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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

R. Markley Dennis, Jr., General Sessions Judge

Case No. 2022-000472

The State, Respondent,

v.

Bowen Gray Turner, Respondent,

In re: Victim C.B., Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether Victim's constitutional rights to present and be heard at the Plea Hearing were violated when the court deemed the Rule to Show Cause, Motion to Enforce Victims' Rights and to be Heard Prior to Guilty Plea, and Petition for Writ of Mandamus as each being untimely filed.

STATEMENT OF THE CASE

In May 2018, Respondent Bowen Turner was accused of sexual assault of a teenager at her home. They were both high school students and this accusation did not result in charges. On January 29, 2019, Turner was charged with Criminal Sexual Conduct - First Degree in the General Sessions Court in Bamberg County for sexually assaulting a second high school student, Victim D.S. Victim D.S. is now deceased. On June 2, 2019, while out on bond for the sexual assault against Victim D.S, Turner assaulted Victim C.B., his third victim, and was again charged with Criminal Sexual Conduct - First Degree.

On August 5, 2019, after several bond hearings, Respondent was released on what the court termed "strict house arrest" with an ankle monitor. Respondent was allowed to live at his grandmother's house and was restricted against traveling from that location to his own home. The Court further instructed that Respondent could travel to a medical, legal or mental health appointment without any stops, and was prohibited from contacting anyone outside of his immediate family and from accessing the internet. The Order Granting Bond read in relevant part:

> ANY AND ALL violations of the conditions of HOME DETENTION shall be reported to the Second Circuit Solicitor's Office or the Orangeburg County Sheriff's Office within 24 hours of the violation. FAILURE TO COMPLY WITH THIS NOTIFICATION REQUIREMENT WILL SUBJECT THE ELECTRONIC MONITORING COMPANY TO POTENTIAL CRIMINAL AND CIVIL SANCTIONS FOR CONTEMPT OF COURT. (All caps portions are true to the Order and were not added for emphasis).

The State and defense agreed, outside of court, that Respondent should be allowed to leave his grandmother's house on December 24th, and return the following day so he could spend Christmas with his immediate family. No hearing was held on that issue, and Victim was not given an opportunity to be heard on this bond modification.

Respondent's bond was again modified in March 2020, to allow him to reside with his parents over Victim's objections; all of the other conditions of bond remained in place. At the Victim's request, the South Carolina Law Enforcement Division ("SLED") obtained the GPS records generated by the ankle monitoring device for the previous three months. SLED determined that between November 2021, and February 2022, Respondent violated bond more than fifty (50) times. He made thirteen (13) visits to a golf course, six (6) to a golf center, and multiple visits to Sam's Club, Costco, Red Robin Restaurant, Hibbett Sports, Staples, an apartment complex and several other locations. This information was gathered on March 2, 2022, and the State filed a Motion to Revoke Bond against Respondent on March 25, 2022. A hearing was scheduled for April 8, 2022.

On April 4, 2022, just four days before the scheduled bond hearing, the Solicitor notified Victim C.B. that he planned to make a plea offer to reduced the original charge of criminal sexual conduct 1st degree to assault and battery. In response, on April 6, 2022, Victim filed a Petition for Writ of Mandamus to require law enforcement or the Solicitor to enforce the bond order and arrest Respondent. In addition, Victim filed a Rule to Show Cause against the bond company for failing to report the violations. SLED filed a brief in opposition to Victim's Petition for Writ of Mandamus.

The hearing on the Motion to Revoke Bond was still scheduled for April 8, 2022. Despite being informed of an offer on April 4, no notice was given that the hearing would be converted into a change of plea, when egregious violations of bond were pending. Yet this is what occurred.Victims had been informed of the offer four days earlier, on April 4, but were never notified that the hearing to revoke bond was actually going to be a guilty plea. The hearing on

the Motion to Revoke Bond never took place and instead a guilty plea hearing was held. In response to the scheduled plea hearing, Victim filed and electronically served a formal Motion to Enforce Victims' Rights and to be Heard Prior to Guilty Plea the morning of April 8.

At the April 8 guilty plea hearing, the trial court denied Victim C.B.'s three motions, not on the merits, but on the basis that each was untimely filed and served in violation of "the four day rule". During the hearing, counsel for C.B. moved the court for a continuance in order to comply with the court's four day rule. The court denied this.

Victim C.B. seeks appellate review of the court's findings related to Victim's timeliness of filing and service of Victim's motions and her request to be allowed to present and be heard prior to the plea acceptance.

