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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2019-000454

THE STATE,

Respondent,

vs.

BRANDON KEITH MOORE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge punish Appellant, who did not have a prior criminal record, for exercising his constitutional right to a jury trial by imposing what is commonly referred to as a "trial tax" when the trial judge imposed the maximum sentence for first-offense possession of methamphetamine and when the same judge imposed probationary sentences on people who pled guilty to possession of methamphetamine during the same term of court as Appellant's jury trial, at least one of whom had a record for a prior drug offense?

II.

Did the trial judge impermissibly consider the fact the State initially charged Appellant, who did not have a prior criminal record, with trafficking in methamphetamine by imposing what is commonly referred to as a "trial tax" after a jury acquitted Appellant of that charge when the trial judge imposed the maximum sentence for first-offense possession of methamphetamine and when the same judge imposed probationary sentences on people who pled guilty to possession of methamphetamine during the same term of court as Appellant's jury trial, at least one of whom had a record for a prior drug offense?

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his broad sentencing discretion or commit some other error of law by sentencing Appellant to a three-year term of imprisonment after Appellant was convicted of possession of methamphetamine when that sentence fell within the permissible statutory sentencing limits for Appellant's crime and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or improper considerations on the part of the trial judge?

STATEMENT OF THE CASE

In March of 2018, Appellant Brandon Keith Moore was arrested after a large quantity of methamphetamine and several firearms were uncovered during a warrant-based search conducted at his residence. In July of 2018, the Abbeville County Grand Jury indicted Appellant for trafficking in methamphetamine and possession of a weapon during the commission of a violent crime. On March 11, 2019, a jury trial was commenced in the Abbeville County Court of General Sessions with the Honorable R. Scott Sprouse, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Appellant of the lesser-included offense of possession of methamphetamine while acquitting him of the other charges. Following the verdict, the trial judge sentenced Appellant to a three-year term of imprisonment. Appellant then filed a timely notice of appeal. However, a few days after that, Appellant filed a timely post-trial motion seeking reconsideration of his sentence. In response, the trial judge conducted a hearing on the matter on April 25, 2019. At the conclusion of the hearing, the trial judge took the matter under advisement. Thereafter, through an order filed on May 13, 2019, the trial judge denied the motion for reconsideration. Appellant then filed another notice of appeal upon receiving written notice of the trial judge's ruling.[1]

[1] In addition to submitting his second notice of appeal, Appellant also filed a motion seeking an appeal bond, and the trial judge ultimately granted an appeal bond after considering the matter. (R. pp. 5-7; pp. 143-146).

STATEMENT OF FACTS

On the morning of March 29, 2018, Sergeant Jeff Hines, a narcotics investigator with the Abbeville County Sheriff's Office, answered a phone call from a number he did not recognize as he was in the midst of getting a haircut, and the unknown caller advised him Tara Thomason was presently driving away from the home of an individual called "Bemo" while in possession of "a lot of dope." (R. p. 193; pp. 214-215; p. 255; pp. 274-275; p. 283; p. 321; pp. 376-377). Sergeant Hines was familiar with Thomason as he had been conducting an investigation of her for some time, and he was also aware "Bemo" was the street name of Appellant, who had been mentioned multiple times during the course of the investigation. (R. p. 214; pp. 230-231). As a result, the sergeant alerted Lieutenant Matthew Graham, who was in charge of the Abbeville County Sheriff's Office's investigative unit, of the tip so he could investigate further. (R. p. 193; p. 215; p. 275; p. 319; p. 321; p. 377).

