STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRANCISCO SAUL ORTIZ-AGUIRRE,

APPELLANT.

APPELLATE CASE NO. 2020-000992

ANDERS BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the plea court abused its discretion in denying Appellant's motion to reconsider his sentence of ten years where the judge mistakenly believed she could not reconsider the sentence unless defense counsel presented her with new mitigation?

STATEMENT OF THE CASE

During the October and November 2019 Beaufort County grand jury terms, Appellant was indicted for three counts of burglary second degree, non-violent, four counts of forgery, value less than $10,000, and one count of larceny, value $2000 or less. R. 40-62. On May 18, 2020, Appellant appeared before the Honorable Carmen T. Mullen to enter a guilty plea to all eight indictments with a recommendation from the state for a sentence between five- and ten-years imprisonment. R. 1; R. 4, ll. 1-15. During the plea hearing the state was represented by Mary Jordan Lempesis. Appellant was represented by public defender Melissa Duque. R. 2.

Appellant was sentence to ten-years imprisonment on each burglary charge, five years imprisonment on each forgery charge, and thirty days, time served, for the larceny charge, all to run concurrently. R. 12, l. 21-R. 13, l.14. Appellant, through Counsel Duque, filed a motion to reconsider his sentence on May 28, 2020, and requested a hearing on the matter at the court's earliest convenience. R. 15-17. A hearing on the motion was never held and no formal denial of the motion was filed. Counsel Duque filed a notice of appeal on July 9, 2020, stating that the motion to reconsider had been denied that same day. R. 18.

Subsequently this Court held the case in abeyance and remanded the matter back to the court of General Sessions for a formal ruling on the motion to reconsider. R. 20. A hearing on the motion to reconsider was held via WebEx videoconferencing on September 15, 2020. The lower court filed a formal order[1] denying Appellant's motion to reconsider on October 8, 2020. R. 37. Upon receipt of the order this Court removed the appellate case from abeyance.

This brief follows.

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1 The order incorrectly states that the hearing on the motion to reconsider the sentence was held on September 14, 2020.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

ARGUMENT

The plea court abused its discretion in denying Appellant's motion to reconsider his sentence of ten years where the judge mistakenly believed she could not reconsider the sentence unless defense counsel presented her with new mitigation.

Relevant Facts

In May 2019 three homes in the Sun City retirement community in Bluffton, SC, were burglarized. Various items, including jewelry, cash, and checks, were taken from the homes. The stolen checks were later forged by Appellant, who was captured on camera in a local bank cashing the checks. Appellant was also seen on the exterior security camera system of one of the burgled homes. R. 6-10.

Appellant pled guilty as indicted with a recommendation from the State for concurrent sentences between five and ten[2] years imprisonment. R. 4, ll. 14-17. The State informed the plea court that Appellant's only prior conviction was for driving without a license. R. 12, ll. 10-12. Counsel Duque informed the court that Appellant had come to the United States from Honduras when he was seventeen years old and had been granted asylum. Appellant was having financial difficulties when these crimes occurred. R. 11-12. The plea court sentence Appellant to an aggregate term of ten years imprisonment. R. 12-13.

Counsel Duque filed a motion to reconsider the sentence on May 28, 2020, at the request of Appellant. R. 15-17; R. 24, ll. 10-11. In the motion Counsel Duque argued that the plea court had failed to give Appellant any consideration for his acceptance of responsibility because the court had sentence Appellant to the maximum sentence for each offense. R. 15-17. The parties

2 Appellant's total sentencing exposure was 50 years and 30 days. R. 5, ll. 2-5.

reconvened before Judge Mullen on September 15, 2020, to address the motion to reconsider. R. 21.

At the beginning of the resentencing hearing Counsel Duque informed the court that Appellant had requested the motion be filed because "he felt that, though the sentences imposed were within range, the sentences were harsh and excessive for a first-time offender who does not have a criminal record." R. 24, ll. 10-15. In response the court stated,

> I didn't see that there was any new information that you wanted me to reconsider as far as his sentence is concerned. Your motion says that I need to give him some consideration for his guilty plea, although my problem is this with that: He was looking at three counts of burglary in the second degree, non-violent, which carried ten years apiece. So that's thirty years. He was then looking at four counts of forgery, less than $10,000, which carried five years apiece, and then the petite larceny. So what he was really looking at was fifty years in prison and thirty days. And what I gave him was ten years. As far as your grounds for reconsideration, I didn't see anything that allowed me to take into account anything that you hadn't already presented at the sentencing. And that's the standard, is whether or not you have new information. I certainly know and gave him credit for pleading guilty because I agree with you – I mean, he was looking at fifty years, and I sentenced him to ten years with credit, so again, I guess is there anything new that you need to tell me other than that?

