

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2015-000636

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TIMOTHY JAMES WRIGHT,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion in considering in sentencing two incident reports regarding crimes for which Wright was not convicted when the arguments raised on appeal were not preserved for appellate review, the trial court was well within its discretion in considering the information contained in the incident reports, and Wright failed to utilize the afforded opportunity to address the allegations presented in the reports during his sentencing hearing?

STATEMENT OF THE CASE

On February 2-5, 2015, Appellant Timothy James Wright ("Wright") was tried by a jury for the murder of Melinda Ford and for possession of a firearm during the commission of a violent crime. Wright was tried in the Charleston County Court of General Sessions before the Honorable J.C. Buddy Nicholson, Jr., Circuit Court Judge. Ted Smith and Martha Kent Runey, both Assistant Public Defenders for Charleston County, represented Wright. The State was represented by Assistant Solicitors Jennifer Shealy and Ted Corvey of the Ninth Judicial Circuit Solicitor's Office.

On February 4, 2015, Wright was convicted of murder and possession of a weapon during the commission of a violent crime. (R. pp. 163-64). He was sentenced to life confinement for the murder conviction and five years confinement for the possession of a weapon during the commission of a violent crime conviction, both to be served concurrently. (R. p. 185). Before this Court is Wright's direct appeal of his sentence. Wright requests this Court reverse his sentence and remand for new sentencing. The State respectfully requests this Court deny Wright's appeal and affirm his convictions and sentences.

STATEMENT OF FACTS

On February 16, 2013, Appellant Timothy Wright shot his soon to be ex-girlfriend, Melinda Ford, with a shotgun. The shot was fired within three to four feet of Ford. (R. p. 103). The pathologist noted that the shotgun blast essentially destroyed Ford's right lung, bruised her left lung, and the blast damaged her liver as well. (R. p. 100). Ford died as a result of right lung and liver maceration due to a close range shotgun wound to the back. (R. pp. 105-6).

Background

Wright and Ford had been dating for approximately seven to eight months before the shooting. (R. p. 107). Wright had been living with Ford and her three children for approximately five months. (R. p. 7). Ford had three children. Chrisson Hayward, Ford's oldest daughter, was nineteen at the time of the shooting; Kadasha J., Ford's youngest daughter, was fifteen; and Davon M., Ford's son, was six. (R. pp. 2-4; 45). Ford's mother, Kate Ford ("Kate"), also lived nearby. (R. p. 51).

Wright was a hunter. (R. pp. 7, 112). He testified that he kept a 12 gauge Remington pump gun in a cabinet in Ford's bedroom. (R. p. 112).

Kadasha testified that she, Ford, and Kate went shopping on the day of the shooting.¹ (R. pp. 3, 5, 7-8). During the trip, Ford's mother picked up some Chinese food. (R. p. 8). Ford and Kadasha took Kate to her house on their way home, and they then returned to their home. (R. pp. 9-10). When the two got home, they unpacked the car, and they went to their separate bedrooms. (R. p. 10). While unpacking the car, the two found Kate left her Chinese takeout. (R. p. 10). Kadasha noted Wright was home

¹ They were shopping for a cousin's birthday party that was scheduled for the next day. (R. pp. 7-8).

when they arrived. (R. p. 10). She also indicated that Ford stopped in the kitchen and poured wine into a jar. (R. pp. 10-11).

Kadasha testified that she washed her clothes that afternoon. (R. p. 16). While Kadasha was in the kitchen, she heard Wright screaming in Ford's bedroom, but she did not hear Ford's voice. (R. p. 16). She later saw him open up the bedroom door, and he came out to the kitchen. (R. p. 16). Kadasha noted that she heard Wright say he was done; he got some black trash bags from a cabinet and started packing up his belongings that were in Ford's bedroom. (R. pp. 16-17). Ford was inside the bedroom at that time. (R. p. 18).

Wright Shoots Ford

Kadasha went back to her bedroom. (R. p. 18). Ford stopped by her room and told Kadasha that she was going to take Kate her Chinese food.² (R. p. 18). The next thing Kadasha heard was Ford scream very loud. (R. p. 18). She next heard a gunshot. (R. p. 19). After hearing the gunshot, Kadasha ran to the door and saw Wright standing over Ford with a gun in his hands. (R. pp. 19-21, see R. p. 36).

