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Dec 22 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

R. Markley Dennis, Circuit Court Judge

The State,

Respondent,

v.

Bowen Gray Turner,

Respondent,

In Re: Victim C.B.,

Appellant.

APPELLATE CASE NO. 2022-000472

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE 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 Victim's Rights and to be Heard Prior to Guilty Plea, and Petition for Writ of Mandamus as each being untimely filed.

COUNTER STATEMENT OF ISSUES PRESENTED

1.

Whether the victim has failed to show any right to appeal the result of respondent's guilty plea after the solicitor agreed to the terms of that guilty plea, the circuit court accepted the guilty plea, and imposed sentence upon respondent since there is no constitutional, statutory, or appellate court rule which provides a victim a right to such an appeal?

2.

Where the victim, even if such a right to appeal existed, cannot show any prejudice since the allegations of the various victims were allowed to be heard at the guilty plea proceeding, and where the court actually increased respondent's sentence after hearing them, would reversal be unwarranted?

STATEMENT OF THE CASE

Respondent, Bowen Turner, allegedly assaulted the victim on June 7, 2019, after she attended a party in Orangeburg County. Tr. 13, ll. 4-21. The state and respondent reached a guilty plea agreement in this case, and a guilty plea proceeding was held on April 8, 2022, before the Honorable R. Markley Dennis, Jr.¹ Respondent was represented by C. Bradley Hutto. The assistant solicitor was David W. Miller. Tr. 1.

Respondent waived grand jury presentment on the charge of assault and battery in the first degree, pursuant to the negotiated or recommended sentence agreement. R. * (Indictment). At the conclusion of the hearing, after hearing from various people on the alleged victim's side of the case, the judge sentenced respondent to an indeterminate period not to exceed six years' pursuant to the Youthful Offender Act. That sentence was suspended upon five years' probation with various conditions attached. The judge ruled: "[T]he sex offender conditions of probation shall apply for all five years [rather than the two years agreed upon]." The judge also issued a restraining order against respondent to have no contact with the victim at the request of the victim's attorney. Tr. 33, l. 15 – 34, l. 23.

Counsel Sarah Ford, as the "Attorney for the Victim" then filed a Notice of Appeal/Notice of Request for Appellate Review" with this Court on April 18, 2022. An initial brief of appellant was then filed on May 23, 2022. The state filed a motion to dismiss the victim's appeal on May 23, 2022, a motion in which respondent joined. R. p. *.

Appellant filed a return to the motion to dismiss on June 2, 2022. The motion to dismiss was denied by the order of this Court filed on June 13, 2022. However, this order also stated

¹ As will be seen *infra*, the parties and the judge agreed during the guilty plea proceeding that the sentence was more properly termed "recommended" by the state rather than it being a "negotiated sentence." The sentencing sheet was amended to reflect that change. R. p. * (sentencing sheet).

that: “Nothing in this order prevents the parties from arguing the issues of appealability or standing in their briefs.” R. p. *.

The state then filed its brief of respondent arguing that the “Victim’s appeal should be dismissed as there is no right to appeal afforded a victim. Further, the case is moot as there is no relief which can be granted because the guilty plea is final, and the Court may not reopen the guilty plea to provide Victim her requested relief.” Respondent’s brief at 4.

This Brief of Respondent Bowen Turner follows.

COURTESY OF
LUNA SHARK MEDIA

STANDARD OF REVIEW

Counter Issue One: There is no constitutional right to appeal even on behalf of a criminal defendant. The right to appeal is authorized by statutes and the appellate court rules of procedure in this state. State v. Rearick, 417 S.C. 391, 398-99, 790 S.E.2d 192, 196 (2016). “An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal.” McKane v. Durston, 153 U.S. 684, 687 (1894).

Counter Issue Two: Any error on the part of the court that did not result in prejudice to the appealing party does not warrant reversal. State v. Huggins, 336 S.C. 200, 204, 519 S.E.2d 574, 576 (1999).

