IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

APPEAL #28407

****

State of South Dakota, Plaintiff/Appellee

vs.

Shawn Raynard Ross, Defendant/Appellant.

****

Appeal from the Circuit Court
of the First Judicial Circuit
Brule County, South Dakota

Honorable Bruce V. Anderson, Circuit Court Judge

****

BRIEF OF APPELLANT

****

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Notice of Appeal filed October 4, 2017.

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PRELIMINARY STATEMENT

For purposes of brevity and clarity, the Appellant, Shawn Raynard Ross, will be referred to as Ross or Defendant throughout this Brief.

The Settled Record consists of Brule County file 07CRI17-000009, which will be cited as "SR" followed by the page number(s) of the page(s) cited. The Appendix will be referred to as “APP” followed by the number assigned for said attachment.

Finally, the transcripts referred to in this Brief will be cited in the following manner followed by the page number(s):

Arraignment, 05/16/17	ARR
Sentencing Hearing, 06/13/17	SH1
Resentencing Hearing, 09/05/17	SH2

JURISDICTIONAL STATEMENT

Defendant appeals from a Judgment of Conviction pronounced on June 13, 2017, and signed and filed on July 20, 2017 (APP 3; SR 93) and an Amended Judgment of Conviction pronounced on September 5, 2017, and signed and filed on September 28, 2017 (APP 5; SR 133). The Notice of Appeal was filed on October 4, 2017. SR 139.

STATEMENT OF ISSUES

1.

Whether the trial court erred when it enhanced the Defendant’s sentence immediately after he was held in contempt of court.

Answer: The trial court did enhance the Defendant's sentence after he was held in contempt of court.

2.

Whether the trial court erred when it enhanced the Defendant's sentence again after the re-sentencing hearing.

Answer: The trial court did enhance the Defendant's sentence again after the re-sentencing hearing.

MOST RELEVANT CASES, STATUTES & CONSTITUTIONAL PROVISIONS

Litschewski v. Dooley, 71 F.Supp.3d 977 (2014)

STATEMENT OF THE CASE

This case was a Brule County criminal action in Brule County with the Honorable Bruce V. Anderson, Circuit Court Judge, presiding.

On February 17, 2017, the Brule County Grand Jury indicted the Defendant with the following, to-wit:

Count 1: Third Degree Burglary in violation of SDCL 22-32-8; and

Count 2: Intentional Damage to Property in violation of SDCL 22-34-1(2).

See Indictment (APP 1; SR 9). The arraignment was held on May 16, 2017, and the Defendant entered a guilty plea to Third Degree Burglary pursuant to a plea agreement. ARR 8-10.

On June 13, 2017, the Defendant was sentenced by the Court to serve five years in the penitentiary with three and one-half years of said sentence suspended. SH1 6. Immediately following the sentencing hearing, based upon

the Defendant's actions and commentary, the Defendant's sentence was enhanced to the full five year penitentiary sentence by the Court and given an additional 60 days in jail for contempt of court. SH1 7-9. That 60 days in jail was later changed to 30 days in jail. SR 89.

A Judgment of Conviction was signed and filed on July 20, 2017. APP 3; SR 93.

The Defendant filed a motion to withdraw his guilty plea (SR 86) and a separate motion for a re-sentencing hearing (SR 85). The Court denied the Defendant's motion to withdraw his guilty plea (SR 96), but granted his motion for a re-sentencing (SR 215). The re-sentencing hearing was held on September 5, 2017. The Amended Judgment of Conviction was signed and filed on September 27, 2017. SR 133.

A Notice of Appeal was filed by Defendant on October 4, 2017. SR 139.

STATEMENT OF FACTS

There is no dispute concerning Defendant's guilty plea to Third Degree Burglary. The issues in this matter are strictly concerning the events and rulings during and after the sentencing hearing and resentencing hearing.

