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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

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JAMES WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001608

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# BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the plea judge err in denying Appellant the right to allocution in a serious felony case where the judge specifically assured Appellant that he would be afforded an opportunity to address the court prior to sentencing but then sentenced Appellant without allowing him the opportunity to speak on his own behalf?

## STATEMENT OF THE CASE

On June 20, 2017, Appellant waived presentment of the indictments to the grand jury and appeared before the Honorable Grace Knie to enter a guilty plea[1] to assault and battery of a high and aggravated nature, armed robbery, and possession of a weapon during the commission of a violent crime. Stephen Story represented Appellant. The state was represented by Casey Rankin. App. 1-3.

Judge Knie sentenced Appellant to twenty years imprisonment for assault and battery of a high and aggravated nature, twenty-five years imprisonment for armed robbery, and five years imprisonment for possession of a weapon during the commission of a violent crime, all to run concurrently. App. 19-20. Appellant filed an application for post-conviction relief on May 14, 2018. App. 24-31. The state filed a return dated September 7, 2018. App. 32-41. On January 17, 2019, PCR Counsel Art Aiken filed an amended PCR application alleging that counsel was ineffective for failing to object when Appellant was denied his right to allocution and for failing to consult with Appellant about his direct appeal rights.

An evidentiary hearing was convened before the Honorable Walton J. McLeod, IV, on April 5, 2019. Appellant was represented by Art Aiken. The state was represented by Johnny James. App. 45. Judge McLeod issued an order on July 26, 2019, granting Appellant a belated appeal pursuant to White v. State[2] to allow Petitioner to "present the allocution issue on appeal" and denying Appellant's second claim. App. 81-87.

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1 At the PCR hearing it became clear that a number of charges, including a first degree burglary charge and another armed robbery charge, were dismissed pursuant to the plea agreement. App. 59, ll. 20-25; App. 69, ll. 18-21.

2 236 S.C. 110, 208 S.E.2d 35 (1974).

The state filed a motion to alter or amend, challenging the grant of the belated appeal. The PCR court issued an order denying the motion on August 16, 2019. In the order the PCR court found that the initial order had "properly and fully" addressed all of the allegations and issues raised by both parties. App. 88-93.

This brief pursuant to White v. State, *supra*, and a simultaneously filed petition for writ of certiorari, follow.

## STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

## ARGUMENT

The plea judge erred in denying Appellant the right to allocution in a serious felony case where the judge specifically assured Appellant that he would be afforded an opportunity to address the court prior to sentencing and then sentenced Appellant without allowing him the opportunity to speak on his own behalf.

***Relevant Facts***

At the beginning of Appellant's guilty plea Judge Knie addressed Appellant stating "Mr. Williams, I need to go over some questions with you before we proceed with the plea, okay? … I will give you an opportunity to address the Court at the conclusion of the plea before I issue a sentence, all right?" App. 4, ll. 9-15. Thereafter a standard plea colloquy occurred, and Appellant entered a guilty plea.

Plea counsel spoke in mitigation stating that Appellant did "pretty well" while in SCDC, obtaining his GED and staying drug free. He further stated that for a short period of time after his release Appellant "did pretty well." However, Appellant began "hanging out" with people he had met in prison and "those types of people were not good structural support" for Appellant. Counsel concluded by asking the court to give Appellant a sentence that would allow him the opportunity to "get out and make something of himself." App. 17, ll. 4-19.

Appellant was also on community supervision at the time of his guilty plea. At the conclusion of the plea the court again addressed Appellant stating, "Mr. Williams, before I give you an opportunity to address the Court, I need to also hear from probation about the community [supervision]." App. 18, ll. 7-12. After the probation agent had given his presentation Judge Knie asked counsel to approach the bench and held a side bar off of the record. App. 19, ll. 1-5. After a short recess Judge Knie retook the bench and sentenced Appellant to twenty years

imprisonment for assault and battery of a high and aggravated nature, twenty-five years imprisonment for armed robbery, and five years imprisonment for possession of a weapon during the commission of a violent crime, all to run concurrently. App. 19-20. At no time prior to sentencing was Appellant given the opportunity to address the court.

Later that same day Appellant was brought back before Judge Knie and the following exchange occurred:

> THE COURT: Mr. Williams, when you were here earlier today, sir, we took a recess for me to confer with counsel and I came back and I neglected to give you the opportunity to address the Court. If you would like to do that, I would give you that opportunity at this time. You are still under oath sir, because you were sworn earlier today.
>
> MR. WILLIAMS: Uhm, I don't have anything to say.
>
> THE COURT: Are you sure?
>
> MR. WILLIAMS: Mm-hmm. Yes, ma'am.

App. 21, ll. 1-15.

