STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable George M. McFaddin, Jr., Circuit Court Judge
Appellate Case No. 2020-000631

THE STATE,

Respondent,

vs.

CHARLES DAVENPORT, JR.,

Appellant.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENTS OF ISSUE ON APPEAL

I.

Did the plea judge abuse his broad sentencing discretion or commit some other error of law by sentencing Appellant to a twenty-five-year term of imprisonment that was suspended to twenty years' imprisonment and a fine after Appellant knowingly and voluntarily pled guilty to felony driving under the influence resulting in a death when the sentence imposed fell within the permissible statutory sentencing limits for Appellant's offense 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 plea judge?

II.

To the extent Appellant appears to be asserting the manner in which he was sentenced violated his due process rights, is that particular constitutional claim properly preserved for appellate review when it was neither raised to nor ruled upon by the plea judge? Furthermore, even if that constitutional claim could somehow appropriately be raised and considered for the first time on appeal, were Appellant's due process rights violated by the manner in which he was sentenced when he was fully on notice of the applicable sentencing limits for his offense before he pled guilty and was sentenced to a term of imprisonment falling squarely within those limits?

STATEMENT OF THE CASE

In November of 2017, Appellant Charles Davenport, Jr. was arrested following an investigation into a truck and moped collision that resulted in the death of the moped's driver. In February of 2018, the Richland County Grand Jury indicted Appellant for felony driving under the influence ("DUI") resulting in a death. On November 8, 2018, Appellant appeared in the Richland County Court of General Sessions and entered a guilty plea to the indicted offense before the Honorable George M. McFaddin, Jr., circuit court judge. During the course of the plea hearing, the plea judge accepted Appellant's guilty plea and sentenced him to a twenty-five-year term of imprisonment that was suspended upon the service of a twenty-year term of imprisonment and a fine of $10,100. Thereafter, Appellant filed both a motion and a supplemental motion seeking reconsideration of the sentence. Subsequently, through an order dated April 12, 2020, the plea judge declined to reconsider Appellant's sentence. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Around 7:25 p.m. on the evening of November 15, 2017, David Newell, a twenty-two-year-old college senior attending the University of South Carolina and a staunch advocate against drunk driving, was driving along on his moped in the right-hand lane of Rosewood Drive in the City of Columbia. (Tr. pp. 7-8; p. 28; pp. 33-34; pp. 39-41; pp. 51-54). At that same time, Appellant, a twenty-three-year-old college junior, was also travelling along Rosewood Drive in his father's full-size pickup truck just behind Newell. (Tr. p. 7; pp. 57-58). However, unlike Newell, Appellant was not merely lawfully operating a vehicle on the roadway. (Tr. p. 7). Instead, Appellant was driving at a speed of approximately seventy-six miles per hour, which was more than double the posted speed limit of thirty-five miles per hour, and had his vehicle's accelerator pedal essentially pressed all the way to the floorboard. (Tr. pp. 12-13). Furthermore, Appellant was grossly intoxicated, had consumed so much alcohol his blood alcohol concentration was 0.154 percent, was also under the influence of recently-used marijuana, and was potentially under the influence of Xanax. (Tr. pp. 10-12; pp. 15-16).

Tragically, due to his substantial level of impairment from multiple sources combined with his reckless driving, Appellant crashed his truck into the back of Newell's moped, which caused catastrophic injuries to Newell and ejected Newell's body into the left-hand lane of the roadway. (Tr. p. 8; p. 13). Appellant then lost control of his vehicle and—while dragging Newell's moped along—careened off the roadway into a tree. (Tr. p. 8; p. 13). Significantly, the collision with the tree brought Appellant's truck to a halt, but Appellant was still depressing the vehicle's accelerator pedal at the time of impact. (Tr. p. 13).

In the immediate aftermath of those terrible events, multiple witnesses to the collision quickly alerted authorities of what had occurred, emergency personnel rapidly responded to the

scene, and both Newell and Appellant were rushed to the hospital. (Tr. pp. 8-9). However, by that point, Newell was already unresponsive. (Tr. p. 9). As to why, Newell had sustained multiple spinal fractures and traumatic brain injuries from the collision, and those injuries were both irreparable and wholly incompatible with life. (Tr. p. 13; p. 54). Sadly, Newell's time of death was recorded at the hospital not long after the collision, and he was subsequently removed from a life support system that kept his body functioning long enough for his family to get to his side and for arrangements to be made consistent with his previously-expressed desire to be an organ donor. (Tr. p. 13; p. 33; pp. 36-37; pp. 46-49; p. 51; Arrest Warrant).

