STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2012-213016

THE STATE, ...RESPONDENT

v.

CANDACE BEHELER, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Appellant's argument is preserved for appellate review and, to the extent it is preserved, whether the trial court properly designated Appellant's convictions for "hit and run, duties of driver involved in accident with death" as violent crimes where: (1) they were in fact violent crimes as defined in Section 16-1-60 of the South Carolina Code, thereby depriving the trial court of the authority to designate them as nonviolent; (2) the record fails to show the existence of a promise from the solicitor or a plea agreement to treat the crimes as nonviolent; (3) Appellant waived any right to seek enforcement of the alleged agreement by entering her plea under the terms described on the record; and (4) Appellant did not detrimentally rely on the alleged promise and suffered no prejudice because the crimes are "no parole offenses" as defined in Section 24-13-100 of the South Carolina Code?

STATEMENT OF THE CASE

Appellant was indicted at the June, 2012 term of the grand jury for Spartanburg County for two counts of "Traffic / hit and run with death" under Section 56-5-1210(A) of the South Carolina Code. (Indictment numbers 12-GS-42-3189 & -3190). She was represented by J. Patricia Anderson, Esquire. The State was represented by Barry Joe Barnette of the Seventh Circuit Solicitor's Office. On September 10, 2012, Appellant pled guilty as charged. She was sentenced by the Honorable Leticia H. Verdin to two concurrent terms of fifteen (15) years' imprisonment, to run consecutive to a probation revocation sentence she was serving for a prior conviction. (R.p.1; p.37, line 25-p.38, line 1; p.45). Appellant timely filed a notice of intent to appeal her conviction and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On the afternoon of May 20, 2012, Appellant was driving a van in Spartanburg County when she drove left of center, across an intersection, and collided with a motorcycle. The motorcycle driver and his passenger were ejected and sustained injuries that were ultimately fatal. After the crash, Appellant immediately jumped from the van and ran from the scene without checking on either person's injuries. She was driving under suspension at the time of the accident and was uninsured. (R.p.9, line 2-p.12, line 1; p.29, lines 9-12). Appellant was subsequently apprehended and charged with two counts of hit and run, duties of driver involved in accident with death.

On September 10, 2012, Appellant appeared before the Honorable Leticia H. Verdin to enter a guilty plea to the charges. The solicitor explained Appellant was pleading guilty to both charges as "straight up pleas" with "no recommendation." He noted that each charge carried a sentence of one to twenty-five years and that they were "no parole offenses." (R.p.4, line 9-p.5, line 7). The judge then questioned Appellant about the voluntariness of the plea. Appellant said she had discussed the charges with her attorney and was happy with what her attorney had done for her. She said she understood that each charge carries a minimum of one year in jail and up to twenty-five years and that the crimes are serious offenses, which means she could face a sentence of life without parole if she later is convicted of a third serious offense. Appellant said no one had forced her to plead guilty or promised her anything to get her to plead guilty. (R.p.5, line 9-p.7, line 14).

After hearing from the solicitor and various members of the victims' families, the following exchange took place:

> The Court: Okay. One other thing I did not go over with you, ma'am, is that that [sic] and this is a violent offense and you understand, you understand that this is a violent offense and you discussed that with your attorney?
>
> The Defendant: Yes, ma'am.
>
> The Court: You understand what a violent offense means and it means that your, uh, well I believe this is no parole
>
> Mr. Barnette: It's no parole - - -
>
> The Court: - - - eligible, is that correct?
>
> Mr. Barnette: - - - yes, ma'am.
>
> The Court: And so you're not eligible for parole on this, on these charges, you understand that? So in other words, the sentence that I give you is the sentence for all intensive [sic] purposes may be, may be off by slightly but with the sentence I give you is the sentence you serve, do you understand that?
>
> The Defendant: Yes, ma'am.
>
> The Court: Alright, I've taken the liberty of changing the sentencing sheets, they were marked as non-violent, I ch - - I've taken the liberty of changin' those to reflect they're violent offenses. Yes, ma'am.

(R.p.29, line 13-p.30, line 8) (emphasis added). Appellant did not object to or otherwise challenge the trial court's comments or decision to correct the sentencing sheets to reflect the correct designation of the offenses as violent crimes. The trial court accepted Appellant's plea and sentenced her to two concurrent terms of fifteen (15) years' imprisonment, to run consecutive to a probation revocation sentence she was serving for a prior conviction.