COURTESY OF
LUNA SHARK MEDIA

ARGUMENT

1.

The victim has failed to show any right to appeal the result of respondent's guilty plea after the solicitor agreed to the terms of that guilty plea, the circuit court accepted the guilty plea, and imposed sentence upon respondent since there is no constitutional, statutory, or appellate court rule which provides a victim a right to such an appeal.

Relevant facts

At the beginning of the guilty plea proceeding, counsel Sarah Ford said she was the attorney for the victim. She told the judge that she had filed a Motion to Enforce Victim's Rights and to be Heard prior to the plea and she had also filed a Writ of Mandamus and a Rule to Show Cause against the bail bond company. Tr. 2, ll. 3-12.

Counsel Ford admitted she "handed copies of these documents" to the guilty plea judge on the morning of the plea. Tr. 2, ll. 17-24. Ford confirmed she was not representing the state of South Carolina, and that she filed her motions as the victim's attorney and not as a "victim's advocate." Tr. 3, ll. 13-17. The judge stated that he would hear from the victims in this case, as he had done in every guilty plea proceeding during his twenty-eight years on the bench. Tr. 3, ll. 18-23.

The solicitor then confirmed to the judge that the State of South Carolina wanted to resolve this case with the guilty plea, and the judge again said he would hear from the victims and the arguments of the victims at the proper time. Tr. 5, l. 19- 6, l. 3. The judge did note, however, that the motions filed on the behalf of the victims on the morning of the guilty plea proceeding were not timely filed. Tr. 6, ll. 4-24.

Counsel Ford then asked the judge to continue the case until the victim could seemingly properly file their motions. Tr. 7, ll. 5-7. The solicitor told the judge that the state did not want to continue the case, and that the state wanted this case resolved. Tr. 7, ll. 8-11.

Solicitor Miller then stated that respondent was going to waive presentment to the grand jury on the charge of assault and battery in the first degree and that there was a recommended sentence. The judge and solicitor agreed that the sentencing sheet had been changed to indicate the guilty plea involved a “recommendation” by the state rather than a “negotiated sentence.” Tr. 8, l. 14 - 9, l. 7; R. p. * (Sentencing Sheet). The judge said that he would either accept or reject the recommended sentence. Tr. 9, l. 8- 10, l. 1. See R* (Sentencing Sheet).

The solicitor then told the judge:

“As far as the recommendation, the recommendation from the State is that the Defendant be sentenced under the Youthful Offender Act not to exceed six years, suspended to time served of 55 days and probation for five years. The Defendant will be placed on the sex offender probation supervision and is required to complete sex offender counseling as directed by the South Carolina Department of Probation Parole and Pardon Services.

Sex offender registration will be held in abeyance. If the Defendant successfully completes all the probation requirements, he would not be required to register as a sex offender. If the defendant violates the terms of the probation and does not have a sentence activated, a further hearing would be held to be determined whether he has to register.

Additional conditions of probation will include no direct, indirect, or third party contact with any of the victims’ families in this case. Mr. Hutto is well aware of who those victims’ families are. *And this probation would terminate upon completion of the sex offender counseling or two years, whichever is later.*”

Tr. 13, l. 23 – 14, l. 25

Counsel Ford then said that “the families” disagreed with the court moving forward with the case. Counsel Ford added that she understood the state was fully in charge “[a]nd can allow

someone to go from criminal sexual conduct first to an assault and battery first, plead that, and can make a recommendation of probation.” Tr. 18, ll. 13-20. The judge stated that he would hear from the victim’s families during the guilty plea proceeding. Counsel Ford then interjected that it was the victim’s opinion that probation was not a proper sentence in this case. Tr. 18, l. 24- 19, l. 14.

The judge agreed to hear from Karl Stoller, whose daughter Counsel Ford said “[w]as the victim in the Bamberg case and she tragically passed away in November, Your Honor.” Tr. 19, ll. 6-13. Mr. Stoller then told the court about a case where his daughter was brought home from a party heavily intoxicated and was ultimately found to have been sexually assaulted. Tr. 19, l. 23- 25, l. 17.