Wright was wearing a white shirt, Nike slacks, and a camouflage jacket. (R. p. 20). Kadasha was able to identify the gun he was holding. (R. pp. 21-22). She noted that Wright was standing in front of the porch around Ford, who was on the ground at that time. (R. pp. 21-22). Kadasha testified Wright said he would shoot Kadasha. (R. p. 21). Kadasha noted that at some point, he said "huh, huh, huh" and pointed the gun

² Kate Ford, Melinda's mother and Kadasha's grandmother, testified that Kadasha called to inform her that Melinda would be bringing her Chinese food. (R. p. 51).

at Ford.³ (R. p. 22). Kadasha attempted to find a phone at her house, and when she could not find one, she ran to the next door neighbor's house to call for help. (R. pp. 22-23, 37). The neighbors were already on the phone with a 911 operator. (R. pp. 23-24).

Kadasha looked back towards her house and saw Wright on the ground next to Ford. (R. p. 24). She heard a second gunshot. (R. p. 24). After the second shot, she saw Wright lying on the ground next to Ford. (R. p. 37). She assumed he shot himself. (R. p. 37). She then ran back over to her house. (R. p. 24).

Wright then got up, ran to his truck, and drove off. (R. pp. 25, 28). Kadasha moved the gun he had been holding back from where they were. (R. p. 25). She ran over to Ford, found Ford's cell phone, and called 911. (R. p. 26). Kadasha noted that her mother was not able to speak, and it appeared she had been shot in the chest. (R. p. 27). The 911 dispatcher gave instructions on how to stop the bleeding. (R. p. 27).

Chrisson arrived at the home while Kadasha was attempting to help stop the bleeding. (R. pp. 29-31, 47-48). After being advised by a neighbor of what was going on, she assisted Kadasha in aiding their mother. (R. pp. 47-48).

Leonard Maxwell, one of Ford's neighbors, testified he heard gunshots that afternoon. (R. pp. 38-39). After he heard the first shot, he ran out to the porch and saw Ford lying on the ground. (R. p. 39). He thought he saw Wright shoot the gun again. (R. p. 39). Maxwell saw Wright standing over Ford, and then saw him lying next to her on the ground. (R. p. 39).

³ During cross-examination, Kadasha testified that at some point after the initial shooting, Wright attempted to give the gun to Kadasha and requested that she shoot him. (Tr. 172). She declined to do so. (Tr. 172).

After the first shot, Maxwell looked out over the porch and saw Ford on the ground. (R. p. 40). That's when he heard a second shot. (R. p. 40). He saw Wright point the gun at himself. (R. p. 40). Wright put the gun in his mouth and said he was going to kill himself. (R. p. 40). Maxwell told him no, but then Wright shot himself twice. (R. pp. 40, 44). After that, Wright got in his truck and drove away. (R. p. 41). Maxwell noted that Ford's daughter came over after the first shot. (R. p. 41). At that time, Maxwell's roommate had already called 911. (R. p. 41). Maxwell also testified he was outside when Kadasha was attempting to help Ford. (R. p. 42). He was telling her to apply pressure. (R. p. 43). He also saw her move the gun out of the way. (R. p. 43).

Ford was dead when EMS arrived. (R. p. 54).

Wright Was Apprehended

Wright led law enforcement in a vehicle pursuit around John's Island. (See R. pp. 59-69, 73-76). The chase ended after Wright drove his truck through a fence and onto a baseball diamond in a local park. (R. pp. 57, 69, 74-77). Wright, however, eluded arrest at the scene. He instead hid in a local residence that was under construction. (R. pp. 70-72, 92-95, 120-21). After midnight the next morning, Wright surrendered to law enforcement, who had maintained a perimeter near the site of the truck crash. (R. pp. 78-80, 81-82). He was treated at the scene by EMS and was transported to MUSC for treatment of his gunshot wounds. (R. pp. 80, 82-89).

