



ALAN WILSON
ATTORNEY GENERAL

February 24, 2014

Veronica Swain Kunz, Crime Victims' Ombudsman
Office of the Crime Victims' Ombudsman
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Ombudsman Kunz:

Attorney General Alan Wilson has referred your letter dated October 31, 2013 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue: Does Rule 29(a) of the South Carolina Rules of Criminal Procedure allowing post-trial motions without a hearing permit a sentence reduction by a judge without prior notification to the Victim or opportunity for the Victim to be heard concerning such reduction?¹

Short Answer: This Office believes a court will find neither the South Carolina Rules of Criminal Procedure nor any statutory law may be used in such a way that violates State Constitutional rights belonging to the Victim of a crime.

Law/Analysis: The Victims' Bill of Rights, which is found in Article 1, Section 24 of the South Carolina Constitution, states:

(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 victim's constitutional rights, provided by statute;

¹ Pursuant to your request that any details of your question remain confidential citing S.C. Code Section 16-3-1640, this Office will not address any specific details. In any case where you have received a court order, this Office's policy is that you must abide by that order until it is judicially modified or set aside by appeal. *Op. S.C. Atty. Gen.*, 2010 WL 3505058 (August 11, 2010) (citing *State v. Bevilacqua*, 316 S.C. 122, 128, 447 S.E.2d 213, 216 (Ct. App. 1994)). This Office does not comment on pending litigation or court orders, though it is our understanding this question does not involve any such pending litigation or orders but is a future hypothetical question. This Office will address your legal question concerning future Victims in general, noting this Office does not investigate specific facts in a legal opinion, nor will we undermine the court system. We recommend if this legal question is an issue that you want an ultimate determination on we suggest you seek a declaratory judgment by the court.

- (2) be reasonably informed when the accused or convicted person is arrested, released from custody, or has escaped;
- (3) be informed of and present at any criminal proceedings 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 either 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, including both adult 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.**

(B) Nothing in this section creates a civil cause of action on behalf of any person against any public employee, public agency, the State, or any agency responsible for the enforcement of rights and provision of services contained in this section. The rights created in this section may be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or circuit court judge to require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of these services contained in this section, and a wilful failure to comply with a writ of mandamus is punishable as contempt.

(C) For purposes of this section:

- (1) A victim's exercise of any right granted by this section is not grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.
- (2) "Victim" means a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him. The term "victim" also includes the person's spouse, parent, child, or lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.

(3) The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve, and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.

(4) The enumeration in the Constitution of certain rights for victims shall not be construed to deny or disparage others granted by the General Assembly or retained by victims. (1998 Act No. 259.)

S.C. Const. Art. 1, Section 24 (emphasis added).

Rule 29 of the South Carolina Rules of Criminal Procedure authorizes a post-trial motion such as a sentence reconsideration. It states:

(a) Generally. Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence. In cases involving appeals from convictions in magistrate's or municipal court, post-trial motions shall be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal. The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and **the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.**

Rule 29(a), SCRCrimP. (emphasis added).

Your legal question concerns a motion to reduce the sentence of a Defendant.² As you may be aware, the authority to change a Defendant's sentence rests "solely and exclusively in the hands of the sentencing judge within the exercise of his discretion," per the South Carolina Supreme Court. State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981) (citing State v. Cagle, 241 N.C. 134, 84 S.E.2d 649, 653 (1954)). Our State Supreme Court has also said, "it is the established rule in this State that this Court has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law and in the discretion of the Trial Judge, and is not the result of partiality, prejudice, oppression or corrupt motive." State v. Hall, 224 S.C. 546, 547, 80 S.E.2d 239 (1954). In a post-trial motion such as a motion to reconsider a sentence, an issue may not be raised for the first time. Johnson v. Sonoco Products Co., 381 S.C. 172, 672 S.E.2d 567 (2009); State v. Geer, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2010). Your question presumes that based on a plain reading of Rule 29 a judge may decide a post-trial motion such as a reconsideration of a sentence using briefs without any oral argument. Rule 29(a), SCRCrimP.

² For purposes of your question concerning the South Carolina Victims' Bill of Rights, this Office will address a motion to reduce a sentence as the equivalent of a motion to reconsider, a motion to amend and a petition to alter, modify or rescind a sentence, though this Office recognizes they are all different motions and petitions.

