

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
W. Jeffrey Young, Circuit Court Judge (Trial)
George M. McFaddin, Jr., Circuit Court Judge (Post-Trial)

Appellate Case No. 2017-002175

THE STATE,RESPONDENT

v.

MARCUS C. MCFADDEN,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's argument that the trial court abused its discretion by failing to exercise any discretion when it denied his motion to reconsider his sentence is not preserved for appellate review where: (1) the argument was neither raised to nor ruled upon by the trial court and (2) the underlying motion to reconsider was abandoned by Appellant prior to the denial. Furthermore, whether the trial court exercised appropriate discretion when it found the grant of the motion would be "improper" under the factual and procedural circumstances of Appellant's case?

STATEMENT OF THE CASE

Marcus C. McFadden (Appellant) and two codefendants, Latique Kareem Bracey and Dominique A. Ross, were indicted at the September 2016 term of the grand jury for Sumter County for first-degree burglary and third-degree assault and battery by a mob (2018-GS-43-880: Counts One and Two).¹ Appellant was represented by Michael M. Jordan, Esquire. Respondent (the State) was represented by Assistant Solicitor John P. Meadors of the Third Circuit Solicitor's Office. On September 20-21, 2016, Appellant and Bracey proceeded to a joint trial by jury and they were convicted as indicted. Appellant was sentenced by the Honorable W. Jeffrey Young to twenty (20) years' imprisonment for first-degree burglary and one (1) year's concurrent imprisonment for third-degree assault and battery by a mob. (Tr.p.285-p.287; Indictment & Sentencing Sheets).

Appellant timely served and filed a motion for a new trial and reconsideration of sentence with the trial court; however, on June 29, 2017, he served a notice of intent to appeal his conviction and sentence with this Court before the pending post-trial motion was heard. The Notice of Appeal was filed with this Court on July 3, 2017, and stated in part: "A timely motion for New Trial and Reconsideration of Sentence was filed on September 30, 2016. No hearing has been held on such Motion as of this date and *Appellant now withdraws such Motion in favor of pursuing this appeal.*" (Notice of Appeal filed July 3, 2017) (emphasis added).² In an order filed July 7, 2017, this Court dismissed the initial appeal without prejudice because Appellant's motion for a new trial was still pending. (Order filed July 7, 2017). The remittitur was sent down on August 8, 2017. (Remittitur).

¹ Bracey was also indicted for pointing and presenting a firearm and possession of a weapon during the commission of a violent crime (2016-GS-43-890: Counts Three & Four).

² The initial notice of appeal incorrectly lists Appellant's middle initial as "M" rather than "C," as did the notice of appeal filed in the current appeal now before this Court.

On October 11, 2017, the matter of the pending post-trial motion was reconvened before the circuit court, with the Honorable George M. McFaddin, Jr., presiding because Judge Young had retired from the judiciary and was no longer available. Respondent was again represented by Mr. Jordan and the State was again represented by Assistant Solicitor Meadors. After briefly hearing from the parties, Judge McFaddin orally denied the motion for a new trial and the motion to reconsider the sentence. (October 11, 2017, Tr.p.8). No written order followed. Appellant timely filed a notice of intent to appeal his conviction, sentence, and denial of his post-trial motions, and he has submitted a brief in support of his appeal. This Brief of Respondent now follows.

STATEMENT OF FACTS

As described by the solicitor in his opening statement, on the evening of April 8, 2016, Artemis Bryant and Tiffany Calvin were eating pizza and watching movies at Calvin's residence. In the early morning hours of April 9, 2016, at around 12:30 a.m., they suddenly heard someone at the door yelling that he was going to shoot the door down. When Bryant and Calvin got up to see what was going on, Appellant, Calvin's ex-boyfriend Bracey, and Ross forced their way into the residence and started hitting Bryant about his face and body. Bracey pointed a gun at Bryant and threatened to kill him if he didn't leave. He also slapped at Calvin and told her "bitch, you better leave." During the tussle, Bryant made it outside to a car and ultimately drove himself to the hospital to get treatment for his injuries. A gunshot was fired as the intruders were fleeing the house. Appellant, Bracey, and Ross were later identified as the burglars and were charged. (Tr.p.49-p.59).