Wright Asserts the Shooting Was An Accident

Wright testified that on the day of the shooting, he purchased a cell phone for Kadasha. (R. p. 108). He was at home when Kadasha and Ford came home from shopping. (R. p. 109). He noted that Ford was frustrated about comments people had

made to her regarding their relationship. (R. pp. 109-10). The two had a discussion in Ford's bedroom about that issue for three to four minutes. (R. p. 110). Wright decided that based on that discussion, it was best that he leave the home. (R. p. 110). He went to the kitchen, got some trash bags, and went back into the room to pack his clothing. (R. pp. 110-11).

Wright testified that all of his clothes were on hangers. (R. p. 111). After he packed some of his belongings, and while Ford was in the bathroom, Wright grabbed the shotgun he kept in the room, along with two bags he had packed, and he headed outside to his truck. (R. pp. 113-14).

I walked outside and. I went to go open the truck door. Because my — the way my vehicle was sitting I had the two bags in my hand, the shotgun in my hand. And I went to go use one hand and kick the handle open to release the door. And when I released the door I used the other hand to kind of swing the door open.

(R. p. 114, ll 7-12). The shotgun fired. (R. p. 114). Wright claimed he did not know Ford was outside. (R. p. 114). After the shotgun fired, Wright dropped the bags that were in his hands, and he started walking away back towards the step. (R. p. 115). He then heard Ford call his name. (R. p. 115). According to Wright, Ford then told him she had been shot. (R. p. 115). Wright testified that he tried to pick her up off the ground, but she told him to stop because of the pain. (R. p. 115).

Wright asserted that he called for Kadasha, but she did not come outside immediately. (R. p. 115). He also stated that he told Kadasha to go call for help. (R. p. 115). She ran back into the house, but when she returned, he attempted to hand Kadasha the shotgun and asked her to shoot him. (R. p. 116). Wright noted that Kadasha never touched the shotgun. (R. p. 116). Instead, he went off to the side and

shot himself with the shotgun. (R. p. 117). Wright said that he heard Ford yell out, so he walked over to her and explained what he did to himself. (R. p. 117). He then shot himself again. (R. p. 117). Wright testified that he then went back over to Ford, held her leg, and talked to her. (R. p. 117).

Wright testified that he observed Kadasha and a neighbor calling for help on the phone. (R. p. 118). At that point, Wright became concerned about his personal safety if members of Ford's family came to the scene. (R. p. 118). He promptly got into his truck, left the scene, and drove in the direction of his aunt's house. (R. pp. 118-19). Wright acknowledged that he saw a police car pull behind him with lights on, and that he did not stop. (R. pp. 119-20). He also admitted that he crashed his truck into a couple of fences, and that he got out of the truck and ran into a house under construction nearby. (R. p. 120). From the house, Wright could see police officers in the softball field where he left his truck. (R. pp. 120-21). Wright recalled that at some time after many of the officers left the scene, he walked out to the remaining officers. (R. p. 121). He recalled being treated by EMS, and that he was transported to MUSC. (R. pp. 121-22).

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HEARING ABOUT WRIGHT'S INCIDENT REPORTS PRIOR TO SENTENCING; HIS ARGUMENTS FOR RELIEF ARE NOT PRESERVED FOR APPELLATE REVIEW. THE INCIDENT REPORTS WERE PROPERLY CONSIDERED BY THE TRIAL COURT IN SENTENCING, AND THE CONSIDERATION OF THE INCIDENT REPORTS DID NOT CONSTITUTE A DUE PROCESS VIOLATION.

Discussion at the Sentencing Hearing

The trial court sentenced Wright on February 5, 2015. At the sentencing hearing, the solicitor initially noted the State was unaware of any difficulties Wright may have had in his childhood. (R. p. 166). Wright's prior record consisted of a 1998 conviction for possession of cocaine and a 2001 conviction for simple assault in which Wright struck his girlfriend in her face with his fist. (R. p. 166). The trial court asked both the solicitor and Wright if the simple assault conviction was reduced from a higher charge. Id. The solicitor noted that the rap sheet reflected that Wright was arrested for assault and battery, and he was convicted of simple assault. (R. p. 167). Wright also stated that he was originally charged with simple assault. Id.

