

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM PICKENS COUNTY  
Letitia H. Verdin, Circuit Court Judge

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Appellate Case No. 2017-001070

THE STATE, .....RESPONDENT

v.

BOYCE DEREK LOWRANCE, .....APPELLANT.

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INITIAL BRIEF OF RESPONDENT

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**RECEIVED**  
AUG 24 2018  
SC Court of Appeals

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## RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's argument that the plea court's actions in reconsidering and amending his sentence violated the double jeopardy clauses of the United States Constitution and the South Carolina Constitution should be deemed abandoned as conclusory where it is not supported by any authority. Also, whether the plea court's actions did not violate double jeopardy where Appellant was not twice put in jeopardy of life, limb, or liberty for the same offense. Finally, to the extent Appellant now argues the trial court's actions in reconsidering and amending his sentence violated the *ex post facto* clauses of the United States Constitution and the South Carolina Constitution, whether the argument is not preserved for appellate review because it was neither raised to nor ruled upon by the plea court.

## STATEMENT OF THE CASE

Boyce Derek Lowrance (Appellant) was charged with failure to stop for a blue light (2017-GS-39-0815) and criminal domestic violence of a high and aggravated nature (CDVHAN) (2017-GS-39-0816). He was represented by Richard Warder, Esquire. Respondent (the State) was represented by Assistant Solicitors Baker Cleveland and Graham Buckner of the Thirteenth Circuit Solicitor's Office. On March 29, 2017, Appellant appeared at the Pickens County Courthouse before the Honorable Letitia H. Verdin, waived presentment to the grand jury, and pled guilty as charged. The court accepted the plea and sentenced Appellant for CDVHAN to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment followed by two (2) years' probation, with the first eighteen (18) months' imprisonment to be served in the South Carolina Department of Corrections (SCDC) and the second eighteen (18) months' imprisonment to be served home detention pursuant to the Pickens County home incarceration program (HIP). *See* S.C. Code Ann. § 24-13-1510 to -1590 (South Carolina "Home Detention Act"). Special conditions of the sentence as indicated at the proceeding and on the sentencing sheet included (1) random drug/alcohol testing and (2) no contact with victim. (Indictment; Sentencing Sheet; Tr.p.1-p.14; p.25-p.26).

The State subsequently made a motion to reconsider the sentence, and two days later, on March 31, 2017, the case was reconvened to address the State's motion. Appellant was present and was again represented by Mr. Warder. The State was again represented by Assistant Solicitor Cleveland. After identifying the basis of the State's motion to reconsider, Judge Verdin granted Appellant's request to hold the reconsideration hearing in abeyance to give him more time to prepare. (March 31, 2017, Tr.p.1-p.8). The motion hearing was subsequently held before Judge Verdin in Pickens County on April 17, 2017. Appellant was present and was

represented by Mr. Warder. The State was represented by Assistant Solicitor Brandi B. Hinton. At the conclusion of the hearing, Judge Verdin amended Appellant's sentence to require that he serve the entire three (3) year active portion of his sentence in SCDC with no portion served in the HIP; however, she ordered that after the first eighteen (18) months in SCDC Appellant could ask the Court to reconsider and reinstate the eighteen (18) month HIP portion of the active sentence. (April 17, 2017, Tr.p.1-p.11). Appellant timely filed a notice of intent to appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

### **STATEMENT OF FACTS**

At his plea, Appellant testified he was there to plead guilty to the two charges and understood the possible sentences he could receive. He testified he had discussed the charges with his lawyer and was happy with what his lawyer had done for him. Appellant testified he was not under the influence of drugs or alcohol and that nobody had forced him to plead guilty or promised him anything to get him to plead guilty. He testified he understood his constitutional rights, including his right to a jury trial and the right to have the charges presented to a grand jury and that he was giving up those rights by pleading guilty. Appellant testified he wanted to waive his constitutional rights and plead guilty. (Tr.p.1-p.14).

The solicitor then gave a brief recitation of the facts of the offenses. On September 15, 2016, Appellant assaulted his five-year-old son's mother. While armed with a knife, Appellant woke the victim up in the early morning hours, struck her in the face, and inflicted a deep cut on her arm. The victim did not immediately report the assault, and instead called the police ten days later when Appellant refused to return their son to the victim after picking him up from school. The victim called the police to report the assault and her missing child. When police later encountered Appellant in a car and attempted to stop him with sirens and blue lights he sped

away, but was ultimately apprehended a few hours later. The solicitor recommended a sentence of ten (10) years suspended to three (3) years with eighteen (18) months in SCDC and eighteen (18) months on HIP. Judge Verdin agreed to go along with the recommendation and ordered “no contact with the victim.” (Tr.p.25-p.26).

