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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2016-000044

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NOV 28 2016

SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES BRYSON MUNN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The plea court properly held a reconsideration hearing, allowed testimony from Appellant's doctor, heard the arguments of both parties—including statistics concerning sentencing in similar felony DUI cases involving death—and upheld the statutorily authorized sentence of fourteen years.

II.

The plea court properly considered the goals of sentencing when contemplating Appellant's motion for reconsideration.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for felony driving under the influence (DUI) resulting in death. (R.166-167.) On July 13, 2014, Appellant pled before the Honorable Roger M. Young, Sr. John Sinclair, III, Esquire, and Glenn Churchill, Esquire, represented Appellant, and Assistant Solicitor Jennifer Kneece Shealy, Esquire, represented the State. Judge Young accepted Appellant's plea of guilty and sentenced him to fourteen years' imprisonment. Appellant filed a motion to reconsider his sentence. Judge Young held a hearing, at which William G. Yarborough, III, joined Sinclair in Appellant's representation. After a thorough hearing, Judge Young denied Appellant's motion.

Appellant filed a timely notice of intent to appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

At the plea proceeding, after questioning Appellant to ensure his plea was being entered freely and knowingly, the plea judge had the solicitor recite the facts. On August 15, 2014, Appellant (who was twenty years old at the time) illegally purchased beer and headed to Johns Island to a party celebrating and mourning the life of his best friend who had recently died. (R. 9, line 22–R. 10, line 8). The next morning, after a night of consuming alcohol, he got into his car and drove at speeds of up to 94 miles per hour (mph) before crashing into another vehicle while going 83 mph in a 45 mph zone. (R. 10, line 7–R. 11, line 1). The other driver, seventeen-year-old Kylie Gillette, died instantly from blunt head trauma. (R. 11, lines 12–22).

Officers who arrived on the scene smelled alcohol and noticed Appellant's slurred speech and bloodshot eyes. (R. 12, lines 2–19). Appellant consented to a blood draw, and his Blood Alcohol Content (BAC) was .217, almost three times the legal limit. (R. 12, lines 19–23). The plea judge found there was a substantial factual basis for the plea. (R. 13, lines 10–12). The State next presented statements of several witnesses who either saw Appellant driving extremely fast shortly before the collision or actually witnessed the crash. (R. 14, line 3–R. 16, line 6). The solicitor told the plea judge the victim's family believed fourteen years would be an appropriate sentence. (R. 23, line 14–R. 24, line 21).

Next, the State called Sergeant Chris Wells, with the Charleston County Sheriff's Office. He testified he does not believe sentencing for DUI is severe enough and needs to be taken more seriously. (R. 26, line 7–R. 27, line 17). The victim's family members then spoke, reflecting on the victim's life and expressing to the plea judge the impact of losing their daughter/sister at such a young age. (R. 27, line 18–R. 38, line 10).

Appellant did not challenge the facts the State presented, but defense counsel did present mitigation in the form of Appellant's history of ADHD, vitiligo, Hashimoto's thyroid disease,

anxiety, depression, and substance abuse. (R. 39, line 17–R. 42, line 9). Defense counsel told the court about the death of Appellant’s best friend, Matt Gaither, and how it affected him. (R. 43, line 1–16). He talked about the party Appellant attended at the home of Gaither’s parents and the drinking he participated in. (R. 43, line 17–R. 44, line 7.) He shared with the court Appellant’s subsequent attempt at suicide, following the wreck, by taking his grandmother’s Oxycodone. (R. 47, line 2–R. 48, line 5). Defense counsel told the plea court, “[H]e remains willing to do whatever anybody asks of him to try to send a message that the solicitor is hoping to send, and that is that other people can see firsthand the tragic consequences of wrong decisions.” (R. 49, lines 2–6).