The solicitor indicated she was only addressing Wright's convictions when the trial court expressed she could discuss incident reports. (R. p. 167).

THE COURT: You can go over his incident reports.

MS. SHEALY: Well, there are other ---

THE COURT: Are there some where they weren't reduced to arrest?

MS. SHEALY: I'm sorry, say that again.

THE COURT: Are you talking about there are some incident reports where they did not issue arrest warrants?

MS. SHEALY: They either did not issue arrest warrants or the victim backed out.

THE COURT: Well, I would like to hear from those.

MS. SHEALY: Okay..

THE COURT: We are not at trial. We are at sentencing.

(R. p. 167, I 19 – 168, I 5).

The solicitor also informed the trial court of a 2012 conviction for assault and battery, third degree in which Wright was accused of striking his wife's 16 year old daughter. (R. p. 168): The solicitor noted two days after the incident that led to the conviction, Wright had filed an incident report asserting his wife removed his handgun from his vehicle. Id. The solicitor contended the wife's actions were suggestive that she was scared for Wright to have a gun. Id.

Based on the convictions, the solicitor argued it was apparent that Wright had episodes of violence in his background. They appeared to be of a domestic nature, though there were no prior incidents between Wright and Ford. (R. p. 169). At that point, the solicitor also discussed two incident reports that did not result in convictions.

In July of 2001 there was no arrest, but a girlfriend called during an argument asking for the police to come and diffuse the situation out of fear of where it was leading.

And in September of 2003 there was a criminal domestic violence charge involving the victim Tymeia Davis who he has testified is one of the mothers of one of his children. He grabbed her hair and punched her in the face.

(R. p. 169, II 9-15).

The solicitor further contended one could see a pattern of abusive behavior on the part of Wright towards females and those with whom he is involved in a relationship and their children. (R. p. 169). The solicitor then focused on the testimony of the

victim's family members who testified and the impact the shooting has had on them. (R. pp. 169-71). The State then requested the trial court sentence Wright to life confinement. (R. p. 171).

During the sentencing hearing, Kadasha recalled one argument between Wright and Ford prior to the shooting in which Wright yelled at Ford. (R. pp. 172-73). Chrisson also informed the trial court of the impact the murder has had on her and her two siblings. The solicitor also referred the trial court to a letter that was found in the glove compartment of Wright's truck. (R. pp. 175-76). The letter discussed Wright's treatment of his wife and her child, and it warned Ford of Wright's behavior. (R. pp. 175-76). Isis Frasier, Ford's cousin, stated Ford had informed her that Wright never hit her, but Ford feared Wright was capable of harming her. (R. p. 178). Frasier further discussed the harm Wright's actions in killing Ford had on both Ford's family and on Wright's children. (R. pp. 179-80).

At the hearing, Wright's counsel indicated Wright was evaluated in light of the self-inflicted gunshot wounds. (R. p. 180). Counsel noted he never had any problems communicating with Wright, and the doctor who evaluated Wright indicated he suffered from depression. Id. Wright was receiving treatment for depression while he was incarcerated. Id. Counsel further noted Wright has worked a series of jobs over the years, and also indicated his mother and sister were in court throughout the week to show their support for Wright. (R. pp. 180-81). Then, the following exchange occurred regarding the incident reports:

Obviously 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 ---

THE COURT: We are not at trial; Mr. Smith; we are at sentencing.

MR. SMITH: I understand.

THE COURT: And it is appropriate information for the court to be aware of for sentencing, okay. So don't talk about admissibility. I agree with you it would not be admissible at trial, okay.

MR. SMITH: I understand that, Your Honor.

THE COURT: And his conduct in the past is very relevant on sentencing.

MR. SMITH: It is, Your Honor.

THE COURT: And I'm going to consider it.

MR. SMITH: I understand.

THE COURT: Okay.

MR. SMITH: I understand your ruling as far as that goes.

THE COURT: So don't sit there and tell me I can't consider it.