In response, Lieutenant Graham quickly headed in the direction of the area identified in the tip, and, when he neared Appellant's street, he observed Thomason's vehicle coming from the direction of Appellant's home. (R. p. 183; p. 193; p. 199; p. 321). As he continued to look on, Lieutenant Graham observed Thomason commit a traffic infraction, and he proceeded to initiate a stop of her vehicle.[2] (R. pp. 180-181; p. 321; pp. 377-378). During the course of the stop, Lieutenant Graham advised Thomason of the information that had been reported by the tipster, and she candidly acknowledged she had a large quantity of methamphetamine in her vehicle. (R. p. 193; p. 195). Likewise, Thomason admitted she had just dropped off two ounces of methamphetamine at Appellant's residence, which was located a little over a mile away from the location of the stop. (R. p. 183; pp. 217-218; pp. 254-255; p. 260; pp. 276-277; p. 601). At

[2] Just before the stop, Appellant sent a text message to Thomason attempting to warn her of the presence of law enforcement in the area. (R. pp. 262-264).

that point, Lieutenant Graham conducted a consent-based search of Thomason's vehicle and located 148 grams of methamphetamine hidden inside a cereal box.[3] (R. p. 195; p. 209; p. 217; p. 276; pp. 323-324). Beyond that, two ledgers with Appellant's name listed inside were found in Thomason's vehicle along with $2,000 in cash, and Thomason confirmed the entries in the ledgers related to drug transactions. (R. p. 217; pp. 231-232; pp. 278-279; pp. 333-335).

Based on the information that had been uncovered up to that point, officers swiftly obtained a search warrant for Appellant's residence and executed it later that afternoon. (R. pp. 184-185; p. 206; pp. 218-219; p. 246; p. 279; p. 336; pp. 378-379). Upon arriving at the residence, the officers located Appellant at a shed along with his eight-year-old son, and they quickly explained to him why they were there. (R. p. 186; p. 211; p. 220; p. 337; pp. 439-440; p. 462). At that point, Appellant informed the officers he would show them where the methamphetamine was hidden, admitted it was his, and directed them to a nearby stove, which had over forty grams of methamphetamine hidden inside.[4] (R. pp. 186-188; p. 200; p. 220; pp. 222-223; p. 280; pp. 339-340; p. 357; p. 380; pp. 425-426; p. 428). Appellant further admitted there was a "line" of methamphetamine on a dresser in his bedroom, and the officers found that methamphetamine exactly where Appellant stated it would be. (R. p. 189; p. 223; p. 280; pp. 345-346; p. 387). As their search continued, the officers located a shotgun, a fully-loaded pistol, a digital scale, and other drug paraphernalia in the shed where Appellant and his young son had first been encountered, and the scale had what appeared to be drug residue on it. (R. p. 188; p. 225; p. 229; pp. 243-244; pp. 279-280; p. 346; pp. 349-350; p. 355; pp. 382-383; pp. 388-389;

[3] In addition to the methamphetamine found hidden inside the cereal box, more than ten grams of methamphetamine were recovered from Thomason's passenger. (R. p. 194; pp. 207-208; pp. 237-238; pp. 286-287; p. 324).

[4] Significantly, the methamphetamine hidden in the stove had been separated into several smaller plastic bag. (R. p. 225; p. 245; p. 344; p. 381).

pp. 498-499). Ultimately, as a result of the evidence uncovered through the search, Appellant was arrested for trafficking in methamphetamine and possession of a weapon during the commission of a violent crime. (R. p. 190; p. 222; p. 227; p. 353; p. 390; pp. 8-9).

Subsequently, Appellant was indicted for trafficking in methamphetamine and possession of a weapon during the commission of a violent crime, and he proceeded forward to trial. (R. pp. 10-13; p. 273). During the course of trial, testimony and evidence was presented establishing roughly forty-five grams of methamphetamine was uncovered at Appellant's residence on the date of the incident. (R. p. 339; p. 381; pp. 425-428). Similarly, testimony and evidence was presented establishing a substance that Appellant personally identified as methamphetamine and that tested positive for methamphetamine was recovered from the top of a dresser in Appellant's bedroom after Appellant directed officers to it. (R. pp. 345-346; p. 387; p. 427). In addition to that testimony and evidence, Sergeant Hines and Lieutenant Graham confirmed they found a large stash of methamphetamine, multiple firearms, a digital scale with what appeared to be drug residue on it, and other drug paraphernalia during the search of Appellant's property, and the lieutenant confirmed he first encountered Appellant and his young son in close proximity to where those items were found. (R. pp. 337-339; pp. 342-343; p. 346; pp. 349-350; p. 355; pp. 378-389). Furthermore, testimony was presented establishing Appellant directly admitted he was aware of the methamphetamine located at his residence and personally claimed ownership of it. (R. p. 339; p. 357; p. 380; pp. 386-387).