At the PCR hearing Appellant testified that when he was brought back before Judge Knie to address the court he did not say anything because he "had already been sentenced and convicted. Nothing that I would have said then would have held any weight in what I'd already been given." App. 53, ll. 2-8. Appellant then proceeded to testify that, if he had been given the opportunity to speak prior to sentencing, he would have told the court that when he was released from prison a few months prior to being arrested, he was not prepared or "rehabilitated at all." He had spent eleven years in prison, from the age of seventeen until he was twenty-eight, and nothing he had experienced in SCDC had prepared him to be released back into society. App. 53, ll. 12-21.

Appellant testified that he had wanted the court to know that because he was on the sex offender registry due to a prior kidnapping charge, he had struggled to find good work and affordable housing. Further, even though he was working three jobs he was not making enough money to pay for rent, necessities, and his supervision fees. App. 53, l. 22-App. 54, l. 11. Appellant wanted the court to know that he had panicked and committed the robberies. He also wanted to ask the court to show him mercy. App. 54, l. 11-App. 55, l. 5.

***Discussion***

The common law right to allocution has been documented since the 1600's when it was recognized that a court's failure to ask the defendant if he had anything to say *before a sentence was imposed* required reversal. See Green v. United States, 365 U.S. 301, 304 (1961). The historic common law right to allocution was of significant importance because an accused was not afforded counsel, nor did he have the right to testify on his own behalf. See Shelton v. State, 744 A.2d 465, 491 (Del. 2000)[3]. Thus, the only time the accused could speak during his criminal proceeding was during the allocution. Id. Further, the penalty for most crimes in the 1600's was death, which meant that the defendant's allocution had "little to do with pleading for leniency but was the defendant's only opportunity to present one of the specific legal defenses which might arrest the proceedings." Id.

With the advent of modern criminal procedures, the original purpose of allocution has been largely diminished. However, that does not mean that the practice is insignificant. As Justice Frankfurter stated in Green, *supra*,

> "We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century — the sharp decrease in the number of crimes which were punishable by

[3] In Shelton the Delaware Supreme Court engaged in a lengthy and thorough discussion of the history of allocution and the modern treatment of the right in both state and federal courts.

> death, the right of the defendant to testify on his own behalf, and the right to counsel. *But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation.* The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."

365 U.S. at 304, (emphasis added).

In a modern criminal setting, allocution still maintains a critically important function in sentencing. The purpose of allocution is to allow the defendant a chance to speak in mitigation *prior to sentencing* so that a judge may accurately mitigate and individualize a punishment. See Kimberly A. Thomas, Beyond Mitigations: Towards a Theory of Allocution, 75 Fordham L. Rev. 2641, 2657 (2007). In a guilty plea, giving the defendant a chance to speak prior to sentencing is often the only way that a court will be informed of potentially powerful mitigation. Consequently, in order for a sentencing judge to formulate an accurate sentence, a defendant must be accorded the opportunity to speak on their own behalf prior to the imposition of a sentence.

Although the state courts have treated a defendant's right to allocution differently, most have held that the defendant has some right, either at common law, by statute, or by state constitution, to speak on his own behalf prior to sentencing. See Barnett, A.G, Annotation, *Necessity and Sufficiency of Question to Defendant as to Whether He Has Anything to Say Why Sentence Should Not be Pronounced Against Him*, 96 A.L.R. 1291 (Originally published in 1964).[4] While the federal courts are split on whether the federal constitution affords a defendant the right to allocution, the Fourth Circuit has recognized such a right. See Ashe v. North

4 A collection and discussion of state and federal cases which have considered whether there is a right to allocution and where there is such a requirement, the effect of the failure to allow a defendant to exercise that right.

Carolina, 586 F.2d 334, 336 (4th Cir. 1978) ("[W]hen a defendant effectively communicates his desire to the trial judge to speak prior to the imposition of sentence, it is a denial of due process not to grant the defendant's request"), and Compare Boardman v. Estelle, 957 F.2d 1523 (9th Cir. 1992) (recognizing a due process right to allocution at sentencing), with United States v. Li, 115 F.3d 125, 132 (2d Cir. 1997) (the right to allocution "is a matter of criminal procedure and not a constitutional right"), and United States v. Fleming, 849 F.2d 568, 569 (11th Cir. 1988) ("[T]he right to allocution is not constitutional).

There is nothing in the statutory scheme or rules of criminal procedure that define a non-capital defendant's right to allocution in South Carolina. Further, the appellate courts of this state have not often addressed whether a defendant has a right to allocution. The few cases addressing the issue are noteworthy.

In State v. Trezevant, 20 S.C. 363 (1884), this Court indicated that allocution by the defendant was "indispensably necessary" to the imposition of a capital sentence. In capital cases the practice of asking a defendant "whether he had anything to say why judgment should not be pronounced on him" had been "universally recognized and followed in this State from the earliest period of our judicial history." Trezevant at 363. This Court held it was error to not ask the defendant whether he had anything to say. Further, this Court held the proper remedy was to vacate the sentence and remand for resentencing. Id. at 364. See also State v. Jefcoat, 20 S.C. 383 (1884).