MR. SMITH: No, I'm not saying that you can't. I am just asking you to temper your consideration.

THE COURT: I will be glad to place it under where it is. You know, it was no conviction; but that happens so frequently in domestic violence cases where the victim refuses to prosecute and the prosecutor doesn't have any independent evidence of it. It is right rampant throughout the history of South Carolina and other states. And you know that, and the solicitor knows that.

MR. SMITH: Yes, sir.

THE COURT: Okay.

MR. SMITH: No question about that, Your Honor, the -- I would say that his -- as I said, his mother has been here and his sister has been here. One of his aunts, a number of other family members throughout the week. They are a strong support system for him and will continue to support him.

(R. p. 181, 18 – 182, 120). After a statement from Wright's mother and a brief statement from Wright, the trial court sentenced Wright to life imprisonment for the murder conviction. (R. pp. 183-85).

Standard of Review

"It is well settled in this State that [an appellate court] has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction, Article I, Sec. 19, against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive." Wood v. State, 257 S.C. 179, 184 S.E.2d 702 (1971). A judge is allowed broad discretion in sentencing within statutory limits. Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) (citing State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974)). A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice. Garrett, 320 S.C. at 356, 465 S.E.2d at 350 (citing Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979)).

"[T]he admissibility of evidence is limited by constitutional provisions which require the evidence to be relevant, reliable and trustworthy. State v. Gulledge, 326 S.C. 220, 487 S.E.2d 590, 594 (1997) (citing United States v. Silverman, 976 F.2d 1502 (6th Cir.1992), cert. denied, 507 U.S. 990, 113 S.Ct. 1595, 123 L.Ed.2d 159 (1993) (hearsay evidence inadmissible at trial may be considered at sentencing); United States v. Holmes, 961 F.2d 599 (6th Cir.), cert. denied, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992); 24 C.J.S., Criminal Law § 1494 (1989) (hearsay is admissible if relevant and reliable); Thomas W. Hutchison, et al, Federal Sentencing and Practice at

649 (2d ed.1994) (“a court may consider any relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided the information has sufficient indicia of reliability to support its probable accuracy”).

A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. U.S. v. Magliano, 336 F.2d 817 (4th Cir. 1964); North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976)

A. Wright’s arguments are not preserved for appellate review.

On appeal, Wright contends the trial court abused its discretion in considering information from prior incident reports that did not result in convictions because Wright had no notice that these prior incidents would be addressed and had no opportunity to rebut the information contained in the incident reports. The arguments presented on appeal were not presented to the trial court. First, Wright did not raise a contemporaneous objection to the consideration of the incident reports.⁴ Second, Wright never argued to the trial court that it would be a due process violation for the court to consider the incident reports, nor did he contend that he did not have adequate notice to respond to the allegations presented in the incident reports. As a general rule, an issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388

⁴ If a timely objection is not made at a sentencing hearing, an issue may not be preserved for appellate review. State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991)

(1995)(defendant's claim that his due process rights were violated because he was not present at pretrial hearing during which trial judge decided to bring in jury from another county because of pretrial publicity was not preserved, where defendant did not object to his absence from pretrial hearing), cert. denied, 516 U.S. 1096, 116 S.Ct. 821, 133 L.Ed.2d 764 (1996), overruled on other grounds by State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (but for very few exceptional situations, appellate court cannot address issue unless it was raised to, and ruled upon by, trial court); Schofield v. Richland County Sch. Dist., 316 S.C. 78, 447 S.E.2d 189 (1994) (issue not raised to or ruled upon by trial judge is not properly before Supreme Court on appeal). Since Wright's due process and notice arguments were not presented to the trial court, and they were not ruled upon by the trial court, they are not preserved for appellate review.