Following the presentation of that testimony and evidence, Appellant testified in his own defense, presented a sharply different account of the events leading to his arrest, and denied any

knowledge of the methamphetamine found concealed in his stove.[5] (R. pp. 454-501). Regarding that particular methamphetamine, Appellant simply claimed he observed Thomason hide some unknown substance in the stove by watching surveillance footage and then refrained from checking to see what the substance was despite Thomason's actions raising "red flags" to him based on his knowledge of her "drug habits."[6] (R. p. 465; pp. 468-469; p. 476; pp. 490-491; p. 501). Additionally, Appellant appeared to allege the officers violated his rights by continuing to question him after he purportedly invoked his right to remain silent, and he denied specifically mentioning methamphetamine to the officers at any point. (R. pp. 473-476; p. 494; p. 497). Beyond that, Appellant acknowledged a digital scale with residue on it was found in his shop, but he denied having any knowledge about it despite being in the shop with his young son when the officers arrived. (R. pp. 461-462; pp. 498-499). Furthermore, Appellant acknowledged methamphetamine was found inside his residence but again denied any knowledge of it without further explanation. (R. p. 499; p. 501).

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law, including on the law related to trafficking in methamphetamine, possession of a weapon during the commission of a violent crime, and the lesser-included offense of possession of methamphetamine. (R. pp. 517-557). Once the trial judge completed his jury instructions,

[5] In addition to Appellant's testimony, Appellant's mother also testified as a defense witness. (R. pp. 439-453). However, during her testimony, she acknowledged she was not present at Appellant's residence at the time of the incident and had no knowledge of what occurred there after she left, which occurred well before the officers' arrival. (R. p. 439; pp. 446-447; p. 453).

[6] Although Appellant discussed what the surveillance footage allegedly showed, no footage was actually introduced during trial. (R. pp. 454-501). As to why no footage was introduced, Appellant, who was only in custody for two days after his arrest, claimed it had been erased from his surveillance system after a period of thirty days had elapsed. (R. pp. 466-467; p. 562).

Appellant's case was submitted to the jury, and the jurors began their deliberations. (R. pp. 558-559). Shortly thereafter, the jury convicted Appellant of possession of methamphetamine while acquitting him of all the other charges. (R. pp. 558-559).

During the ensuing sentencing proceedings, the solicitor asserted it was "pretty clear" Appellant, who had no known prior criminal record, was a trafficker of methamphetamine based on the evidence presented but acknowledged the State nonetheless respected the jury's verdict. (R. p. 561). The solicitor then left the matter of determining the appropriate sentence to the trial judge without making any specific sentencing recommendations. (R. p. 561). Conversely, Appellant's trial counsel asked the trial judge to "consider" a probationary sentence while acknowledging Appellant was facing a sentence of up to three years' imprisonment. (R. p. 561). As support for his suggestion, trial counsel conceded Appellant was "certainly" a user of methamphetamine, which he speculated the jury "perhaps" recognized based on the verdict, and pointed to Appellant's lack of a prior criminal record. (R. p. 561). Following the solicitor's and trial counsel's remarks, the trial judge stated:

> Well, I've heard the testimony in this case and will say this: Methamphetamine is a destructive force. It's a destructive force in this community. It's a very destructive force in the Tenth Circuit where I come from. I see it. It's a poison and it's infecting our communities, our homes. It's something that the answer is elusive. I don't -- I don't know what -- what's going to become of us if we can't get a handle on the methamphetamine that's just surging through our society. But I heard the testimony.