At the sentencing hearing for Third Degree Burlary, a Class 5 felony, on June 13, 2017, the Court recognized the Defendant's criminal record. The Court initially sentenced the Defendant as follows:

> "I'm ordering you to serve five years in the South Dakota State Penitentiary, there to be fed, kept, and clothed in accordance with the rules governing said institution. I'm suspending three and a half years. I'm giving you credit for 133 days served."

SH1 6.

After discussing parole eligibility and ordering restitution, the Court "remanded the Defendant to the custody of the Sheriff for execution of the sentence" and advised:

"Well. That's my sentence. That concludes the matter."

SH1 7.

As the Defendant was leaving the Courtroom with the Sheriff and while the Court and counsel were having a discussion about the particulars of the sentence, the Defendant "flipped" the Court off. APP 2; SH1 8. The Court ordered that the Defendant come back in and sit down and placed on the record what had just happened and resentenced the Defendant to the full five year sentence. Id. The following colloquy took place between the Court and the Defendant:

> THE COURT: For the record, the Court observed Mr. Ross flip him the bird as he was leaving the courtroom. For that reason, the Court is modifying its sentence. The Court is reimposing the three and a half years suspended. It's five years in prison.
>
> THE DEFENDANT: Thank you. I'll get my day, same to you.
>
> THE COURT: For that I'm holding you in contempt of court. You'll be held in the Brule County jail for 30 days before you go and start your prison without any credit.
>
> THE DEFENDANT: Well give me a year, I don't care. Do what you got to do.
>
> THE COURT: Now it's 60 days in the Brule County jail before you start your prison sentence without any credit. Anything more to say?
>
> THE DEFENDANT: Uh-huh. I got a lot to say. You'll hear about it when I file, when I file my paperwork.

THE COURT: File your paperwork.

THE DEFENDANT: Uh-huh.

THE COURT: That's it. Take him to jail immediately.

SH1 8-9.

At the resentencing hearing on September 5, 2017, the Court ordered that the Defendant serve 60 months in the penitentiary with 40 of those months suspended. APP 5; SH2 15-18.

ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ENHANCED THE DEFENDANT'S SENTENCE IMMEDIATELY AFTER HE WAS HELD IN CONTEMPT OF COURT.

We contend that the Court erred when it revoked the suspended portion of the sentence without affording the Defendant any due process hearing for a violation of said sentence.

The South Dakota Supreme Court has ruled that "[a] sentence within the statutory maximum is generally reviewed for an abuse of discretion, and we give great deference to the court's sentencing decision. State v. Diaz, 2016 S.D. 78, ¶ 47, 887 N.W.2d 751, 765. Citing *State v. McKinney*, 2005 S.D. 73, ¶ 10, 699 N.W.2d 471, 476.

SDCL 23A-27-18.4 states, in part, that "[a] defendant with a partially suspended penitentiary sentence is under the supervision of the Department

of Corrections and the Board of Pardons and Paroles." The Court concurred in this case by stating as follows:

> "I'm ordering that as a condition of your *parole*, you will pay restitution of $2,887.21 to the victim as laid out in the PSI."
>
> (Emphasis added.) SH1 6-7.

Accordingly, after the sentence was pronounced, the Defendant's supervision was transferred from the judicial branch to the executive branch. Any violation would have been an issue involving the Department of Corrections and not the judicial system.

However, it is clear that the Defendant did not violate any conditions of his sentence. There was no order pronounced and there was no order included in the Judgment of Conviction to the effect that the Defendant shall obey all laws or even that he not be held in contempt of court. Assuming arguendo that he was in violation of said sentence for his behavior and comments to the Court, he was under the supervision of the Department of Corrections and the Board of Pardons and Paroles and that entity would have been required to issue an order to show cause and schedule a hearing. See SDCL 24-25-20.

Ultimately, it is our contention that there was no violation of parole. It was simply a matter of the Court enhancing the sentence after the Defendant's contemptuous behavior.

> It is a well-established rule in South Dakota that "as against an unwilling defendant, a valid sentence cannot be increased in severity after he has commenced the serving thereof."

