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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2019-000511

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

AARON MCKENZIE CAPERS,

APPELLANT.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I.

The lower court abused its discretion in denying Appellant Motion for Reconsideration of sentence where the lower court abused its discretion in sentencing the Applicant to a sentence which was not consistent with the articulated intent of the judge and therefore was based upon a factual conclusion not supported by evidence in the record.

II.

The lower court abused its discretion in denying Appellant's Motion for Reconsideration of sentence where the lower court abused its discretion in sentencing the Applicant to a term of years sentence which was not consistent with the articulated intent of the sentencing judge not to give Appellant a life sentence inasmuch as the sentence imposed would result in Appellant having to serve a sentence that would exceed his life expectancy by nearly thirty (30) years before having any chance of release from the custody of the South Carolina Department of Corrections and therefore was based upon a factual conclusion not supported by evidence in the record.

III.

The lower court abused its discretion in denying Appellant Motion for Reconsideration of sentence where the lower court abused its discretion in sentencing the Applicant to a sentence which was not consistent with the articulated intent of the judge and where record below establishes that the Appellant's aggregate sentence of eighty (80) years imposed by the sentencing judge was imposed in significant part as punishment for bad

acts for which he had neither been convicted, or, pleaded to and therefore were entered in violation of the trial judge's sentencing authority and as such were based upon an error of law.

STATEMENT OF THE CASE

Appellant, Aaron McKenzie Capers, was indicted by the Berkeley County Grand Jury grand jury for one count of First Degree Burglary, one count of First Degree Criminal Sexual Conduct, one county of Kidnapping, one count of Armed Robbery and Possession of a Weapon During the Commission of a Violent Offense. ***See, Indictments No. 2018-GS-08-00528 – 00532.*** He proceeded to trial by jury on March 18 – 21, 2019. He was represented in the trial court by Sharon Capers, Esquire, and Donna McQueen, Esquire. The Appellant was tried before the Honorable R. Markley Dennis, presiding circuit court judge. The State was represented at trial by Anne Williams, Assistant Solicitor, and Deputy Solicitor, Bryan Alfaro. At the conclusion of this trial, the Appellant was found guilty on all counts. He was sentenced to fifty (50) years incarceration for the First Degree Burglary count, thirty (30) years for the First Degree Criminal Sexual Conduct count, consecutive to the First Degree Burglary count, thirty (30) years concurrent for the Armed Robbery and Kidnapping counts, as well as five (5) years concurrent for the weapon count. The Appellant served and filed a timely Notice of Appeal from his judgment and sentence. Thereafter, Appellant was represented on direct appeal by undersigned counsel. Appellate Counsel subsequently filed Petition to Stay the direct appeal when it became apparent that trial counsel had filed Appellant's Notice of Appeal before post-trial motions had been heard and ruled upon by Judge Dennis. Said motion was granted and a hearing was held on Appellant's Motion to Dismiss and Motion to Reconsider sentence on January 6, 2020. At the conclusion of that

hearing, the lower court agreed to hold the record open to receive a report from Dr. Donna Maddox, a forensic psychiatrist, who had been hired by the defense to evaluate Appellant.

On February 16, 2021, a second hearing was held on Appellant's Motion to Reconsider Sentence. While the record of this proceeding does not reflect that the report issued by Dr. Donna Maddox, was introduced by Defense Counsel as an Exhibit, the record of that hearing clearly evidences that it was given to the Court, had been read by Judge Dennis and was obviously taken into consideration by the sentencing judge in his ruling on the Motion to Reconsider sentence which was denied by Court. This appeal follows.

STANDARD OF REVIEW

In the case of ***In re Christopher H., 432 S.C. 600, ___ S.E.2d ___ (S.C. Ct. App., 2021)***, the Court held that,

> A [sentencing court] must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant. The sentence imposed will not be overturn on appeal absent an abuse of discretion. An abuse of discretion occurs when the sentence imposed was based o0n either an error or law or a tactual conclusion not supported by evidence in the record. ***Citing, In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).***

ARGUMENT

Issues

I.

The lower court abused its discretion in denying Appellant Motion for Reconsideration of sentence where the lower court abused its discretion in sentencing the Applicant to a sentence which was not consistent with the articulated intent of the judge and therefore was based upon a factual conclusion not supported by evidence in the record.

II.

The lower court abused its discretion in denying Appellant's Motion for Reconsideration of Sentence where the lower court abused its discretion in sentencing the Applicant to a term of years sentence which was not consistent with the articulated intent of the sentencing judge not to give Appellant a life sentence inasmuch as the sentence imposed would result in Appellant having to serve a sentence that would exceed his life expectancy by nearly thirty (30) years before having any chance of release from the custody of the South Carolina Department of Corrections and therefore was based upon a factual conclusion not supported by evidence in the record.

III.

The lower court abused its discretion in denying Appellant Motion for Reconsideration of sentence where the Applicant was given a sentence which was not consistent with the articulated intent of the judge and where record below establishes that the Appellant's aggregate sentence of eighty (80) years was imposed by the sentencing judge in significant part as punishment for bad acts for which he had neither been convicted, or, pleaded to, and therefore the sentences were entered in violation of the trial judge's sentencing authority and as such were based upon an error of law.