(R. p. 562). The trial judge then sentenced Appellant to a three-year term of imprisonment, which—as had been acknowledged by trial counsel—fell within the permissible statutory sentencing limits for Appellant's offense. (R. pp. 561-562). At that point, trial counsel did not raise any objections and, instead, thanked the trial judge. (R. p. 562).

Subsequently, after trial counsel prematurely attempted to initiate an appeal, Appellant retained new defense counsel, who promptly filed a motion seeking reconsideration of the sentence. (R. pp. 15-18; p. 147). Through that motion, defense counsel argued the trial judge should vacate Appellant's sentence and replace it with a probationary one. (R. p. 15). In seeking that relief, defense counsel first asserted Appellant's sentence was "excessive" because Appellant had no "significant" prior record, had only been convicted of first-offense possession of methamphetamine, and had received a sentence that was purportedly "disproportionate" to sentences received by several other unrelated defendants who had been sentenced for drug offenses in Abbeville County during the same term of court.[7] (R. pp. 15-17). Based solely on the perceived disproportionate nature of the sentences, defense counsel alleged it "appear[ed]" the trial judge had improperly punished Appellant for exercising his right to a jury trial by imposing what defense counsel characterized as a "trial tax." (R. p. 17). Next, defense counsel asserted the disproportionate nature of the sentences made it appear the trial judge took into consideration the fact Appellant was originally charged with trafficking, which defense counsel maintained was also improper. (R. pp. 17-18). Finally, defense counsel averred there was additional evidence regarding Appellant's character and circumstances that had not yet been presented. (R. p. 18).

In response to the motion, the trial judge conducted a hearing on the matter. (R. p. 564; p. 566). During the course of the hearing, defense counsel noted the reconsideration motion was based on three distinct grounds. (R. p. 566). Regarding the first ground, defense counsel argued Appellant was entitled to the same type of sentence he would have received if he pled guilty. (R.

[7] Notably, in referencing the other unrelated defendants' cases, defense counsel did not identify any pertinent details about them other than the names of the offenders involved, the charges involved, the manner in which the cases were resolved, and the sentences imposed. (R. pp. 15-17).

p. 566). Regarding the second ground, defense counsel affirmed the defense no longer thought it mattered.[8] (R. p. 566). Regarding the third and final ground, defense counsel asserted there was additional information about Appellant that should be considered. (R. pp. 566-567). Defense counsel then proceeded to discuss some details related to Appellant's background before opining Appellant should receive a suspended sentence with appropriate conditions attached, such as a requirement for substance abuse treatment. (R. pp. 567-570). Following defense counsel's remarks, both the trial judge and solicitor noted a child had been involved in the incident, and the solicitor explained the child had actually been present at the scene when the incident transpired. (R. pp. 572-574). Based on that fact along with the other relevant facts and circumstances of Appellant's case, the solicitor argued Appellant's current sentence was appropriate. (R. pp. 574-575). The trial judge then took the matter under advisement. (R. p. 576).

Thereafter, upon considering the matter, the trial judge issued an order declining to reconsider Appellant's sentence. (R. p. 4). In doing so, the trial judge affirmed he carefully considered the arguments and filings of counsel along with the record and determined he had not overlooked or inappropriately considered any material fact or principle of law. (R. p. 4).

[8] More specifically, defense counsel stated: "As the second ground we don't think it matters." (R. p. 566).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016). When reviewing a sentencing issue on appeal, an appellate court will only interfere with a trial judge's sentencing decisions in rare and unusual circumstances in light of the broad discretion afforded to trial judges on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come."). Furthermore, appellate courts in South Carolina have "no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the trial judge, and is not the result of partiality, prejudice, oppression or corrupt motive." State v. Scates, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948); cf. State v. Davis, 88 S.C. 229, __, 70 S.E. 811, 814 (1911) ("It is excepted that imprisonment for five years in this case is excessive. We have repeatedly held that we have no jurisdiction to correct a sentence on this ground, provided it is within the limits prescribed by law for the discretion of the trial court, and is not the result of partiality, prejudice, oppression, or corrupt motive.").