Third, Wright waived the argument that was presented at the sentencing hearing. While Wright initially requested the trial court not consider the information contained in the incident reports, he later agreed the information contained in the reports could be considered by the trial court. Specifically, Wright stated that he was not contending the trial judge could not consider the incident reports; he merely wanted the trial court to temper its consideration of the information contained in those reports. (R. p. 182). "[Where an objection is expressly withdrawn, it cannot be raised on appeal." State v. King, Op. No. 5390 (S.C.Ct.App. filed March 16, 2016 (Shearouse Adv.Sh. No. 11 at 29) (available at 2016 WL 1039478, at *10)(citing Rosamond Enter., Inc. v. McGranahan, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983) (per curiam) ("Any objection to that testimony cannot be raised for the first time on review, nor can it be

heard on appeal when it is not properly raised by an exception.”); see also Ligon v. Norris, 371 S.C. 625, 634, 640 S.E.2d 467, 472 (Ct.App.2006) (“An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review.”).. Since the only potential objection was withdrawn by Wright at the sentencing hearing, it is not preserved for appellate review.

B. The trial court did not abuse its discretion in considering the incident reports.

The trial court was well within its discretion to consider the incident reports regarding the July 2001 domestic violence allegation and the September 2003 allegation assault allegation. The trial court’s consideration of the information did not constitute a due process violation.

“Sentencing courts have not only taken into consideration a defendant’s prior convictions, but have also considered a defendant’s past criminal behavior, even if no conviction resulted from that behavior.” Nichols v. United States, 511 U.S. 738, 747, 114 S. Ct. 1921, 1928 (1994). The United States Supreme Court upheld the constitutionality of considering such previous conduct in Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 (1949). Nichols, 511 U.S. at 747, 114 S.Ct. at 1928.

A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Williams, 337 U.S. at 247, 69 S. Ct. at 1083 (footnote omitted).

That being said, a criminal defendant has a due process right not to be sentenced on the basis of false information. Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690 (1948); United States v. Restrepo, 832 F.2d 146, 149 (11th Cir.1987); see Gullede, 326 S.C. 220, 487 S.E.2d at 594 (noting the broad scope of the circuit court's inquiry regarding issues relevant to imposing a sentence, but noting that constitutional provisions require the evidence to be relevant, reliable and trustworthy."); see also State v. Thomason, 355 S.C. 278, 286, 584 S.E.2d 143, 147 (Ct. App. 2003).

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. 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.

Franklin, 267 S.C. at 245-46, 226 S.E.2d at 897.

Wright here fails to show his right to due process was violated by the trial court's consideration of the two incident reports presented at sentencing. First, neither at the sentencing hearing nor on appeal has Wright asserted that any of the information contained in the incident reports was false. Instead, on appeal, Wright only contends that he was not provided with adequate opportunity to address the allegations presented in the incident reports. Second, contrary to Wright's assertions, he was clearly provided with a meaningful opportunity to explain any discrepancy and inform the trial court of any alleged errors within the incident reports at issue. Wright's counsel had the opportunity to present a response, and Wright was provided allowed to comment on anything he wished in sentencing. They chose not to address the incident

reports. (See R. pp. 180-81, 182-85). Respondent would note Wright never indicated he needed more time to prepare a response to the allegations presented in the incident reports, nor did Wright request a continuance in order to bring in witnesses to challenge the accuracy of the incident reports. Altogether, he failed to show the trial court error in this regard.

This case is analogous to the scenario presented in State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). In Franklin, the appellant asserted the trial court improperly considered information that was not properly before it for sentencing. These included a probation report that included charges for which the appellant had not been tried and charges of infractions of prison rules. Id. at 245, 226 S.E.2d at 897. The appellant objected to the trial court's consideration of the charges included in the probation report, and further explained that those violations had been dropped and explained that a prior armed robbery conviction. Id.

The South Carolina Supreme Court affirmed the appellant's sentence. The Supreme Court found that the facts that were divulged to the trial court were also fully disclosed to the appellant in such a manner that he had an opportunity to explain any misapprehension the court may have had. Franklin, 267 S.C. at 246, 226 S.E.2d at 898. Similarly, in State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976), the South Carolina Supreme Court found the trial court did not abuse its discretion in considering two prior fines for marijuana violations at sentencing. Sullivan, 267 at 618, 230 S.E.2d at 625. In Sullivan, the Supreme Court noted the appellant "had the opportunity to explain any discrepancies and the sentencing judge has the obligation to consider information material to punishment." Id.