A trial, Assistant Solicitor Anne Williams stated for the record that Appellant was 16 years old at the time of the crimes for which he went to trial. **Tr. p. 15, lines 13-14.** Appellant was considered a junior at USC at the time of this crime because he had earned an associates degree while still in high school. **Tr. p. 14, lines 1-5**. He had no prior convictions. **Tr.p. 11, lines 17 – 19**. At the sentencing proceeding held immediately after the verdicts in this case, the trial judge stated, I'm not going to impose a life sentence, so I don't need to have mitigation. I understand, though, it is 15 years to life, which gives me discretion. So I'm going to not impose life and give you a chance at some point in time, but I can't in good conscience to my oath do what I maybe could have done in a different setting." **Tr. p. 796, lines 6 – 13.** He subsequently reiterated this sentiment, stating for the record, "Mr. Capers, I'm not going to impose a life sentence. You might deserve it, but I am not going to impose it; I'm going to give you a chance." **Tr. p. 798, lines 1 – 6.**

Appellant asserts that as a practical matter, the lower court did give him a life

sentence. The trial judge sentenced Appellant t an aggregate term of eighty (80) years incarceration for crimes which require a minimum service of 85% of the sentence imposed before he will be eligible for supervised community release or any other type of early release. As previously noted, Appellant was sixteen years old at the time of these crimes and 18 at the time he was sentenced. Eighty -five percent of eighty (80) years equals sixty-eight (68) years. Appellant was never released on bond following his arrest; therefore, with credit for jail time served, he will be eighty-four years old before being eligible for any sort of early release; including Supervised Community Release. ***S.C. Code §24-13-150 (A) (2010).***

If Judge Dennis intended to give Appellant "a chance at some point in time", he was clearly factually mistaken. The statistics taken into consideration in ***State v. Conrad Slocumb, 426 S.C. 297, 827 S.E.2d. 148*** (2019), support that assertion. A wealth of information concerning the life expectancy of male inmates incarcerated since the age of sixteen is found in the Amicus Curiae Brief filed in the ***Slocumb*** matter by the Appellate Division of SCCID, the South Carolina Public Defender's Association, and the South Carolina Association of Criminal Defense Lawyers. The data compiled in the "***Dolan Study***" is heavily referenced in that brief and indicates that a sixteen (16) year old male incarcerated in SCDC has a life expectancy of 39.2 years and will likely die around the age of 55.2. A seventeen (17) year old male incarcerated in SCDC has a life expectancy of very slightly older at 55.3 years. ***Amicus Brief, p. 6-9.*** Therefore the sentence given to Appellant by Judge Dennis with the articulated intent of not giving him a life sentence, in effect did just that.

Appellant has been locked up since age sixteen (16) and has been in SCDC since age eighteen. Applying even the race neutral findings of ***the Dolan Study*** to Appellant gives him

a life expectancy of 55.2 years of age. With the eighty (80) year sentence imposed by the lower court, Appellant will not be eligible for release until he has served 85% of that term of years; 68 years. ***S.C.Code §24-13-150(A)(2010)***. Combing his age at the time he was arrested, 16.years old, with the time he must serve before he is eligible for any type of early release, results in an expected release date of eighty-four years of age; 28.8 years longer than his projected life expectancy under the Court under the Dolan Study. It is impossible to understand how that outcome accomplishes the lower court's express desire to impose a sentence that gives Appellant, "a chance at some point in time."

Furthermore, Appellant most respectfully asserts that the remarks made during the second hearing on Appellant's Motion for Reconsideration, held on February 16, 2021, strongly suggest that the Court took into consideration Appellant's alleged attempt to procure the murder of the Victim in his case. During the second hearing, Judge Dennis made the following statement after Defense Counsel's pleas for reconsideration and mercy.

> And I would agree with you to a degree, Ms. Capers, if it stopped with the rape [oral sex], but it didn't. It continued, continued going with the use of the card. But where the real continuation came was with the solicitation that took place. And that evidence was overwhelming to me and it was incredible and it gave me grave concern. And, frankly, warranted the punishment. I may have given him less time, total time, but the maximum for the Victim, that was – and for the kidnapping, I understand the consecutive aspect of it, it just—I think the sentence is appropriate for the crime that was committed and the actions taken thereafter. And I can't remove that from my head, that's what it is. I think there was overwhelming evidence to support the verdict.
> MTR, Tr. p. 10, lines, 2-15.

Appellant respectfully submits that the lower court abused it's discretion in denying Appellant's Motion to Reconsider sentence where the sentence imposed was not consistent with the sentencing intent articulated by the sentencing judge and where the record below illustrates that the trial judge exceeded his sentencing authority by effectively sentencing

Appellant for a crime for which he had not been convicted of or pleaded guilty to.

CONCLUSION

For all the reasons set forth above, Appellant asks that his sentence be reversed and his case be remanded to the Court of General Sessions for a new sentencing proceeding.

Respectfully submitted,

S/ Tara D. Shurling

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ATTORNEY FOR APPELLANT

This 16th day of May, 2022

7. Copy of Evaluation Report issued by Dr. Donna Maddox.

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

S/ Tara D. Shurling

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May 16, 2022

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Certificate of Service

The undersigned hereby certifies that a Copy of the Amended Initial Brief of Appellant with a corrected Index, Table of Authorities and DOM, has been sent to opposing counsel, William M. Blitch, Jr., Esquire, this 17th day of May, 2022 by email to the address listed below.

William M. Blitch, Jr., Esquire
wblitch@scag.gov

s/Tara D. Shurling
Tara Dawn Shurling
Attorney at Law

This 17th day of May, 2022.