

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi L. Harrington, Circuit Court Judge
Appellate Case No. 2010-153226

THE STATE

RESPONDENT,

v.

JEFFREY HERRMANN,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the judge err in refusing to instruct the jury that the testimony of an informer who provides evidence against the defendant for expected gain, the hope of reward or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness?

II. Did the judge err in refusing to reconsider the 45 year sentence imposed when, at sentencing, the Appellant failed to fully argue mitigation facts in support of a sentence of 30 years?

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court abused its discretion in denying Appellant's request for a jury instruction regarding the credibility of a jailhouse informant when such a charge was not an accurate statement of the law of South Carolina, there was no precedent warranting the charge, and the jury instruction regarding the jury's role in assessing the credibility of witnesses was an accurate statement of South Carolina law?

II. Whether the trial court abused its discretion in denying Appellant's motion to amend his sentence when the sentence given by the trial court was lawful, Appellant failed to specifically proffer the information he believed was not before the trial court at sentencing, and when the trial court was not required to hold a hearing on the motion?

STATEMENT OF THE CASE

On January 4-7, 2010, Appellant Jeffrey Herrmann ("Appellant") was tried by a jury for the murder of Ali Sarhan. Appellant was tried in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, Circuit Court Judge. Appellant was represented by Rodney D. Davis, Esquire, and Cody Groeber, Esquire, both with the Ninth Judicial Circuit Public Defenders Office. The State was represented by Assistant Solicitors Benjamin Chad Simpson and Julie Cardillo, both of the Ninth Judicial Circuit. On January 7, 2010, Appellant was convicted of murder. (Amended R. pp. 898-99). He was sentenced to confinement for a period of forty-five (45) years for the murder conviction. (Amended R. p. 913). On January 15, 2010, Appellant moved to amend his sentence. (Amended R. pp. 919-23). In an Order filed February 10, 2010, Judge Harrington denied the motion. (Amended R. p. 924). Before this Court is Appellant's direct appeal of his conviction. He requests this Court reverse his conviction and order a new trial. Appellant further requests this Court remand for a new hearing regarding Appellant's Motion to Amend Sentence. The State respectfully requests this Court deny Appellant's appeal and affirm his conviction and sentence.

STATEMENT OF FACTS

In July 2000, Appellant shot and killed the victim, Ala "Ali" Sarhan in Sarhan's car in Charleston County. The forensic pathologist determined that Sarhan died as the result of homicidal violence, possibly including head trauma, chest trauma, and possibly drowning. (Amended R. p. 702). A forensic anthropologist concluded that Sarhan was shot at or near his ear. (Amended R. pp. 669-70).

Prior Relationship between Appellant and Victim

The victim, Ala Sarhan, was an Iraqi national who was granted permission to enter the United States in 1992. (R. p. 30). Sarhan had lost his foot during the Iran/Iraq war in the late 1980s. (R. p. 32). He was granted permanent resident status. (R. p. 34). According to Theresa Freeman, one of Sarhan's friends in Charleston, Sarhan lived in an RV at a campground. (R. pp. 38-39, 42-44).

Justin Hettich, a former friend of Appellant's, testified that in 2000 he lived with Appellant and Appellant's then girlfriend, Shanna Cumbee ("Shanna"), for two to three months. (R. pp. 68-70). Hettich testified that he, Appellant, and Shanna were all using cocaine and marijuana at that time. (R. pp. 69, 74-75). Hettich indicated that Appellant got his drugs from Sarhan.¹ (R. p. 76-82). Hettich also testified about a conversation he had with Appellant while he was living with Appellant.² According to Hettich, Appellant explained that Sarhan had

¹ Hettich testified that he drove Appellant to a meet with Sarhan for a cocaine purchase some time before the murder. (R. pp. 77-81). Hettich was able to identify Sarhan in a photograph. (R. p. 81).

² During cross examination, Hettich indicated the conversation occurred sometime in September of 2000. (R. p. 97).

come to the house to get money Appellant owed for an ounce of cocaine Sarhan had provided to Appellant. (R. p. 82). Appellant told Sarhan that he had left the money at Jason Cumbee's house, which was five to ten miles away. (R. p. 82). Appellant and Sarhan went down the road towards Jason's house. During that drive, Appellant shot Sarhan in the head. (R. pp. 83, 86, 90-91). Appellant subsequently put Sarhan's body in the trunk of the car. (R. p. 121).