ARGUMENT

Appellant's argument is not preserved for appellate review and, to the extent it is preserved, the trial court properly designated Appellant's convictions for "hit and run, duties of driver involved in accident with death" as violent crimes where: (1) they were in fact violent crimes as defined in Section 16-1-60 of the South Carolina Code, thereby depriving the trial court of the authority to designate them as nonviolent; (2) the record fails to show the existence of a promise from the solicitor or a plea agreement to treat the crimes as nonviolent; (3) Appellant waived any right to seek enforcement of the alleged agreement by entering her plea under the terms described on the record; and (4) Appellant did not detrimentally rely on the alleged promise and suffered no prejudice because the crimes are "no parole offenses" as defined in Section 24-13-100 of the South Carolina Code.

Appellant argues the trial court erred in treating her hit and run charges as violent offenses because the solicitor had entered into an agreement to treat them as nonviolent offenses and Appellant relied on that agreement in pleading guilty as charged. The State disagrees and submits Appellant's argument should be dismissed on several grounds.

Initially, the State submits Appellant's argument is not preserved for appellate review because it was neither raised to nor ruled upon by the trial judge. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements to 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, ___, 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."). By failing to object to or otherwise challenge the trial court's decision to correct the sentencing sheets to reflect Appellant's offenses as violent crimes, Appellant failed to raise this argument to the trial court, and failed to

secure a ruling on her claim. Thus, the argument is not preserved for appellate review. Brown, supra; Policao, supra. In any event, the State submits Appellant's argument is without merit.

First, the State submits the trial court properly recognized Appellant was entering a plea to two violent crimes. "For purposes of definition under South Carolina law, a violent crime includes the offenses of: . . . Hit and run resulting in death (Section 56-5-1210(A)(3)) . . . ." S.C. Code Ann. § 16-1-60 (Supp. 2012). "[A] nonviolent crime [includes] all offenses not specifically enumerated in Section 16-1-60. S.C. Code Ann. § 16-1-70 (2003 & Supp. 2012). "Hit and run resulting in death" was added to Section 16-1-60 on June 2, 2010, as part of the "Omnibus Crime Reduction and Sentencing Reform Act" of 2010. Thus, Appellant's crimes were defined as violent both on the offense date and the sentencing date, and the trial judge committed no error in marking the sentencing sheets accordingly. To the contrary, it would have been error for the trial court to designate Appellant's offenses as nonviolent because the language of the relevant statutes is plain and unambiguous in classifying the hit and run convictions as violent crimes. See State v. Jacobs, 393 S.C. 584, 587-89, 713 S.E.2d 621, 622-24 (2011) (holding the trial court lacked the authority to suspend a criminal sentence for first degree burglary in favor of probation where the statute provided a sentence of "not less than fifteen years").

Second, the State submits Appellant has failed to carry her burden of proving the existence of a promise from the solicitor or any plea agreement. Where a guilty plea rests on a promise or agreement which can be said to be part of the inducement or consideration, then the agreement must be fulfilled. Santobello v. New York, 404 U.S. 257, 262 (1971); State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994).

However, neither the State nor the defendant will be able to enforce plea agreement terms which do not appear on the record before the trial judge who accepts the plea. Thrift, 312 S.C. at 296, 440 S.E.2d at 349.

Appellant claims "the solicitor promised that Appellant's hit and run offenses charged would be treated [as] non-violent offenses;" however, the record simply does not support this claim. Although the sentencing sheets were initially marked "nonviolent," nothing suggests this marking was based on a promise from the solicitor or constituted anything more than a scrivener's error or mistake. Indeed, the transcript reveals Appellant entered a "straight up plea" with "no recommendation," and that no one had promised her anything to get her to plead guilty. (R.p.4, lines 15-21; p.6, lines 11-15). In her brief, Appellant quotes trial counsel's "explanation showing an issue that can be reviewed on appeal," (Initial Brief of Appellant p.6); however, that explanation likewise fails to show the existence of a promise from the solicitor or a plea agreement.[1] Instead, it simply demonstrates counsel's failure to independently research whether the charged offenses were violent or nonviolent. Because the specific terms of the alleged plea agreement do not appear on the record, review of that agreement on direct appeal is limited. See Sprouse v. State, 355 S.C. 335, 339, 585 S.E.2d 278, 280 (2003) (discussing Thrift).