Meanwhile, blood samples were collected from Appellant at the hospital, and an analysis of those samples revealed the extreme extent of his intoxication along with the presence of the alcohol and other substances in his system. (Tr. pp. 10-12). Furthermore, law enforcement officers investigating the collision attempted to speak with Appellant once he regained consciousness. (Tr. pp. 9-10). However, aside from revealing he had been at a friend's house prior to the collision, Appellant declined to make any further statements. (Tr. p. 10).

Ultimately, as a result of law enforcement's investigation, Appellant was arrested and indicted for felony DUI resulting in a death, and he elected to plead guilty to that offense. (Tr. pp. 3-4; pp. 13-14; Indictment). During the course of the ensuing plea hearing, Appellant acknowledged he was facing a sentence between one and twenty-five years based on his plea. (Tr. pp. 5-6). Appellant further agreed the solicitor's summary of his criminal actions was "substantially" correct, and he personally confirmed he was guilty as charged.[1] (Tr. pp. 7-16).

[1] Notably, the defense's only quibble with the solicitor's account of Appellant's crime was a belief the Xanax detected in Appellant's system "may" have been administered during medical treatment provided after the collision. (Tr. pp. 15-16). However, Appellant directly affirmed there was no dispute concerning his use of alcohol and marijuana around the time of the collision. (Tr. p. 16).

Following those remarks, the plea judge accepted Appellant's guilty plea as freely, knowingly, voluntarily, and intelligently entered. (Tr. p. 17).

After the plea was accepted, a number of Newell's family members and friends addressed the court and provided statements about their profound and lasting grief over the loss caused by Appellant's "indefensible" choices. (Tr. pp. 18-56). Many of those individuals also requested the imposition of the maximum punishment while pointing to its high potential to serve as a powerful deterrent to other potential offenders. (Tr. pp. 18-56). In addition to those remarks, Appellant personally addressed the court, indicated he was "truly sorry," and attributed what occurred to his efforts to "self-medicate." (Tr. p. 59). However, Appellant also denied "just" being "completely reckless." (Tr. p. 59). Furthermore, many of Appellant's family members and friends spoke on his behalf and discussed his positive attributes. (Tr. pp. 60-76). Finally, defense counsel addressed the court, affirmed he believed the plea judge was "uniquely equipped to be objective and to consider everything" he heard based on his past experiences, and explicitly called the plea judge's attention to the fact Appellant had no prior record. (Tr. pp. 76-79).

Thereafter, the plea judge took the matter under advisement for several hours. (Tr. p. 80). He then returned to the courtroom and confirmed he reviewed everything that had been presented before reaching his sentencing decision. (Tr. p. 80). As to the basis for that decision, the plea judge explained he recognized Appellant did not intend his victim's death but noted Appellant nonetheless did choose to operate a vehicle under the influence of multiple intoxicating substances. (Tr. p. 81). He further indicated he gave consideration to Appellant's lack of a prior record and apparent remorse. (Tr. p. 81). However, the plea judge also indicated he gave consideration to the multiple aggravating factors involved, which included Appellant's consumption of both marijuana and alcohol and the fact Appellant was driving around twice the

posted speed limit on a city street. (Tr. p. 81). The plea judge then imposed a twenty-five-year sentence that was suspended to a twenty-year term of imprisonment along with a mandated fine of $10,100. (Tr. pp. 81-82).

Subsequent to the plea hearing, defense counsel filed a motion seeking reconsideration of Appellant's sentence.[2] (Recon. Motion, pp. 1-9). In seeking such relief, defense counsel alleged Appellant's sentence was not just a "surprise" but a "shock" and argued it was purportedly: (1) greater than necessary to achieve the goals of sentencing; (2) disproportionate in comparison to the sentences imposed in the past upon similarly-situated defendants; and (3) "excessive given the facts of the case." (Recon. Motion, p. 1). As support for those claims, defense counsel referenced data compiled regarding sentences imposed on offenders in South Carolina between 2014 and 2018 and alleged Appellant's sentence was above the average sentence imposed for other offenders convicted of felony DUI resulting in a death during that limited time frame. (Recon. Motion, pp. 1-2). Defense counsel also identified several aggravating factors— "prior convictions for others offenses, prior convictions for similar offenses, general lawlessness, and diagnosed or ignored personality or addiction generated misconduct"—that purportedly were of particular significance while maintaining none of those self-selected aggravating factors were present in Appellant's case. (Recon. Motion, p. 3). Furthermore, defense counsel maintained Appellant's sentence was "excessive" due to the fact Appellant lacked a prior criminal record, had support in the community, had a lower likelihood to be a repeat offender based on his status as a first-time offender, and had a high potential for rehabilitation based on his lack of "prior DUI convictions or a repeated history of lawlessness." (Recon. Motion, pp. 5-8). For all those

[2] In addition to the reconsideration motion, defense counsel also submitted a supplemental motion with a partial transcript attached that contained remarks a different plea judge made before sentencing an offender who pled guilty to one count of felony DUI resulting in great bodily injury and one count of felony DUI resulting in death. (Supp. Recon. Motion, pp. 1-11).

reasons, defense counsel urged the plea judge to reconsider Appellant's sentence while noting Appellant had accepted responsibility for his actions and understood he would have to serve a "substantial" sentence as a consequence of them.[3] (Recon. Motion, p. 8).

