

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM PICKENS COUNTY

S.C. SUPREME COURT

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2018-001153
Lower Court Case No. 2013-GS-47-00009

THE STATE, PETITIONER,

v.

FREDERICK SCOTT PFEIFFER, RESPONDENT.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

S. CREIGHTON WATERS
Senior Assistant Deputy Attorney General

BRIAN T. PETRANO
Senior Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3693
bpetrano@scag.gov SCBAR# 074244

ATTORNEYS FOR PETITIONER

RALPH GLEATON
Gleaton Wyatt, PA
935 South Main Street Ste 203
Greenville, SC 29601-3314
ralph@seblawfirm.com.

WILLIAM G. YARBOROUGH III
William G. Yarborough III,
Attorney at Law, LLC
522 North Church Street
Greenville, SC 29601
wgyarborough@gmail.com

ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 23, 2018.

QUESTION PRESENTED

WHETHER PER RULE 29(a), SCR CRIMP. THE CIRCUIT COURT WAS WITHOUT AUTHORITY TO RULE ON RESPONDENT'S 2ND POST-TRIAL MOTION BECAUSE RESPONDENT'S 2ND MOTION WAS NOT MADE WITHIN TEN (10) DAYS AFTER THE IMPOSITION OF HIS SENTENCE.

STATEMENT OF THE CASE

On June 19, 2012, the State Grand Jury of South Carolina (the “State Grand Jury”) returned a true-billed indictment charging Respondent and Arthur M. Field (“codefendant”) with securities fraud and conspiracy. (App. pp. 107 - 113 [Indictment 2013GS4709]). Respondent was a lawyer licensed in South Carolina until his indictment.¹ The Indictment alleged that Respondent and codefendant conspired to perpetrate a fraud upon South Carolina investors by concealing and misstating material information in connection with the offer and sale of notes by the now defunct Capital Investment Funding, LLC (“CIF”). CIF raised money through the sale of “senior notes” to South Carolina investors. These notes constituted securities under South Carolina law, and as such were registered with the South Carolina Securities Division (the “Securities Division”). The proceeds of these note sales were then lent to various entities; primarily the New Jersey based Lancaster Resources, Inc. (“LRI”), which was CIF’s primary debtor for the entirety of its existence. Respondent served as counsel to CIF as well as the co-owner and co-manager of CIF’s principal re-lender Cosimo, LLC (“Cosimo”). Throughout the course of CIF’s existence, Respondent supplied legal opinions on CIF’s compliance with state and federal securities laws and the lack thereof. Respondent was also separately indicted by the South Carolina State Grand Jury; these multi-county indictments include commission of securities fraud and conspiracy with regard to

¹ <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2012-06-15-01>

the operations of Cosimo, LLC, which served as the major relender of investor funds provided to Capital Investment Funding, LLC. (App. pp. 115 - 118 [Indictment 2013GS4710]). They also alleged forgery by use of a fictitious name to endorse a check from the South Carolina Department of Transportation for compensation in condemnation of property, and perjury and false swearing regarding this fictitious name in two depositions where Capital Investment Funding loans were involved.

Ultimately, Respondent pled guilty on September 18, 2013 to three (3) of the counts, i.e. 2013GS4709 Count I (Criminal Conspiracy, CDR 0049); Count III (Securities Fraud, CDR 2615); and Count VI (Securities Fraud, CDR 2615). (App. pp. 16 - 64 [September 18, 2013 plea transcript]). Respondent's restitution hearing was deferred following his plea and sentencing.

Respondent filed a timely (1st) motion for reconsideration on September 30, 2013. (App. p. 14 [Respondent's 1st Motion for Reconsideration, dated September 30, 2013]). On October 8, 2013, the circuit court held a hearing on Respondent's (1st) Motion for Reconsideration of sentence at the same time as the restitution hearing – the circuit court issued amended sentencing sheets the same day at Respondent's request for a mere clarification regarding SCDC's calculation(s) methods. (App. pp. 5 - 7 [Amended Sentencing Sheets dated October 8, 2013], App. pp. 65 - 78 [October 8, 2013 restitution and re-sentencing transcript]).

