STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal From Richland County
R. Knox McMahon, Circuit Court Judge

Appellate Case No: 2018-001219

THE STATE, Respondent,

vs.

SHYKIEM UNIVERSAL SMITH, Appellant.

# INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Other Authorities

## STATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse its very broad discretion in denying Appellant's motion to reconsider sentence without a hearing. Most significantly, the issue is not preserved for review on appeal.

## STATEMENT OF THE CASE

The Richland County Grand Jury indicted Appellant on charges of murder and attempted armed robbery. (True-billed Indictments; R.___). On December 11, 2017, Appellant pled guilty to voluntary manslaughter and attempted armed robbery pursuant to North Carolina v. Alford. The Honorable R. Knox McMahon heard the plea and found the plea knowingly, voluntarily, and intelligently made. Judge McMahon sentenced Appellant to twelve years on each charge, to run concurrent. On December 21, 2017, Appellant filed a Motion to Reconsider Sentence, which Judge McMahon denied on June 11, 2018. Appellant filed a timely Notice of Appeal.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Dawson, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013) (citing State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law. Id.

## ARGUMENT

### I. The trial court did not abuse its very broad discretion in denying Appellant's motion to reconsider sentence without a hearing. Most significantly, the issue is not preserved for review on appeal.

Appellant contends the trial court erred in denying his motion to reconsider his sentence without holding a hearing or allowing the parties to file a brief. Significantly, the issue is not preserved for review on appeal because Appellant never asked for a hearing or to file briefing. Also, the written filing in which he provided the explanation for the grounds of his motion to reconsider sentence was sufficient to entitle the judge to know the basis on which he was asked to rule.

**Preservation**

In this case, Appellant never asked the court to hold a hearing or to allow briefing. His motion does not request a hearing or briefing, instead it merely asks the trial court do what was done, reconsider his sentence. Even after receiving the denial, Appellant failed to request a hearing or briefing through a subsequent motion. As the South Carolina Supreme Court recently explained:

> Successive Rule 29(a) motions are generally not permitted. However, where a second Rule 29(a) motion is related to the disposition of the first Rule 29(a) motion, the trial court retains authority to hear and dispose of the subsequent motion, provided the subsequent motion is filed within ten days of the disposition of the prior post-trial motion.

State v. Pfeiffer, Op. No. 27891 (S.C. filed May 29, 2019). In this case, where Appellant would be explaining an error in the procedure utilized by the trial court, which he could not have known would occur until receipt of the denial of his motion, he certainly would be entitled and expected to file a subsequent motion to allow the trial court the opportunity to correct any error Appellant

alleges occurred. Because the trial court was never asked to hold a hearing or to allow briefing, the issue is not preserved for review on appeal. See Jean H. Toal, Amelia W. Walker & Margaret E. Baker, Appellate Practice in South Carolina 185 (3d ed. 2016) ("There are four basic requirements to preserving issues at trial for appellate review. . . . [T]he issue must have been (1) raised to and ruled upon by the [trial] court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the [trial] court with sufficient specificity.").

Additionally, Appellant has failed to provide this Court with any information regarding what he would have explained in a hearing or in subsequent briefing that was not already presented to the trial court. As a result, the issue is not properly before the Court because Appellant has failed to provide the Court with the ability to determine and consider any alleged prejudice which occurred. See State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) ( "It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been."); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402-03 (1986) ("Ordinarily, this [c]ourt will not review alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record.").

**Merits**

On the merits, Appellant contends Rule 29(a), SCRCrimP, requires the trial judge to either hold a hearing or accept "briefs" filed by the parties. He asserts because he was not asked to file a brief, the trial court should have held a hearing. However, a clear reading of the rule allows for flexibility and discretion by the Court, not a mandated process, in determining the motion.

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." Green By & Through Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161. The statute must also be read as a whole and in harmony with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

Rule 29 provides:

> Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence. . . . The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion **may**, in the discretion of the court, be determined on briefs filed by the parties without oral argument.