The judge also heard from the Reverend Doctor William Darren Bess on behalf of another alleged victim. Rev. Bess told the judge he did not believe justice was being served in this case. Tr. 25, l. 19 – 29, l. 10.

Ford then told the court that she wanted permanent restraining orders “for the three victims.” The judge agreed to sign those restraining orders. Tr. 29, l. 11- 30, l. 5. The judge offered that he realized the frustration being shared publicly that day in the courtroom and he added: “[T]hank you for your advocacy and I appreciate that and I mean that sincerely too, Ms. Ford. Thank you.” Tr. 30, l. 6- 32, l. 15.

The judge then briefly heard from defense counsel Hutto. Tr. 32, l. 16 – 33, l. 5. Respondent told the judge he did not have anything additional to tell him. Tr. 33, ll. 3-5. The following then occurred, as the judge altered and increased the recommended sentence:

“All right. What I’m going to do – I believe you said after two years [probation] was a recommendation?”

Mr. Miller: Yes, Your Honor.

The Court: I understand that. Because of a lot of things, but given the accusations and the number of them and *I understand he was 16. I'm not going to accept that part of it.*

Mr. Miller: Yes, sir, Your Honor.

The Court: And I understand you wanted to know that, Mr. Hutto. I understand – I understand the negotiation. I do think the YOA sentence is appropriate for many reasons. Because one, because of what I said about the adult sentence and that doesn't help him. But the YOA, if he has activated, it would at least help him rehabilitate maybe. So that's my rational [sic] for accepting the YOA sentence. So I'm going to sentence him in the Department of Corrections under the Youthful Offender Act for an indeterminate period not to exceed six years. However, I'm going to suspend that and I'm going to place you on probation for five years. Now, listen closely. Sex offender – the sex offender conditions of probation shall apply for all five years. *So that's – and they're – they're some of the toughest, but they also are -- I think they also provide some rehabilitation counseling that would be helpful to you to – I know you've probably done some, I hope you have, but – that will reinforce what you have already experienced. No contact with the victim.* Of course, I'm going to sign that Order as well. It would not only would violate the probation, but it will violate the Order which provides for a penalty in and of itself. I believe that's the Order you're talking about?

Ms. Ford: Yes, sir. Asking for three Permanent Restraining Orders.

The Court: Okay. Sir, you understand that?

Mr. Turner: Yes, sir.

The Court: I'm going to allow the probation, if he has completed five years without any violation and done all of the counseling necessary, then he will not have to register as a sex offender. So – that may not shorten probation. That's the other thing. That's five years instead of the other. So he's got this over your hear for five years.

Mr. Tuner: Yes, Sir.”

Tr. 3,3 l. 6 – 35, l. 9.

As stated, the victim filed a notice of appeal, which the Attorney General moved to dismiss on behalf of the state, and respondent joined in that motion. R. p. *. This Court denied the motion to dismiss with leave for respondents to continue to argue that this appeal was improper since there was no provision in the law which allowed for it.

Discussion

There is no constitutional right to appeal even on behalf of a criminal defendant. The right to appeal is authorized by statutes and the appellate court rules of procedure in this state. State v. Rearick, 417 S.C. 391, 398-99, 790 S.E.2d 192, 196 (2016). The United States Supreme Court in McKane v. Durston, 153 U.S. 684, 687 (1894) held, “An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal.”

As the Attorney General in this case correctly stated in its brief of respondent: “A victim does not have a right to appeal . . . [and] once the plea was accepted and [Bowen] Turner was sentenced, the plea was final, and this Court cannot reopen the plea to provide Victim the relief she seeks. Accordingly, this appeal should be dismissed.” Brief of Respondent, State of South Carolina at 4.

