THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000044

The State, Respondent

v.

James Bryson Munn, Appellant

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in its discretion by denying appellant's motion for reconsideration of sentence for a sentence with unwarranted disparity among similar defendants with similar charges and no prior criminal records?

2. Did the court err in failing to consider all goals of sentencing, namely appellant's rehabilitation, stating that rehabilitation was "almost a joke' when contemplating appellant's motion for reconsideration of sentence?

STATEMENT OF THE CASE

On July 13, 2015, appellant pled guilty to felony driving under the influence resulting in death before Honorable Judge Roger M. Young, Sr. and was sentenced to 14 years' incarceration under South Carolina law. S.C. Code Ann. § 56-5-2945 (2012). On December 30, 2015, Honorable Judge Roger M. Young, Sr. denied appellant's motion to reconsider the sentence.

Appellant had a history of disruptive behaviors associated with attention deficit hyperactivity disorder, some co-occurring anxiety, depression and performance anxiety issues. (Motion to Reconsider Transcript, p. 12, lines 20-24). On August 15, 2014, appellant, who was 20 years old at the time, purchased beer from a local grocery store. (Plea Transcript, p. 8, lines 22-24). Appellant then joined others in celebrating the life of appellant's best friend, Matt Gaither, at the home of Gaither's parents. (Plea Tr., p. 9, lines 7-8). Gaither had recently been killed in an airplane crash. (Mot. Re. Tr., p. 4, lines 1-4).

Appellant became intoxicated while mourning the loss of his best friend, and decided to spend the night on a couch at the Gaithers' home rather than drive home that night. (Mot. Re. Tr., p. 4-5, lines 22-25, 1-5). The following day, appellant awoke around 11:00 a.m., ate breakfast, and played a few games of pool. (Plea Tr., p. 43, lines 19-21). At or around 12:30 p.m., appellant called his father, then left the Gaither's home in his SUV. (Plea Tr., p. 43, lines 24-25). While traveling down River Road, appellant attempted to make a turn, went off the road, overcorrected, crossed the center line, and struck victim Kylie Gillette's vehicle head on, killing her instantly. (Plea Tr., p. 10, lines

12-22). Appellant's blood alcohol content was determined to be .217% by a blood test. (Plea Tr., p. 11, lines 19-23).

There were 19 felony DUI resulting in death cases resolved by final disposition in the Charleston County Court of general Sessions from April 14, 2006 until January 2013. (Sentencing Considerations, p. 1). The average of all maximum sentences imposed was 8.22 years, and the average active sentence actually imposed was only 5.72 years. (Sen. Cons., p. 2). The average state-wide sentence for people under the age of 25 charged with felony DUI with a death before appellant's charges were brought was 7.75 years. (Mot. Re. Tr., p. 8, lines 3-10).

At least seven similar defendants had a BAC exceeding .190%, and only two were sentenced to a term exceeding 10 years. (Sentencing Considerations, p. 9). Appellant's BAC was .217% at the time of the accident. (Plea Tr. p. 11, line 22). Samuel Thompson, Jr., who had a BAC of .238%, was only sentenced to 9 years for a felony DUI with death. (Sen. Cons., p. 9). Another similar defendant, Samuel McCauley, was given a sentence of 10 years suspended on the service of 5 years and 5 years of probation, and his BAC was .208% at the time of his felony DUI with death. (Sen. Cons., p. 9).

Appellant had no prior criminal record. (Plea Tr., p. 12, line 1). Appellant does have a history of psychological issues, including ADHD and depression, as well as a history of counselling and treatment for those issues. (Mot. Re. Tr., p. 12, lines 17-25, p. 22, lines 14-20). Appellant's psychologist, Dr. Lewis Waid, testified at the motion hearing that appellant's imprisonment is not a good situation for his rehabilitation, but that the right facilities and circumstances could be beneficial in terms of appellant's rehabilitation. (Mot. Re. Tr., p. 21, lines 10-18). Dr. Waid suggested that facilities which

have more intervention directed toward moving people into more productive lives and reducing recidivism would be much more beneficial for rehabilitation, rather than high security facilities which are difficult for psychologically fragile people such as appellant. (Mot. Re. Tr., p. 21, line 15 – p.22, line 3). Appellant is currently serving his sentence in a high security facility which houses the state's Death Row inmates. (Mot. Re. Tr., p. 20, lines 2-7).