STANDARD OF REVIEW

Determination that a motion has not been properly filed as required by the "four-day rule" is a question of law which is reviewed de novo, without any particular deference to the circuit court. Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

The enforceability of rights granted by the South Carolina Constitution is a question of law which is reviewed de novo, without any particular deference to the circuit court. Jeter v. S.C. Dept. of Transp.,369 S.C. 43. 438 , 633 S.E.2d 143. 146 (2006) (holding interpretation of statute is a question of law).

ARGUMENT

I. THE TRIAL COURT DENIED VICTIM C.B. PROCEDURAL JUSTICE WHEN IT REFUSED TO HEAR FROM HER BEFORE ACCEPTING THE GUILTY PLEA, IN VIOLATION OF HER CONSTITUTIONAL RIGHTS TO BE HEARD AND TO PRESENT.

The South Carolina Constitution includes the Victims' Bill of Rights.[1] This important document sets out the rights accorded every victim in the justice system and is included in the Constitution to insure that the Victims' rights be protected "as diligently as those of the defendant." S.C. Code Ann 16-3-1550 (D). Despite this mandate, Victim C.B.'s constitutional rights have been consistently disregarded throughout this case. This appeal focuses on two of the procedural injustices she suffered: the right to be heard and to present at the guilty plea.

Victims have the right to" be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present." S.C. Const. Art. I,§ 24(A)(3). Despite this clear constitutional mandate, Victim CB. was not allowed to make any statement before the trial court accepted the guilty plea. Under South Carolina law, once a guilty plea has been accepted by the court, the parties are bound to it. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (S.C. App. 1999). Although she was allowed to speak after the plea was

[1] The South Carolina Constitution Article 1,§ 24(A) 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: 1) be treated with fairness, respect and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process, and informed of the victims' constitutional rights, provided by statute; 2) be reasonably informed when the accused or convicter person is arrested, released from custody, or escaped; 3) be informed of and present at any criminal proceeding which are dispositive of the charges where the defendant has the right to be present; 4) be reasonably informed of and be allowed to submit a written or oral statement at all hearings affecting bond or bail 5) be heard at any proceeding involving a post-arrest release decision, a plea, or sentencing; 6) be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process; 7) confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and informed of the disposition; 8) have reasonable access after the conclusion of the criminal investigation to all documents relating to the crime against the victim before trial; 9) receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury, inlcuding both adulty and juvenile offenders; 10) be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision; 11) a reasonable disposition and prompt and final conclusion of the case; 12) have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and have these rules subject to amendment or repeal by the legislature to ensure protection of these rights.

accepted, the timing rendered her presentation a meaningless show: the plea had already been accepted and could not be changed. This process denies the Victim of any meaningful input and thereby circumvents the constitutional provision that she be allowed to "present.".

In South Carolina, the recommended plea becomes a "done deal" once it is accepted by the court. The trial court's custom of delaying the victims' statement until the sentencing phase of the plea denies the Victim procedural justice. If the Victim is not allowed to present until after the plea is accepted, the court is just going through the motions when it listens to the Victim's Impact Statement and the Victim's input, rendered after-the-fact, is reduced to a mere formality.

The S.C. Supreme Court's decision in Ex parte Littlefield provides a roadmap for situations like this. Littlefield v. Williams, 343 S.C. 212, 540 S.E.2d 81 (2000). Littlefield explains the responsibilities of the prosecutor as well as the rights of the victims. While prosecutors retain broad discretion over whether "to pursue a case to trial, to plea bargain it down to a lesser offense, or they may simply decide not to prosecute the case in its entirety," their discretion is constrained by many sources, including the Victims' Bill of Rights. Prosecutors have certain duties to crime victims.

As Littlefield explains, under the Victims' Bill of Rights, S.C. Const.art. I, § 24(C)(2), "a victim has the right to 'be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present'." (Emphasis in original.) The Court in Littlefield held that once a criminal proceeding has concluded, it cannot be re-opened even when there has been a violation of victims' rights. In Littlefield, the two petitioners lost substantial funds in financial dealings with the defendant, following the commission of white-collar crimes. The Solicitor's Office determined that there was not probable cause to charge the defendant with any crime against petitioner Littlefield, but it proceeded with

charges relating to petitioner Jeter. Littlefield and Jeter both moved the court to set aside the guilty plea that was entered, arguing that they were not notified of the plea prior to the hearing and were denied the right to attend. The Court determined that a victim's rights to participate in the criminal process arise when the defendant is charged with a crime involving that victim. Since the defendant was not charged with any crime involving Littlefield, the prosecution was not his "concern" and Littlefield was not a "victim" in that case. In effect, neither the petitioner-victims nor defendants have the right to participate in cases that do not involve them. Similarly, once Jeter was notified that the indictment was dismissed due to inability to prosecute, he was not a victim in the subsequent proceedings and there was apparently no need for further communication with him. Littlefield at p. 221.