In regards to your question, even if a judge may hear a sentence reconsideration (which we are including for purposes of this opinion a motion to reduce a sentence, as stated in Footnote 2) without a hearing and where no new issues are raised, that does not change the Victims' Bill of Rights in the South Carolina Constitution. Regardless of whether or not a Victim may be heard at such a motion to reconsider a sentence, this Office believes a court will find a Victim must be properly notified by the court of such a motion pursuant to the Victims' Bill of Rights and statutory law. S.C. Const. Art. 1 § 24 (A)(5),(10),(12); S.C. Code §16-3-1535, § 16-3-1550, et al.

While a Victim may have already submitted a written statement concerning the crime and may have previously had the opportunity to speak at the sentencing, we believe a court will find a Victim still has a Constitutional right to be heard (whether through a new opportunity to speak or through a updated written statement) specifically on the new motion concerning sentencing. S.C. Const. Art. 1 § 24 (A)(5), (10), (12). In further support, the South Carolina Rules of Evidence (including probative value outweighing prejudicial effect) do not apply in sentencing, per the South Carolina Rules of Evidence Rule 1101(d)(3) and case law. State v. Hutto, 356 S.C. 384, 589 S.E.2d 202 (Ct.App. 2003) The Hutto case stated:

We are not concerned with balancing prejudicial impact with probative value when reviewing evidence used in the sentencing phase of a non-capital crime because evidentiary rules are inapplicable in a sentencing proceeding. Rule 1101(d)(3), SCRE; *State v. Gulledge*, 326 S.C. 220, 228-29, 487 S.E.2d 590, 594 (1997); *see also Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). In sentencing a convicted defendant a trial court is only limited by constitutional provisions that require the evidence to be relevant, reliable and trustworthy. *See Gulledge, supra*.

Id. Additionally, Rule 37 of the South Carolina Rules of Criminal Procedure states “these rules shall apply... within the limits of the jurisdiction and the powers of the court provided by law....” That would imply the Rules of Criminal Procedure could not undermine rights belonging to Victims of a crime provided in the State Constitution. For example, there could be a change in circumstances since the initial sentencing (one of the parties could have moved or there may be a change with custody of children or a number of other things could have changed that the Victim would want to share with the judge in regards to sentencing) or new evidence could have been turned over pursuant to search warrants or otherwise recovered (e.g. evidence of the extent of the Defendant’s stalking recovered by electronic data such as emails, phone calls, text messages, facebook or DNA evidence, as information can take months and even years to recover even with a search warrant). We believe a court will find that to deny a Victim the right to be heard or submit a statement concerning any such sentencing rehearing would preclude the Victim’s ability to bring the court’s attention to the issues. These issues may be issues that the State either does want to address or cannot address in its legal briefs. As our court has already stated, a Victim maintains his or her rights under the Victims’ Bill or Rights throughout the entire criminal proceedings involving the crime. Ex parte Littlefield, 343 S.C. 212, 40 S.E.2d 81 (2000).

However, one may argue that a case such as the Bradley case could preclude a Victim the right to be present or submit a statement concerning a motion to reconsider a sentence. State v. Bradley, 324 S.C. 387, 478 S.E.2d 537 (1996). In that case the South Carolina Court of Appeals held under the South Carolina Constitution the Defendant had no right to be present at a sentence reduction hearing. One could

argue that case would extend to a Victim so he or she would have no such right to be present at a sentence reduction hearing either. Id.³ Based on the Victims' Bill of Rights in Article 1 Section 24 of the South Carolina Constitution, this Office does not believe a court would extend the Bradley case to include a Victim not being allowed either to speak at a motion to reduce a sentence or to at least present a new statement for the judge to review concerning the motion. Id.

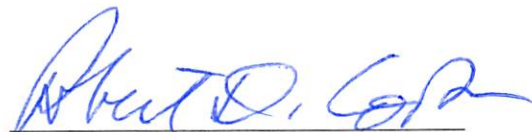
Conclusion: Therefore, this Office believes a court will find the South Carolina Constitution requires a Victim to be notified of and allowed to speak or present a new or updated statement in regards to a sentence reconsideration regardless of whether such motion is filed pursuant to the Rules of Criminal Procedure (e.g. Rule 29, SCRCrimP.) or pursuant to statutory law (e.g. S.C. Code § 17-25-326).⁴ This Office believes a court will find Victims of a crime in South Carolina have Constitutional rights which cannot be ignored. However, this Office is only issuing a legal opinion. It is the court's job to interpret the South Carolina Constitution. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

³ Though this Office references State v. Bradley, we make no assertion or analysis of its constitutionality as such a determination is left within the realm of the courts.

⁴ While there may be other statutory and legal support for such a conclusion (e.g. S.C. Code § 17-25-326, § 16-3-1550, et al.) this Office believes a court will find the Victims' Bill of Rights in the South Carolina Constitution adequately answers your question.