Hettich testified that Appellant stated he found Jason after he killed Sarhan. (R. p. 91). Appellant told Hettich that he drove the car to a boat ramp in the national forest, put the car in neutral, and let the car roll down the ramp into the water. (R. p. 92). Appellant then got in the truck with Jason, and they left. (R. p. 92).

Jason Cumbee (Jason) testified that he first met Appellant nine to ten years before the trial. (R. pp. 159-60). Jason indicated that both he and Appellant were using drugs at that time, and Jason learned that Appellant obtained his drugs from a man named Ali. (R. pp. 160-62). Jason recalled that one afternoon, he saw Appellant driving a black Chevrolet.³ (R. pp. 165-67). Jason had seen the car before on the day he met the victim. (R. p. 171, see R. pp. 161-62). Jason noted that at some point that afternoon, he followed Appellant to Appellant's home. (R. p. 170). Appellant asked Jason to look in the trunk of the car, but Jason declined. (R. pp. 170-71). Appellant indicated that he wanted to get rid of the car, and Jason suggested he put it in water. (R. p. 172). Jason testified that he and Appellant drove to a boat landing down a side road.

³ Jason noted that the photographs of the car in State's Exhibit 7 and 8 were consistent with the car he saw Appellant driving that afternoon. (R. p. 168).

Appellant drove the Chevrolet, and Jason drove a red pickup truck. Jason testified that he watched Appellant drive the car down the ramp. Appellant jumped out of the car halfway down the ramp. Appellant then got into the truck with Jason, and they both drove away from the scene. (R. pp. 173-81). Jason further testified that he assisted Appellant in getting a gun prior to that incident. (R. pp. 182-84).

Jason acknowledged that he did not tell law enforcement about the incident until eight years later. (R. p. 186). He offered the information after he was arrested for driving under suspension, third offense. (See R. pp. 187-88). Also, Jason testified that he provided law enforcement over seven different statements, and that not all of those statements were truthful. (R. pp. 193-95). Jason further indicated that he was not entirely truthful in his proffer statements or after them. (R. pp. 196-98).

Shanna Cumbee ("Shanna"), Jason's sister and Appellant's girlfriend at the time of the murder, testified that Appellant told her about the shooting sometime either at the end of 2000 or the beginning of 2001. (R. pp. 289-91, 298-301). Appellant told Shanna that the victim came to their house one afternoon. (R. p. 299). The victim picked up Appellant and made Appellant drive the victim's car. (R. p. 299). While Appellant was driving, Sarhan reached behind his back. Appellant pulled out his gun and shot Sarhan in the ear. (R. pp. 299-300).

Jeremy Casselman, who worked with Appellant in 2000, testified that Appellant had informed him about his purchase of a firearm. (R. pp. 325-26,

328). According to Casselman, Appellant obtained the gun because he owed someone money and the person to whom he owed the money was looking to collect. (R. pp. 331-32).

Melissa Rose Hollander, Appellant's girlfriend from September 2007 to end of July 2008, testified that on July 21, 2008, Appellant told her he shot and killed a man. (R. pp. 350-52). Appellant told Hollander that he had owed the victim a lot of money, and he was not able to pay. (R. p. 357). Appellant indicated it was a drug deal gone bad, and asserted that he shot the victim in self-defense. (R. pp. 357-58). Appellant told Hollander that he shot the man several times and he got rid of the evidence. (R. p. 358). Appellant further indicated the body was put in a car and pushed into a creek. (R. p. 358). Hollander believed that Appellant stated the victim's body was put in the trunk of the car. (R. p. 358). Hollander also recalled Appellant discussed going to a campground where the victim was staying, destroyed some evidence, and looked for money. (R. pp. 360-61, 376-77, 380).

Bryan Korth, a former cell mate of Appellant's, also testified that Appellant told him about the murder. (Amended R. pp. 548-53).