When defense counsel introduced information about another felony DUI case and attempted to compare the two, the State objected to the relevancy and the plea judge asked him to “move on from trying to compare things that can’t be compared.” (R. 50, lines 7–22). The judge stated that he had read the documents defense counsel submitted to him but that “[e]very case is different.” (R. 51, lines 1–4). Appellant and his mother then spoke to the plea court, each apologizing for what happened. (R. 52, line 16–R. 54, line 11). Appellant told the court, “I would trade my life for hers in the blink of an eye.” (R. 54, lines 7–8).

In imposing Appellant’s sentence, the plea judge acknowledged “there is nobody in this room that thinks this kid is a bad kid.” (R. 54, lines 16–25). He considered the mitigating circumstances and the request of the victim’s family, and he sentenced Appellant to fourteen years’ imprisonment. (R. 57, lines 1–7). Appellant later moved for a reconsideration of the sentence, and Judge Young held a hearing on December 30, 2015. Defense counsel argued to the judge that the average active sentence for felony DUI involving death in Charleston in the last several years was 5.72 years. (R. p. 66, lines 15–20). However, he also told the judge the

average state-wide sentence for people charged with felony DUI involving death is fourteen years. (R. p. 66, lines 21–24).

Defense counsel then called Dr. Lewis Randolph Waid, a licensed clinical psychologist, to testify regarding his treatment of Appellant. (R. p. 70, line 5–R. 71, line 17). Dr. Waid testified he saw Appellant in order to provide an updated evaluation of him so that he could receive support services and accommodations at a technical college where he planned to enroll. (R. p. 72, lines 2–18).

Next, the State discussed the statistical information both parties had given the judge from the Department of Corrections, which provided data regarding people serving sentences for felony DUIs involving death. (R. p. 87, lines 16–25). The statistics showed that forty-seven people were serving ten to fifteen years, thirty people were serving fifteen to twenty years, and thirty-two people were serving twenty to twenty-five years. (R. p. 88, lines 1–6). The solicitor noted that in all of those cases the BAC was much lower than Appellant's, and defense counsel agreed. (R. p. 88, lines 12–19; Tr. 41, lines 8–13). She then reminded the judge that Appellant was driving so fast and so recklessly on the day of the crash that three witnesses stopped and called the police. (R. p. 90, lines 1–8).

Appellant's attorney asked for a sentence of seven to eight years. (R. p. 101, lines 1–2). He stressed the need for Appellant's sentence to serve as rehabilitation, not simply as punishment or deterrence. (R. p. 102, lines 2–23). He advocated that Appellant should get drug and alcohol related treatment during his probationary period to include AA (Alcoholics Anonymous).¹ (R. p. 101, lines 2–9). The judge decided he had heard nothing that would

¹ According to its website, at Lieber Correctional Institution, where Appellant is housed, "Inmates can receive substance abuse treatment, participate in twelve step programs like Alcoholics and Narcotics Anonymous, . . . and receive counseling during their incarceration." <http://www.prisonpro.com/content/lieber-correctional-institution>, last visited August 8, 2016.

change his mind and denied the motion, upholding Appellant's sentence of fourteen years. (R. p. 107, lines 11–15).

ARGUMENT

I.

The plea court properly held a reconsideration hearing, allowed testimony from Appellant's doctor, heard the arguments of both parties—including statistics concerning sentencing in similar felony DUI cases involving death—and upheld the statutorily authorized sentence of fourteen years.

Appellant argues the plea 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,” thus effectuating an error of law. On the contrary, the plea judge considered the sentencing disparities presented to him during the plea and again at the reconsideration hearing and acted within his discretion to decide to uphold his original sentence that already was well within the statutory range for felony DUI involving death. Because the plea judge sentenced Appellant appropriately within the statutory limits, his decision to deny Appellant’s motion to reconsider was proper, and this Court should affirm.

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. “[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). “As a general rule, so long as a sentence is within the statutory maximum, the court will not exercise its supervisory powers to inquire into the propriety of a sentence, even when that sentence creates a disparity with the sentences of co-defendants.” State v. Brouwer, 346 S.C. 375, 394, 550 S.E.2d 915, 925 (Ct. App. 2001).