Victim C.B. was notified in advance of the pending plea offer; however, she was not notified of the final negotiated deal. Although she was given an opportunity to attend the guilty plea proceedings,she was not allowed to *present* until after the guilty plea was accepted. Once the court accepted the guilty plea, the deal was done and her subsequent presentation was meaningless.

Unlike the petitioners in Littlefield, Victim C.B. was the subject of the charged Criminal Sexual Conduct 1st Degree. The crimes against her were actively prosecuted and she was entitled to all protections under the Victims' Bill of Rights. When she was informed of the guilty plea hearing, she promptly filed a formal Motion to Enforce Victim's Rights and to Be Heard Before Guilty Plea. A hearing on the Solicitor's Motion to Revoke Bond had originally been scheduled for Friday, April 8, but it was never confirmed that it was to be recast as a guilty plea hearing. Appearing at the scheduled hearing, Victim's counsel moved the trial court to be heard on the motion prior to the announcement of the plea bargain. Transcript p. 6, lines 12-15. The

trial judge denied that motion as not properly served and without proper notice in violation of the 4-day rule. T. at p. 7, lines 2-4. Victim's counsel moved for a continuance, which was denied. Then the judge asked the Solicitor whether he wanted to continue the matter and was answered in the negative. T. at p. 7, lines 5-11. At that point he allowed the State to present the terms of the recommended plea and heard from the Defendant about his acceptance and understanding of the plea. It was clarified by the Solicitor that the plea was a recommendation, which could be accepted or rejected by the court. T. at p. 8, lines 21-25; T. at p. 9, lines 1-2. The judge accepted the plea. T. at p. T. at p.16, line 10.

After the plea was formally accepted, the Court allowed Victim's counsel and father to address the court regarding the plea. Victim's counsel expressed Victim's objection to the plea bargain. T. at p. 18, lines 13-15. Victim's father read a Victim's Impact Statement and then the father of Defendant's second alleged sexual assault victim read an impact statement. After hearing from counsel and the families, the Court modified the plea offer to extend probation from two to five years.

Victim C.B., in this instance, moved to protect her rights while the Victims' Bill of Rights were still applicable, as compared to the appellants in Littlefield, who were non-victims seeking to enforce rights after the guilty plea had already been entered. Victim C.B., unlike the Littlefield petitioners, is not seeking to re-open the guilty plea, but is seeking a finding that the court should have heard from Victim prior to ruling on the guilty plea and should not have proceeded to sentencing at the guilty plea hearing, because doing so deprived Victim of an opportunity to be heard and to present regarding the plea and its acceptance and for those comments to be afforded due consideration.

A. Victim Had A Right to Present At The Plea Hearing

As noted above, the Victims Bill of Rights specifies that "victims of crime have the right to . . . be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present." S.C. Const.art. I, § 24(C)(2).

It is undisputed that as the defendant in a criminal action, Respondent Turner and his counsel had the right to present throughout the proceedings on April 8; they presented their position before the plea was accepted and again during the sentencing stage. Prior to the hearing, Victim C.B. filed a motion that she be allowed the same opportunity to present before the plea was accepted. This was denied as not timely, as was her request for a continuance in light of the 4-day rule. T. at p. 6, lines 12-24; T. at p. 7, lines 2-10. By this ruling, the trial court denied Victim C.B. the right to make a meaningful presentation before the sentencing.

The Trial Court apparently construed the word "present" to be an adjective, as in describing a particular location, such as "a doctor must be present at the ringside". Google's English Dictionary, provided by Oxford Languages. Similar adjectives include near, close, and at hand. However, in this context, "present" is not an adjective; it is actually a transitive verb, meaning "to lay (something such as a charge) before a court as an object of inquiry." Merriam-Webster's Collegiate Dictionary (1999) . Or, as Black's Law puts it: ". . . To find or represent judicially; used of the official act of a grand jury when they take notice of a crime or offense from their own knowledge or observation, without any bill of indictment before them." Present, Black's Law Dictionary, (10th ed. 2014).