Police Investigation

Freeman had filed a missing persons report on or around July 19, 2000. (R. pp. 46-47, see R. p. 65). When Jason was arrested for a driving under suspension, third offense warrant, he informed the officers that arrested him that he had information about an open missing persons case. (R. pp. 185-88, see R. pp. 389-95, 403). Based upon the information provided by Jason, law

enforcement searched for a vehicle in various waterways. (R. pp. 422-45). They discovered a car with a North Carolina plate in a creek. (R. pp. 445-49). The tag number indicated the vehicle belonged to Sarhan, who at the time of the search was listed as a missing person. (R. pp. 448-49). Law enforcement personnel retrieved the vehicle from the creek. (R. pp. 449-61). A body was found in the trunk of the car. (R. pp. 473-74; Amended R. pp. 610-11). That body fit the general description of the victim in regards to the height of the victim and the missing lower leg. (See Amended R. pp. 656-57). There was evidence of an entrance wound near the victim's ear. (Amended R. pp. 666-70).

ARGUMENT

- I. The trial court did not abuse its discretion in denying Appellant's request to charge regarding informer testimony; the requested charge was not an accurate statement of South Carolina law, and would have constituted a charge on the facts. The jury instruction regarding the weighing of the credibility of witnesses was adequate, and any error would have been harmless.

Argument at Trial

At trial, the State presented the testimony of Bryan Korth, one of Appellant's former cell mates. (Amended R. pp. 538-99). Korth testified that over the course of several months, Appellant told him about the murder. (Amended R. pp. 548-53). Appellant initiated the conversations by asking for assistance in determining how to place all blame for the incident on Jason Cumbee. (Amended R. p. 548). Korth learned from Appellant that Appellant sold drugs, and his source for the drugs was Sarhan. (Amended R. pp. 549-50). Appellant indicated that people were saying he owed the victim money. (Amended R. p. 553). Appellant told Korth that he did not owe Sarhan money, but he did not want to deal with Sarhan anymore. (Amended R. p. 553). Appellant told Korth that he shot Sarhan in the head. (Amended R. p. 553).

He [Appellant] called from the pay phone across from his house, the gas station I think on seventeen and forty-five. Ali got there with his car. Picked him up. I think he said he was heading towards, that they were both heading towards Jason's house. That he told Ali, Jeff told Ali that he was going to get something from Jason's house. And as they were driving down the road he said it was a bumpy road, he pulled a gun out, shot him in the head. He said, quotes, verbatim, whatever you want to say it, imagine driving down a bumpy road and shooting someone directly through their ear and not even making a mess. Only the window broke.

(Amended R. p. 554, l 9 - 555, l 4). Appellant told Korth that he stripped Sarhan's body and placed the body in the trunk of the car. (Amended R. p. 555). Appellant then enlisted the assistance of Jason, and Appellant took the car to a boat landing. (Amended R. pp. 556-57). Korth indicated that Appellant pushed the car into the water. (Amended R. p. 557). Afterwards, Appellant and Jason went to Sarhan's camper to retrieve any evidence of a link between Appellant and Sarhan. (Amended R. pp. 559-61). Korth also noted that Appellant told him about purchasing a firearm before the shooting. (Amended R. pp. 558-59).

Korth had an extensive criminal record. (Amended R. pp. 544, 566-67). At the time of trial, Korth was facing prosecution for charges in Berkeley County. (Amended R. pp. 540-41). When he contacted the State about his knowledge in Appellant's case, he was in jail on federal charges. (Amended R. p. 570). Korth testified that he had his attorney contact the solicitor's office to see if he could get some relief in return for testimony regarding what he learned from Appellant. (Amended R. p. 545). Korth noted that he received no plea offers in response to his request. (Amended R. p. 545).

During the discussion regarding the jury charge at the end of the day January 6, 2010, Appellant indicated he wanted the judge to consider a charge on the issue of the reliability of a jailhouse snitch. (See Amended R. p. 733). Appellant subsequently submitted the following request to charge:

The testimony of an informer who provides evidence against the Defendant for expected gain, the hope of a reward or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

See Guam v. Dela Rosa, 644 F.2d 1257, 1259-60 (9th Cir. 1980);
United States v. Morgan, 555 F.2d 238, 243 n.10 (9th Cir. 1977).

(Ct. Exhibit 8, Amended R. p. 915).