Upon giving the matter due consideration, the plea judge declined to reconsider Appellant's sentence. (Order, pp. 1-4). In declining to do so, the plea judge explained he listened to everyone who spoke during the plea hearing, considered what they said, and imposed Appellant's sentence after thoughtfully evaluating the matter. (Order, pp. 1-2; p. 4). Additionally, the plea judge noted the sentence he imposed complied with and fell within the limits established by the legislature for Appellant's crime. (Order, p. 2). Furthermore, the plea judge indicated he provided an explanation for the sentence when it was imposed and reiterated he considered the following factors to be particularly important to his sentencing decision: (1) Appellant was heavily intoxicated; (2) Appellant had consumed multiple intoxicating substances; (3) Appellant was driving at a speed more than double the speed limit on a city street at or shortly before the point he collided with his victim's vehicle; (4) Appellant's victim was driving lawfully on the roadway at the time of the collision; and (5) Appellant was knowingly engaging in unlawful acts on the roadway at that same time. (Order, pp. 2-3). Beyond that, the plea judge noted he considered defense counsel's arguments from the reconsideration motion along with the anecdotal evidence provided. (Order, p. 3). However, the plea judge found the sentence imposed was nonetheless warranted. (Order, pp. 3-4). For all those reasons, the plea judge denied the reconsideration motion. (Order, p. 4).

[3] Significantly, defense counsel did *not* allege at any point in the reconsideration motion Appellant's due process rights were violated by the manner in which he was sentenced or raise any arguments as to the adequacy of the notice Appellant had received in regard to sentencing. (Recon. Motion pp. 1-9).

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 circuit court judge's sentencing decision in rare and unusual circumstances in light of the broad discretion afforded to the circuit court judge 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."). 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."[4] 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.").

[4] Notably, that limited standard of review differentiates South Carolina appellate courts from some out-of-state appellate courts that have been expressly conferred with wider authority to review sentencing decisions. See, e.g., Ind. R. App. P. 7 (establishing the scope of appellate review of a criminal sentence and permitting Indiana appellate courts to "revise" a statutorily-authorized sentence of appeal "if, after due consideration of the trial court's decision, the [appellate] [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender"); 42 Pa. Stat. and Cons. Stat. Ann. § 9781(c) (establishing the parameters of appellate review of criminal sentences in Pennsylvania and permitting appellate courts to evaluate sentences for reasonableness pursuant to established guidelines).

ARGUMENT

I.

The plea judge did not abuse his broad sentencing discretion or commit any other error of law by sentencing Appellant to a twenty-five-year term of imprisonment that was suspended to twenty years' imprisonment and a fine after Appellant knowingly and voluntarily pled guilty to felony driving under the influence resulting in a death because the sentence imposed fell within the permissible statutory sentencing limits for Appellant's offense 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 plea judge.

Appellant contends the plea judge reversibly erred by sentencing him to a twenty-five-year term of imprisonment that was suspended to twenty years' imprisonment and a fine after he knowingly and voluntarily pled guilty to felony DUI resulting in a death, which—by Appellant's own admission—was an offense punishable by a term of imprisonment of up to twenty-five years. As support for that claim, Appellant alleges the plea judge abused his broad sentencing discretion by purportedly failing to "meaningfully" consider the "tremendous amount" of mitigating evidence presented and by imposing a sentence that was allegedly "too punitive" for the deadly crime committed. To the contrary, the plea judge did not commit any error whatsoever when sentencing Appellant—or when refusing to reconsider the sentence imposed—because he imposed a sentence that fell within the permissible statutory sentence limits for Appellant's terrible offense after considering *all* the evidence presented to him, and nothing appearing in the record established the plea judge imposed Appellant's statutorily-authorized sentence as the result of any partiality, prejudice, corrupt motive, or improper considerations. Under such circumstances, 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). Amongst the information that may be considered, the sentencing judge can consider such factors as the conduct or demeanor the defendant and the "atmosphere" of the proceedings 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."). Likewise, the sentencing judge is fully permitted to consider one or more of variety of legitimate penological justifications—including retribution, incapacitation, deterrence, and rehabilitation—in deciding what sentence is appropriate under the circumstances. See Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) (instructing "[a] sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation[,]" and explaining there is no constitutional mandate requiring adoption of any one penological theory); Jones v. United States, 463 U.S. 354, 368-369 (1983) ("A particular sentence of incarceration is chosen to reflect society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation."). Importantly, 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.[5] See Garrett v.