Under the first canon of construction, the plain meaning rule, words are given the plain meaning in the statutory text. Anderson v. S.C. Election Comm'n, 397 S.C.551,556, 725 S.E.2d 704, 707 (2012). Another canon is the presumption that every word in a statute or law has

meaning. Under this canon, every word and every provision is to be given effect. 16 Jade Street, LLC v. R. Design Const. Co., LLC., 398 S.C. 338, 728 S.E.2d 448 (2012). Applying these two canons of construction, the word "be" is intentionally included in S.C. Const.art. I, § 24(A)(2), which reads a victim has a right to … "be reasonably informed when the accused is arrested, released from custody or escapes". By contrast, the verb "to be" is omitted from the next paragraph, that the victim has a right to "be informed of and present at any criminal proceeding." This absence of "be" in the second clause is important because it provides a different meaning to the paragraph. As written, the statute bestows the right for victims to be noticed of and to make presentations at the criminal proceedings. In contrast, if the phrase read a victim has a right to be informed of and "to be present", the meaning would then be that a victim merely has the right to attend the proceeding as does the general public.

This interpretation of the word "present" as a verb is consistent with other sections of the Victims' Bill of Rights. Specifically, S.C. Const.art. I, §24(A)(10) uses the word "present" in the sense of "appearing" in parallel construction with the infinitive "to be"when it" specifies that victims have a right to "be informed" and "be present," as follows: the victim's right to "(10) be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision." The public at large has a right to attend criminal hearings, which are open proceedings, so there would be no need to include in the Constitution that victims have a right that is available to all.

Allowing the Victim C.B. the constitutional "right to present" is fully compatible with the Court of Appeals ruling in Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (S.C. App. 1999), that the victim does not have the right to veto a proposed plea agreement. While recognizing the solicitor's unfettered discretion in arriving at a plea agreement and presenting it to the trial court

as either a recommended or negotiated plea, the victim still has the constitutional right to present her point of view before the plea is accepted. Denial of the opportunity to speak to the court before the plea is accepted is a violation of the victim's constitutional right to present.

B. Obtaining A Writ Was Impossible Under These Circumstances

Littlefield concludes with an exposition as to the proper enforcement of victims' rights in the trial courts. The Victims' Bill of Rights does not establish a civil cause of action: these rights are properly presented in a writ of mandamus to the circuit judge or any justice in the Supreme Court. S.C. Const.art. I, § 24(B)

A victim may seek a writ of mandamus to enforce compliance with the Victims' Bill of Rights. However, considering the short amount of notice that is usually given to victims before a plea hearing is held, it is not practical or possible for a victim to obtain a writ of mandamus prior to the hearing. Also, a victim can not seek a writ of mandamus before the plea hearing because the issue of a victim being heard is not ripe until it is actually denied. A writ of mandamus was not a practical option in this case because the court accepted the plea minutes after denying Victim's motion to be heard. There was no time for the Victim to present a writ to the Supreme Court under these circumstances.

The trial court erred in finding that Victim's Motion to Enforce Victim Rights was not timely filed and served. Victim was not able to provide more notice than she was provided by the State in terms of a recommended plea being presented at the scheduled hearing. Victim filed and provided notice of the motion on the same day that she learned for certain that the State was going to present the plea recommendation to the court. The court's finding that sufficient notice of the motion was not provided is error. There is no known South Carolina Rule of Criminal Procedure, or case law, that requires a specified amount of notice of a motion to a party in a

criminal proceeding. And even if such a rule existed, it would not have been possible for Victim C.B. to have provided lengthy notice of the Motion to Enforce, because she was only given four day notice that the plea offer was being made.

There is a legal quandary in having a writ of mandamus as the remedy for violations of victims' rights related to a plea agreement; it is not ripe to seek relief before the violation occurs and it is too late to seek relief for a violation after the plea is approved.

In Reed, 333 S.C.2d 396, the Victim and State appealed an order finding a plea agreement was valid and enforceable. The court held that a victim possesses no rights in the appellate process and that nothing in the South Carolina Constitution or statutes provides the victim standing to appeal the trial court's order. Id. at 681. The court went on to find that the rights granted to victims by the Constitution and statute are enforceable by a writ of mandamus, rather than direct participation at the trial level. Id. at 681. In the current case before the Court, Victim was denied the opportunity to even be heard on the Petition for Writ of Mandamus, which the Reed court recognized as a means to enforce victims' rights. Under Reed,Victim should have at a minimum been heard on the Petition for a Writ of Mandamus.