Appellant contended the requested instruction was applicable and appropriate in cases when there is an informant and the primary motivation for the informant's testimony is for personal gain. (Amended R. pp. 755-56). Appellant further contended that Mr. Korth's testimony was clearly for his own personal gain; thus, the charge was appropriate in Appellant's case. (Amended R. p. 757).

In response, the trial court noted that the charge she was planning on giving to the jury "included the credibility of witness charge, the general charge, that the jury is to consider motive, bias, or any other. . ." (Amended R. p. 757, ll 9-13). Appellant noted that the instructions outlined by the court were sufficient for all of the witnesses, but the additional request to charge was warranted by the testimony of the jailhouse snitch. (Amended R. pp. 757-58).

The State contended the standard charge that the judge was planning to use "covers thoroughly the fact that any motive or bias or, or anything of that nature is a, a consideration for the jury." (Amended R. p. 758, ll 22-25). Further, the State argued Appellant could argue Mr. Korth's ulterior motives for his testimony during closing argument. Altogether, the solicitor noted,

I don't think there's any, any need in this case to tread on new legal ground and create some new exception for jailhouse snitches that has before this time never been recognized as a standard jury charge in South Carolina. Your [the trial court's] standard charge on bias and motive thoroughly covers this issue and certainly [Appellant] is welcome to point that out in his closing argument.

(Amended R. p. 759, l. 25 – 760, l. 12).

In response to the trial court's question whether Mr. Korth's testimony should be weighed with greater care than the testimony of an ordinary witness, the solicitor stated no. He further distinguished Appellant's case with the cases cited by Appellant in the request to charge. Specifically, the solicitor noted in Morgan, there was a very clear immunity grant by the prosecution in exchange for grand jury testimony. In Delarosa, there was a promise by law enforcement to the witness that the witness would not be prosecuted in exchange for its testimony. (Amended R. pp 761-62. Mr. Korth's situation did not fit within the factual parameters of those cases. (Amended R. p. 762).

Appellant conceded that the two cases cited in the request to charge were not binding on the court, but Appellant noted they were persuasive. (Amended R. p. 763). Second, Appellant disputed the State's contention that Mr. Korth's situation was not analogous to those of the witnesses in Morgan and Delarosa. Specifically, Appellant noted that the State admitted they spoke with an assistant U.S. Attorney and informed the U.S. Attorney that Mr. Korth did cooperate. (Amended R. pp. 763-64).

The trial court ultimately denied the request to charge:

Based upon my review of the cases I am declining to charge your specific request to charge. The Court is comfortable and feels that the language in the credibility of witnesses section which is the standard charge in the State covers whether or not and indicates to the jury that they may consider whether the witness has exhibited any interest, bias, prejudice, or other motive in this case.

(Amended R. p. 764, ll 7-21). The following charge on credibility was given to the jury:

Necessarily you must determine the credibility of the witnesses who have testified in this case. Credibility simply means

believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth. In determining the believability of witnesses who have testified in this case you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may also consider the appearance and manner of a witness while on the witness stand.

(Amended R. p. 875, l 23 – R. p. 877, l 5).

Standard of Review

“An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.” State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, “[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct.App.2006). “The law to be charged must be determined from the evidence presented at trial.” Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

“Generally, the trial judge is required to charge only the current and correct law of South Carolina.” State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct.App.2005). If a charge is substantially correct and covers the law

there is no need for reversal. Id. To warrant reversal, the refusal to give a requested charge must be erroneous and prejudicial to the defendant. State v. Hill, 382 S.C. 360, 368, 675 S.E.2d 764, 768 (Ct.App.2009) (citing Zeigler, supra). “Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error.” State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

Appellant was not entitled to the requested charge; the requested charge was not an accurate reflection of South Carolina law.

The trial court correctly denied the instruction regarding the credibility of jailhouse informants requested by Appellant. The requested instruction is inconsistent with South Carolina law regarding the jury’s role in weighing the credibility of witnesses.

Generally speaking, any instruction is erroneous which unduly emphasizes the right of the jury to pass upon the weight and effect of the testimony of any particular witness, whether it be the defendant, or any other witness. The jury is charged with the grave responsibility of considering and passing upon the credibility of all witnesses alike, and it would be contrary to the due administration of the law, and inimical to a fair and impartial trial, to give overprominence to any portion of the testimony.