In State v. Phillips, 215 S.C. 314, 316, 54 S.E.2d 901, 902 (1949), Phillips was charged with unlawful possession of unstamped alcoholic liquors and unlawful manufacture of alcoholic liquors. Both charges were misdemeanor level offenses. At the guilty plea Phillips discussed with the court his guilt to the charges, the fact that he had been engaged in the unlawful liquor

business for years, the fact that his wife was sick with tuberculosis and that he was the only person to care for their four small children. Id. at 317, 54 S.E.2d at 902-903. On appeal Phillips argued he had been denied his right to allocution. This Court held that the rule requiring allocution is inapplicable in the absence of statute in a *misdemeanor* case. Id. at 318–19, 54 S.E.2d at 903. Furthermore, this Court ruled there was a lengthy conversation between Phillips and the court after the plea and before sentencing which would have satisfied a right to allocution if one had existed in such cases. Id. at 319, 54 S.E.2d at 903. See, also, State v. Bell, 215 S.C. 311, 314, 54 S.E.2d 900, 901 (1949) (rule that inquiry should be made of a defendant in capital case prior to sentencing was based on the common law and absent a statute there is no rule that such inquiry be made in misdemeanor cases).

Recently in State v. Quinn, 430 S.C. 115, 136, 843 S.E.2d 355, 366, n. 3 (2020) this Court had the opportunity to define the term "allocution." This Court stated "[a]n "allocution statement" is when, after pleading guilty, a defendant is offered a formal opportunity to address the court to express remorse and explain personal circumstances that might be considered in sentencing … A defendant is not required to *exercise his right* to submit an allocution statement, and lawyers are permitted to submit a statement on the defendant's behalf." Id. (emphasis added). Further in State v. Holmes, 320 S.C. 259, 269, 464 S.E.2d 334, 340 (1995) (Finney, C.J., Dissenting) then Chief Justice Finney stated that "failure to accord appellant his right to allocution requires, at a minimum, that the case be remanded for sentencing." These instances of dicta from this Court hint to the existence of, at least, a common law right to allocution in this state in a felony case.

While the right to allocution in serious felony cases has not been addressed, the appellate courts of this state have repeatedly held that a sentencing judge must be permitted to consider

any and all information that reasonably might bear on the proper sentence for a particular defendant in a given case. See State v. Hicks, 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008); See Also State v. Adcock, 194 S.C. 234, 9 S.E.2d 730, 732 (1940) (holding that where it falls to the court to determine the appropriate punishment to be imposed and there is any discretion as to the punishment, it is the correct practice that the court hear evidence in mitigation or aggravation of the punishment). The allocution of a defendant is certainly mitigating information that a court should consider in fashioning a sentence.

Appellant's case falls between the standards set forth in Trezevant and Phillips, *supra*. While not a capital case where the right to allocution is absolutely enforced, Appellant's case was also not dealing with a simple misdemeanor charge. Appellant was charged with serious, violent crimes. He was facing, and in fact received, lengthy sentences. In considering whether he had a right to allocution, the facts of his case positioning him closer to that of the defendant in Trezevant than that of the defendant in Phillips. Further, Appellant was twice told he would be given the opportunity to speak prior to sentencing. Appellant acknowledged that he would be given that opportunity, and then he was denied it. Thus, the due process right recognized in Ashe, *supra*, was implicated.

Appellant had a right to personally address the court regarding any information he deemed relevant which would possibly have affected his sentence. Not affording Appellant his right to allocution, particularly after Appellant was assured that he would receive an opportunity to allocute, was an error of law. Further, the minimal mitigation presented by defense counsel did not satisfy Appellant's right to allocution. As the United States Supreme Court held in Green, *supra*, and its progeny (Hill v. United States, 368 U.S. 424 (1962)) and United States v. Behrens, 375 U.S. 162 (1963) the right of a defendant to make a statement in his own behalf

requires that *the defendant be given the opportunity to present such in person and not merely through counsel*.

Appellant respectfully submits that in a case involving with a serious felony charge, where the defendant is facing a substantial term of imprisonment, it was reversible error to deny the defendant the opportunity to speak for himself in mitigation prior to sentencing. The appellate courts of this state have recognized the importance of presenting a sentencing judge with mitigating evidence. This includes informing the judge not only about the circumstances of the crime but about the circumstances of the individual defendant. To ensure that a sentencing judge has the ability to fairly and accurately sentence an individual, the court should be required to allow the defendant an opportunity to personally address the court prior to sentencing.

## CONCLUSION

By reason of the foregoing argument, Appellant's sentences should be vacated, and this case remanded to the Lexington County Court of General Sessions for resentencing.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of August, 2020.