[5] Perhaps tellingly, aside from making a conclusory statement in the notice of appeal, Appellant

State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) ("A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against respondent."); 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.").

Notably, in State v. White, 311 S.C. 289, 296, 428 S.E.2d 740, 744 (Ct. App. 1993), this Court addressed a challenge to a twenty-one-year sentence imposed following a conviction for felony DUI resulting in a death. In that case, evidence was presented establishing White crashed his vehicle while driving at a speed of approximately seventy-five to eighty miles per hour on an *interstate* highway, and White's *passenger* was killed as a result of the crash. Id. at 293, 428 S.E.2d at 742. Further evidence was presented establishing White's blood alcohol concentration was .079 percent several hours after the crash, and the presence of benzodiazepine was also detected in White's urine. Id. at 292, 428 S.E.2d at 742. White was ultimately convicted of felony DUI in connection to the fatal crash, and the trial judge sentenced him to a twenty-one-year term of imprisonment.[6] Id. at 296, 428 S.E.2d at 744. Following his conviction, White appealed, arguing his sentence was "excessive as a matter of law." Id. at 296, 428 S.E.2d at 744. However, on appeal, this Court rejected White's sentencing challenge as having "no merit whatsoever." Id. As support for that conclusion, this Court simply noted White's sentence fell

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has not attempted to argue his sentence constituted cruel and unusual punishment on appeal. (App. Br. pp. 1-13; Notice of Appeal, pp. 1-2).

[6] Notably, nothing contained in the opinion in White suggests White had any prior convictions that impacted the trial judge's sentencing decision. White, 311 S.C. at 296-297, 428 S.E.2d at 744.

squarely within the statutory sentencing range for White's offense and, based on that alone, affirmed White's sentence without need for further analysis or discussion. Id.

In the case sub judice, Appellant selfishly chose to operate a motor vehicle on a South Carolina roadway while grossly intoxicated, and that legally-and-morally indefensible choice resulted—predictably—in the death of a blameless victim who did nothing other than attempt to lawfully drive his own vehicle at a time of day in which countless other people routinely do the exact same thing. See State v. Long, 186 S.C. 439, __, 195 S.E. 624, 627 (1938) ("[T]he driving of an automobile upon the public highway by a person while intoxicated is not only malum prohibitum, but malum in se."); see also State v. Grant, 483 A.2d 411, 414 (N.J. Super. Ct. App. Div. 1984) (characterizing a drunk driver as "one of the chief instrumentalities of human catastrophe"). Additionally, Appellant's blood alcohol concentration was well above the legal limit at that time, and he had also consumed at least one other substance—marijuana—that cannot even be legally possessed in our state. See S.C. Code Ann. § 44-53-370 (outlawing—amongst other things—possession of marijuana); S.C. Code Ann. § 56-5-2933(A) ("It is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more."). Furthermore, Appellant was unlawfully operating his vehicle—a full-size pickup truck—on a *city* street located in the heart of South Carolina's capital at a speed—seventy-six miles per hour—more than double the posted speed limit and in excess of the permissible speed limit on *any* South Carolina roadway, including our interstate highways. See S.C. Code Ann. § 56-5-1520(B)(1) (setting the maximum speed limit for interstate highways in South Carolina at seventy miles per hour). Undeniably, Appellant's actions were exceedingly wrongful and dangerous, which is perhaps best demonstrated by the fact similar actions have been recognized as being sufficiently culpable to warrant a conviction

for *murder*. Cf. State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) (concluding evidence establishing Mouzon struck and killed a pedestrian while intoxicated and driving a vehicle at a speed of seventy to eighty miles per hour in an area with a posted speed limit of thirty-five miles per hour in the small town of Alcolu supported Mouzon's conviction for murder along with its accompanying life sentence).

As a consequence of his unjustifiable and illegal actions, Appellant—just like the defendant in White—was convicted of felony DUI resulting in a death. Resultantly, Appellant was facing—as he personally acknowledged during the plea hearing—a mandatory term of imprisonment of no less than one year up to a maximum term of imprisonment of twenty-five years. See S.C. Code Ann. § 56-5-2945(A)(2) (mandating a person convicted of felony DUI be punished "by a mandatory fine of not less than ten thousand one hundred dollars nor more than twenty-five thousand one hundred dollars and mandatory imprisonment for not less than one year nor more than twenty-five years when death results"); see also Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.").