This Court in Reed v. Becka, 333 S.C. 676, 681, 511 S.E.2d 396, 399 (Ct. App. 1999), explained that a victim possesses no rights in the appellate process, and a victim has no standing to appeal a trial court’s order:

A victim, as defined in S.C. Code Ann. § 16-3-1510 (Supp.1997), possesses **no rights in the appellate process**. Nothing in our Constitution or statutes provides the “victim” standing to appeal the trial court’s order. Additionally, the rights granted by the South Carolina Constitution and statutes are enforceable by a writ of mandamus, rather than direct participation at the trial level.

(emphasis added).

As our Supreme Court stated in Ex parte Littlefield, 343 S.C. 212, 218-19, 540

S.E.2d 81, 84 (2000):

[T]he Victims' Bill of Rights is not a drastic transformation of the criminal justice system whereby the victim is given control over the solicitor's broad discretion. The criminal justice system gives prosecutors, as opposed to victims, broad discretion in deciding which cases to try because prosecutors are less likely to be prejudiced by personal and emotional motives. The South Carolina Constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands. "*Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense or they may simply decide not to prosecute the offense in its entirety.*" State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994). Furthermore, the Court of Appeals held that while prosecutors have some duties to crime victims, "*their prosecutorial discretion is not contracted or limited by victims' rights laws.*" Reed, 333 S.C. at 676, 511 S.E.2d at 400.

(emphasis added).

The criminal justice system in our state is already overloaded, and solicitors and defense attorneys make difficult trial or guilty plea decisions every day after solicitors consult with victims and defense attorneys consult with their clients, and at times, their families about what is the best possible resolution to their case under the circumstances. Respectfully, our system would completely break down if victims were given a veto power -- including a right to appeal or intervene in an appeal -- any time a prosecutor agrees to allow a defendant to plead guilty rather than go to trial.

The Attorney General offers that the victim could have sought a writ of mandamus from a justice of the South Carolina Supreme Court who could order that the circuit court judge comply with Article I, Section 24(A) of the South Carolina Constitution. However, as the Attorney General's Office wrote -- "Instead, Victim sought a motion to Enforce Victims' Rights and to be Heard prior to Guilty Plea from the circuit court. (Motion to Enforce). Even if

construed as a petition for writ of mandamus, the order was sought from the same judge they were seeking to mandate to act in accordance with the Victim's Bill of Rights. As a result, Victim did not seek the appropriate relief contemplated by the Victims' Bill of Rights." See Brief of Respondent State of South Carolina at 5-6.

The victim's appeal in this case should be dismissed because there is no constitutional provision or statute or appellate court rule which allows for it, and the victim does not have standing to challenge the propriety of the solicitor's discretionary plea decision which the circuit court judge accepted in this case.

COURTESY OF
LUNA SHARK MEDIA

2.

The victim, even if such a right to appeal existed, cannot show any prejudice in this case since the allegations of the various victims were allowed to be heard at the guilty plea proceeding, and the court actually increased respondent's sentence after hearing from them which would make reversal completely unwarranted.

Relevant facts

As seen above, the solicitor told the judge that respondent's probation would be terminated after two years or after completion of sex offender counseling according to the agreement. "This probation would terminate upon completion of the sex offender counseling or two years, whichever is later." Tr. 13, l. 23 – 14, l. 25.

However, after hearing from Counsel Ford for the victim, the judge heard at length from Karl Stroller whose daughter "was the victim in the Bamberg case and she tragically passed away in November," Tr. 19, l. 19 – 25, l. 17, and then from Reverend Doctor William Darren Bess who complained at length that "justice will not be served here today." Tr. 25, l. 19 – 29, l. 9.

Counsel Ford then demanded a permanent restraining order "for the three victims" that the judge said he would sign. Tr. 29, l. 11 – 32, l. 19. Defense Counsel Hutto then briefly reminded the judge that respondent was only fifteen or sixteen years old when the complained of incidents took place. Tr. 32, l. 20 – 33, l. 2.

