STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2017-001070

THE STATE, ...RESPONDENT

v.

BOYCE DEREK LOWRANCE, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

Constitutions and Statutes:

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) (R. p.7 –p.8). 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. (R. p. 53- p.55).

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. (R. p.33 -p.39). 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. (R.p.41-p.51). 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. (R.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." (R.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. (R.p.33 -p.40).

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. (R. p.41-p.46). 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 be the grounds to set aside the sentence. So it's first, double jeopardy. It's absolutely prohibited. It's - -.

(R.p.46, lines 8-16). Judge Verdin found she had absolute jurisdiction to reconsider any sentence within the term of court in which she sentenced somebody, noted the objection, and proceeded to reconsider the sentence. The State then summarized the contents of the jail phone calls, including Appellant's attempts to contact the victim through his mother. Counsel repeated his contention that any action by the court to reconsider Appellant's sentence would violate double jeopardy. Co-counsel then alleged Appellant is bipolar and claimed he had not been given his medication by jail personnel for seven months. 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 (R.p.47-p.51).

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), *cert. denied,* ___ U.S. ___, 133 S. Ct. 2779 (2013); *State v. Wilson,* 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. *Wilson,* 345 S.C. at 6, 545 S.E.2d at 829.

ARGUMENT

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 because it is not supported by any authority. In any event, the plea court's actions did not violate double jeopardy because Appellant was not twice put in jeopardy of life, limb, or liberty for the same offense. 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, the argument is not preserved for appellate review because it was neither raised to nor ruled upon by the plea court.

Appellant argues the plea court "erred in re-sentencing [him] with a more onerous sentence based on conduct that occurred after his original sentence as this sentence violated the double jeopardy clauses of the United States Constitution and the South Carolina Constitution. (Brief of Appellant, p.3). The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds.

First, Appellant's argument should be deemed abandoned on appeal because it is conclusory. *See State v. Howard*, 384 S.C. 212, 217-18, 682 S.E.2d 42, 45 (2009) (finding "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377-78 (Ct. App. 2011) (finding an issue is deemed abandoned on appeal where appellate counsel made a "two sentence conclusory argument with citation to only *Brady* and no analysis whatsoever as to why or how *Brady* applies"). In his brief, Appellant argues the plea court committed a double jeopardy violation because it gave him a more onerous sentence based on conduct that occurred after his original sentence. He then acknowledges Appellant "objected on grounds of double jeopardy" at the plea proceeding, Appellant, however, fails to cite authority on double jeopardy in support of this argument, and he provides no analysis as to why or how the double jeopardy

clauses would be implicated by the trial court's actions. Thus, Appellant's challenge to reconsideration of his sentence on double jeopardy grounds has effectively been abandoned.

Second, even if this Court determines Appellant's double jeopardy argument has not been abandoned, the actions of the plea court did not violate double jeopardy because: (1) the plea court did not increase the sentence originally imposed where it merely amended the location where Appellant was required to serve his term or imprisonment; and (2) Appellant had no legitimate expectation of finality in his original sentence where the amendment took place during the same term of court. The United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. *See* U.S. Const. amend. V ("No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). This guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense after an improvidently granted mistrial. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *State v. Kirby*, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977); *State v. Cuccia*, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003). Presumably, it is the guarantee against multiple punishments that Appellant believes is involved in this case. However, nothing in the double jeopardy principle or in the policies upon which the prohibition rests bars a modification of the sentence as long as the duration of the original sentence has not increased. *See, e.g., White v. State*, 576 A.2d 1322, 1328 (Del. 1990) ("After a related sentence has been vacated on appeal, a trial judge may resentence a defendant up to the combined duration of the original sentences without violating

the constitutional prohibition against double jeopardy."); *State v. Bowen*, 540 A.2d 218, 225 (N.J. Sup. Ct. 1988) ("In sum, we perceive nothing in the double jeopardy principle or in the policies upon which the prohibition rests barring the Resentencing Panel under the circumstances present here from increasing one or more of the sentences originally imposed as long as the aggregate period of incarceration is not thereby increased."). Here, the plea court first sentenced Appellant to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment followed by two (2) years' probation. Following the State's timely motion to reconsider, the plea court resentenced Appellant to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment followed by two (2) years' probation. The only difference between the two sentences was the location where Appellant would serve his three years of imprisonment. The Home Detention Act provides in part that: "Notwithstanding another provision of law which requires mandatory incarceration, electronic and nonelectronic home detention programs may be used as an alternative to incarceration." S.C. Code Ann. § 24-13-1530. "'Home detention'" means the confinement of a person convicted or charged with a crime to his place of residence under the terms and conditions established by the department." S.C. Code Ann. § 24-13-1520. Because the plea judge did not increase the duration of Appellant's term of imprisonment, no double jeopardy violation could have occurred.

Furthermore, even if the change in location could be considered an increase in punishment, that increase still did not violate double jeopardy. Appellant had no expectation of finality in the original sentence because the resentencing/amendment took place during the same term of court. *See United States v. DiFrancesco*, 449 U.S. 117, 138-39 (1980) (holding that the Government's taking of a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive the defendant of the benefit of a more

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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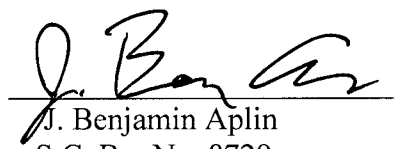
BY: 
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Columbia, South Carolina
October 11, 2018

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CERTIFICATE OF COUNSEL

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

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