Litschewski v. Dooley, 71 F.Supp.3d 977, 980 (2014), citing State v. Hughes, 62 S.D. 579, 585, 255 N.W. 800, 802 (1934), partially cited with approval, State v. Sieler, 1996 S.D. 114, ¶ 10, 554 N.W.2d 477, 480 (1996).

For all of these reasons, we contend that after Defendant had been sentenced and had been remanded to the custody of the Sheriff, that he was in the custody of the executive branch, began serving the sentence and had the right to not have the sentence enhanced. Accordingly, the Court abused its discretion in doing so.

2. THE TRIAL COURT ERRED WHEN IT ENHANCED THE DEFENDANT'S SENTENCE AGAIN AFTER THE RE-SENTENCING HEARING.

We contend that the Court again enhanced the sentence at the resentencing hearing. The oral sentence of the Court on June 13, 2017, ordered that the Defendant serve five years in the State Penitentiary with three and one-half years suspended. SH1 8-9. The enhancement of the sentence immediately following the contemptuous behavior of the Defendant was illegal.

The sentence of the Court at resentencing was 60 months in the State Penitentiary with 40 months suspended. APP 5; SH2 15-18; SR 133. This constitutes an increase from 18 months to 20 months.

Accordingly, we contend that the Court abused its discretion by illegally enhancing the Defendant's sentence at the resentencing hearing for the same reasons as stated above.

CONCLUSION

For each of the reasons set forth above, it is requested that the Amended Judgment of Conviction be reversed and this matter be remanded for further proceedings with the Trial Court.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument on all of the issues set forth herein.

Dated this 21st day of December, 2017.

_____

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CERTIFICATE OF COMPLIANCE

I, Douglas N. Papendick, attorney for Appellant, hereby certify that the Brief of Appellant complies with the type volume limitation as set forth within SDCL 15-26A-66(b) in that it contains no more than the greater of 10,000 words or 50,000 characters, to-wit: 2,222 words or 11,283 characters (no spaces) or 13,686 characters (with spaces). I have relied upon the word and character count of our word processing system used to prepare this Brief.

Dated this 21st day of December, 2017.

_____

Douglas N. Papendick
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Douglas N. Papendick, hereby certify that on the 21st day of December, 2017, I caused the original and two hardcopies of the Brief of Appellant to be mailed, postage prepaid, by U.S. mail, to the following:

Supreme Court Administrator
c/o Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol
Pierre, South Dakota 57501

I, Douglas N. Papendick, hereby certify that on the 21st day of December, 2017, I electronically filed the Brief of Appellant by submitting the same by email attachment with the number of the case appearing in the subject line to:

SCClerkBriefs@ujs.state.sd.us

I, Douglas N. Papendick, hereby certify that on the 21st day of December, 2017, I served a true and correct of the Brief of Appellant upon Marty J. Jackley, Attorney General, and David V. Natvig, Brule County State's Attorney, by the electronic service to the following last known email addresses, to-wit:

Marty J. Jackley
Attorney General
atgservice@state.sd.us

David V. Natvig
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_____
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Dated this 21st day of December, 2017.

_____

Douglas N. Papendick
Attorney for Appellant

APPENDIX

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APPENDIX

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
COUNTY OF BRULE) FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

-vs-

SHAWN RAYNARD ROSS,
D/O/B 10-7-1978
Defendant.

CRI 17-9

INDICTMENT

Count 1
3RD DEGREE BURGLARY
CLASS 5 FELONY
SDCL 22-32-8

Count 2
INTENTIONAL DAMAGE TO
PROPERTY - 1ST DEGREE
CLASS 5 FELONY
SDCL 22-34-1(2)

* * * * * * * * *

THE BRULE COUNTY GRAND JURY CHARGES:

COUNT I.