As was the case in Franklin, the trial court here considered incident reports regarding crimes for which Wright had not been tried. Wright was provided with the information as the trial court was informed. Wright had the opportunity to challenge the information presented as the trial court allowed Wright and counsel to discuss anything they wished to present regarding sentencing. (See R. pp. 180-85). Unlike the appellant in Franklin, Wright here chose not to challenge any of the information presented in the incident reports. Since Wright was properly provided with the information to be considered, and he had a meaningful opportunity to challenge the information if he wanted to do so, Wright cannot show the trial court abused its discretion in hearing about the two incident reports. See Franklin, 267 S.C. at 246, 226 S.E.2d at 898; Sullivan, 267 at 618, 230 S.E.2d at 625.

Wright's case is also clearly distinguishable from the scenario presented in State v. Rich, 269 S.C. 701, 239 S.E.2d 731 (1977). In Rich, the record reflected the sentencing judge acquiesced to the defendant's request to not consider charges that did not have dispositions on the defendant's rap sheet. Id. at 702, 239 S.E.2d at 732. However, despite the sentencing judge's indication that he would not consider those charges, statements made by the same judge at a motion for reconsideration of sentence hearing indicated the sentence was influenced by those unresolved charges the judge stated he would not consider. Id. at 703, 239 S.E.2d at 732. The Supreme Court remanded for resentencing, noting that the trial judge failed to discuss the appellant's record prior to imposing sentence and did not designate what he was not considering for sentencing purposes. Id. at 703-04, 239 S.E.2d at 732. Unlike the defendant in Rich, Wright was fully aware of the information being considered by the

sentencing judge. The trial court clearly informed Wright that he would be considering the incident reports relating to the charges for which Wright was not convicted. (R. p. 182). Further, unlike the situation presented in Rich, the trial court here informed Wright at a time during the sentencing hearing that would allow Wright to present argument that would rebut or mitigate the information contained in the incident reports.

Wright's assertion that the State could not have portrayed him as a repeat offender of domestic abuse without the incident reports is without merit. The transcript reflects that prior to discussing the incident reports, the State had already informed the trial court that Wright had two prior convictions reflective of domestic violence. First, Wright had been convicted of simple assault for an incident in which he struck a girlfriend on her face with his fist in 2001. (R. p. 166). Second, Wright had a 2012 conviction for a third degree assault and battery that resulted from Wright striking his wife's sixteen year old daughter. (R. p. 168). Furthermore, Kadasha informed the trial court that she recalled an incident in which Wright engaged in an argument with the victim. (R. pp. 172-73). Kadasha noted the argument consisted primarily of Wright yelling at Ford, but Kadasha did not hear Ford yelling in return. Id. The trial court was also informed of a letter that warned Ford of Wright's treatment of his wife and her child. (R. pp. 175-76; Court's Exhibit 4). The trial court also heard from one of the victim's cousins about how Wright hit his girlfriend in 1997. (R. p. 178). Even without the discussion of the incident reports, the State presented significant and substantive information to support its argument that Wright was a repeat offender of domestic abuse.

Altogether, the trial court did not abuse its discretion in considering the information contained in the two incident reports for sentencing. Wright had an opportunity to challenge the veracity of the information presented in the incident reports at the sentencing hearing, and he chose not to utilize that opportunity. Wright has not shown that his sentence was the result of consideration of false information. He has not established he was denied due process. As a result, this claim for relief should be denied, and Wright's sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Wright's appeal and affirm his convictions for murder, possession of a weapon during the commission of a violent crime, and his sentence of life imprisonment for murder.

Respectfully submitted,

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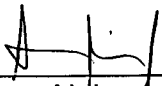
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July 11, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2015-000636

RECEIVED
JUL 11 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

v.

TIMOTHY JAMES WRIGHT,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 11th day of July, 2016.



ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
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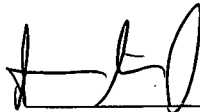
APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201; and to Kristy Goldberg, Esq., Law Offices of Kristy Goldberg, 1720 Main Street, Suite 303, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 11th day of July, 2015.



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