R. 24, l. 18-R. 25, l. 8.

Appellant addressed the court stating that while he accepted responsibility for his actions, there were three other individuals involved in the crimes who were never caught. R. 25, l. 24-R. 26, l. 3. Appellant stated that he was never inside any of the homes and he did not know the checks were stolen when he was given them to cash. R. 31, ll. 9-11; R. 32, ll. 9-10. The State reviewed the underlying facts for the court and added that Appellant had admitted to being involved in the burglaries when he was interviewed by law enforcement. R. 31, l. 20-R. 33, l. 14.

Judge Mullen did not reconsider Appellant's sentence. In ruling she stated, "there is nothing that I have heard that I didn't previously hear and nothing that changes my mind." R.

34, ll. 9-11. She further clarified that her original sentence was based on the amount of the forged checks, the stolen jewelry, and the fact that the burglaries occurred in a retirement community. R. 34, ll. 9-18. Judge Mullen stated she considered Appellant's lack of record in fashioning a sentence, noting that if Appellant had had a prior record, he would have received more than ten years imprisonment. R. 34, l. 24-R. 35, l. 2.

Discussion

The plea court mistakenly relied upon a non-existent standard in denying Appellant's motion to reconsider his sentence. The court stated that the standard "is whether or not you have new information" indicating that the court was without the authority to reconsider Appellant's sentence without being provided new information. R. 25, ll. 4-8. That was not correct. Moreover, Appellant did provide new information for consideration that the court did not take into account when it denied the motion. The denial of Appellant's motion to reconsider his sentence was an abuse of discretion.

It is well settled that the authority to change a sentence rests solely within the discretion of the sentencing judge. See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). The only time a judge is without authority to change a sentence is after the term of court at which the sentence was imposed has expired. State v. Best, 257 S.C. 361, 186 S.E.2d 272 (1972). Otherwise, the sentencing, and resentencing, of an offender is entirely within the purview of the sentencing judge with the only limits on a judge's sentencing discretion being the statutorily created maximum and minimum sentencing limits for certain offenses.

In State v. Smith, *supra*, the South Carolina Supreme Court held in part that the failure of the sentencing judge to exercise discretion was, in itself, an abuse of discretion. Smith at 498, 280 S.E.2d at 202. Smith had been tried in his absence and his sentence sealed. Id. at 496, 280 S.E.2d at 201. After his sentence was published Smith moved for reconsideration. Id. The

judge denied Smith's motion stating he lacked the jurisdiction to change the sentence. Id. at 497, 280 S.E.2d at 201. The Supreme Court held that the motion, although heard later, was "made within the term of court at which the sentence became the judgment of the court, to the sentencing judge," and he therefore had the jurisdiction to alter, amend or modify the sentence. Id. at 498, 280 S.E.2d at 202. The Court found that the judge did not exercise any discretion at all but based his ruling on an erroneous view of the law. Id. The Court stated

> *It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.* We call to the attention of the bench and bar that the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised.

Id. (Emphasis added).

The sentencing judge in Appellant's case based the denial of the motion to reconsider Appellant's sentence on an erroneous view of the law. There is not a "standard" for a motion to reconsider a sentence. The "new information" standard that the judge referred to applies to bond reconsideration motions, not sentencing reconsideration motions. Admittedly, Appellant received a legal sentence and the sentencing judge gave her reasons for the sentence. However, these are not excuses upon which to rest the judge's misapprehension of the law.

The sentencing judge was required to exercise discretion and she did not do so. Instead she incorrectly denied Appellant's motion to reconsider his sentence based on an inaccurate view of the law. Moreover, Appellant did provide the court with additional information in mitigation that was not previously presented, and it appears from the record the court did not consider that information in denying the motion. The judge abused her discretion by not considering the new information and by not exercising her discretion to actually consider the motion on its merits.

CONCLUSION

Based on the foregoing argument, Appellant respectfully request this Court remand his case to the Court of General Sessions of Beaufort County for a new hearing on his motion to reconsider his sentence.

s/Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of June, 2021.

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Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Francisco Saul Ortiz-Aguirre states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on May 18, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Francisco Saul Ortiz-Aguirre.

Respectfully Submitted,

s/Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of June, 2021.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1) Guilty Plea Transcript dated May 18, 2020
2) Motion to Reconsider
3) Notice of Appeal
4) Ct. App. Order dated September 1, 2020
5) Transcript of Hearing on Motion for Reconsideration held September 15, 2020
6) Order Denying Motion to Reconsider Sentence dated October 8, 2020
7) Sentence Sheets
8) Indictments

I certify that this designation contains no matter which is irrelevant to this appeal.

s/Jessica M. Saxon
Appellate Defender

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Columbia, SC 29211-1589
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ATTORNEY FOR APPELLANT

June 7, 2021

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CERTIFICATE OF COUNSEL

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

s/Jessica M. Saxon
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

June 7, 2021.