

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARCUS C. MCFADDEN,

APPELLANT

APPELLATE CASE NO 2017-002175

INITIAL BRIEF OF APPELLANT

RECEIVED

SFP 19 2018

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the judge who heard the motion to reconsider sentence abuse his discretion in finding that it was improper for him to address the motion?

STATEMENT OF THE CASE

In September of 2016, the Sumter County Grand Jury indicted Appellant, Marcus Codell McFadden, and co-defendants Latique Kareem Bracey and Dominique A. Ross, for burglary first degree and assault and battery by mob third degree, indictment #2016-GS-43-0880. Bracey was also indicted for pointing and presenting a firearm and possession of a weapon during the commission of a violent crime. On September 20, 2016, Appellant and Bracey proceeded to jury trial before the Honorable William Jeffrey Young. Michael M. Jordan represented Appellant. Jason E. Bridges represented Bracey. John P. Meadors prosecuted the case. The jury found Appellant and Bracey guilty as charged. Judge Young sentenced Appellant to twenty (20) years for burglary first degree and one year concurrent for assault and battery by mob third degree. Judge Young sentenced Bracey to twenty-two (22) years for burglary first degree, one year concurrent for assault and battery by mob third degree, five years concurrent for pointing and presenting a firearm and five years consecutive for possession of a weapon during the commission of a violent crime.

Appellant filed a timely motion for new trial and reconsideration of sentence on September 30, 2016. On July 3, 2017, Appellant filed a notice of intent to appeal before the pending motions were heard. On July 7, 2017, the South Carolina Court of Appeals dismissed the appeal so that the pending motions could be heard. The remittitur issued on August 8, 2017. On October 11, 2017, Appellant appeared before the Honorable George M. McFadden so that the pending motions could be heard. Michael M. Jordan again represented Appellant. Judge McFadden denied the motions. A timely notice of intent to appeal was served on October 17, 2017. This appeal follows.

STANDARD OF REVIEW

“In criminal cases, the appellate court reviews only errors of law and is bound by the factual findings of the trial court unless the findings are clearly erroneous. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). An abuse of discretion occurs where the conclusions of the trial court are either controlled by an error of law or lack evidentiary support. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010).” State v. Warren, 392 S.C. 235, 237–38, 708 S.E.2d 234, 235 (Ct. App. 2011).

ARGUMENT

The judge who heard the motion to reconsider sentence abused his discretion by finding that it was improper for him to address the motion.

The jury found Appellant and his co-defendant, Latique Kareem Bracey, guilty of the burglary of Tiffany Calvin's house and assault on Artemis Bryant on April 9, 2016. Bracey and Tiffany Calvin dated on and off again between 2011 and February of 2016. (Tr. p. 118, lines 6-24). On the evening of April 9, 2016, Artemis Bryant visited his former co-worker, Tiffany Calvin, at her house. (Tr. p. 73, line 14 – p. 74, 75). At some point Bryant heard yelling outside and banging on the door. (Tr. p. 78, lines 19-21). Bryant testified, "I gave her her phone and then we discussed, like, what, what, what do we do now. And then she was, like, I think, I think I know him. So, I mean, we should talk to him. You know, like, just open the door and just, like, talk to him, try to calm him down. And so I had a bad feeling, so I took my wallet and I tucked it in the couch and . . ." (Tr. p. 80, lines 18-24). Bryant testified that when he opened the door Bracey put a gun to his head, came in the house with two others and they began hitting him. (Tr. p. 81, lines 6-25). Bryant testified that Appellant was one of the three men who hit him. (Tr. p. 86, lines 7-13). Bryant testified that Bracey was the only one with a gun. (Tr. p. 110, lines 7-9). Appellant, Bracey and another co-defendant, Dominique A. Ross, were stopped by police later that night in a car driven by Bracey. (Tr. p. 204, line 20 – p. 205, 206, lines 1-9). All three were arrested.

The jury found both Bracey and Appellant guilty of burglary first degree and assault and battery by a mob third degree. The jury additionally found Bracey guilty of pointing and presenting a firearm and possession of a weapon during the commission of a violent crime. (Tr. pp. 272-273). Prior to sentencing the judge stated, "As to Mr. Marcus McFadden, I think he's

the lesser culpable. He was a tool of Mr. Bracey, but he was still a very useful tool for Mr. Bracey.” (Tr. p. 286, lines 11-13). Appellant received an aggregate sentence of twenty (20) years. Bracey received an aggregate sentence of twenty-seven (27) years. (Tr. pp. 286-287). Appellant’s only prior record was a magistrate level marijuana charge and two public “disorderlies.” (Tr. p. 280, lines 11-12).

Appellant filed a timely motion for new trial and reconsideration of sentence on September 30, 2016. The trial judge, William Jeffrey Young, retired before hearing the pending motions. (Oct. 11, 2017, Tr. p. 3, lines 10-19). The motions were heard before Judge George M. McFadden, Jr. on October 11, 2017. In denying the motion Judge McFadden stated, “I find it would be simply improper for me to go back now, not even practical, to go back and address those motions so I will respectfully deny your motions, but at the same time, clear this matter to proceed to appeal.” (Oct. 11, 2017, Tr. p. 8, lines 5-9). The judge erred.

The judge’s finding that it would be improper for him to consider the motion to reconsider sentence in the present case is similar to the judge’s finding in State v. Smith, 276 S.C. 494, 497, 280 S.E.2d 200, 201 (1981), where the judge stated “I recognize that the sentence is severe. It has been dealt with severely. The solicitor does not want the sentence changed. The attorney general does not want the sentence changed and under those circumstances, I cannot change the sentence so the motion for a resentence is denied.” In Smith the Court found that the judge erred writing:

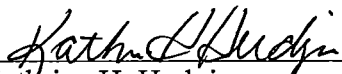
It is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. We call to the attention of the bench and bar that the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised. Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d

484 (1972); State Highway Commission v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

276 S.C. at 498, 280 S.E.2d at 202. As in Smith the judge hearing the motion to reconsider sentence in the present case did not exercise any discretion but based his ruling on an erroneous view of the law which constitutes an abuse of discretion.

CONCLUSION

Based on the above argument, this Court should remand the case to the trial court for reconsideration of the sentence.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2018.

STATE OF SOUTH CAROLINA
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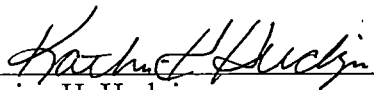
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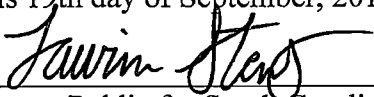
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Marcus C. McFadden, #369866, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 19th day of September, 2018.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of September, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.