Twenty-nine (29) days after his plea and sentencing, Respondent filed a 2nd motion for reconsideration – dated October 17, 2013. (App. p. 15). Respondent was ordered to pay restitution in the net amount of \$169,186.30. (App. pp. 102 - 105

[July 9, 2014 restitution and 2nd reconsideration transcript], App. p. 8 [Restitution Order]). Ultimately, the circuit court granted Respondent's 2nd request to reconsider his sentence. (App. p. 9)

Petitioner filed a timely Notice of Appeal and the Final Briefs were filed on November 7, 2016. (App. p. 124, 136). The Court of Appeals issued a decision affirming the circuit court on March 28, 2018. (App. p. 152). Petitioner's Petition for Rehearing was filed on April 12, 2018. (App. p. 154). Respondent filed a Return to Petition for Rehearing on April 23, 2018. (App. p. 158). The Court of Appeals issued its decision denying the Petition for Rehearing on May 23, 2018. (App. p. 160). The Petition for Writ of Certiorari to this Court was filed on June 21, 2018. The Respondent's Return to the Appellant's Petition for Writ of Certiorari was dated July 20, 2018. This Court granted Certiorari on August 21, 2018.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). “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 where the trial court’s conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 860 (Ct. App. 2010).

ARGUMENT

PER RULE 29(a), SCRCrimP. THE CIRCUIT COURT WAS WITHOUT AUTHORITY TO RULE ON RESPONDENT'S 2ND POST-TRIAL MOTION BECAUSE RESPONDENT'S 2ND MOTION WAS NOT MADE WITHIN TEN (10) DAYS AFTER THE IMPOSITION OF HIS SENTENCE

This Court recently reiterated, in no uncertain terms, that [absent an exception] the ten-day limit for serving a post-trial motion is an absolute deadline and a trial court does not have the power to alter or amend, nor does it have any power to grant an extension of time in which to file a post-trial motion. Overland, Inc. v. Nance, Op. No. 27800 (S.C. Sup. Ct. filed May 23, 2018). Nance is a civil case applying Rule 59, SCRCP; but the logic applies to criminal cases applying Rule 29(a), SCRCrimP. because the language of the rules is practically identical.²

There were two (2) motions for reconsideration filed by Respondent, the first was timely filed and the circuit court of course retained authority to decide the very narrow issue presented in Respondent's 1st motion for reconsideration – but that authority does not extend to supplemental arguments presented outside the ten (10) day window.³ *See, State v. Warren*, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011).

² Rule 59(f), SCRCP, provides:

“[A]nd the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term.”

Rule 29(a), SCRCrimP., provides:

“[A]nd the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term.”

³ Respondent's plea/sentencing was on September 18, 2013. Ten (10) days later was September 28, 2013, which was a Saturday. Accordingly, Respondent's 1st Motion for Reconsideration was timely filed on September 30, 2013.

The relevant dates are as follows:

- Sept. 18, 2013 Respondent's plea and sentencing. (App. p. 16).
- Sept. 30, 2013 Respondent's 1st "Motion to Reconsider." (App. p. 14).
- Oct. 8, 2013 Order granting Respondent's 1st "Motion to Reconsider." (App. p. 5-7).
- Oct. 17, 2013 Respondent's 2nd "Motion to Reconsider." (App. p. 15).

After September 30, 2013, the only narrow issue the circuit court had authority to address was to clarify the sentences for SCDC as requested in the 1st motion for reconsideration. Respondent got exactly what he was seeking in the 1st motion; there was nothing to warrant a 2nd motion.⁴ The narrow issue in Respondent's 1st motion was how SCDC was doing their arithmetic, i.e. how they were interpreting which count was consecutive/concurrent. (App. p. 66, line 12 – p. 67, line 18). Respondent's 2nd "Motion to Reconsider" was twenty-nine (29) days after Respondent's sentencing – far beyond the ten (10) days required for the circuit judge to "retain jurisdiction" "of the motion" per Rule 29(a), SCRCrimP.

Respondent's 2nd "Motion to Reconsider" raised for the first-time a completely new and wholly unrelated issue and is therefore untimely and invalid. Respondent's 2nd motion was essentially a *new information has come to light* type claim regarding the sentence of the co-defendant, who Respondent argued was the "ring-leader kingpin of the conspiracy", and thought the comparative sentences were unfair. (App. p. 15). Respondent did not and could not have raised the co-defendant sentence disparity issue within ten (10) days of Respondent's sentencing [September 18] because "the codefendant's sentence was not known to Defendant until October

⁴ There was only one (1) single issue in the 1st motion for reconsideration - an alleged inconsistency with the circuit court's sentencing as interpreted by SCDC, i.e. "that there are inconsistencies between the sentences handed down by the Court with what is reflected within the Sentencing Sheets..." (App. p. 14 [Respondent's 1st Motion for Reconsideration, dated September 30, 2013]).

8, 2013.” (App. p. 11).