“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 argues the judge should have considered the sentences given to similar defendants in Charleston and around the state. He states in his brief, “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.” (App.Br.10). The State submits that Appellant’s argument is without merit and is based on mere speculation. Simply because he feels the judge’s sentence did not reflect consideration of similar sentences does not actually mean the judge did not consider those sentences. Furthermore, no error of law is present because judges are not required to consider other sentences. See State v. Charping, 333 S.C. 124, 131, 508 S.E.2d 851, 855 (1998) (noting that “Brewington does not stand for the proposition that trial courts are **required** to consider the sentences of codefendants”).

From the very beginning of the reconsideration hearing, Appellant presented the court with information about similar cases and what sentences others had received. He noted the average sentence in Charleston County is 5.72 years, while the average state-wide is fourteen years. (R. p. 66, lines 15–24). Appellant introduced evidence of other sentences in the Charleston area and around the state. The plea judge allowed the evidence to be presented and did not at any time indicate he would not consider the data provided. Indeed, even when the

State objected to Appellant's discussing other cases, the plea judge allowed him to continue. (R. p. 67, lines 14–25).

After presenting testimony from Dr. Waid, the State extensively argued to the judge that Appellant's sentence was appropriate based on the statistics from the Department of Corrections regarding people serving sentences for felony DUI involving death. The statistics showed that forty-seven people were serving ten to fifteen years, thirty people were serving fifteen to twenty years, and thirty-two people were serving twenty to twenty-five years. (R. p. 88, lines 1–6). The solicitor noted that in all of those cases the BAC was much lower than Appellant's, which was .217. (R. p. 88, lines 12–19).

Defense counsel then argued that 7.75 years would be a proper sentence. He agreed with the State that Appellant's BAC was high and argued the high number could have been due to having blood drawn rather than having it measured by a breathalyzer. He admitted Appellant did plead guilty and must be punished. He then asked the court to set a sentence in line with other cases around the state and again suggested it be between seven and eight years with a twenty-five year suspended sentence hanging over his head. He focused on Appellant's need for rehabilitation. He argues the judge should have looked more closely at the sentences of people Appellant's age. However, he presented a case in which another twenty-year-old was sentenced to twenty-five years.

After the judge heard all the arguments, he stated, "You know, **weighing all the things** and trying to figure out what is a proper sentence in any given case is a difficult matter on a best day." (R. p. 105, lines 18–20) (emphasis added). He wondered aloud whether fourteen years served justice in this case given the excessive speeding and excessive amount of alcohol involved. Ultimately, he determined nothing had changed his mind from the original sentence

and denied the motion to reconsider. It is apparent the judge considered everything presented to him when making his decision, including the sentence disparities.

Appellant cites State v. Brewington, 267 S.C. 97, 103, 226 S.E.2d 249, 251 (1976), for the proposition that “sentences imposed upon other defendants for similar offences are among the factors that are properly considered in determining a proper punishment.” (App.Br.10). The Brewington Court actually stated, “The sentence imposed upon a codefendant for the same offense and upon others for similar offenses are among a wide variety of factors which **may be** properly considered in determining a proper punishment.” Id. (emphasis added). However, “Brewington does not stand for the proposition that trial courts are **required** to consider the sentences of codefendants.” Charping, 333 S.C. at 131, 508 S.E.2d at 855. Brewington’s holding was merely that “the trial court did not commit reversible error in considering, among other factors, the sentence of an accomplice.” Id.

In support of his argument, Appellant also cites State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001), where the Court of Appeals reversed the defendant’s sentence when the record failed to reflect an otherwise appropriate basis for his disparate sentence, and Appellant compares the current case to it. However, the inappropriate basis in Brouwer refers to the judge’s basing his reasoning for disparate sentences on someone pleading guilty versus going to trial. The trial judge in Brouwer stated:

I’m a judge that gives serious consideration for someone admitting their guilt. I think that’s important. . . . I believe that’s the first step towards rehabilitation. . . . [T]here is no way in rhyme or reason for us to ever give a sentence for someone pleading guilty the same sentence for a jury trial. Then we have ignored the fact that a person has admitted their guilt. . . . And . . . I will take [that] into consideration in imposing this sentence, because it is not an admission of guilt.