That on or about the 26th day of January, 2017, in the County of Brule, State of South Dakota, **SHAWN RAYNARD ROSS** did commit the public offense of 3RD DEGREE BURGLARY (SDCL 22-32-8) in that he did enter or remain in an unoccupied structure, with intent to commit any crime, to wit: North Side Car Wash in Chamberlain

Count II.

That on or about the 26th day of January, 2017, in the County of Brule, State of South Dakota, **SHAWN RAYNARD ROSS** did commit the public offense of **INTENTIONAL DAMAGE TO PROPERTY (SDCL 22-34-1(2)) a Class 5 Felony**, in that he did intentionally injure, damage or destroy private property in which any other person has an interest without the consent of the other person, with damage to property being two thousand five hundred dollars or less, but more than one thousand dollars to wit: North Side Car Wash in Chamberlain

Dated this 17th day February, 2017, at Chamberlain, South Dakota.

A True B. 11

"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

Joe Hunter

GRAND JURY FOREPERSON

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARD TO THIS INDICTMENT: officer Joe Hutmaker
officer Catlin Landagin

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF BRULE)

REQUEST FOR SUMMONS

I, David V. Natvig, prosecuting attorney in the above matter do hereby request a Summons to be issued against the above Defendant.

Dated this 17th day of February, 2017.

David V. Natvig
Prosecuting Attorney

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF BRULE)

NOTICE OF DEMAND FOR ALIBI DEFENSE

I, David V. Natvig, prosecuting attorney in the above matter, hereby state that alleged offense was committed on or about January 24th, 2017, in Brule County, South Dakota. I hereby request that the Defendants or their attorneys serve upon me a written notice of their intention to offer a defense of alibi within ten (10) days as provided by SDCL 23A-9-1. Failure to provide such notice of an alibi defense may result in exclusion of any testimony pertaining to an alibi defense.

David V. Natvig
Prosecuting Attorney

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF BRULE		FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	*	07CRI17-09
vs.	*	**FINDINGS OF FACT AND**
SHAWN ROSS, Defendant.	*	**CONCLUSIONS OF LAW AND ORDER OF CONTEMPT**

This matter came before the Court on June 13, 2017, at the hour of 1:30 p.m. for purposes of sentencing. The State appeared through David Natvig, the Brule County state's attorney. The Defendant appeared in person. Theresa Maule, the Defendant's previously appointed Court appointed attorney and subsequently appointed advisory counsel to the Defendant, also appeared. Based upon certain actions that occurred during the hearing the Court enters the following **Findings of Fact** for contempt:

1. After hearing all parties at the sentencing hearing, and considering the presentence report, this Court ordered that for the charge of third-degree burglary, the Defendant would serve five years in the South Dakota State Penitentiary with three and a half years suspended. The Defendant was further ordered to pay restitution and other costs as well as attorney's fees.

2. Following the Court's pronouncement of sentence, and while the Court was continuing to discuss details of the sentence with counsel, the Defendant stood up, walked around the bar and was being escorted by Law Enforcement towards the door of the courtroom and was saying things under his breath. When he was midway through the courtroom, the Defendant raised his left hand and extended his middle finger to the Court. This action occurred while many other court participants and members of the public were present in the courtroom.

3. This Court certifies that it personally observed the Defendant raise his left hand and extend his middle finger towards the direction of the Court and also heard him mumbling under his breath.

4. The Court immediately had the Defendant stopped and returned to counsel table. At that time the Court informed the Defendant that it had observed the Defendant extend his middle finger towards the Court and informed him that he would be held in contempt. The Court further indicated that it would be unsuspending the three and a half years of the sentence and imposing the full five-year penitentiary sentence.

5. The Court did this because the Defendant had been given the grace of the Court in sentencing and the Defendant, by his contemptuous behavior, indicated to the Court that he was not worthy of the suspension of a portion of his sentence. Rather, he exhibited behavior that indicated he would be problematic on parole supervision.

6. The Court thereupon asked the Defendant to comment and the following dialogue occurred:

THE COURT: For the record, the Court observed Mr. Ross flip him the bird as he was leaving the courtroom. For that reason, the Court is modifying its sentence. The Court is re-imposing the three and a half years suspended.