Upon considering all the information presented to him concerning both Appellant and Appellant's crime, the plea judge elected to impose a sentence that would require Appellant to effectively serve a twenty-year term of imprisonment unless he engages in some further misconduct and serve no more than twenty-five years' imprisonment at the most. See State v. Picklesimer, 388 S.C. 264, 270, 695 S.E.2d 845, 848-849 (2010) ("[U]nder no circumstances shall a defendant be incarcerated, or forced to participate in mandatory CSP or residual probation, stemming from the same conviction, outside of the time given by the trial judge in the

original sentence, which encompasses both the suspended and unsuspended portions of the sentence."). Thus, the sentence imposed by the plea judge fell squarely within the applicable sentencing limits for Appellant's offense, and nothing was presented—or even identified by Appellant—suggesting the sentence was imposed as the result of some partiality, prejudice, or corrupt motive on the part of the plea judge. S.C. Code Ann. § 56-5-2945(A)(2); cf. Garrett, 320 S.C. at 356, 465 S.E.2d at 350 (reinstating a sentence originally imposed by a plea judge because "it was within the limits permitted by law" and Garrett did "not assert either a constitutional violation or that the sentencing judge acted with partiality, prejudice or pressure"). Under such circumstances, the plea judge—just like the sentencing judge in White—did not abuse his broad discretion or otherwise err when sentencing Appellant, and there is simply no proper basis upon which the plea judge's discretionary sentencing decision could be disturbed 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.").

In arguing to the contrary, Appellant maintains the plea judge erred by allegedly failing to "meaningfully" consider the mitigating evidence presented and by purportedly imposing a sentence that was both "disproportionate to his crime" and "too punitive." Importantly though, the plea judge—and not Appellant himself—was the one tasked with evaluating the evidence presented and selecting an appropriate sentence under the circumstances involved. See State v. Miller, 187 S.C. 271, __, 197 S.E. 310, 311 (1938) ("Where left to his discretion by the law, the presiding judge, in the exercise of a wise judgment, determines what sentence, within the law, would be just and proper in any particular case."); see also Solem v. Helm, 463 U.S. 277, 290, n. 16 (1983) ("Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence[.]");

Reina-Rodriguez v. United States, 655 F.3d 1182, 1193 (9th Cir. 2011) ("Appellate courts are not sentencing courts."). And, while Appellant may have preferred the plea judge focus exclusively on Appellant's purported potential for rehabilitation or past positive actions, the plea judge was *not* required to do so and, instead, was fully permitted to consider other penological goals, such as deterrence or incapacitation, when deciding upon an appropriate punishment for Appellant's offense.[7] See Jones, 463 U.S. at 369 ("The State may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes."); Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937) ("[A state] may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes."); State v. Fletcher, 322 S.C. 256, 260, 471 S.E.2d 702, 704 (Ct. App. 1996) (recognizing "punishment of the offender" is a proper motivation for a sentencing judge).

Critically, as demonstrated by the plea judge's thorough explanation for his sentence, the plea judge carried out his difficult sentencing task by carefully evaluating *everything* presented to him, and the sentence he elected to impose after doing so fell within the appropriate sentencing limits for Appellant's crime. Cf. State v. Harrison, 402 S.C. 288, 303, 741 S.E.2d 727, 735 (2013) ("The trial court's statements at sentencing are the very embodiment of

[7] Demonstrating the significant need for deterrence in DUI cases, Appellant candidly acknowledges on appeal his deadly offense was one that is "all too common." (App. Br. p. 2). Likewise, at least one extensive DUI-focused study has recognized the potential value of imposing sentences on first-time DUI offenders that are sufficiently severe to discourage recidivism, which is a particularly rampant problem in the context of DUI offenses. See William J. Rauch et al., Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders, 100 Am. J. Pub Health 919, 921-922 (2010) (concluding from a study of more than *one-hundred million* driving records collected over a three-decade span of time "the rate of a subsequent [DUI] violation was increased 615% by the first violation," indicating the study's findings "call into question" the soundness of lenient sanctions being imposed upon first-time DUI offenders, explaining its findings "demonstrate the significance of any first arrest in terms of risk of recidivism," and noting surveyed offenders overwhelmingly reported "they would have been less likely to recidivate if their sanctions for a first offense had been more severe").