Id. at 387, 550 S.E.2d at 922.

Here, no inappropriate basis exists. The plea judge considered the information about similar sentences, the excessive BAC, the excessive speeding, the statements from the victims' family, the statements from Appellant's family, the testimony of the psychologist, and all other factors presented to him. Nothing in the record indicates he based his decision on anything inappropriate like the court clearly did in Brouwer in announcing it gave different consideration to defendants who pled guilty versus those who went to trial.

Appellant argues his sentence is "nearly double the state average sentence for similar defendants." (App.Br.12). However, the data presented by the solicitor showed the average sentence in South Carolina for felony DUI resulting in death is fourteen years, the exact length of Appellant's sentence. While he does not dispute this is the state average, Appellant argues this number is inapplicable to him because it does not take into consideration age and prior convictions. He argues offenders under the age of twenty-five received an average sentence of 7.75 years. He argues "[t]here is no evidence that the court took other sentences into consideration," and argues "[t]he disparity between appellant's sentence and those in the same county and state reflects this lack of consideration." (App.Br.12). However, the fact that the plea judge sentenced Appellant to the same amount as the state average could indicate he did consider the average presented to him. (App.Br.12).

Here, the plea judge allowed both sides to present arguments, documents, witnesses, and family members before making his decision both at the plea hearing and at the reconsideration hearing. The judge was not required to sentence Appellant in accordance with others' sentences. Charping, 333 S.C. at 131, 508 S.E.2d at 855. Each sentence is based on the particular facts of the case. See State v. Brouwer, 346 S.C. 375, 394, 550 S.E.2d 915, 925 (Ct. App. 2001) ("As a general rule, so long as a sentence is within the statutory maximum, the court will not exercise its supervisory powers to inquire into the propriety of a sentence, **even when that sentence creates**

a disparity with the sentences of co-defendants.”) (emphasis added). Thus, regardless of whether he considered other sentences, the judge gave Appellant a sentence within the statutory range, and this Court should affirm his sentence.

II.

The plea court properly considered the goals of sentencing when contemplating Appellant's motion for reconsideration.

Appellant argues the court erred in failing to consider rehabilitation as a factor when contemplating his motion for reconsideration of sentence. However, the plea court properly considered the goals of sentencing before denying Appellant's motion for reconsideration, and this Court should affirm.

"The goals of sentencing are to reflect the seriousness of the offense, promote respect for the law, provide appropriate punishment, deter criminal conduct, protect the public from the defendant's criminal conduct, and provide the defendant with needed care or treatment.

Punishment serves several purposes: retribution, rehabilitation, deterrence, and prevention."

State v. Brouwer, 346 S.C. 375, 388–89, 550 S.E.2d 915, 922–23 (Ct. App. 2001) (Anderson, J., dissenting) (internal citations omitted).

Appellant cites Tapia v. United States, 564 U.S. 319 (2011), for the proposition that imprisonment is not an appropriate means of promoting rehabilitation, concluding that here the plea court's "excessive" prison sentence cannot serve any rehabilitative purpose for Appellant. However, in Tapia's case, the error was specifically that the judge extended her sentence so that she could complete a rehabilitation program while incarcerated. The Court held that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation." Id. at 334.

Appellant's argument here is that the judge did not properly consider rehabilitation in sentencing him, not that the judge gave him a longer sentence to afford an opportunity for rehabilitation while in prison. If Appellant is arguing the judge did not consider rehabilitation at

all, it is difficult to see why a case about a judge giving a longer sentence in order to accommodate a rehabilitation program would apply.