Third, to the extent this Court finds the record sufficiently establishes a promise from the solicitor and a plea agreement with Appellant, the State submits Appellant

[1] The State notes that trial counsel's written comments appear to have been submitted directly to this Court, after Appellant filed a notice of appeal, in response to a request for a written explanation showing that there is an issue for appeal. Thus, the "explanation" was not before the trial court, should not be referenced in Appellant's brief, and should not be designated for inclusion in the record on appeal. Consequently, the State hereby asks this Court to strike item number four from Appellant's designation of matter and to strike any reference to trial counsel's "explanation" from Appellant's brief.

waived any right to enforce that agreement when she: (1) said she understood her crimes were violent offenses and had discussed this with her attorney (R.p.29, lines 13-17); (2) said she understood that the sentence given by the trial judge would be the sentence she would have to serve (R.p.30, lines 1-3); and (3) failed to object when the judge corrected the sentencing sheets to reflect the offenses as violent. (R.p.30, lines 5-8). This is particularly true where, as noted above, the trial judge had no authority to issue the sentence agreed upon. Jacobs, supra. Indeed, this absence of authority is what distinguishes Appellant's case from the cases she attempts to rely upon for support.

In Thompson, the solicitor promised not to make any specific recommendation for a particular number of years and then recommended the maximum sentence during the plea. Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 296 (2000). In Custodio, the solicitor promised a fifteen-year cap and then failed to honor the agreement. Custodio v. State, 373 S.C. 4, 7, 644 S.E.2d 36, 37 (2007). In Sprouse, the solicitor agreed to classify Sprouse's second-degree burglary sentences as nonviolent but then classified them as violent during the plea proceeding. Sprouse, 355 S.C. at 337, 585 S.E.2d at 279. In each of these cases, the promise from the solicitor involved some aspect of the sentence that was within the sentencing court's authority and discretion.[2] In the instant case, Appellant alleges a promise from the solicitor for a wholly unauthorized sentence without providing authority that would support specific enforcement of such an agreement. The State submits this is likely because a trial judge would never permit an

[2] At first blush Appellant's claim about the solicitor's promise for nonviolent sentences appears to match the promise in Custodio, but it does not. Second degree burglary is unusual because it carries both a violent and a nonviolent version for purposes of sentencing. S.C. Code Ann. § 16-1-60 & 16-11-312 (2003 & Supp. 2012). By comparison, hit and run resulting in death is always a violent crime.

unauthorized sentence if all aspects of a plea agreement for that sentence were actually disclosed to the trial court as mandated by Thift.[3]

Finally, the State submits that even if this Court finds the solicitor made a promise to classify Appellant's convictions as nonviolent in exchange for her plea, Appellant suffered no prejudice because she has failed to prove she detrimentally relied on that promise in entering the plea. Custodio, 373 S.C. at 10, 644 S.E.2d at 39; Reed v. Becka, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999). Appellant argues that treating her convictions as violent crimes "changed the character of her criminal record and increased her sentencing time;" however, she appears to confuse classification for a violent crime with classification for a no parole offense. See S.C. Code Ann. § 24-13-100 (2007 & Supp. 2012) (defining a "no parole offense" under South Carolina law). At the plea proceedings, there was never any question that Appellant was entering a plea to no parole offenses, which the trial judge explained would result in Appellant being required to serve whatever sentence was imposed. (R.p.5, lines 2-7; p.29, line 18-p.30, line 3). A person sentenced to a no parole offense is "not eligible for early release, discharge, or community supervision" and must serve "at least eighty-five percent of the term of imprisonment imposed." S.C. Code Ann. § 24-13-150 (2007 & Supp. 2012). By comparison, a person sentenced to a parole-eligible violent offense must serve "at least one-third" of the term of imprisonment before being considered for parole, and a person sentenced to a parole-eligible nonviolent offense must serve "at least one-fourth" of the term of imprisonment before being considered for parole. S.C. Code Ann. § 24-21-610

[3] Thrift, 312 S.C. at 295-95, 440 S.E.2d at 348-49 (underlining the requirement of disclosure to the court of all aspects of the plea agreement and holding that all plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement).

(2007 & Supp. 2012). Because classification as a no parole offense is significantly more onerous than classification as a violent crime, Appellant has failed to show any prejudice from the violent crime designation in regard to "increased sentencing time."

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
July 18, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated July 18, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Deputy Chief Appellate Defender
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I further certified that all parties required by Rule to be served have been served. This 18th, day of July, 2013.

Angela Bennett
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