STANDARD OF REVIEW

"[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law," *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The appellate court's task is to determine whether the trial court abused its discretion. *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998). Sound judicial discretion must be exercised in every case with a thorough regard for what is just and proper under the circumstances. *State v. Scates*, 212 S.C. 150, 156, 46 S.E.2d 693, 695 (1948). "The reasonableness of any given sentence will largely depend upon the specific facts of each case and the district court's consideration and application of the § 3553(a) factors to those facts." *U.S. v. Hampton,* 441 F.3d 284, 287 (4th Cir. 2006), (referring to sentencing factors outlined in 18 U.S.C.A. § 3553(a) (2012)).

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS DISCRETION BY FAILING TO CONSIDER THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITIES WHEN CONSIDERING APPELLANT'S MOTION FOR RECONSIDERATION OF SENTENCING, AND THIS FAILURE EFFECTUATES AN ERROR OF LAW.

The judge erred in refusing to reconsider appellant's sentence in order to address the unwarranted sentence disparities with similar defendants. The trial court should consider several factors in the process of determining an appropriate sentence for a defendant. The South Carolina Supreme Court stated that the sentences imposed on other defendants for similar crimes are among these factors that may be considered, in order to avoid unwarranted disparity between sentences. *State v. Brewington,* 267 S.C. 97, 103, 226 S.E.2d 249, 251 (1976). The trial court failed to consider this factor when sentencing appellant to a term that is excessively disproportional to sentence terms for similar defendants. The average sentence in Charleston over the 6 years preceding appellant's sentencing was just 8.22 years, and the average active sentence was only 5.72 years. (Mot. Re. Tr., p. 8, lines 3-10).

Additionally, appellant's sentence is disproportional to sentences given to similar defendants throughout the state. The prosecutor found that that the average sentence in South Carolina for defendants charged with felony DUI resulting in death is 14 years. (Mot. Re. Tr., p. 7, lines 21-24). However, this number cannot be applied to appellant's case because it does not account for similar defendants, but rather takes the average for all defendants with those charges, regardless of age or prior convictions. (Mot. Re. Tr., p. 7, line 21 – p. 8, line10). Appellant was only 20 years old at the time of his DUI, and had no prior criminal convictions. (Plea Tr., p. 11, line 24 – p. 12, line 1). Among similar defendants, those who were under the age of 25, the average sentence statewide is only

7.75 years, just over half the length of the sentence imposed upon appellant. (Mot. Re. Tr., p. 8, lines 1-10). Even this number is heavily skewed upward by the case of Austin Shackelford, who was 20 at the time his charges were brought, and was sentenced to 25 years. However, unlike appellant, Shackelford pled guilty to eight counts including two deaths in his felony DUI case. (Mot. Re. Tr., p. 8, lines 10-13).

A proper sentence should be formulated using many factors. According to *Brewington,* the sentences imposed upon other defendants for similar offences are among the factors that are properly considered in determining a proper punishment. *Brewington,* 267 S.C. 97, 103, 226 S.E.2d 249, 251 (1976). Accordingly, the trial court should have considered the sentences given to similar defendants charged in Charleston, or even throughout the State, with felony DUI resulting in death. If the trial court had considered these sentences as factors, appellant's sentence should have reflected some similarity to those sentences. Instead, appellant's sentence of 14 years reflects a clearly unwarranted disparity with similar defendants.

In *State v. Brouwer,* the Court of Appeals reversed the defendant's sentence, noting that the record failed "to reflect an otherwise appropriate basis for [the defendant's] disparate sentence." *State v. Brouwer,* 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001). Given the disparity in sentences in the current case, the record should reflect some appropriate basis for appellant's disproportional sentence. During the hearing for appellant's motion to reconsider the sentence, the court suggested excessive alcohol was a factor which justified the severe sentence. (Mot. Re. Tr., p. 47, line 25 – p. 48, line 10).