Rule 29(a), SCRCrimP (emphasis added).

Nothing in the language of the Rule requires the trial court to either have a hearing and allow oral argument or allow briefing. The language is written that the judge "may" request briefs. Rule 29(a) is written in a manner that allows flexibility and discretion in ruling on the motion based on whether the trial judge believes additional information is necessary or warranted, which is clearly the legislative intent behind the Rule. Accordingly, there should not be a requirement of a hearing or briefing when the trial judge, in his discretion, determines he has all the information necessary to make the requisite decision. The determination should be made on a case-by-case basis by the judge who is in the best position to determine the necessity of a hearing or brief. Cf., State v. Manning, 418 S.C. 38, 44, 791 S.E.2d 148, 151 (2016) (finding a full evidentiary hearing is not necessary in all cases regarding a determination of immunity, and instead finding a case by case "approach permit[s] the trial judge to tailor the hearing to the needs of each case, [and] it serves to save precious judicial resources in cases like this one where an extensive hearing is simply unnecessary."); State v. Wessinger, 408 S.C. 416, 420, 759 S.E.2d 405, 407 (2014) (finding "the scope and necessity of a separate evidentiary hearing" regarding whether a crime should be considered sexually violent for SVP purposes "is to be determined on a case-by-case basis.").

This case is a prime example of the benefit of a rule of flexibility. At the plea hearing, counsel for Appellant explained Appellant "actually did, in fact, the solicitor alluded to this, fully cooperated from the very beginning." (T.27; R.___). Further, he described Appellant as "prepared to testify at trial to everything that he saw and who shot and what happened" and because of his willingness he was receiving death threats. (T.30; R.___). Counsel explained the co-defendant is now serving a forty-year sentence due to Appellant's testimony. (T.31; R.__).

The trial court also knew from the plea hearing all the mitigating factors for Appellant. (T.5-7; 31-32; R.___).

The trial court, in sentencing Appellant initially, specifically took everything presented at the hearing into account in reaching his sentence. He considered the statement by the State, statement by his counsel, testimony by those present at the hearing, and the mental health report. (T.39; R.___). The trial court took into account the fact Appellant had no criminal history. (T.42; R.___). Most importantly, the court explained: "I take into account his cooperation, also his willingness to testify, the fact that he has no prior criminal record." (T.45; R.___).

Appellant then filed a motion to reconsider in which he maintained the "Court did not give sufficient consideration to [Appellant's] cooperation with the State in the prosecution of Maurice Miller." He presented no additional information, and still has presented no additional information for the court to consider. Instead, he merely argues the court did not give enough consideration to what was already presented. The trial court is in the best position to know what consideration it gave to the cooperation. He stated on the record he considered it and Appellant's willingness to testify in sentencing Appellant to 12 years. In denying the motion, he again stated he considered "all facts and circumstances and [Appellant's] file."

Accordingly, there was no need to have a hearing or to require briefing when the court already had the information in the file and presented at the hearing and was able to determine whether he previously gave proper consideration. This case demonstrates why a requirement of a hearing or briefing would only burden the court unnecessarily, and instead, Rule 29(a) should be read to allow the proper discretion and flexibility for the trial court. See State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) ("The statute must be interpreted with realistic circumstances and rationales in mind."); State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672

(1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.").

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 1, 2019

STATE OF SOUTH CAROLINA
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Appeal From Richland County
R. Knox McMahon, Circuit Court Judge

Appellate Case No: 2018-001219

THE STATE, Respondent,

vs.

SHYKIEM UNIVERSAL SMITH, Appellant.

**PROOF OF SERVICE**

I, William M. Blitch, Jr., certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 1st day of July, 2019.