It's five years in prison.

THE DEFENDANT: Thank you. I'll get my day, same to you.

THE COURT: For that I'm holding you in contempt of court. You'll be held in the Brule County jail for 30 days before you go and start your prison without any credit.

THE DEFENDANT: Well give me a year, I don't care. Do what you got to do.

THE COURT: Now it's 60 days in the Brule County jail before you start your prison sentence without any credit. Anything more to say?

THE DEFENDANT: Uh-huh. I got a lot to say.

You'll hear about it when I file, when I file my paperwork.

THE COURT: File your paperwork.

THE DEFENDANT: Uh-huh.

THE COURT: That's it. Take him to jail immediately.

THE DEPUTY SHERIFF: Come on guys, the other three too.

(All comply.)

MS. MAULE ROSSOW: I'm sorry, Judge.

THE COURT: It's okay. It's not your fault.

(The proceedings conclude at 2:35 p.m. on June 13, 2017.)

7. As far as the first contempt with the raising of the middle finger, the Court ordered that in addition to the imposition of the suspended prison time, that the Defendant would serve an additional 30 days in the county jail without credit against his prison sentence in accordance with SDCL 23A-38-1.

8. Upon the Court's requesting the Defendant to comment about the Court's order and the second contemptuous statement that was made as described above, the Court ordered that the Defendant serve an additional 30 days for a separate contempt, again to be served without credit against the penitentiary sentence. Since the date of the hearing the Court has had time to reflect and reconsider this second contempt and has determined that it was said in the heat of the moment during a stressful sentencing hearing and has decided not to impose a second contempt or punishment for the statement.

Conclusions of Law

1. SDCL 23A-38-1 provides:

> Criminal contempt may be punished summarily if a judge or magistrate judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. An order of contempt shall recite the facts and shall be signed by the judge or magistrate judge and entered of record. Contempt prosecuted under this section shall be punishable by imprisonment of not more than thirty days in the county jail or a fine not exceeding one hundred dollars or both.

2. The act of criminal contempt is directed at the power and dignity of the Court. *State v. DuBray*, 618 N.W.2d 728 (2000).

3. Contempt is usually defined as words spoken or acts committed in the presence of the Court that tend to subvert, embarrass or prevent the administration of justice and may be summarily punished by the presiding judge as she may deem just and necessary. *DuBray*.

4. To constitute direct contempt the act must be within the judge's personal knowledge, although it does not necessarily have to occur inside a court or during the judicial proceeding. *Id.*

5. Direct contempt occurs when contumacious acts take place in the presence of the Court or when the acts are committed outside the presence of the judge but are admitted in open court. *Id.*

6. In the present case, in front of a full courtroom, and while the Court was still discussing details of the sentence with counsel, the Defendant extended his middle finger towards the Court while leaving the Courtroom and was mumbling things under his breath. The Court had him sit down and imposed a contempt punishment for his contumacious act by imposing the suspended portion of the prison sentence and ordering him to serve 30 additional days in jail for his contemptuous behavior. When the Court asked if he had any response, the Defendant again, in the presence of the Court and in the presence of others in attendance, made further contemptuous remarks, which tended to subvert, embarrass or prevent the administration of justice.

7. The Court certifies here that these contemptuous behaviors occurred in the direct presence of the Court.

8. The Court finds it necessary for control of the Court's decorum and to ensure that all litigants express proper respect towards the Court and towards judicial proceedings that the Defendant be punished by contempt in accordance with SDCL 23A-38-1 by serving 30 days in jail without credit for time served on the sentence for the underlying charge. Upon further consideration the Court Decides not to impose punishment for the second contempt which occurred after the Court had the Defendant returned to counsel table.

