

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2019-001328

The State,

Respondent,

vs.

Michael G. Strother,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. The plea court properly denied Appellant's motion to reconsider his sentence or to vacate his guilty plea. Initially, the motion to vacate was not timely made. Nonetheless, the State did not breach its plea agreement with Appellant, the plea court did not consider inappropriate information in determining Appellant's sentence, and Appellant's sentence was proper and within the statutory limits.

STATEMENT OF THE CASE

Appellant was charged with one count of first degree sexual exploitation of a minor, five counts of third degree sexual exploitation of a minor, and one count of voyeurism. The State offered Appellant a plea by which he would plead guilty to one count of first degree sexual exploitation of a minor. The remaining charges would be dropped and the State would not seek additional charges related to the images and videos found. (Plea Offer attached as Exhibit A to Appellant's Motion; R. ____). At the plea hearing on January 10, 2019, before the Honorable R. Lawton McIntosh, Appellant waived presentment on one count of first degree sexual exploitation of a minor. (T.3; 8-9; R. ____). He pled guilty to one count of first degree sexual exploitation of a minor and was sentenced to fifteen years in prison. (T.7; 29; R. ____).

Counsel for Appellant filed a Motion to Reconsider Sentence or In the Alternative Motion to Vacate Guilty Plea on January 18, 2019. The plea court denied the Motion without a hearing by Order dated July 31, 2019 and filed August 5, 2019. Appellant timely served his Notice of Appeal on August 7, 2019. This appeal follows.

STATEMENT OF FACTS

While conducting an investigation of child pornography file sharing, Special Investigator Kevin Atkins of the South Carolina Attorney General's Office, identified Appellant as an individual requesting specific files to download. The files sought by Appellant included one where "an adult male touch[ed] the vagina of a prepubescent female believed to be between 11 and 13 years of age. Another video file was reviewed and appeared to be female children between that same age range performing oral sex on each other and rubbing each other's vagina, and then one final video file depict[ed] what appears to be a minor female in that same age range performing oral sex on an adult male." (T.9; R. ____).

A search warrant was obtained to seize electronic devices from Appellant's residence. At the time the warrant was executed, Appellant admitted to secretly recording both an adult female and a minor female without their knowledge. Appellant had installed a hidden camera in his home in order to record the unsuspecting females. (T.9-10; R. ____). Forensic review of the devices seized showed the hidden recordings were taken in his bathroom. Over 14,000 files were located including over 11,000 of the adult and minor females in various stages of undress. The recordings of the minor go back to when the minor was 13 years old. Additionally, other child pornography was located which included children as young as 4 years old. (T.10-11; R. ____). Appellant admitted to investigators that he masturbated to these types of files. (T.10; R. ____).

The State and Appellant entered into a plea agreement. (Exhibit A to Motion to Reconsider or Vacate; R. ____). In the State's plea offer, the various files located on Appellant's computer were discussed in more detail. He had 1,598 photos and 6 videos of the minor step-granddaughter and 9,852 photos and 2 videos of his adult step-daughter. He had approximately 3000 other pictures or videos of child pornography depicting people not related to Appellant. (Exhibit A p.1; R. ____).

Another drive contained further deleted files showing the step-granddaughter changing clothes. (Exhibit A p.2; R.____). The State offered to allow Appellant to plead guilty to one count of sexual exploitation of a minor, first degree and would drop the remaining charges and not seek additional charges. The agreement noted the “State will not make a formal recommendation, but will state to the Court that we believe a substantial sentence would be appropriate.” (Exhibit A p.2; R.____).

At his guilty plea, the State presented the above discussed facts to the court for consideration. Additionally, the State specifically noted: “he does not have a record, and he has signed a consent order to forfeiture of all the device that had images on it.” (T.11; R.____). The victims also spoke at the hearing, with the adult female discussing the pain that Appellant’s actions have caused and claiming: “This is not the first time he’s done this.” (T.12; R.____). After objection, the court stated: “I get to listen to anything I want to. I’ll note your objection but I get to listen to anything I want to when I’m going to sentence somebody.” (T.12-13; R.____). The adult victim then explained that Appellant had a prior marriage in which he molested his step-daughter. (T.13; R.____).

