, line 3.) She sentenced him to eight years' imprisonment with credit for 288 days. (R. p.13, line 23-R. p.14, line 1.)

Appellant moved to withdraw his plea or alternatively for a reconsideration of his sentence. On June 5, 2014, the plea judge held a motions hearing. (R. p.18-30.) Defense

[1] The following facts were recited by the State at Respondent's plea hearing.

counsel began by addressing the reconsideration motion. (R. p.18, lines 15-18.) Defense counsel told the plea judge that after extensive investigation, and obtaining alibi affidavits from several witnesses who were out of the county at the time of the plea, he reentered negotiations with the State at which time they agreed three years' imprisonment would be the best resolution to the case. (R. p.19, lines 13-20.) He also explained to the judge that "perhaps [Appellant] did not present very well to the Court and if the Court would have to [sic] like to make further inquiry as far as not excuses whatsoever of what occurred, but perhaps by way of explanation of how and why he actually got into that situation if you'll feel more comfortable about it." (R. p.19 line 24-R. p.20, line 4.) Defense counsel asked the plea court to go along with the recommendation and even allow a probationary component, or alternatively to at least impose a sentence of less than eight years. (R. p.20, lines 6-21.)

The State reviewed Appellant's record, including out-of-state convictions of assault and battery with a dangerous weapon, assault with a dangerous weapon, armed robbery, assault and battery on a police officer, possession of cocaine with intent to distribute by means of a dangerous weapon, and assault and battery. (R. p.21, lines 2-17.) The plea judge then questioned Appellant regarding what she told him during the guilty plea, and he agreed she told him the State's recommendation was merely that and that he was waiving any defense, including alibi. (R. p.22, line 17-R. p.23, line 14.) She then asked him questions about the facts of the case and what he told her during the plea. (R. p.23, lines 15-24.) While Appellant admitted he did not remember exactly what he told her, he told her that he was under the influence and was in the process of getting evicted at the time of the crime, and he wanted to make a quick "come up" to be able to

find another place to stay.[2] (R. p.24, lines 3-10.) While reciting the facts she could recall from the plea hearing, the plea judge stated, "I'm doing this all from memory. I didn't pull the transcripts." (R. p.25, lines 11-12.) She then asked him, "I think you and I talked about that you knew, at least knew who lived in the home; right?" to which Appellant answered, "Yes, ma'am." (R. p.26, lines 6-8.) She then stated, "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." (R. p.26, lines 9-13.) At that point, defense counsel interjected that he had "not yet heard of the specific circumstances what lead to that" and that "what he's saying to the Court today I had not heard that yet up until very recently and today." (R. p.26, lines 16-R. p.27, line 1.) He then argued that because Appellant acknowledged what he did was wrong and admitted he was having difficulty being head of household for his family, and based on the reasons the State made the recommendation, the court should either reduce the sentence to conform to the recommendation or simply make it less than the imposed eight years. (R. p.27, lines 1-13.) The State's position was that because Appellant pled guilty to second-degree burglary (violent), which carries up to ten years, the eight-year sentence was well within the statutory limitations and appropriate. (R. p.27, lines 18-22.) In explaining why she would not change the sentence, the plea judge stated:

> I took into consideration that the state thought it was appropriate to limit the active time to 10 years based upon his prior record and the facts of the case—the state had reduced from burg first, which carries the potential of a life sentence, eight years was an appropriate sentence. I have

[2] Urban Dictionary defines "come up" as "a bargain, or a found item that is of value to the finder." *See come up,* Urban Dictionary (May 5, 2015), http://www.urbandictionary.com/define.php?term=come+up.

> not heard anything that would require me to—and I am reconsidering, just I think the nature of this hearing is the reconsideration that I will not change this sentence.

(R. p.28, line 19-R. p.29, line 2.)

Defense counsel then advised the court that Appellant "would like to withdraw his motion to withdraw from the guilty plea and instead accept the sentence of eight years." (R. p.29, lines 9-11.)

ARGUMENT

Appellant's argument is not preserved, but even if preserved, the plea judge did not abuse her discretion in denying Appellant's motion to reconsider his sentence as it was well within the range of sentencing for second-degree burglary and was properly based upon his prior record and his admission of guilt at the plea proceeding.

Appellant argues the plea judge abused her discretion in denying Appellant's motion to reconsider his sentence. Specifically, he claims she based her decision on a false recollection of a colloquy with Appellant about the facts of the case. Initially, this issue is not preserved for this Court's review because Appellant did not raise the issue during the motions hearing. Thus, the issue should be dismissed. However, even if this Court finds the issue is preserved, because the plea judge sentenced Appellant appropriately within the statutory range for second-degree burglary, her decision to deny his motion to reconsider was proper, and this Court should affirm it.

Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). During the reconsideration hearing, defense counsel did not object or bring to the plea judge's attention that she was reciting facts that were not a part of Appellant's case even after the plea judge candidly admitted, "I'm doing this all from memory. I didn't pull the transcripts." (R. p.25, lines 11-12.) All the defense counsel said in response to what Appellant now calls a "false recollection of a colloquy . . . that never took place" was that he had "not yet heard of the specific circumstances what lead to that" and that "what he's saying to the Court today I had not heard that yet up until

very recently and today." (R. p.26, lines 16-R. p.27, line 1.) Because he had the opportunity to raise the issue to the plea judge and give her a chance to review and clarify the actual facts of the case but did not, he cannot now raise this issue on appeal. Therefore, this Court should dismiss on preservation grounds and affirm the plea court.