The common practice of hearing guilty pleas and sentencing within one proceeding makes it impractical to seek a writ of mandamus for a victim to enforce their rights. This is particularly true for the vast majority of victims in our state who are not represented by legal counsel. Although the court may be limited in remedying the violations in the present case because the guilty plea has already been accepted, it is a matter of public interest for the court to address the right to present and timing of victims being heard during a guilty plea hearing.

The court will not address moot or speculative questions. Sloan v. South Carolina Dep't of Transp.,379 S.C. 160 (2008). However, there are three exceptions to the mootness doctrines

and under which the appellate court can take jurisdiction: 1) if the issue is capable of repetition but generally will evade review 2) to decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest, or 3) if a decision by the trial court may affect future events, or have collateral consequences for the parties. Id. at 667.

This case falls within the first two exceptions to the mootness doctrine. First, this situation is likely to repeat itself. Defendants enter guilty pleas on a daily basis in South Carolina. Requiring victims to be afforded an opportunity to be heard before the plea is approved or rejected, would allow victims, who are overwhelmingly unrepresented by legal counsel, to be heard, to present and to be treated with dignity and respect. This issue is likely to evade review because of the practice of conducting plea review and sentencing at the same time and thus closing the opportunity for a victim to seek a writ. Secondly, the handling of plea hearings and victims participation in the process is of important public interest. Pleas, as in this case, often address matters of public safety like restraining orders.

The likelihood of this issue of a victim not being heard before a plea is accepted is great. This likelihood, and the important public interest of this issue, warrants the Court issuing an order in the present matter requiring victims be provided an opportunity to be heard before a recommended plea is accepted or rejected by the trial court.

C. Victims Are Entitled To A Reasonable Disposition In A Case

Victims are entitled to a reasonable disposition in a case. S.C. Const Art. I § 24(11). It cannot be presumed that a plea bargain is automatically reasonable. The appellate courts have held that judges are not required to accept plea agreements and may reject them. State v. Rosier, 312 S.C. 145 (S.C. App. 1993). A plea is subject to the scrutiny of the court. The court may reject a plea in exercise of sound judicial discretion. Once the State and Defense have agreed to

terms of a proposed plea, there is no way for the trial court to know whether those terms are reasonable under all of the facts of a case. The court is dependent upon the facts as presented by the two parties to the case, the State and Defense, who are in agreement that the plea, which is their construct, should be approved. Allowing a Victim to be heard and express any objections or concerns about the proposed plea before it is accepted and cannot be revoked, would increase the likelihood that a reasonable disposition is reached in a case.

In this case, Defendant was allowed to plead down from Criminal Sexual Conduct 1st Degree to Assault and Battery first degree. The original charge was not presented to the trial court when the State presented the proposed plea bargain. T. at p. 9, line 7. The court did not have the benefit of the full history of the case and details such as Defendant violated bond more than fifty times, before deciding to accept the plea. The full context of the case and the details that would potentially make the plea unreasonable would only have been able to be presented through the Victim and Victim's counsel. The trial court denied Victim a reasonable disposition in this case by not allowing Victim's counsel to present. As a result, the court deprived itself of an opportunity to learn the full factual background of this case that should have affected whether the plea was accepted and whether the plea recommendation was reasonable.

CONCLUSION

Victims should be given an opportunity to present and be heard before a guilty plea recommendation or plea is approved by the Court. This is necessary for procedural justice in the criminal process and would uphold the Victims' Bill of Rights as a requirement under the South Carolina Constitution, as opposed to its current treatment as discretionary. Victim C.B. is seeking a finding that the trial court should have heard from Victim prior to accepting the guilty plea, because doing so deprived Victim of an opportunity to present and be heard regarding the plea.

Respectfully submitted:

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter by emailing a copy of it on May 11, 2022, to the South Carolina Court of Appeals at ctappfilings@sccourts.org; to Deputy Solicitor for Aiken County, David Miller at DMiller@aikencountysc.gov; to Alan Wilson of the S.C. Attorney General's Office at awilson@scag.gov; to William Blitch of the S.C. Attorney General's Office at wblitch@scag.gov; to Robert Dudek of the S.C. Commission on Indigent Defense at rdudek@sccid.sc.gov; and to and by emailing a copy of it on May 11, 2022, to Respondent Bowen Gray Turner's attorney of record, Bradley Hutto at cbhutto@williamsattys.com.

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