Following jury qualification and jury selection, the trial court addressed pretrial motions before the jury was sworn, including Appellant's motion for severance. (Tr.p.1-p.41). The trial judge gave brief preliminary instructions and the parties made opening statements. (Tr.p.41-

p.69). The State then called five witnesses, including Bryant (Tr.p.70-p.116); Calvin (Tr.p.116-p.163); Calvin's sister, Monique Francis (Tr.p.164-p.176); Calvin's father, Johnny Kinlaw (Tr.p.176-p.194); and Officer Rodney McFadden (Tr.p.194-p.213). After the State rested, Appellant and Bracey made motions for directed verdicts and those motions were denied. (Tr.p.213-p.216). Appellant and Bracey each elected not to testify or offer any evidence in defense and the parties proceeded to closing arguments. (Tr.p.216-p.253). The trial court charged the jury on the law and following deliberations the jury found Appellant and Bracey guilty as charged. (Tr.p.253-p.275). After hearing facts in aggravation and mitigation, the trial court sentenced Appellant as described above. (Tr.p.275-p.287).

Post-Trial Motion

As explained in the procedural history above, after his conviction and sentence Appellant timely served and filed a post-trial motion for a new trial and reconsideration of sentence; however, he subsequently served a notice of intent to appeal his conviction and sentence before the pending post-trial motion was heard. The Notice of Appeal was filed with this Court on July 3, 2017, and stated in part: "A timely motion for New Trial and Reconsideration of Sentence was filed on September 30, 2016. No hearing has been held on such Motion as of this date and *Appellant now withdraws such Motion in favor of pursuing this appeal.*" (Notice of Appeal filed July 3, 2017 (emphasis added). In an order filed July 7, 2017, this Court dismissed the initial appeal without prejudice because Appellant's motion for a new trial was still pending. (Order filed July 7, 2017). The remittitur was sent down on August 8, 2017. (Remittitur).

On October 11, 2017, a hearing on the post-trial motion was convened before the Honorable George M. McFaddin, Jr. At the start of the hearing, the solicitor gave a brief procedural history of the case. (October 11, 2017, Tr.p.3, lines 1-20). Next, Mr. Jordan

explained that in filing the initial appeal, Appellant's intent was to "abandon[] the grounds for the motion for reconsideration of sentencing and motion for new trial." (October 11, 2017, Tr.p.3, line 21-p.4, line 2). He noted, however, that this Court found there was no appellate jurisdiction until the post-trial motion had been resolved, and therefore he was not able to directly abandon the motion on appeal. Mr. Jordan said he instead began working with Appellate Defense "to get some disposition on the motion." Appellant explained his grounds for the new trial were the same as the grounds for severance, which he argued at trial, and noted Appellant was really only now appearing before the lower court "so that [he] can have full appeal rights and prosecution of his appeal." (October 11, 2017, Tr.p.3-p.5). The parties explained the arguments they made to the trial court prior to Judge Young denying Appellant's request for a severance as they related to his post-trial motion for a new trial. They did not, however, provide any explanations or make any arguments in regard to reconsideration of the sentence. (October 11, 2017, Tr.p.5-p.7). Indeed, Appellant did not appear to pursue modification or reduction of the sentence. Ultimately, Judge McFaddin ruled as follows:

THE COURT: All right, sir. Mr. Jordan, I, as we well know, did not try this case. I would assume motions were made for severance, so forth, back then. Would that be correct.

MR. JORDAN: That's correct, Your Honor.

THE COURT: That means that Judge Young considered them. That means they have been considered by the Court and were considered by the Court. It's virtually impossible for me to reach back and stand in his shoes when I didn't hear those motions, nor was I present then. Judge Young had been on the Bench, I would assume then for a good number of years in general sessions. 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.

(Tr.p.7, line 17-p.8, line 9).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); *State v. Lynch*, 375 S.C. 628, 632, 654 S.E.2d 292, 294 (Ct. App. 2007). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, 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 (emphasis added); *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

ARGUMENT

Appellant's argument that the trial court abused its discretion by failing to exercise any discretion when it denied his motion to reconsider his sentence is not preserved for appellate review because: (1) the argument was neither raised to nor ruled upon by the trial court and (2) the underlying motion to reconsider was abandoned by Appellant prior to the denial. Furthermore, the trial court exercised appropriate discretion when it found the grant of the motion would be "improper" under the factual and procedural circumstances of Appellant's case.