However, excessive alcohol does not aptly differentiate appellant's case from similar defendants. At least seven similar defendants had a BAC exceeding .190%, and only two were sentenced to a term exceeding 10 years. (Sentencing Considerations, p. 9). Appellant's BAC was .217% at the time of the accident. (Plea Tr. p. 11, line 22). Samuel Thompson, Jr., who had a BAC of .238%, was only sentenced to 9 years for a felony DUI with death. (Sen. Cons., p. 9). Another similar defendant, Samuel McCauley, was given a sentence of 10 years suspended on the service of 5 years and 5 years of probation, and his BAC was .208% at the time of his felony DUI with death. (Sen. Cons., p. 9). Clearly, excessive alcohol is not unique to the current case, and the existing disparity cannot be justified by this factor alone.

Although the court is not required to recognize federal law, 18 U.S.C. § 3553(a) lists the factors that should be considered when imposing a sentence. According to §3553(a)(6), the court shall consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when determining the sentence to be imposed. 18 U.S.C. § 3553(a)(6) (2012). The Sentencing Guidelines for the United States Courts state that the court shall "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole: when determining the application of the Sentencing Guidelines. 18 U.S.C.S. § 1B1.1(c).

Congress sought to achieve three objectives with the guidelines when it enacted the Sentencing Reform Act of 1984. The second of these objectives Congress sought was "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. U.S.S.G., Ch. ONE, Pt. A, Subpt. 1(3), 18 U.S.C. Clearly, Congress has a strong interest in reducing

sentence disparities, and this interest should be reflected in state criminal proceedings as well.

The Fourth Circuit ruled that the reasonableness of a sentence depends in part on the court's consideration and application of the factors laid out in § 3553(a). *U.S. v. Hampton,* 441 F.3d 284, 287 (4th Cir. 2006). Therefore, a reasonable sentence should be made with consideration for the need to avoid unwarranted sentence disparity. Appellant's sentence of nearly double the state average sentence for similar defendants does not reflect any consideration of this factor by the court.

The trial court should have considered the sentences of similar defendants with similar charges when reconsidering appellant's sentence. There is no evidence that the court took other sentences into consideration. The disparity between appellant's sentence and those in the same county and state reflects this lack of consideration. Accordingly, the trial court erred in its discretion by failing to consider the sentences of similar defendants with similar charges when considering appellant's motion for reconsideration of sentencing. This failure to consider similar sentences when denying appellant's motion to reconsider affected the outcome of appellant's sentencing.

II. THE TRIAL COURT ERRED IN FAILING TO CONSIDER REHABILITATION AS A FACTOR WHEN CONTEMPLATING APPELLANT'S MOTION FOR RECONSIDERATION OF SENTENCE.

In his dissenting opinion in *Brouwer*, Judge Anderson states that one of the goals of sentencing is to provide the defendant with needed care or treatment. *Brouwer*, 246 S.C. 375, 388-89, 550 S.E.2d 915, 922 (Ct. App. 2001). At sentencing, there is a legitimate interest in the defendant's prospect for rehabilitation and restoration to a useful place in society. *Brouwer,* 246 S.C. 375, 389, 550 S.E.2d 915, 923. (Ct. App. 2001). In *Tapia v. U.S.*, the Supreme Court stated "a court ordering imprisonment must recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation." *Tapia v. U.S.*, 564 U.S. 319, 320 (2011). Moreover, probation instead of imprisonment can satisfy the state's penal goals. *State v. Hamilton*, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999)(citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)).

Dr. Lewis Waid testified to the court that appellant had serious issues with ADHD, depression, and some substance abuse. (Mot. Re. Tr., p. 12, line 17 – p. 13, line 1). He testified that appellant has been guilt-ridden, remorseful, and fragile since the accident. (Mot. Re. Tr., p. 15, lines 15-21). In fact, prior to his sentencing, appellant expressed intense remorse for the accident, at one point even attempting suicide out of guilt for what he had done. (Mot. Re. Tr., p. 14, lines 18-19; and p. 15, lines 2-5). Dr. Waid further testified that appellant was able to return to some level of functioning following the accident by returning to his employment. (Mot. Re. Tr., p. 15, lines 13-18). Finally, he testified that there is a significant rate of improvement for people with issues similar to appellant's. (Mot. Re. Tr., p. 17, lines 1-8).