Merits

The trial court has broad discretion in giving sentences within the statutory limits. Brooks v. State, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). "A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant." Id. at 272, 481 S.E.2d at 713. "A court is not required to accept a plea agreement reached by the State and the defendant." Id. "[An appellate c]ourt has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

"The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge." State v. Warren, 392 S.C. 235, 237-38, 708 S.E.2d 234, 235 (Ct. App. 2011) (citing State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 201, 202 (1980)). "An abuse of discretion occurs where the conclusions of the trial court are either controlled by an error of law or lack evidentiary support." Id. at 238, 708 S.E.2d at 235 (citing State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010)).

Appellant cites three cases for the following proposition: "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." (App.Br.9-10.) This standard is very similar to the reconsideration of sentence standard

cited above; however, all of Appellant's cited cases refer to probation and parole revocations. That is what "such a decision" refers to in the above quoted language, not a reconsideration of sentence hearing. Accordingly, no language regarding a decision being "arbitrary and capricious" exists in regard to reconsidering a sentence. Regardless, Appellant's only argument in his brief in which he attempts to show the decision was arbitrary and capricious is confusing at best: "Thus, Judge Harrington's determination that a better suited sentence had no basis in the record and was therefore arbitrary and capricious." (App.Br.10.)

Appellant cites Franklin, 267 S.C. at 245, 226 S.E.2d at 897, for the proposition that a sentencing judge should know all material facts and is required to listen and give consideration to any information material to punishment. The State certainly agrees with the Supreme Court in Franklin and maintains that is exactly what the plea judge did here. Additionally, Franklin provides: "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 240, 245-46, 226 S.E.2d 896, 897. Likewise, if the facts of a defendant's case are misrepresented, the defendant should inform the court. Here, he did not. Finally, the Franklin court correctly noted that an appellate court has no jurisdiction to review a sentence that is within the statutory limits and is not the result of prejudice, oppression, or corrupt motive. Here, the sentence is well within the statutory limits for second-degree burglary and Appellant has made no showing of prejudice, oppression, or corrupt motive. Appellant even states in his brief, "In attempting to reconsider Appellant's sentence with insight and understanding, Judge Harrington properly attempted to learn all the material facts." (App.Br.10.) That

statement certainly does not sound like an allegation of prejudice, oppression, or corrupt motive on her part.

In this case, the State acknowledges some of the details the plea judge recalled from the plea were incorrect. For example, nothing in the record indicates Appellant ever stated at the plea hearing that he knew the victim (in fact he stated he did not know her), and no discussion exists on the record that the victim would have given Appellant food for his children if he had asked.[3] However, he did agree with the plea judge when she asked him if he knew the victim at the reconsideration hearing. Appellant argues he was not drinking or using drugs. (App. Br.10.) This assertion is incorrect. While Appellant did not admit to being under the influence at the plea hearing, he did at the reconsideration hearing. He stated on his own without even being questioned about intoxication: "I can't remember exactly what I told you, but at the time I was just—I was under the influence . . . ." (R. p.24, lines 4-5.)

Regardless of whether the plea judge recalled incorrect facts from the plea, her sentence was within the statutory range for second-degree burglary and her denial of Appellant's motion to reconsider was proper. The plea judge based her denial on the fact that she had already considered the State's recommendation and recognized the charge was reduced from first-degree burglary, which carried the potential for a life sentence.

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[3] It is worth noting that during the plea hearing, the recitation of facts by the State that Appellant agreed with included the fact that the victim was familiar with Appellant and was able to give his name to law enforcement. (R. p.5, lines 6-9.) Additionally, Appellant admitted he lived close to the house. (R. p.6, lines 18-19.) Therefore, the plea judge may well have been recalling these facts when she asked Appellant at the reconsideration hearing, "I think you and I talked about that you knew, at least knew who lived in the home; right?" to which Appellant answered, "Yes, ma'am." (R. p.26, lines 6-8.)

She found that eight years' imprisonment was an appropriate sentence and did not hear anything at the motions hearing that would require her to change the sentence.

Appellant argued at the motions hearing that the plea judge should follow the State's recommendation. However, it is certainly not required to accept a recommendation by the State. See Brooks v. State, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) ("A court is not required to accept a plea agreement reached by the State and the defendant."). Because the original sentence was within the statutory range for second-degree burglary, and the plea judge did not come to any conclusions that were either controlled by an error of law or lacked evidentiary support, she did not abuse her discretion. The sentence is statutorily appropriate, the denial of reconsideration was proper, and this Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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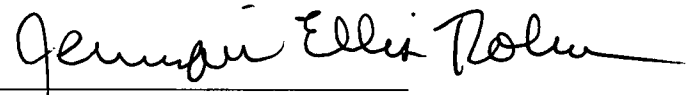
BY: 
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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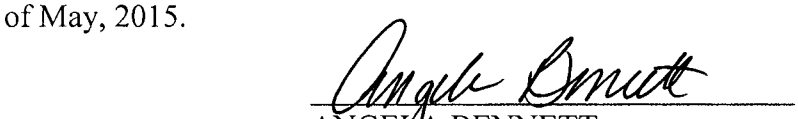
I further certify that all parties required by Rule to be served have been served. This 29th day of May, 2015.



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