proportionality, and the court performed the analysis envisioned by the statute's broad penalty provision and in sentencing [Harrison] based on the facts and circumstances of the case."); Clark v. State, 259 S.C. 378, 382-383, 192 S.E.2d 209, 210-211 (1972) ("Appellant seeks to have his sentence set aside and be resentenced to a lesser term. His contentions in this respect require little comment. It has long been settled that this Court has no jurisdiction on appeal to correct an allegedly excessive sentence, which is within the limits prescribed by law for the discretion of the trial judge and which is not proved to be the result of partiality, prejudice, oppression or corrupt motive. We deem it unnecessary to cite or refer to the many authorities for this well settled proposition. The record here contains no suggestion, let alone evidence, of any partiality, prejudice, oppression or corrupt motive influencing or affecting the sentence."). Beyond that, as reflected by the strikingly-similar sentence imposed in White for the exact same offense, the sentence imposed upon Appellant was *not* disproportionate—grossly or otherwise—to the seriousness of his highly-dangerous and reckless offense, which was one that resulted in irreparable harm in the form of the death of an innocent victim through extreme actions that were both totally unjustifiable and completely avoidable.[8] See Brooks v. State, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (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."); see also Missouri v. McNeely, 569 U.S. 141, 160 (2013) (explaining drunk driving is a problem that "continues to exact a terrible toll on our society"); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the

[8] Notably, unless a sentence imposed is *grossly* disproportionate to the offense committed, it is unnecessary for purposes of a proportionality analysis to compare that sentence to the sentences imposed on other offenders convicted of similar crimes. Harrison, 402 S.C. at 299-300, 741 S.E.2d at 733; see also State v. Jones, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001) ("The cruel and unusual punishment clause requires the duration of a sentence not be *grossly* out of proportion with the severity of the crime." (emphasis added)).

States' interest in eradicating it."); South Dakota v. Neville, 459 U.S. 553, 558 (1983) ("The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented[.]"); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."). As a result, the fact Appellant may have personally wished the plea judge evaluated the pertinent sentencing factors differently and in a way that resulted in a sentence more to his liking does not in any way support a conclusion the plea judge abused his discretion or otherwise erred by imposing the sentence he imposed. See State v. Sanders, 251 S.C. 431, 444, 163 S.E.2d 220, 228 (1968) (instructing the "established rule" in South Carolina is an appellate court will not reverse a sentence for being "excessive" if it falls within the statutory sentencing limits and was not imposed as the result of partiality, prejudice, oppression, or corrupt motive); cf. People v. Cruz, 141 N.E.3d 1119, 1131 (Ill. App. Ct. 2019) ("[A]ll of the factors cited by [Cruz] on appeal were presented to the trial court and are presumed to have been considered appropriately. . . . [Cruz]'s argument is actually that the court did not weigh his potential for rehabilitation heavily enough. We decline to substitute our own judgment on the weight of such factors for that of the trial court. The trial court was not required to assign more weight to [Cruz]'s rehabilitative potential than to the seriousness of the offense, which is the most important sentencing factor." (citations omitted)); State v. Helms, 40 P.3d 626, 630 (Utah 2002) ("[T]he fact that Helms views his situation differently than did the trial court does not prove that the trial court neglected to consider the [sentencing] factors listed in [a specific Utah statutory provision].").

Accordingly, since Appellant's sentence fell within the appropriate statutory sentencing limits for his grievous offense and nothing suggested it was imposed based on partiality,

prejudice, oppression, corrupt motive, or any other improper considerations, the plea judge—just like the sentencing judge in White—did not abuse his broad discretion or commit any other error of law when imposing a legislatively-sanctioned sentence for felony DUI resulting in a death, 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."). Appellant's conviction and sentence should be affirmed.

II.

To the extent Appellant appears to be asserting the manner in which he was sentenced violated his due process rights, that particular constitutional claim was not properly preserved for appellate review because it was neither raised to nor ruled upon by the plea judge. Furthermore, even if that constitutional claim could somehow appropriately be raised and considered for the first time on appeal, Appellant's due process rights were not violated by the manner in which he was sentenced because he was fully on notice of the applicable sentencing limits for his offense before he pled guilty and was sentenced to a term of imprisonment falling squarely within those limits.

For the first time on appeal, Appellant appears to be challenging his sentence on due process grounds. As support for that constitutional challenge, Appellant maintains South Carolina's sentencing laws allegedly do not provide adequate notice to defendants in regard to what sentencing factors will be considered and, based on that, seems to be suggesting his due process rights were violated by the manner in which he was sentenced. Importantly though, Appellant neither raised any due process arguments to the plea judge nor asserted he had not received adequate notice as to sentencing, and the plea judge obviously did not rule on those arguments since they were never raised. As a result, Appellant's new constitutional claim was not properly preserved for appellate review and, thus, cannot appropriately be considered or addressed for the first time on appeal. However, even if Appellant's due process challenge could somehow properly be entertained for the first time on appeal, Appellant had all the notice to which he was entitled based on the notice he received prior to sentencing regarding the applicable sentencing range for his offense. Therefore, Appellant's due process rights were not violated by the manner in which he was sentenced. Appellant's conviction and sentence should be affirmed.

A. Appellant's Failure to Properly Preserve Any Due Process Issues for Appellate Review

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004).