According to Dr. Waid, this improvement can likely be accomplished through programs and treatment. (Mot. Re. Tr., p. 17, line 22 – p. 18, line 10). However, Dr. Waid also testified that a prison sentence, especially at a high security facility, would not be healthy for appellant and that the circumstances would not be good for his rehabilitation. (Mot. Re. Tr., p. 20, lines 2-22). Furthermore, the court's own language establishes a failure to rehabilitate in prison: "You know, I have long given up on prison being a place where you can get rehabilitation." (Mot. Re. Tr., p. 47, lines 4-6).

Thus, pursuant to South Carolina case law and by the court's own reasoning, a prison sentence alone cannot accomplish the goal of rehabilitation for the appellant, and probation instead of prison time is a legally accepted method to accomplish rehabilitation. Instead, in this case, the appellant received a disproportionately long sentence which reflected no regard for his own rehabilitation. Rather than seeking a sentence that would incorporate all of the goals of sentencing, the court simply considered whether there would be a deterrent effect and punishment. (Mot. Re. Tr., p. 47, lines 7-19).

Further, were the appellant's rehabilitation taken into account, it is likely that appellant's sentence would more closely resemble the sentence given to Samuel McCauley. McCauley, who had a BAC of .208% at the time of his felony DUI resulting in death, was sentenced to 10 years, suspended on the service of 5 years and 5 years of probation. (Mot. Re. Tr., p. 9, lines 1-9). This split sentence reflects a consideration for the rehabilitation of the defendant. By splitting the sentence and allowing for probation, the court expressed an interest in allowing the defendant to seek treatment outside of prison, albeit with the threat of the full sentence hinging on his continued rehabilitation.

Appellant was not given this same opportunity for rehabilitation, thereby threatening the ends of justice and the equal protection of the law.

Thus, the trial court failed to consider appellant's rehabilitation as a goal of sentencing and failed to address this factor when considering appellant's motion to reconsider the sentence. The Supreme Court has ruled that imprisonment is not an appropriate means of promoting rehabilitation, and therefore the trial court's excessive prison sentence cannot serve any rehabilitative purpose for appellant. *Tapia v. U.S.*, 564 U.S. 319, 320 (2011). Further, probation instead of imprisonment can serve rehabilitative purpose. *Hamilton*, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999)(citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)). This failure to consider rehabilitation is a substantial error that resulted in an unreasonably severe prison sentence, and will result in poor rehabilitation, if any, for appellant. The court's own words clearly convey its opinion that rehabilitation is "almost a joke in this day and age." (Mot. Re. Tr., p. 47, line 6-7).

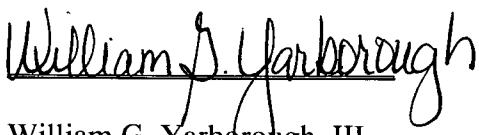
CONCLUSION

The trial court erred in sentencing appellant to a prison term with unwarranted disparity among the sentences given to similar defendants. The excessive sentence given to appellant exemplifies a failure to consider similar defendants' sentences. The trial court's failure to consider these sentences affected appellant's outcome at sentencing, and this effectuates an error in the trial court's reasoning.

Additionally, the trial court erred when it failed to consider rehabilitation as one of the goals for sentencing. The court sentenced appellant to 14 years in prison without regard to rehabilitation programs in lieu of such an excessive sentence. The trial court stated that rehabilitation was "almost a joke in this day and age," clearly indicating a failure to consider this goal of sentencing. This reflects the courts failure to consider appellant's rehabilitation, and this failure expresses an error in the trial court's reasoning.

As a result of these sentencing errors, which are errors of law, appellant's sentence should be reversed, and remanded for re-sentencing.

RESPECTFULLY SUBMITTED THIS 26th day of May 2016.



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AFFIDAVIT OF SERVICE BY MAIL

I, Traci Trouton-Burr, certify on this date, May 26, 2016, I served an Initial Brief and Designation of Matter in this action, dated May 26, 2016, on Hon. Julie J. Armstrong, Clerk of Court, Charleston County, Jennifer Kneece Shealy, Ninth Judicial Circuit Assistant Solicitor, and J. Benjamin Aplin, South Carolina Attorney General's office by mailing it to him/her at his/her work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

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SWORN TO before this 26
Day of May, 2016

Notary Public for South Carolina
My Commission expires: 4/9/24