

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge  
\_\_\_\_\_

RECEIVED

SEP 17 2012

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

GREGORY PENCILLE,

APPELLANT

APPELLATE CASE NO. 2012-212050  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

ROBERT M. PACHAK  
Appellate Defender

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

ATTORNEY FOR APPELLANT

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**TABLE OF AUTHORITIES**

**Cases**

State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)..... 6

**STATEMENT OF ISSUE ON APPEAL**

Whether the plea court erred in taking into account other charges that appellant may have had but were not convictions in deciding to sentence him to thirty (30) years imprisonment?

STATEMENT OF THE CASE

On August 9, 2010, appellant appeared before the Honorable Larry B. Hyman in Horry County and pled guilty to criminal sexual conduct in the first degree. A thirty (30) year sentence was imposed. G. Scott Bellamy, Esquire, was plea counsel. Candice A. Lively was the assistant solicitor.

On March 14, 2012, appellant again appeared before the Honorable Larry B. Hyman for a motion to reconsider the sentence. That motion was denied.

This appeal follows.

## ARGUMENT

The plea court erred in taking into consideration other charges that appellant may have had, but were not convictions in deciding to sentence him to thirty (30) years imprisonment.

Early on at appellant's guilty plea, plea counsel noted that other charges were being dismissed as a result of this plea. (August 9, 2010, Tr. p. 3, lines 22-24). Appellant acknowledged this. (August 9, 2010, Tr. p. 5, lines 5-8). The criminal sexual conduct charge appellant pled guilty to was alleged to have occurred on June 3, 2004. The related kidnapping charge was not being pursued. (August 9, 2010, Tr. p. 7, line 23 – p. 8, line 10). At the plea court's request, the assistant solicitor brought up two old cold cases dating back to 2001 that were believed to involve appellant. There were also a criminal sexual conduct charge and a kidnapping charge. Both charges were being nol prossed in exchange for appellant's guilty plea. (August 9, 2010, Tr. p. 11, lines 11-25). The assistant solicitor also withdrew a notice of seek life without parole in exchange for appellant's guilty plea. (August 9, 2010, Tr. p. 13, line 24 – p. 14, line 8). Later, she said she had concerns over whether appellant was a serial rapist and that there may have been other cases out there. She said she was not asking the court to consider this, but she truly thought appellant was a predator. (August 9, 2010, Tr. p. 17, lines 10-23).

At the March 14, 2012, motion to reconsider the sentence, appellant said he had concerns over the accusations the solicitor made at the guilty plea hearing. (Tr. p. 5, lines 12-25).<sup>1</sup> He felt the solicitor brought up unrelated matters which he was not charged with or that would be dismissed. The solicitor said there could be some other unresolved rapes.

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<sup>1</sup> All future transcript pages refer to the March 14, 2012, transcript.

(Tr. p. 6, lines 12-17; Tr. p. 8, lines 8-13). Appellant wanted the court to reconsider because he believed the court received improper information during his sentencing hearing. (Tr. p. 11, lines 11-15).

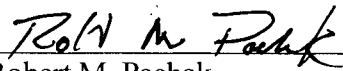
The court noted that it would have given the same sentence regardless of whether there was any mention of any other offenses. He said appellant was not indicted for them. There was no evidence to tie him to them and they had nothing to do with the sentence he got. The court said the sentence he gave had to do with three very serious charges being dropped, appellant's prior criminal record, and the fact that life without parole was taken off the table. (Tr. p. 12, lines 16-25).

The plea court's refusal to deny appellant's motion for reconsideration was error. The court is only to consider relevant evidence in sentencing a defendant. Evidence is relevant only if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears. State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). The assistant solicitor even admitted that she brought out that information to justify the thirty (30) year sentence. She relied on the plea court to consider that improper information to justify the thirty (30) year sentence.

CONCLUSION

Appellant's case should be remanded for re-sentencing.

Respectfully submitted,

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of September, 2012.

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PETITION TO BE RELIEVED AS COUNSEL

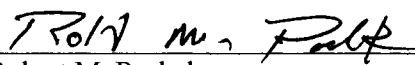
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Counsel for Gregory Pencille states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Larry B. Hyman, Jr., which was held on August 9, 2010, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Gregory Pencille.

Respectfully submitted,

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of September, 2012.

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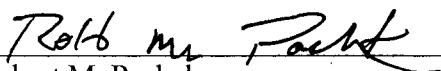
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire August 9, 2010, Transcript
- (3) Entire March 14, 2012, Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

September 17th, 2012

  
Robert M. Pachak  
Appellate Defender

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

Attorney for Appellant

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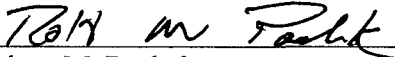
APPELLANT

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CERTIFICATE OF SERVICE

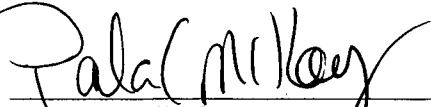
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The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Record on Appeal have been served on Gregory Pencille, #312332 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 17th day of September, 2012.

  
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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 17th day of September, 2012.

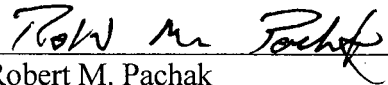
 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 17, 2012

  
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