In Appellant's Motion for Reconsideration of Sentence, he lays out circumstances of mitigation and extenuation, which include Remorse and Acceptance of Responsibility. (R. p. 116). He writes, "[Acceptance of responsibility] is the reason why persons who plead guilty more often receive lesser sentences than those who are convicted at trial." (R. p.116). This was an interesting argument to make considering Appellant earlier cited State v. Brouwer, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001), where the Court of Appeals found a judge's consideration of guilty pleas versus going to trial was an inappropriate basis for disparate sentences. Similarly, in State v. Follin, 352 SC. 235, 257-58, 573 S.E.2d 812, 824 (Ct. App. 2002), this Court ruled "a sentencing judge may NOT improperly consider a defendant's decision to proceed with a jury trial" and cautioned "the Bench that a trial judge abuses his or her discretion in sentencing when the judge considers the fact that the defendant exercised the right to a jury trial." Thus, it is clear it would have been highly improper for the plea judge to consider Appellant's guilty plea as a factor in his sentence and Judge Young was correct not to do so.

In his motion, Appellant also attempts to distinguish DUI from other crimes by pointing out that nobody intends to go out drinking and driving whereas "an actor will formulate a plan or intention to break into a house and to steal; or to commit armed robberies; or to engage in a fight that results in an assault charge or a homicide; or to sell or to use drugs." (R. p. 120). However, no criminal intent is required for the crime of DUI. The DUI statute is devoid of any language regarding knowledge or intent. See S.C. Code Ann. § 56-5-2930(A) (Supp. 2015). The statute is primarily a safety statute which seeks to punish an individual's drunken actions, not his or her intent. As recognized by our Supreme Court when considering an earlier version of the statute,

“The purpose of the statute is to prevent accidents and preserve persons from injury” State v. Long, 186 S.C. 439, 446, 195 S.E. 624, 627 (1938). See Case v. Com., 753 S.E.2d 860, 866 (Va. Ct. App. 2014) (“Thus[,] the concern is what could happen with an intoxicated individual behind the wheel, regardless of whether he intended to be there, turn on the car, or move the vehicle.”). Therefore, it is clear the Legislature intended DUI to be a strict liability offense. See Guinyard v. State, 260 S.C. 220, 227, 195 S.E.2d 392, 395 (1973) (“[W]hether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute, construed in the light of its purpose and design.”); see also Case, 753 S.E.2d at 866 (“Bearing these concerns . . . in mind, we conclude that there is no mens rea requirement in [the DUI statute]. As long as the Commonwealth proves beyond a reasonable doubt that an intoxicated individual ‘operated’ his vehicle, regardless of intent, he is guilty of [DUI].”).

Equally confusing in Appellant’s motion is the statement that Appellant “does not require much for his rehabilitation; that, in fact, he was rehabilitated by the facts and experiences of this case.” (R. p.121). If that is indeed the case, Appellant’s argument that the judge did not properly consider rehabilitation does not seem to make sense. He argues a split sentence would reflect consideration of rehabilitation and continually argues Appellant should have gotten probation, not just a lesser sentence. His proposal at the reconsideration hearing was a sentence of twenty-three years suspended to the average sentence followed by five years of probation after his release. (R. p. 69, lines 2–19).

The State submits a split sentence including probation is certainly not the only sentence that would reflect a consideration of rehabilitation. However, even if the plea judge did not fully consider rehabilitation to the extent desired by Appellant, his sentence was nevertheless proper. He sentenced Appellant within the statutory limits for his offense, which is all that is required so long as the judge showed no prejudice against the defendant. See Brooks v. State, 325 S.C. 269,

271, 481 S.E.2d 712, 713 (1997) (noting the trial court has broad discretion in giving sentences within the statutory limits); id. at 272, 481 S.E.2d at 713 (“A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant.”); State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (“[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.”). Appellant failed to demonstrate the plea judge showed prejudice against him in sentencing him to fourteen years or in upholding that sentence and denying his motion to reconsider. This Court should affirm his conviction and sentence.

CONCLUSION

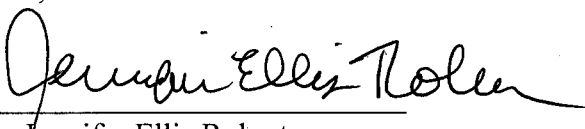
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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