ARGUMENT

The trial judge did not abuse his broad sentencing discretion or commit any other error of law by sentencing Appellant to a three-year term of imprisonment after Appellant was convicted of possession of methamphetamine because that sentence fell within the permissible statutory sentencing limits for Appellant's crime and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or improper considerations on the part of the trial judge.

Appellant contends the trial judge reversibly erred by sentencing him to a three-year term of imprisonment following his conviction for possession of methamphetamine. In support of that contention, Appellant readily acknowledges the sentence imposed by the trial judge fell within the permissible statutory sentencing limits for his offense. Nonetheless, Appellant maintains his sentence was improper because he opines the trial judge must have improperly punished him for exercising his right to a jury trial in light of the fact defendants in other unrelated drug cases did not receive sentences as lengthy as the one he received. Likewise, Appellant maintains his sentence was improper because he opines the trial judge must have considered the fact he was originally charged with trafficking in methamphetamine, which he alleges the trial judge could not permissibly do.[9] Contrary to Appellant's wholly speculative claims, the trial judge did not commit any error whatsoever when sentencing Appellant because he imposed a sentence that—by Appellant's own admission—fell within the permissible statutory sentence limits for Appellant's crime, and nothing appearing in the record established the trial judge imposed Appellant's statutorily-authorized sentence as the result of any partiality, prejudice, corrupt

[9] Although Appellant's claim related to the trial judge's alleged consideration of the original charge was initially raised through the reconsideration motion, defense counsel did not raise it during the hearing conducted on that motion and, instead, appeared to inform the trial judge he no longer thought it mattered. (R. p. 566). As a result, that claim was abandoned in the trial court and cannot now properly be revived and raised on appeal. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal); see also State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot make one argument to the trial judge and then raise a different argument to the appellate court).

motive, or improper considerations. Therefore, there is no proper basis upon which Appellant's sentence can be disturbed on appeal. Appellant's conviction and sentence should be affirmed.

In South Carolina, sentencing judges are vested with broad discretion to impose a sentence falling within the statutory limits upon an offender convicted of a crime. Sidell, 262 S.C. at 398, 205 S.E.2d at 3. In exercising that broad sentencing authority, the sentencing judge must be accorded "very wide" discretion to determine the appropriate sentence and can properly consider "*any and all information* that reasonably might bear upon 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) (emphasis added). Amongst the information that may be considered, the sentencing judge can consider such factors as the conduct or demeanor of the defendant and "the atmosphere of the trial" if applicable when determining what sentence to impose. See Scates, 212 S.C. at 155, 46 S.E.2d at 695 ("It must be remembered that the demeanor and conduct of the prisoner, and the atmosphere of the trial, are not truly reflected in a cold, written record."). Obviously though, a sentencing judge unquestionably cannot improperly penalize a defendant for exercising a constitutional right, such as the right to a jury trial, when imposing a sentence. State v. Follin, 352 S.C. 235, 257-258, 573 S.E.2d 812, 824 (Ct. App. 2002); see Castro v. State, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) ("When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion.").

In the case sub judice, Appellant was convicted of possession of methamphetamine. In light of that conviction coupled with the fact Appellant did not have any prior drug convictions, the trial judge was statutorily vested with discretion to sentence Appellant to a term of imprisonment not exceeding three years, a fine of up to $5,000, or both for his offense. See S.C.

Code Ann. § 44-53-375(A) (outlining the offense of possession of methamphetamine and instructing a person convicted of a first offense "must be imprisoned not more than three years or fined not more than five thousand dollars, or both"). Upon considering the matter, the trial judge concluded a three-year term of imprisonment—with no fine—was appropriate and imposed that statutorily-authorized sentence upon Appellant. Id.