Appellant argues Judge McFaddin abused his discretion in denying the motion to reconsider his sentence because the denial was based on "an erroneous view of the law." He contends Judge McFaddin concluded it was improper for him to address the motion simply because he did not preside over trial and, as a result, Judge McFaddin "did not exercise any discretion" in denying the motion, which itself constitutes an abuse of discretion. (Brief of Appellant, p.4-p.6). The State disagrees and submits Appellant's argument should be denied and dismissed for several reasons.

First, this argument is not preserved for review because it was not made to Judge McFaddin at the post-trial hearing. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Indeed, the appellate court will not consider any issues that were not presented to or passed upon by the trial court. *State v. Fleming*, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). Here, Appellant did not object to or otherwise challenge Judge McFaddin when he articulated the basis of his ruling denying the motion to reconsider. He did not argue Judge McFaddin was taking "an erroneous view of the law" or that the court "did not exercise any discretion" in denying the motion. Appellant also did not request or move the lower court for a more specific ruling in regard to denying his motion to reconsider, likely because, as previously articulated to

this Court, he wished to abandon that motion so he could allow his direct appeal to proceed. As a result, the argument now being made on appeal is not preserved for appellate review and the appeal should be dismissed.

Second, this Court should decline to address the propriety of Judge McFaddin's denial of Appellant's motion to reconsider his sentence where that motion was effectively abandoned by Appellant. It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Indeed, failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. *Id.* Similarly, collateral estoppel, or issue preclusion, bars relitigation of the same facts or issues necessarily determined in a former proceeding. *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). While collateral estoppel typically prevents a party from relitigating an issue that was decided in a *previous action*, as an equitable doctrine it should equally prevent a party from relitigating an issue that was initially raised but then abandoned by that party in the *same action* when the party attempts to raise it anew on appeal.

Here, Appellant explicitly abandoned his motion to reconsider the sentence by stating: "Appellant now withdraws such Motion in favor of pursuing this appeal." (Notice of Appeal filed July 3, 2017). He repeated this explicit abandonment by explaining to Judge McFaddin that in filing the initial appeal, his intent was to "abandon[] the grounds for the motion for reconsideration of sentencing and motion for new trial." (October 11, 2017, Tr.p.3, line 21-p.4, line 2). Finally, Appellant implicitly abandoned his motion to reconsider his sentence by failing to advance any argument to Judge McFaddin in support of that motion. (October 11, 2017, Tr.p.5-p.7). These actions demonstrate Appellant's desire to NOT challenge the sentence of the

lower court, and his unequivocal desire to withdraw, drop, and abandon his post-trial motion to reconsider his sentence. They also should prevent him from complaining on appeal that he was improperly prevented from relitigating this abandoned issue. This Court should affirm Judge McFaddin's ruling on procedural grounds.

Finally, even if this Court determines the issue is preserved for appellate review and has not been abandoned, it is without merit. Relying primarily on our supreme court's opinion in *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981), Appellant argues Judge McFaddin's comment that it would be "improper" for him "to go back and address those motions" is equivalent to the trial court's reversible error in *Smith*. However in *Smith*, the trial judge concluded: "I *cannot* change the sentence so the motion for a resented is denied." *Smith*, 276 S.C. at 498, 280 S.E.2d at 202. (emphasis added). The Supreme Court noted: "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." *Id.* Here, Judge McFaddin referenced Judge Young's experience and years on the bench in regard to the trial court's denial of Appellant's pretrial motion to sever and the trial court's sentence. Judge McFaddin then simply declined to go back and second guess those rulings based on the scant or nonexistent arguments made at the post-trial motion hearing. Rather than a refusal to exercise discretion or a finding that he "cannot" grant the motion to reconsider sentence, this was a discretionary decision not to grant the motions. Finding the grant of the motions "improper" under the factual and procedural circumstances of Appellant's case is not the same thing as finding the court "cannot change the sentence." While Judge McFaddin certainly could have elaborated on his discretionary decision, such elaboration was not necessary. He stated on what basis his discretion was exercised. This is all that was required. 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
November 29, 2018

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George M. McFaddin, Jr., Circuit Court Judge (Post-Trial)

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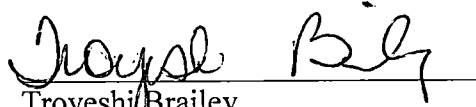
MARCUS C. MCFADDEN,APPELLANT.

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 November 29, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Kathrine H. Hudgins, Esquire
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 29th day of November, 2018.


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November 29, 2018

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Re: The State v. Marcus C. McFadden
Appellate Case No. 2017-002175

Dear Ms. Hudgins:

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/tb
Enclosures

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