The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the trial court is guaranteed a chance "to rule properly after it considered all relevant facts, law, and arguments[,]" and the appellate court is provided with everything needed to properly review whatever ruling is made within the limits of the applicable standard of review. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); Queen's Grant, 368 S.C. at 373, 628 S.E.2d at 919 ("The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Thus, based on those requirements, an issue—including a constitutional one—cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the trial judge. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974)

("Only matter that has been ruled on below can be reviewed[.]"); In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal.").

In the case at bar, Appellant—in addition to alleging the plea judge abused his discretion by sentencing him to a term of imprisonment falling squarely within the statutory limits for his crime—contends South Carolina's sentencing laws categorically result in a denial of due process because the broad sentencing discretion afforded to sentencing judges in our state purportedly does not give adequate notice to a defendant as to what factors will be considered during the sentencing process. Beyond that, Appellant maintains principles of fundamental fairness demand "a criminal defendant should be allowed to plead guilty and be sentenced by a judge who is committed to meaningfully assessing all of the mitigation evidence he has marshalled on his behalf." Furthermore, Appellant goes on to chastise this Court for somehow "abdicat[ing] its duty" to ensure "fairness in the system" by "not requiring judges to put their sentencing reasoning on the record to facilitate meaningful appellate review" of sentences. Appellant then urges this Court to remand his case for resentencing while providing advisory guidance to the plea judge "as to what mitigating and aggravating factors the court should use to guide his discretion" when imposing a sentence.

Critically though, during the circuit court proceedings in Appellant's case, defense counsel did not: (1) argue Appellant did not have constitutionally-sufficient notice as to what factors would be considered during sentencing; (2) allege the broad discretion afforded to sentencing judges in South Carolina was violative of due process in some manner; (3) contend the plea judge failed to identify—adequately or otherwise—the reasons upon which he based his sentencing decision in Appellant's case; (4) ask the plea judge to provide a fuller explanation of

why he imposed the sentence he imposed; or (5) even mention due process *at all*. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (instructing an appellant is limited on appeal solely to the grounds raised at trial). Thus, *none* of the arguments currently being raised on appeal in support of Appellant's apparent due process challenge to his sentence were actually raised to or ruled upon by the plea judge.[9] See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); cf. State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) ("Baker cannot now add a constitutional claim on appeal because he cannot raise one ground to the trial court and a different ground on appeal.").

Accordingly, to the extent Appellant is attempting to challenge his sentence on constitutional grounds for the first time on appeal, that challenge must be rejected as it was simply not properly preserved for appellate review pursuant to our well-established issue preservation requirements. See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"); cf. State v. Charron, 351 S.C. 319, 328, 569 S.E.2d 388, 393 (Ct. App. 2002) (finding allegations of due process and equal protection violations were not preserved for appellate review when there was no indication those issues were raised to the trial judge). Appellant's conviction and sentence should be affirmed.

B. Absence of Any Due Process Violations

Pursuant to the United States Constitution and the South Carolina Constitution, no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V;

[9] Interestingly, the issue of due process was first referenced in the notice of appeal, which contained a statement indicating a due process argument "may" potentially be raised on appeal. (Notice of Appeal, pp. 1-2).

U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Through the constitutional guarantee of due process, a criminal defendant is entitled to a criminal proceeding that is fundamentally fair, which—amongst other things—means one conducted only after reasonable notice has been provided. See California v. Trombetta, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness."); Thompson v. State, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016) ("Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review."). However, in the context of criminal sentencing, the notice required by due process simply means notice of the applicable sentencing range for the charged offense, which is sufficient to alert the defendant of the bounds of the discretion afforded to the sentencing judge. See Beckles v. United States, __ U.S. __, 137 S. Ct. 886, 894 (2017) ("All of the notice required is provided by the applicable sentencing range, which establishes the permissible bounds of the court's sentencing discretion."). Significantly, if such notice is provided, a sentencing judge can exercise broad or even "unfettered" discretion in imposing a sentence falling within the established limits without violating a defendant's due process rights. See id. (recognizing a system of "unfettered" sentencing discretion is not unconstitutional); United States v. Booker, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

In Appellant's case, the plea judge ensured Appellant was fully aware of the sentencing range for his offense before accepting Appellant's guilty plea, and Appellant personally affirmed he understood he could be lawfully sentenced to a term of imprisonment of one to twenty-five years. Based on that, Appellant possessed all the notice to which he was entitled regarding sentencing, and he could validly and fairly be sentenced to a term of imprisonment falling within

the permissible sentencing limits of which he was fully aware. See Beckles, 137 S. Ct. at 894 (explaining notice of "the applicable sentencing range" provides a criminal defendant with constitutionally-sufficient notice as to sentencing). Therefore, the plea judge did not violate Appellant's due process rights by imposing a statutorily-authorized sentence for Appellant's crime even though the plea judge's discretion over the matter was somewhat broad in scope. See id. at 893 ("[O]ur cases have never suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered."); Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (recognizing it is not impermissible for sentencing judges to "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute").