Appellant’s counsel indicated his objection to the testimony of the prior allegations again. He explained that he knew nothing of the prior allegations and was “not able to defend” his client. He indicated the statement “puts my client at a huge disadvantage” and then reiterated his objection. (T.14; R.____). The plea court responded by specifically noting: “And I know the State says he has no prior record, so that’s what I have to go on.” (T.14; R.____).

Appellant’s counsel then presented his client’s background and mitigating arguments. Further, he presented a psychological report prepared by Dr. Bodtorf. In referencing Dr. Bodtorf, the plea court indicated: “I know he’s good.” (T.15; R.____). After the plea court took time to read the report, Appellant’s counsel then explained the highlights of the report as well as other

mitigating circumstances. (T.16-19; R.____). After hearing from the State, Appellant acknowledged: “I am deeply embarrassed by what I have done. I know that I should not have done any of this. When asked by the people who came to serve the warrant, I did not try to avoid it. I knew what I had done.” (T.25; R.____).

Appellant’s counsel then maintained: “Your Honor, it sounds like you’re not giving much credit to the expert here.” The court directly responded:

I’m not. And I will not. Normally I do, but I read that report and I didn’t buy anything he was selling to me in that report at all. I will make it a part of the Court’s record and make it a court exhibit, but I don’t think it’s credible at all.

(T.26; R.____).

After hearing a final statement from Appellant’s counsel, including a plea for a lighter sentence or a sentence suspended on little active time, the plea court found: “This is a horrible crime that has gone on for a long time, I’m sure, not just this time that they found on your computer.” He then sentenced Appellant to fifteen years in prison. (T.29; R.____).

Subsequently, Appellant served and filed a Motion to Reconsider Sentence or in the Alternative Motion to Vacate Guilty Plea. In it, he claimed that the State breached its agreement by the victim providing information to the judge regarding the other allegations of abuse. Further, he asserted the plea court improperly refused to consider the report by Dr. Bodtorf. He asked the court to either sentence him to three years in prison or vacate the guilty plea. (Motion for Reconsideration or Vacate Plea; R.____). The plea court issued an Order denying the motion without necessity of a formal hearing. (Order on Defendant’s Motion; R.____).

STANDARD OF REVIEW

Sentencing

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 sentencing judge's sentencing decisions in rare and unusual circumstances in light of the broad discretion afforded to sentencing 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 [sentencing] 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.").

Motion to Vacate or Withdraw Plea

"Once a defendant enters a plea of guilty, the decision whether to allow withdrawal of the plea is left to the trial court's sound discretion." State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d

210, 212 (Ct. App. 2002). “A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of that discretion, this court will not interfere.” State v. Cantrell, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001).

ARGUMENT

- I. **The plea court properly denied Appellant's motion to reconsider his sentence or to vacate his guilty plea. Initially, the motion to vacate was not timely made. Nonetheless, the State did not breach its plea agreement with Appellant, the plea court did not consider inappropriate information in determining Appellant's sentence, and Appellant's sentence was proper and within the statutory limits.**

Appellant contends the State breached its plea agreement with Appellant and the plea court erred in considering inappropriate information in determining Appellant's sentence. Finally he asserts the plea court erred in failing to reconsider his sentence or to vacate his guilty plea. The arguments regarding vacating the plea are not properly preserved for review on appeal as the motion was not made at the earliest opportunity, and instead Appellant allowed the plea and sentencing to play out to see what sentence he received before he sought to vacate his plea. Additionally, the State did not breach its agreement as it did not raise any of the objectionable information and specifically told the court Appellant did not have a prior record. Significantly, the victim has a right to be heard at sentencing under the South Carolina Victim's Bill of Rights and her exercise of that right cannot be grounds for setting aside a conviction or sentence. Finally, the plea court did not abuse its discretion in denying Appellant's motion to reconsider sentence or to vacate the plea.

Preservation

Initially, any argument regarding vacating the guilty plea should not be considered because it was waived by not raising it at the earliest opportunity. As soon as the victim began discussing the prior allegations of abuse, and certainly once the plea court allowed it to be discussed in full, Appellant knew the matter was before the court. At this time he should have made his motion to withdraw or vacate his guilty plea, and not waited until after he received his sentence.