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ALAN WILSON
ATTORNEY GENERAL

July 1, 2019

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Division of Appellate Defense
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RE: State v. Shykiem Universal Smith
Appellate Case Tracking No. 2018-001219

Dear Mr. Dudek:

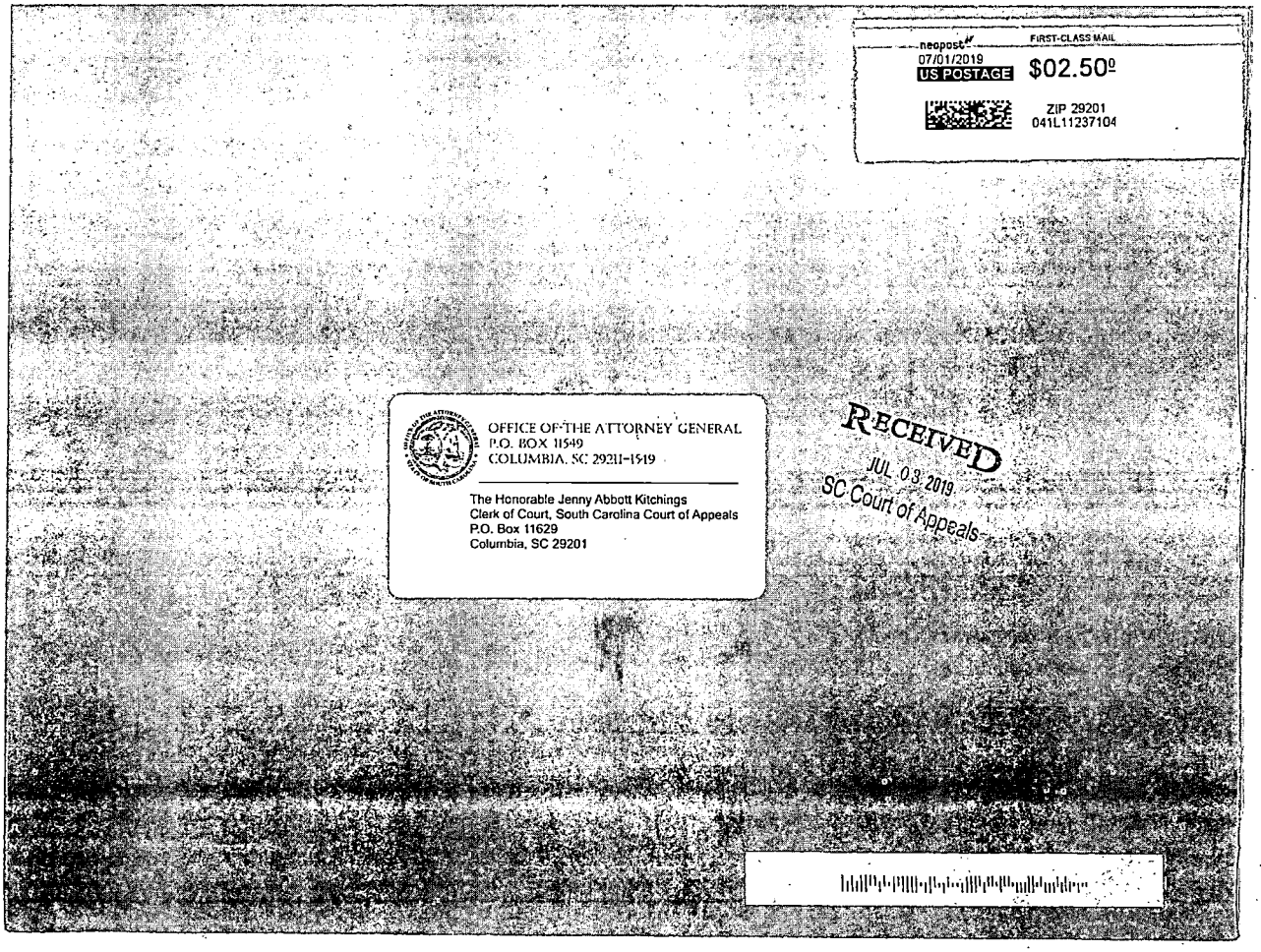
I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services



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