The only way for the circuit court to have jurisdiction over a 2nd post-trial motion would be if that 2nd motion was timely filed [respectively] and sought “relief on issues coming to light as a result of an order following an initial post-trial motion that alters or amends the judgment.” Collins Music Co. v. IGT, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (Ct. App. 2002) (emphasis added). Meaning, a 2nd motion filed outside the original ten (10) day window is only timely if there was a problem with the actual filed order as to the issue(s) raised in the 1st motion. **Respondent’s 2nd motion had nothing to do with the narrow issue raised in his 1st motion.**

The circuit court specifically rejected this timeliness argument explaining, “*that the codefendant’s sentence was not known until October 8, 2013...With this new codefendant sentencing information, Defendant did timely file this 2nd motion for reconsideration, dated October 17, 2013.*”⁵ (App. p. 11 [Order Granting Defendant’s 2nd Motion to Reconsider, dated January 23, 2015]). The circuit court’s ruling is an error of law. Rule 29(a), SCRCrimP. affords a limited ten (10) day window that begins “after the imposition of the sentence.” The sentencing of a codefendant is irrelevant for the purposes of Rule 29(a), SCRCrimP. The clarification of the sentence that occurred (on October 8, 2013) as a result of Respondent’s 1st motion did not “reset” any Rule 29 clock for new claims outside the narrow scope of the 1st Rule 29 motion. State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011).

⁵ Applying the sentencing court’s logic would allow any defendant to file a post-trial motion for reconsideration of sentencing whenever a codefendant’s sentence is arguably at issue. To do so would virtually eliminate any finality – for example, in the matter at hand, the codefendant’s sentence calculation is not final; it is the issue in pending Appellate Case number 2018-001042.

If Respondent truly thought the co-defendant's sentence was relevant after-discovered evidence then he could have considered a remedy via the application of Rule 29(b), SCRCrimP. (as opposed to Rule 29(a)). However, Rule 29(b), SCRCrimP. cannot be used to alter a sentence – the only relief afforded under Rule 29(b) is a “new trial”. Respondent never sought a new trial; instead, he sought a sentence reduction by filing an untimely motion raising a new issue that the circuit court no longer had authority to address. The circuit court erred as a matter of law ruling it had authority over the new issue raised in Respondent's untimely 2nd “Motion to Reconsider”. Applying this Court's logic from Nance, the *Order Granting Respondent's 2nd Motion to Reconsider* filed by the circuit court on January 23, 2015 was a “nullity because the trial judge no longer had jurisdiction over the matter.” Overland, Inc. v. Nance, Op. No. 27800, 2 (S.C. Sup. Ct. filed May 23, 2018) (citing Leviner v. Sonoco Prod. Co., 339 S.C. 492, 530 S.E.2d 127 (2000)).

The Court of Appeals' decision affirms the circuit court's conclusion that it had authority over the new issue raised in Respondent's untimely 2nd “Motion to Reconsider”. Petitioner respectfully asks the Court to reverse the Trial Court's *Order Granting Respondent's 2nd Motion to Reconsider* because the 2nd motion did not seek relief on the order granting his 1st motion.

CONCLUSION

For these reasons, it is respectfully submitted that this Court should reverse the Court of Appeals decision that affirmed the circuit court when the circuit court erred as a matter of law when it granted relief on a new issue raised twenty-nine (29) days after sentencing as the circuit court lacked the authority to do so per Rule 29(a), SCRCrimP. The circuit court's "*Order Granting Defendant's 2nd Motion to Reconsider*" (dated January 13, 2015) should be nullified.

Respectfully submitted,

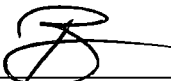
ALAN WILSON
Attorney General

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BRIAN T. PETRANO
Senior Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3693
bpetrano@scag.gov SCBAR # 074244

By: _____



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THE STATE,

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FREDERICK SCOTT PFEIFFER,

Respondent.

PROOF OF SERVICE

I certify that I have served the *Brief of Petitioner* by depositing a copy in the United States Mail; postage prepaid, on September 24, 2018, addressed to his attorneys of record:

Mr. William G. Yarborough, III
William G. Yarborough III, Attorney at Law, LLC
522 North Church Street
Greenville, SC 29601


Mr. Ralph Gleaton
Gleaton Wyatt, PA
935 South Main Street Ste 203
Greenville, SC 29601-3314

ALAN WILSON
Attorney General

S. CREIGHTON WATERS
Senior Deputy Assistant Attorney General

BRIAN T. PETRANO
Senior Assistant Attorney General

September 24, 2018.


BRIAN T. PETRANO
Office of the Attorney General
PO Box 11549 Columbia, SC 29211
(803) 734-3693 SCBAR # 074244
BPETRANO@SCAG.GOV
ATTORNEYS FOR THE
STATE OF SOUTH CAROLINA