In the instant case, Appellant basically tried to keep an ace up his sleeve, something the preservation rules are designed to prevent. See Jean Hoefler Toal et al., Appellate Practice in South Carolina 184 (3d ed. 2016) (“The [preservation] requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.”). Appellant knew as soon as the allegations were mentioned by the victim that the plea court intended to hear them. He further knew as soon as they were discussed by the victim the nature of the allegations and had a complete understanding of any alleged prejudice resulting from the discussion. Instead, he waited until he received his sentence—hoping for a favorable sentence—and only after receiving a harsher sentence than he desired did he raise the vice he knew about since near the beginning of the sentencing proceedings. Any issue objecting to the plea court’s allowance of the testimony by the victim or the consideration of that information is not preserved for review because Appellant did not move to withdraw or vacate his plea at the first opportunity. The Courts of this state recognized long ago, preserving a vice in the hope of a beneficial outcome is not proper. State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) (“The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just.”); see also, State v. Thomas, 248 S.C. 573, 580, 151 S.E.2d 855, 859 (1966), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (“A defendant may not reserve vices in his trial of which he has notice, taking his chances of a favorable verdict, and, in the case of disappointment, use the error to obtain relief.”); State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (“Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning

of the outcome of trial, raise it on appeal.”). Accordingly, this Court should not reach any issue related to the testimony of the victim about additional allegations of abuse because they are not properly preserved for review on appeal.

Merits

Even if properly preserved, Appellant has failed to demonstrate how the plea court abused its wide discretion in denying his motion to vacate his plea or to reconsider his sentence. The State did not breach its plea agreement with Appellant, the trial court did not improperly consider information provided by the victim, and the trial court could accept or reject the evaluation performed by Dr. Bodtorf in making his sentence.

First, the State did not breach its agreement. As specifically laid out in the plea agreement, the State allowed Appellant to plead to one count of sexual exploitation of a minor in the first degree while dropping and not pursuing numerous remaining charges. The State indicated in the written agreement it would seek a “substantial active sentence.” (Exhibit A to Motion to Reconsider or Vacate; R.____). Even considering the discussion prior to the plea when the State indicated it would not bring up the prior allegations, the State complied with its agreement. The State did not address or discuss in any way the prior allegations. Instead, the State made it abundantly clear to the plea judge that Appellant did not have a prior record. (T.11; R.____). As a result, the State fully complied with its agreement to Appellant. Because the plea agreement was fully complied with by both parties, and the record demonstrates the plea was otherwise knowing and voluntary, there was no abuse of discretion by the plea court in denying the motion to vacate or withdraw the plea.

Next, the victim had a right to testify and be heard at the sentencing proceeding. The State cannot restrict or prevent the victim from testifying under the Victim’s Bill of Rights in the South

Carolina Constitution. See S.C. Const. art. I, §24. Specifically, it provides: “To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to: . . . be heard at any proceeding involving a post-arrest release decision, a plea, or sentencing.” Id. The plea court, in accordance with the Victim’s Bill of Rights, properly allowed the victim to address the court and then properly considered that testimony as he deemed appropriate.

A trial court has to be given wide discretion in considering information for sentencing. The South Carolina Supreme Court has recently articulated:

Generally, a sentencing judge has great discretion in the kind of evidence she may use to assist her in determining the punishment to be imposed. Indeed, she is **obligated** to consider information material to punishment and may “exercise a wide discretion in the sources and types of evidence used to assist [her] in determining the kind and extent of punishment to be imposed within limits fixed by law.”

State v. Quinn, 430 S.C. 115, 125, 843 S.E.2d 355, 360 (2020)(internal citation omitted and emphasis added); see also Wasman v. United States, 468 U.S. 559 (1984) (“The sentencing court . . . must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant . . .”). As this Court noted: “A judge or other sentencing authority is **to be accorded very wide discretion** in determining an appropriate sentence, and must be permitted to consider **any and all information** that reasonably might bear on 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). The South Carolina Supreme Court has articulated:

We have held that with the view of fixing the sentence to be imposed upon a defendant, it is proper for the trial judge, in open court, in the presence of the defendant, to inquire **into any relevant facts in aggravation or mitigation of punishment**. Historically courts in

this country have practiced a policy under which a sentencing judge could exercise a wide discretion in the **sources and types of evidence** used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. A sentencing judge is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant, if not essential, to his selection of an appropriate sentence is the **possession of the fullest information possible** concerning the defendant's life and characteristics.

Cantrell, 250 S.C. at 379–80, 158 S.E.2d at 191 (internal citations omitted). As a result, it was not improper for the plea court to consider the information that was presented or to allow the information be presented by the victim.