In apparently arguing to the contrary, Appellant seems to suggest South Carolina's system of affording broad sentencing discretion to circuit court judges is somehow unfair and unconstitutional based on the extent of the discretion it affords while pointing to the federal guideline-based system of sentencing as one that would be more to his liking. However, the adoption of sentencing guidelines by Congress for use in federal cases did *not* render the system of broad discretion that preceded it unconstitutional. See Beckles, 137 S. Ct. at 894 (2017) ("[T]he system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible."). Instead, as has historically been true in our country, South Carolina—along with other states—remains free as a matter of constitutional law to establish appropriate penalties or penalty ranges for state crimes and to define the limits of the discretion afforded to judges on matters of sentencing. See id. at 893 (recognizing the existence of a "long history of discretionary sentencing" in the United States); State v. Cantrell, 250 S.C. 376, 379,

158 S.E.2d 189, 191 (1967) ("*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." (emphasis added)). Therefore, since there is nothing unconstitutional about South Carolina's system of affording broad discretion to sentencing judges, the fact Appellant may wish for South Carolina's legislature to alter our sentencing laws to reign in that discretion or to impose some other new requirements on sentencing judges does not establish a basis to disturb his sentence on appeal no matter how much he personally disagrees with the decision reached by the plea judge in his case. See Collins v. Johnston, 237 U.S. 502, 510 (1915) ("To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the lawmaking power, are functions peculiarly belonging to the several states[.]"); State v. Brannon, 341 S.C. 271, 278, 533 S.E.2d 345, 348 (Ct. App. 2000) ("Under most circumstances, the severity of a sentence prescribed for a particular offense remains a matter of legislative prerogative."); cf. Harrison, 402 S.C. at 310, 741 S.E.2d at 739 (rejecting Harrison's request for the appellate court to direct the legislature to adopt "a sentencing structure in uniformity and harmony with an undefined number of states" due to the fact such a request would run contrary to the broad authority of the legislature to determine "the types and limits of punishments for crimes").

Ultimately, since the plea judge—who thoroughly explained the reasoning behind his decision—sentenced Appellant to a term of imprisonment falling squarely within the sentencing range our General Assembly deemed appropriate for Appellant's crime only after first ensuring Appellant was fully aware of the applicable sentencing range, the plea judge did not deprive

Appellant of any notice or fairness to which he was entitled or otherwise violate Appellant's due process rights. See Beckles, 137 S. Ct. at 894 (recognizing notice of the applicable sentencing range is constitutionally sufficient). As a result, there are no proper grounds to disturb Appellant's sentence under the applicable standard of review. See State v. Beaty, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018) (recognizing appellate courts in South Carolina are constitutionally limited to reviewing solely for errors of law in criminal cases); State v. Crosby, 160 S.C. 301, __, 158 S.E. 685, 687 (1931) (explaining an appellate court "has no power to reduce the sentence or to reverse the judgment" based on a claim the trial judge should have imposed a lighter sentence because the term of the sentence imposed falls within the authority and discretion of the trial judge); see also Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (recognizing courts "do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly"). 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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February 5, 2021

RECEIVED
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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable George M. McFaddin, Jr., Circuit Court Judge
Appellate Case No. 2020-000631

THE STATE,

Respondent,

vs.

CHARLES DAVENPORT, JR.,

Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Elizabeth Franklin-Best, Esq.
Elizabeth Franklin-Best, P.C.
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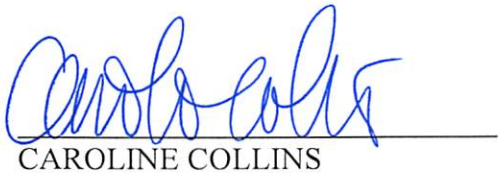
Columbia, SC 29205

I further certify all parties required by Rule to be served have been served.
This 5th day of February, 2021.



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Caroline Collins

From: Caroline Collins
Sent: Friday, February 5, 2021 3:19 PM
To: elizabeth@franklinbestlaw.com
Cc: William Blitch; Mark Farthing
Subject: The State v. Charles Davenport (2020-000631)
Attachments: Davenport.IBOR (02484667xD2C78).PDF

Good Afternoon Ms. Franklin-Best,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter in The State v. Charles Davenport (2020-000631). These documents will be submitted to the Court of Appeals today via the AIS One Drive System. If you would like a hard copy deposited in the mail, please let me know.

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

Thank you!

Caroline Collins
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