In doing so, the trial judge made no statements of any kind referencing—either directly or indirectly—Appellant's decision to exercise his right to a jury trial or suggesting he considered that decision in any manner when imposing the sentence. Cf. Davis v. State, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) ("[T]he trial judge *unequivocally* stated that the other defendants had, in fact, pled guilty. The trial judge further expressed his preference for guilty pleas by explaining that such admissions of responsibility were the first steps towards rehabilitation. We find these statements clearly revealed that the trial judge, in sentencing petitioner, improperly considered petitioner's decision to proceed with a jury trial." (emphasis added)); State v. Hazel, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995) (reversing Hazel's sentence based on the trial judge's improper consideration of Hazel's exercise of his right to a jury trial where the trial judge specifically stated he would have considered a lesser sentence if Hazel had pled guilty); State v. Brouwer, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) (finding the trial judge improperly considered Brouwer's exercise of his constitutional right to a jury trial where the trial judge specifically stated there was no reason to ever give a person convicted by a jury the same sentence as a person who pled guilty and where there was no appropriate justification for the disparity between Brouwer's sentence and the sentence of his identically-situated co-defendant who pled guilty). Similarly, the trial judge did not make any statements supporting a conclusion he harbored any ill motive, partiality, or prejudice towards Appellant or suggesting he

entertained any improper considerations when imposing the sentence. Cf. Scates, 212 S.C. at 154, 46 S.E.2d at 694 (*affirming* the trial judge's decision to impose the maximum penalty of twenty-five years for armed robbery and rejecting Scates's argument the sentence was affected by prejudice even though the trial judge informed Scates during the sentencing proceedings his version of events was "nothing more than a 'cock and bull' story," stated the jury could not have believed that version of events unless they were "dumb simpletons," and called Scates a "husky young man"). Instead, the trial judge's statements prior to sentencing simply confirmed he considered the harmful nature of Appellant's crime along with the testimony and evidence that had been presented during trial. See State v. Saxon, 261 S.C. 523, 530, 201 S.E.2d 114, 118 (1973) ("The statement made by the trial judge must be considered in context."); cf. State v. Mercado, 263 S.C. 304, 309, 210 S.E.2d 459, 461 (1974) ("[Mercado] argues that the trial judge abused his discretion in sentencing him to ten years on the grand larceny charge. In support of this argument he points to a series of comments by the judge prior to sentencing. The judge indicated that he was not in agreement with the acquittal of the murder charge and said that he was satisfied that [Mercado] voluntarily participated in the unlawful actions. He further commented that violence is a way of life with migrant workers like the defendant. The trial judge heard all of the testimony and observed the demeanor of the witnesses. Although the statements might have been better left unsaid, we cannot say that the record before us reflects that the maximum sentence imposed was the result of partiality, prejudice, oppression or corrupt motive."), abrogated on other grounds by State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Under such circumstances, the trial judge did not abuse his broad sentencing discretion or commit any other error of law when imposing Appellant's statutorily-authorized sentence, and there is simply no proper basis upon which to disturb that sentence on appeal. See State v. Bass,

242 S.C. 193, 197, 130 S.E.2d 481, 483-484 (1963) ("This Court has no jurisdiction to correct a sentence alleged to be excessive when it is within the limits prescribed by law."); State v. Fleming, 228 S.C. 129, 133-134, 89 S.E.2d 104, 106 (1955) ("In this question, appellants complain of the sentence in that their accomplice received a sentence of 18 months while they received a sentence of 10 years. This Court has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the trial Judge and is not the result of partiality, prejudice, oppressive or corrupt motive.").