State v. Gowan, 178 S.C. 78, 182 S.E. 159, 162 (1935). Requested jury instructions similar to the charge requested by Appellant but made in reference to different types of witnesses have previously been consistently rejected. For instance, in State v. Collins, the South Carolina Supreme Court held that a trial court properly refused to give instructions that the testimony of a co-defendant should be carefully scrutinized, and that the jury may consider whether the

witness was fearful of retribution or had any hope of leniency from the prosecution. State v. Collins, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976). The Supreme Court found that the trial court's instruction that it was the jury's duty to pass upon the credibility of the testimony of the witnesses, and that the jury could reject any part of the testimony if they found reason for doing so was adequate. Id. Further, "[a]ny further instruction on this point might have invaded the province of the jury to draw inferences from the evidence." Id. In State v. Wright, 269 S.C. 414, 417-18, 237 S.E.2d 764, 766 (1977), the Supreme Court affirmed a trial court's denial of a request for a cautionary instruction on accomplice liability. Again, the Supreme Court found the charge given by the trial court was adequate. Id.

Altogether, Respondent submits there is no South Carolina case law that supports the use of a special jury instruction regarding the credibility of informants. Appellant concedes as much in not relying upon any South Carolina cases in asserting such an instruction would have been proper. Instead, Appellant relied upon two cases from the Ninth Circuit Court of Appeals at trial, and upon both United States v. Brooks, 928 F.2d 1403 (4th Cir. 1991) and United States v. Luck, 611 F.3d 183 (4th Cir. 2010) on appeal. Federal courts "have explained that an informant instruction is necessary because a general witness credibility instruction is not sufficiently cautionary for informants because of special concerns about the incentive that they have to fabricate information for their own benefit." Luck, 611 F.3d at 187. This reasoning in federal case law is inconsistent with South Carolina law, which has consistently left the

determination of the credibility of witnesses in the province of the jury. "It is well established that a trial judge must refrain from any comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of an accused, or any fact in controversy." State v. Brisbon, 323 S.C. 324, 331, 474 S.E.2d 433, 437 (1996)(citing Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); State v. Smith, 288 S.C. 329, 342 S.E.2d 600 (1986)). Overall, Appellant fails to show that the trial court's denial of the requested jury instruction was error.

Appellant also fails to show that he was prejudiced by the trial court's decision not to give the requested instruction. First, the trial court's instructions regarding the weighing of the credibility of witnesses was substantially correct and covered applicable state law. The trial court specifically instructed the jury that it may consider "whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case." (Amended R. p. 877). Further, the trial court instructed the jury that it could be all or part of any witness' testimony, or it could reject all or part of any witness' testimony. Similar instructions have routinely been found to be adequate. See State v. Steadman, 257 S.C. 528, 542, 186 S.E.2d 712, 717 (1972) (finding no prejudicial error in not giving requested credibility instruction when judge instructed jury it was their duty to pass upon witness credibility and they could reject any part of the testimony if they found good reason for doing so); see also Wright, supra; Collins, supra. Since the trial court did not err in refusing to give the requested charge, and Appellant cannot show that he was prejudiced by the denial of the requested

charge, Appellant is not entitled to relief upon this claim. See Hill, 382 S.C. at 369, 675 S.E.2d at 769.

Finally, even if the trial court erred, Appellant cannot show that he was prejudiced because there was overwhelming evidence of guilt outside of Korth's testimony. Several other witnesses, including Jason, Shanna, Hettich, and Hollander all indicated that Appellant told them that he killed the victim. All testified to similar versions of the sequence of events as provided to them by Appellant. Their testimony was corroborated by the physical evidence, which indicated the victim was shot near the ear. Further, the victim's vehicle was found in a creek, and the victim's body was in the trunk. The vehicle was found in a creek with the keys still in the ignition. Altogether, there was more than sufficient evidence to convict Appellant even in addition to the testimony Korth provided.

As a result, this argument should be denied, and Appellant's convictions should be affirmed.

- II. The trial court did not abuse its discretion in denying the motion to amend sentence; the sentence imposed at trial was valid, and Appellant failed to proffer specific information to warrant reconsideration of the sentence in his motion to amend sentence.

The trial court did not abuse its discretion in denying the motion to amend sentence.

