THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
General Sessions

Honorable Frank Addy, General Sessions Judge

State of South Carolina, Respondent,

v.

Joseph E. Swearingen, III,

Appellant.

Appellate Case No. 2019-001384

ANDERS BRIEF OF APPELLANT

Vicki Koutsogiannis
James R. Snell, Jr.
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Attorneys for the Appellant

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STATEMENT OF THE ISSUE ON APPEAL

Did the plea judge abuse his discretion in imposing the maximum sentence for the Felony DUI with Great Bodily Injury of fifteen (15) years?

STATEMENT OF THE CASE

On or about November 5, 2018, a Lexington County grand jury indicted Appellant for Felony Driving Under the Influence with Great Bodily Injury. On or about July 9, 2018, a Lexington County Grand Jury indicted Appellant for Possession of Cocaine. The state represented by Todd Wagoner, scheduled this case for a Plea Hearing before the Honorable Frank Addy on July 23, 2019. James R. Snell, Jr., and Vicki Koutsogiannis from the Law Office of James R. Snell, Jr., LLC, represented the Appellant.

The Appellant pled guilty to Felony Driving Under the Influence with Injury. Judge Addy sentenced the Appellant to fifteen (15) years along with four (4) years on probation with mandatory treatment or the Appellant would go back to SC Department of Corrections for an additional five (5) years.

At the time of Appellant's plea, he had no prior convictions for DUI. He did have a history of minor driving offenses as well as a Reckless Driving conviction from March 2018.

On August 2, 2019 the Appellant filed a Motion for Reconsideration of Sentencing. On August 12, 2019, Judge Addy filed his Order denying the Motion to Reconsider Sentencing. On August 15, 2019, Appellant filed a Notice of Appeal. This brief follows.

STANDARD OF REVIEW

The role of appellate courts in reviewing sentences is to determine: (1) whether the exercise of discretion by the sentencing court was based upon findings of fact grounded in competent, reasonably credible evidence; (2) whether the sentencing court applied the correct legal principles in exercising its discretion; and (3) whether the application of the facts to the law was such a clear error of judgment that it shocks the conscience. State v. Brouwer, 346 S.C. 375, 395, 550 S.E.2d 915 (Ct. App. 2001) (citing State v. Megargel, 143 N.J. 484, 673 A.2d 259 (1996). There is a strong public policy against interference with a trial court's sentencing discretion. *Id.*, See State v. Echols, 175 Wis.2d 653, 499 N.W.2d 631 (1993). The trial court has broad discretionary powers in imposing a sentence because it is generally in a better position than the reviewing court to determine the appropriate sentence by weighing such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id.* (citing People v. Hernandez, 319 Ill. App. 3d 520, 253 Ill.Dec. 550, 745 N.E.2d 673 (2001). Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Id.* (citing People v. Stacey, 193 Ill.2d 203, 250 Ill.Dec. 4, 737 N.E.2d 626 (2000).

ARGUMENT

The Appellant Joseph Swearingen III hereby submits this appeal of his sentence following his guilty plea wherein the Honorable Judge Frank Addy sentenced Appellant to the maximum term for Felony DUI with Great Bodily Injury. Appellant believes the maximum sentence for the Felony DUI was excessive, and appeals the sentence.

The Plea Judge relied on the State's presentation during sentencing that Appellant did not previously complete court-ordered counseling as required following a previous Reckless Driving plea. R. p. 2, p. 67, lines 17-21, p. 68, lines 1-2; p. 105, lines 17-25, p. 106, lines 1-2. However, the record during the plea was replete of any such requirement, and in fact there was no such documentation provided by the State. The disposition for the Reckless Driving conviction only showed a fine or jail time. Motion for Reconsideration, Exhibit A. Absent any report or documentation of any such requirement, the Reckless Driving conviction did not relate to any allegation of impaired driving. In the Motion for Reconsideration, Appellant's counsel noted there was no such conviction on Appellant's record for impaired driving and relied on South Carolina Code § 17-22-910 (regarding the destruction of criminal records). Appellant believes reliance on the prosecutor's own assertion of such a requirement was error, noting that this was not the same prosecutor who previously handled Appellant's Reckless Driving conviction and lacked personal knowledge of any such terms which were absent from the record.

The judge abused his discretion in sentencing Appellant to the maximum possible sentence of fifteen (15) years for the underlying offense of Felony DUI with Great Bodily Injury. See South Carolina Code § 56-5-2945. Appellant accepted responsibility for his actions by agreeing to plead guilty in lieu of contesting the charge and extending the case into trial. Further, Appellant underwent a psychological evaluation by Dr. Selman Watson, who holds a Ph.D.in Psychology.

Dr. Watson opined that the Appellant drug use had been "severe," and that drug use began when Appellant was as young as the 7th or 8th grade, well over 10 years. R. p. 17. Appellant's addiction was clearly distinguishable from other recreational users, due to the severity of his addiction. *Id.* Appellant believes that while this would not have excused his offending conduct, that it is mitigating evidence which was presented during the plea but was ignored by the court (as presented by Appellant's mother). R. p. 98, lines 10-25, p. 99, lines 1-11.