In arguing the trial judge did, in fact, improperly consider his decision to exercise his right to a jury trial when imposing the sentence, Appellant speculates the trial judge *must have* done so because the sentence imposed was higher than the sentences received by other unrelated drug offenders who were sentenced by the trial judge during the same term of court after pleading guilty to their offenses. Importantly though, a sentencing judge is *not* precluded from an imposing a sentence for one defendant convicted of a certain offense that is higher than the sentence imposed on another defendant convicted of the same offense so long as the decision to do so is not arbitrary or unreasonable, and that is true even in a case involving actual co-defendants and accomplices. See Follin, 352 S.C. at 257, 573 S.E.2d at 824 ("[W]hen the record clearly reflects an appropriate basis for a disparate sentence, the sentencing judge may impose a different sentence on a co-defendant in a criminal trial."); see also Fleming, 228 S.C. at 133-134, 89 S.E.2d at 106 (rejecting the appellants challenge to their sentences despite the fact those sentences were over eight years longer than the sentence an accomplice received). In the case at bar, the trial judge was presented with extensive testimony and evidence in regard to Appellant's misdeeds, and, as recognized by both the trial judge and the solicitor, Appellant engaged in his criminal behavior while a young child was present at the scene and in close proximity to a large

quantity of methamphetamine, multiple firearms, and a variety of drug paraphernalia. As a result, the facts and circumstances of Appellant's case certainly could have led the trial judge to conclude a more substantial sentence was warranted than would have been warranted for a less-culpable offender who committed the same offense without exposing a child to it in the manner Appellant did, and that decision was ultimately one for the trial judge alone to make. See State v. Hilton, 291 S.C. 276, 279, 353 S.E.2d 282, 284 (1987) ("There is nothing in the record that suggests [the trial judge's] sentence was based on anything other than proper sentencing considerations."); see also Alabama v. Smith, 490 U.S. 794, 801 (1989) ("[W]hen a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial. . . . [I]n the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." (citations omitted)); cf. State v. Dozier, 263 S.C. 267, 271-272, 210 S.E.2d 225, 226 (1974) (finding no abuse of discretion in the trial judge's issuance of a greater sentence to Dozier than to his co-defendants for the same offenses where the trial judge concluded Dozier's co-defendants "were not tainted with the same degree of guilt" as Dozier). Therefore, the fact other offenders who pled guilty to drug crimes involving unknown facts and unknown mitigation evidence received lesser sentences than Appellant received simply did not—and does not—in any way establish the trial judge improperly considered Appellant's decision to exercise his right to a jury trial when

imposing his sentence. See United States v. Frost, 914 F.2d 756, 774 (6th Cir. 1990) ("Mere disparity in sentences is insufficient to show that the sentencing court penalized Frost and Griffin for going to trial. Many factors may be considered in sentencing and nothing indicates that the district court considered an improper factor such as defendants' exercise of their constitutional right to a trial."); People v. Carroll, 631 N.E.2d 1155, 1174-1175 (Ill. App. Ct. 1992) ("There must be . . . a clear showing in the record that the court imposed the greater sentence as a punishment for demanding a trial. Such instances have occurred where the court has stated explicitly that it was imposing a more severe sentence because the defendant exercised his right to trial . . . or where the defendant's sentence after trial was outrageously higher than the one offered during plea negotiations." (citations omitted)); State v. Garris, 144 S.E.2d 901, 902 (N.C. 1965) ("There is no requirement of law that defendants charged with similar offenses be given the same punishment. The punishment imposed in a particular case, if within statutory limits, is within the sound discretion of the presiding judge."); State v. Anderson, 87 N.E.3d 1203, 1213 (Ohio 2017) ("A disparity existing between sentences imposed on codefendants is insufficient to establish a trial court imposed a longer sentence as a trial tax.").