What Occurred Below

After Appellant was convicted, the trial judge asked if the State wanted to present any additional information before sentencing. The State declined. (Amended R. p. 907). In response to questions regarding prior convictions, the State noted that it did not have certified convictions relating to matters from Ohio. (Amended R. p. 908).

When Appellant was asked about sentencing, he (through counsel) noted that he had already served five hundred and seven days and requested credit for that time served. He further contended that a minimum thirty year sentence was sufficient punishment, especially in light of the fact he would serve the sentence day for day. (Amended R. p. 909). Appellant reminded the trial judge of Appellant's medical conditions that were referred to prior to Appellant's decision not to testify.⁴ Appellant also stated that his mother, sister, step-father, and brother were in court supporting him throughout the duration of the trial, and further noted they were a good, loving family from Charleston. (Amended R. p. 910). Appellant reminded the trial court that he was born in 1981, and at the time

⁴ Appellant indicated he had a prescription for Thorazine for anxiety. He noted that he had not been taking the medication during the trial because it made him groggy. (Amended R. pp. 727-29).

of the murder, both he and the witnesses who testified all would have been young. (Amended R. p. 910).

Appellant informed the trial judge that he worked various jobs over the years, and was working at a heating and air company just before he was arrested. (Amended R. p. 911). In terms of Appellant's criminal history, he noted that the only prior incident was the one in Ohio, and the shooting was not borne out of something from Appellant's past. (Amended R. p. 911). Appellant did not personally provide any information to the trial judge based upon the advice of counsel not to speak. (Amended R. pp. 911-12). Counsel did ask if any of Appellant's family members were willing to speak. Counsel also noted that Appellant's family was "quite emotional" regarding the verdict. In conclusion, Appellant argued that in light of his young age at the time of the incident and his age at the time of trial, a thirty year sentence was more than sufficient punishment for the murder. (Amended R. p. 912). The trial court subsequently sentenced Appellant to forty-five years confinement. (Amended R. p. 913).

On January 15, 2010, Appellant filed a Motion to Amend Sentence. (Motion, Amended R. pp. 919-23). In the motion, Appellant contended that an insufficient showing of mitigation was made after the verdict was presented by the jury. (Motion pg. 1-2, Amended R. pp. 919-20). After briefly recounting what was presented after trial, Appellant asserted as follows:

However, the Defendant's attorney now believes this presentation was insufficient. In 2000 the Defendant was only nineteen years old (19). Presently, the Defendant is twenty-eight years old (28). A photo of the Defendant (which was not presented to the Court) is attached as "Exhibit A". Furthermore, his educational, vocational and psychological histories were not fully presented to the Court.

Finally, given their emotions at the time of sentencing, none of the Defendant's family addressed the Court.

Obviously, the Court could not consider what was not presented. Therefore, in the interest of justice, the Defendant requests a hearing so that the Court may be informed, more fully, as to mitigation including allowing the family members to address the Court. The absence of a full presentation of mitigation by the Defendant's attorney increases the likelihood that an excessive sentence was imposed by the Court. This is especially pertinent when, as in this case, the Defendant's sentence would incarcerate him until he is in his seventies. For all intents and purposes, this could inadvertently result in a de facto life sentence.

(Motion at pg. 2, Amended R. p. 920). Appellant also argued that by statute, only two possible sentences were available to the court: a thirty year sentence or a life sentence. In doing so, Appellant contended the language regarding the sentencing range of S.C. Code § 16-3-20 in State v. Morgan, 367 S.C. 615, 626 S.E.2d 888 (2006), was dicta. (Motion at pg. 3-4, Amended R. p. 921-22). The trial court denied the motion by Order filed February 10, 2010. (Order, Amended R. p. 924).

Standard of Review

"[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (citing State v. Cagle, 241 N.C. 134, 84 S.E.2d 649, 653 (1954)). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct.App.2008). An

appellate court “will not disturb a sentence, provided it is within the limits permitted by law, unless the trial judge sentenced the defendant as a result of partiality, prejudice, oppression, or corrupt motive.” State v. Benning, 338 S.C. 59, 64, 524 S.E.2d 852, 856 (Ct.App.1999).