As also seen, the judge then altered and increased his sentence mandating five years of probation, and not the two years of probation if respondent's sex offender counseling was successfully completed as earlier agreed upon:

I understand the negotiation. I do think the YOA sentence is appropriate for many reasons. Because one, because of what I

said about the adult sentence and that doesn't help him. But the YOA, if he has activated, it would at least help him rehabilitate maybe. So that's my rational [sic] for accepting the YOA sentence. So I'm going to sentence him in the Department of Corrections under the Youthful Offender Act for an indeterminate period not to exceed six years. However, I'm going to suspend that and I'm going to place you on probation for five years. Now, listen closely. Sex offender – the sex offender conditions of probation shall apply for all five years. *So that's -- and they're -- they're some of the toughest, but they also are -- I think they also provide some rehabilitation counseling that would be helpful to you to -- I know you've probably done some, I hope you have, but -- that will reinforce what you have already experienced. No contact with the victim. Of course, I'm going to sign that Order as well.* It would not only would violate the probation, but it will violate the Order which provides for a penalty in and of itself.

Tr. 33, l. 16 – 34, l. 17. (emphasis added).

Discussion

The guilty plea judge did not commit a legal error in this case, so there is not any legal issue upon which this Court could reverse the trial judge. However, even if the judge did somehow err, reversal would be improper since appellant suffered no prejudice. The trial judge, as seen above, actually increased respondent's term of probation from two years to five years after hearing from the victim's representatives.

Error without prejudice does not warrant reversal. State v. Huggins, 336 S.C. 200, 204, 519 S.E.2d 574, 576 (1999) *citing* State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996). See, also, State v. Locklair, 341 S.C. 352, 365, 535 S.E.2d 420, 427 (2000). The judge agreed to hear from the victims in this case, he granted the restraining order requested by Counsel Ford, and he increased respondent's sentence after hearing from the family representative in those other cases. There was simply no prejudice to the alleged victim in this case even if she had

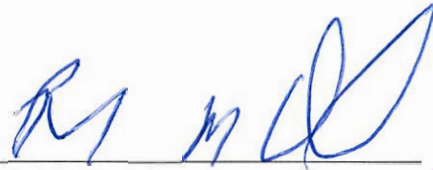
standing to challenge this discretionary plea agreement or recommendation that the solicitor and respondent agreed upon, and which the trial judge accepted, and modified against respondent.

Further, the trial judge would have been well within his discretion if he had refused to hear and consider the other bad acts allegations against respondent that the victims urged that he consider since they did not result in a conviction. Instead, he heard from these family representatives at length, and he increased respondent's sentence at the conclusion of the guilty plea proceeding.

The present appeal should be dismissed for the reasons set forth in the state's motion to dismiss in which respondent joined, those reasons in this brief of respondent – and the reasons contained in the brief of respondent for the State of South Carolina. In the alternative, the decision of the circuit court below should be affirmed because any conceivable error did not result in any prejudice to appellant, and reversal is unwarranted absent prejudice. State v. Huggins, 336 S.C. 200, 204, 519 S.E.2d 574, 576 (1999) *citing* State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996).

CONCLUSION

By reason of the foregoing arguments, appellant's appeal should be dismissed. In the alternative, the acceptance of respondent's guilty plea should be affirmed.



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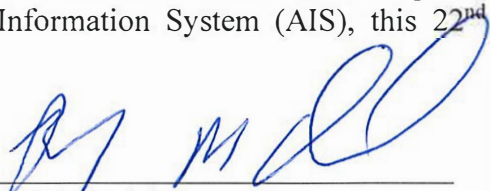
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Appellate Case No. 2022-000472

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the initial brief of appellant and designation of matter in the above-referenced case has been served upon Sarah Anne Ford, Esquire, Tamika D. Cannon, Esquire, Terri Hearn Bailey, Esquire, David Warren Miller, Esquire, and William M. Blicht, Jr., Esquire, at their primary e-mail addresses listed in the Attorney Information System (AIS), this 22nd day of December, 2022.



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