Two days later, on March 31, 2017, the case was reconvened to address the State’s motion to reconsider Appellant’s sentence. The solicitor said the State had received new information directly from Appellant since his sentencing and would like to present it to the Court and have the sentence reconsidered. Judge Verdin found the motion had been timely made within the term of court in which Appellant was sentenced. She noted the court had been provided with a recording of phone calls Appellant made from the jail as well as a written synopsis of those calls. Appellant moved to have the hearing held in abeyance to give him more time to prepare, and that motion was granted. ( March 31, 2017, Tr.p.1-p.8).

The motion hearing was subsequently held before Judge Verdin on April 17, 2017. Judge Verdin recounted the procedural history of the plea and the motion to reconsider, noting the State’s motion was based on jail recordings showing Appellant attempted to make contact with the victim and made threats against the prosecutor in the case. Assistant Solicitor Hinton confirmed the basis of the motion, noting SLED was actively investigating the threats against Assistant Solicitor Cleveland. Counsel for Appellant objected to the proceeding in its entirety and complained he had not been provided with a copy of the recording. Judge Verdin noted Counsel was given a copy and overruled the objection. (April 17, 2017, Tr.p.1-p.6). Counsel responded:

Well, let’s make it a little more specific then. For the record then, Your Honor, I object. It’s double jeopardy. You can not do it. Second of all, there’s no case precedent anywhere for subsequent conduct of the defendant after sentencing to

lenient sentence because there was no expectation of finality in the original sentence).

“Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal.” *DiFrancesco*, 449 U.S. at 133-34. Indeed, at common law the trial court’s increase of a sentence, so long as it took place during the same term of court, was permitted. *Id.* “This practice was not thought to violate any double jeopardy principle.” *Id.* Here, the plea court was presented with a timely motion to reconsider, filed by the State during the same term of court at which the original sentence was imposed. Rule 29(a), SCRCrimP. Until the ten-day time limit had expired for the service and filing of a timely post-sentencing motion under Rule 29, Appellant had no expectation of finality in the original sentence. Thus, any increase in the sentence pursuant to the motion did not violate double jeopardy.

As to any attempt Appellant might be making to argue the trial court’s actions in reconsidering and amending his sentence violated the *ex post facto* clauses of the United States Constitution and the South Carolina Constitution, that argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. *State v. Brown*, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements for preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) (“The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal.”); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). South Carolina law requires a contemporaneous objection with specific grounds to preserve an error for review. *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) (“An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error.”); *State v.*

*Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding that a contemporaneous objection is required to preserve an issue for appellate review); *State v. Bailey*, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing). Here, Appellant raised no ex post facto challenge to the plea court. As a result, the plea court was not given an opportunity to make a ruling and Appellant's ex post facto argument is not preserved for review. *Brown*, 402 S.C. at 125 n.2, 740 S.E.2d at 496 n.2; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94; *Byers*, 392 S.C. at 446, 710 S.E.2d at 59; *Bailey*, 253 S.C. at 304, 170 S.E.2d at 376. Appellant's conviction and sentence should be affirmed.

**CONCLUSION**


For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina  
August 24, 2018

STATE OF SOUTH CAROLINA  
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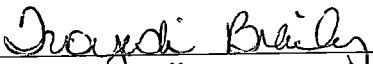
BOYCE DEREK LOWRANCE, .....APPELLANT.

**PROOF OF SERVICE**

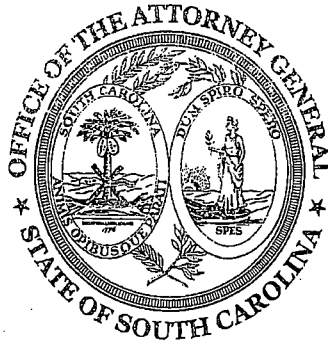
I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated August 24, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Pachak, Appellate Defender  
S.C. Commission on Indigent Defense  
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I further certified that all parties required by Rule to be served have been served. This 24<sup>th</sup> day of August, 2018.

  
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AUG 24 2018

SC Court of Appeals

Re: The State v. Boyce Derek Lowrance  
Appellate Case No. 2017-001070

Dear Mr. Pachak:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 8729

JBA/ab  
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)  
Victim Advocacy Division