Further, it was clear from the record the plea court did not consider the allegations of prior abuse against Appellant. After Appellant placed his objection of not being able to defend against the allegations on the record, the court stated: “And I know the State says he has not prior record, **so that’s what I have to go on.**” (T.14; R. ___)(Emphasis added). The court makes it clear he did not consider the allegation, but instead considered the fact he had no prior record. As a result, Appellant has failed to establish any prejudice even if the plea court improperly admitted the testimony.

Additionally, Appellant’s sentence was well within the statutory limits and there is no basis for this Court to alter the determination made by the plea court. So long as the sentence imposed falls within the permissible sentencing limits for an offender’s crime, the sentencing judge’s decision regarding the appropriate sentence will not be found to be improper *unless* it violated the constitutional prohibition against cruel and unusual punishment or resulted from partiality, prejudice, oppression, or corrupt motive. See Wood v. State, 257 S.C. 179, 182, 184 S.E.2d 702, 703 (1971) (“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 . . . against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive.”); State v. Connally, 227 S.C. 507, 510, 88 S.E.2d 591, 593 (1955) (“[An appellate court] has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute, unless . . . the sentence is the result of partiality, prejudice, oppression, or corrupt motive.”). There is no question the sentence of fifteen years was within the statutory limitations as section 16-15-395 provides: “A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned for not less than three years nor more than twenty years.” S.C. Code Ann. § 16-15-395(D)(Supp. 2019).

Appellant maintains the plea court did not give proper consideration to the evaluation by Dr. Bodtorf. However, the record belies this argument and demonstrates the plea court read the evaluation, considered the evaluation, and found it was not credible. When presented the evaluation, the plea court paused the proceedings so that he could read the report. (T. 16; R. ____). He allowed counsel for Appellant to detail the findings and argue their significance. (T.16-19; R. ____). The court noted he knew the doctor. The plea court, however, found: “I don’t give it much credit, to be honest with you. I know this doctor. I generally do, but I don’t buy a whole lot what he’s selling in that report in this case. I don’t give it much credit.” (T.23; R. ____). In making it a Court Exhibit, the plea court again explained he was not giving much credit to Appellant’s expert: “I’m not. And I will not. Normally I do, but I read that report and I didn’t buy anything he was selling to me in that report at all. I will make it a part of the Court’s record and make it a court exhibit, but I don’t think it’s credible at all.” (T.26; R. ____). Clearly, based on the record, the plea court considered the expert’s evaluation, he just did not give it the credence Appellant hoped that he would.

Additionally, the plea court repeatedly indicated the basis for his sentence. He noted: “the facts of this case are extremely disturbing to me.” (T.14; R. ____). The plea court explained he did not believe Appellant’s excuses related to stressors or issues from people moving in with him. He articulated: “I think he’s got a very serious problem. . . . This is a horrible crime that has gone on for a long time, I’m sure, not just this time that they found on your computer.” (T.29; R. ____).

The plea court in this case did not err in denying Appellant’s motion to reconsider his sentence. The court explained the basis for his sentence, considered properly admitted evidence, made credibility determinations, and correctly weighed the evidence presented in utilizing his wise and wide discretion in sentencing Appellant. Finally, his sentence is entirely within the statutory limits placed by section 16-15-395 of the South Carolina Code and there is no basis for this Court to alter the sentence imposed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

BY:



William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter by email on Appellant's counsel of record, Taylor D. Gilliam, at the email provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 27th day of October, 2020.



CAROLINE COLLINS

Administrative Coordinator

Office of the Attorney General

Post Office Box 11549

Columbia, South Carolina 29211

(803) 734-3727

Caroline Collins

From: Caroline Collins
Sent: Tuesday, October 27, 2020 12:01 PM
To: 'tgilliam@sccid.sc.gov'
Cc: 'Allgire, Mary'; William Blich
Subject: The State v. Michael G. Strother (2019-001328)
Attachments: STROTHER Michael - Initial Brief of Respondent and Designation of Matter - 2019-001328 (02412429xD2C78).PDF

Good Afternoon Mr. Gilliam,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter in The State v. Michael G. Strother (2019-001328). These documents will be submitted to the Court of Appeals today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

Caroline Collins

Administrative Coordinator
South Carolina Attorney General's Office
P: (803) 734-3723

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