Beyond that, in arguing the trial judge's sentence was improper, Appellant further speculates the trial judge *must have* considered the fact he was originally charged with trafficking in methamphetamine when imposing the sentence while maintaining doing so would have been improper.[10] Importantly though, the trial judge did not make any statements to

[10] As support for that particular claim, Appellant primarily relies on this Court's decision in State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010), while appearing to suggest that decision stands for the proposition a trial judge commits an error of law by considering the charge a defendant was originally facing when imposing a sentence for a different charge. (App. Br. pp. 16-17). Importantly though, the actual reason this Court found error in Boggs was because the trial judge denied Boggs credit for time served despite the fact it was mandatory that credit be awarded. See Boggs, 388 S.C. at 316-317, 696 S.E.2d at 598-599 ("We find the plea

support such a conclusion. Instead, he simply referenced the harmful nature of Appellant's crime and noted he had heard the testimony, which—as previously noted—established a young child had been present during the course of the incident and was found in close proximity to methamphetamine, firearms, and drug paraphernalia. Under such circumstances, there was simply nothing establishing the trial judge sentenced Appellant based on anything other than the pertinent facts and circumstances before him when imposing a statutorily-authorized sentence for the offense for which Appellant was convicted.[11] [12] See State v. Benning, 338 S.C. 59, 64-65, 524 S.E.2d 852, 855-856 (Ct. App. 1999) (affirming the trial judge's imposition of the maximum potential sentence upon Benning following his conviction for lewd act and acquittal for first-

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judge committed an error of law when he denied Boggs credit for time served based upon the State's decision to drop the charge from armed robbery to strong arm robbery. A judge's disappointment in the maximum sentence he can impose *is not one of the exceptions to the mandatory language in section 24-13-40*. Accordingly, the trial judge's decision to deny Boggs credit for time served is reversed." (emphasis added and footnote omitted)); see also S.C. Code Ann. § 24-13-40 ("In every case in computing the time served by a prisoner, full credit against the sentence *must be given* for time served prior to trial and sentencing, and may be given for any time spend under monitored house arrest." (emphasis added)). Therefore, Appellant's reliance on Boggs is misplaced.

[11] Notably, although nothing suggests the trial judge took into consideration the fact Appellant was originally charged with trafficking, the United States Supreme Court has explained it is not improper for a sentencing judge to consider facts and evidence related to a charge that resulted in an acquittal when imposing a sentence for another offense. See United States v. Watts, 519 U.S. 148, 156-157 (1997) (recognizing a verdict of acquittal does *not* mean a defendant is actually innocent of a charged offense and holding "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence").

[12] Undermining Appellant's claim the trial judge sentenced him as a trafficker of methamphetamine, the sentence Appellant received for his crime was four years *less than* the mandatory minimum sentence the trial judge would have been statutorily required to impose if Appellant had been convicted as indicted. See S.C. Code Ann. § 44-53-375(C)(2)(a) (requiring the imposition of "a term of imprisonment of not less than seven years nor more than twenty-five years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars" upon an offender convicted of first-offense trafficking in methamphetamine in an amount between twenty-eight and one-hundred grams).

degree criminal sexual conduct with a minor and rejecting Benning's contention the trial judge improperly considered the evidence related to the first-degree criminal sexual conduct with a minor charge even though the trial judge directly stated during the sentencing proceedings he would have convicted Benning of that charge).

Accordingly, since Appellant's sentence fell within the appropriate statutory sentencing limits for his offense and nothing suggested it was imposed based on partiality, prejudice, oppression, corrupt motive, or any other improper considerations, the trial judge did not abuse his broad sentencing discretion or commit any other error of law when imposing Appellant's sentence, and there is no proper basis upon which to disturb Appellant's sentence on appeal. See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("[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. Johnson, 159 S.C. 165, 170, 156 S.E. 353, 354 (1930) ("This Court has no jurisdiction on appeal to correct a sentence alleged to be excessive, when it is within the limits prescribed by law. The length of the prison sentence rests in the sound discretion of the trial Court unless partiality, prejudice, oppression, or corrupt motive is shown."); see also State v. Attardo, 263 S.C. 546, 550, n. 1, 211 S.E.2d 868, 869, n. 1 (1975) (recognizing the appellant bears the burden of establishing error in order to prevail on appeal). Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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September 18, 2020

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2019-000454

THE STATE,

Respondent,

vs.

BRANDON KEITH MOORE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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."

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