“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 when the trial court’s ruling is based on an error of law or, when *325 grounded in factual conclusions, is without evidentiary support.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The trial court did not abuse its discretion in denying Appellant’s motion to amend sentence: the sentence imposed was not unlawful, Appellant did not present any additional information in the motion to amend sentence to warrant amendment, and a hearing was not required to resolve the motion.

First, the sentence imposed by the trial court was clearly lawful. At the time of Appellant’s trial, S.C. Code Ann. § 16-3-20(A) stated “[a] person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.” Nothing in the statute disallowed a sentence between thirty years confinement and a life sentence. Further, in State v. Morgan, 367 S.C. 615, 619, 626 S.E.2d 888, 889 (2006), the South Carolina Supreme Court indicated that the sentencing range under S.C. Code Ann. §16-3-20(A) is between thirty years

and life imprisonment. Thus, Appellant's forty-five year sentence was clearly lawful under S.C. Code Ann. § 16-3-20.⁵

Second, Appellant did not specifically proffer any of the information that would support a modification of Appellant's sentence. In the Motion to Amend Sentence, Appellant he asserted that elements of his educational, vocational, and psychological history were not presented. However, Appellant did not elaborate upon what was not presented. Since Appellant did not proffer in the motion what the trial court should have considered, he cannot establish that the trial court abused its discretion in denying the motion. Respondent would note that the trial court was not required to have a hearing before ruling upon the motion. See Rule 29(a), SCCrimP (noting a post-trial motion may, in the discretion of the court, be determined on the briefs filed by the parties without oral argument). Appellant acknowledged as much in his motion. Specifically, he requested that if a hearing was not granted, any denial of the requested relief be reduced to writing. (See Motion, Amended R. pp. 923). Since Appellant did not specifically proffer a basis for the trial court to reconsider the sentence, he cannot show the trial court abused its discretion in denying the motion to amend sentence.

Respondent submits that Appellant's reliance on State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976) is misplaced. In Franklin, the appellant

⁵ Respondent would note that Appellant has not challenged the validity of the forty-five year sentence under S.C. Code Ann. § 16-3-20(A) on appeal. Thus, any challenge to the validity of the sentence imposed at trial is abandoned on appeal. See Gold Kist, Inc. v. Citizens & S. Nat. Bank of S. Carolina, 286 S.C. 272, 276 n.1, 333 S.E.2d 67, 70 n.1 (Ct. App. 1985).

contended the trial court erred in considering a probation report that included charges for which the appellant had not been tried and prison infractions. Id. at 245, 226 S.E.2d at 897. At the sentencing hearing, the appellant asserted the prison rule violations were dropped, and he explained a prior armed robbery conviction. Id. The Supreme Court affirmed the sentence imposed in Franklin. While the Supreme Court noted that a sentence should not be based upon false information, and a defendant should be given the opportunity to explain any discrepancy and inform the court of any alleged errors concerning the defendant's record, the Supreme Court ultimately found that the trial court did not abuse its discretion because the appellant in Franklin was provided with an opportunity to address any misapprehension the trial court may have had. Id. at 245-46, 226 S.E.2d at 897-98. The sentence was "within the limits provided by statute for the discretion of the trial court, and [was] not the result of prejudice, oppression or corrupt motive." Id. Respondent submits the same is true here. Appellant clearly had a sufficient opportunity to present the information he alleges the trial court should have considered. There is no evidence in the record that the sentence was arbitrary or the result of any improper motive. Altogether, Appellant has not shown the trial court abused its discretion in assessing its sentence. Altogether, for the reasons stated above, Appellant's contention the trial court abused its discretion in denying the motion to amend sentence should be denied.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny Appellant's appeal and affirm his conviction for the murder of Ala Sarhan.

Respectfully submitted,

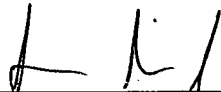
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December 10, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi L. Harrington, Circuit Court Judge
Appellate Case No. 2010-153226

THE STATE

RESPONDENT,

v.

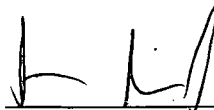
JEFFREY HERRMANN,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 10th day of December, 2012.



ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

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SC Court of Appeals

STATE OF SOUTH CAROLINA
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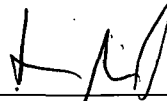
APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Kathrine H. Hudgins, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 10th day of December, 2012.



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