By comparison for other Felony DUI with Great Bodily Injury offenses, for example in Anderson County, a defendant received an of 8 year sentence where the defendant was also charged with Failure to Stop for Blue Light. In Lexington County, a defendant previously received a 7 year sentence for a Felony DUI with Death in 2018. (That case involved a blood alcohol concentration of 0.20 percent. As noted, Appellant's case here did not involve any alcohol consumption and was based solely on other narcotics.) Also in Lexington County, in 2017, a defendant received a 10 year sentence in a Felony DUI with Death (blood alcohol concentration in that case was 0.12). The trend for guilty pleas in these cases, including those which involved death of a victim, has consistently shown that defendants do not receive the maximum sentence upon having accepted responsibility. To impose the maximum sentence effectively renders the acceptance of responsibility meaningless in any case. While the sentencing guidelines are only applicable in federal court, it is noteworthy that the guidelines offer an automatic reduction of the mandatory sentence for offenses by virtue of a defendant's willingness to plead guilty, thereby accepting responsibility. The Plea Judge himself acknowledged his longstanding hesitation in imposing a maximum sentence where a defendant accepts responsibility and pleads guilty, thereby relieving the state and its resources from the burden of proof at trial. R. p. 1-2.

The plea may obtain for the defendant not only the possibility or certainty of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury. State v. Brouwer, 346 S.C. 375, 391-91, 550 S.E.2d 915 (Ct. App. 2001) (citing Corbitt v. New Jersey, 439 U.S. 212, 219-20, 99 S.Ct. 492, 497-98, 58 L.Ed.2d 466, 474-75 (1978).

For those who plead guilty, that fact itself is a constitutionally permissible consideration in sentencing, a consideration that is not present when one is found guilty by a jury. Brouwer, 346 S.C. at 391 (citing Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). The defendant who opts to go to trial rather than negotiating a plea runs the risk of a harsher sentence than he would have received by pleading guilty. Brouwer, 346 S.C. at 391-92 (citing United States v. Quejada-Zurique, 708 F.2d 857 (1st Cir.).

A trial judge is allowed broad discretion in sentencing within statutory limits. Brouwer, 346 S.C. at 394 (citing Brooks v. State, 325 S.C. 269, 481 S.E.2d 712 (1997). A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant. Brouwer, 346 S.C. at 394 (citing Brooks, 325 S.C. at 272, 481 S.E.2d at 713). Absent partiality, prejudice, oppression, or corrupt motive, this Court lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute. *Id.* (citing Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977). See also Garrett, 320 S.C. at 356, 465 S.E.2d at 350 ("'It is well settled in this State that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction, Article I, Sec. 19, against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive.'"); State v. Bolin, 209

S.C. 108, 39 S.E.2d 197 (1946) (length of prison sentence rests in sound discretion of trial court unless partiality, prejudice, oppression or corrupt motive is shown).

Additionally, the Court noted in its Order Denying Defendant's Motion for Reconsideration that Appellant appeared "less than fully alert" at times during the plea. R. p. 3. If there were any concerns over the Appellant's demeanor during the plea which may have been apparent to the presiding judge, this could have been raised *sua sponte* so the appropriate record created.

CONCLUSION

Appellant believes his guilty plea sentence was excessive and an abuse of discretion by the court. Appellant asks for a reversal of the sentence and for the case to be remanded back to the circuit court.

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March 31, 2020
Lexington, South Carolina

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v.

Joseph E. Swearingen, III,

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Appellate Case No. 2019-001384

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph E. Swearingen, III states:

1. She is a Private Attorney for the Law Office of James R. Snell, Jr., LLC and filed the Notice of Appeal to preserve the right of the Appellant.
2. She has reviewed the record of the Appellant's Plea Hearing before Judge Frank Addy, which was held on July 23, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a resentencing of the Appellant nor a reopening of the case.
3. She has, pursuant to Anders vs. California, 386 U.S. 738, 84 S.Ct. 1396 (1967), briefed an arguable issue which arose during the Denial of the Appellants Motion for Reconsideration of Sentence.

WHEREFORE, she asks the Court to relieve her and Attorney James R. Snell, Jr. as counsel for Joseph E. Swearingen, III.

Respectfully submitted,

Vicki Koutsogiannis
James R. Snell, Jr.
LAW OFFICE OF JAMES R. SNELL, JR., LLC
Attorneys for the Appellant

This 31st day of March, 2020

CERTIFICATE OF COUNSEL

The undersigned certified that to the best of my ability this Anders Brief of the Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 31st day of March, 2020

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SC Court of Appeals

March 31, 2020

The Honorable V. Claire Allen
Deputy Clerk of SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: State of South Carolina vs. Joseph Swearingen, III
Appellate Case No.: 2019-001384

Dear Ms. Allen,

Please find enclosed an original Final Anders Brief and Record on Appeal regarding the above-referenced matter. Also included is the Petition to be relieved as Counsel. Please also find an original and one copy of the Certificate of Service. We ask that the copy of the Certificate of Service be clocked with the court and returned back to our office using the pre-stamped, pre-addressed envelope provided. Should you have any questions regarding this, please inform our office. We greatly appreciate your assistance with this matter.

Sincerely,

Caitlyn Lovette
Office Manager

cc: William M. Blitch, Jr., Esq.
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