9. The Court's sentence is left to its sound discretion. The Court made a decision in this case to suspend a substantial portion of the Defendant's prison term. By suspending a portion of the sentence, the Court, by its own discretion, judgment and grace, is granting some judicial clemency in order to give the Defendant an opportunity at rehabilitation on parole. After the Court imposed its sentence, the Defendant engaged in contemptuous behavior towards the Court, which led the Court to firmly believe that it had made a serious mistake in suspending three and a half years of the Defendant's prison sentence. This behavior forces the Court to find that the Defendant would not perform well under parole supervision and is not likely to benefit from the opportunity for rehabilitation. Upon learning this information, the Court summarily corrected its mistake by imposing the suspended prison time and finds that the Defendant was unworthy of the grace of the Court in that regard.

ORDER

Based upon the above and foregoing, IT IS HEREBY

ORDERED, that as to the contempt which occurred when the Defendant extended his middle finger towards the Court, the Court re-sentences and imposes the three and a half years of the penitentiary sentence that was previously suspended,; and it is further

ORDERED that in addition, the Defendant will serve an additional 30 days in the Brule County Jail for contempt of court accordance with SDCL 23A-38-1 without credit for time served from the penitentiary sentence imposed.

Dated this 20 day of July, 2017.

BY THE COURT:

Hon. Bruce V. Anderson
Circuit Court Judge

ATTEST:

Clerk of Courts

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF BRULE) FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,) 07CRI 17-000009
Plaintiff,)
)
V.) JUDGMENT OF CONVICTION
)
SHAWN RAYNARD ROSS,)
DOB: 10-7-1978)
)
Defendant.)

An Indictment was filed with this Court on the 17th day of January, 2017, charging the Defendant with the crimes of Count 1: 3rd DEGREE BURGLARY, (SDCL 22-32-8), a Class 5 Felony and 2: INTENTIONAL DAMAGE (SDCL 22-34-1(2)), a Class 5 Felony. The Defendant was arraigned on said charges on the 7th day of March, 2017. The Defendant, and his attorney, Theresa Maule, and Brule County State's Attorney, David V. Natvig, appeared at the Defendant's arraignment. The Court advised Defendant of his constitutional and statutory rights pertaining to the charges filed against him including but not limited to the right against self- incrimination, the right of confrontation and the right to a jury trial. The Defendant pleaded not guilty to the charges at arraignment and a trial was scheduled. The Defendant filed a motion on April 19th, 2017 to change his court appointed counsel. The Court held a hearing on his request May 2nd, 2017 and denied his motion to change counsel and gave him the choice to continue with present counsel, hire his own counsel, or to represent himself. The Defendant chose to represent himself and the Court ordered Theresa Maule to continue as advisory counsel. The Defendant entered into a plea agreement with the State on May 10, 2017 which was reduced to writing and filed with the Court. On May 16, 2017 the Defendant appeared in person with his Advisory counsel, Theresa Maule, and the Brule County State' Attorney, David Natvig, for a Change of Plea hearing. The Court again advised the Defendant of his statutory and constitutional rights pertaining to the charge. The Defendant pled guilty to Count One of the indictment, Third Degree Burglary, in violation of SDCL 22-32-8.

It is the determination of the Court that the Defendant has been regularly held to answer to said offense, that the plea of guilty was knowing, intelligent and voluntary made, and that a sufficient factual basis existed for the plea and the Defendant is hereby convicted of the offense of Third Degree Burglary as alleged in the Indictment.

SENTENCE

On June 13th, 2017, the Defendant, Shawn Raynard Ross, accompanied by his advisory counsel, Theresa Maule, and Brule County State's Attorney, David V. Natvig appeared for Defendant's sentencing. The Court inquired whether any just or legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

The Court finds, pursuant to SDCL 22-6-11 that aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under SDCL 22-6-11. Those circumstances are significant and this Court finds that any one of them or a combination of them requires this departure from presumptive probation. The aggravated circumstances include:

1. Defendant has a significant criminal history including Escape.
2. Defendant has a federal felony record. Defendant was convicted of taking a motor vehicle by force or violence – carjacking 18 USC 2119. He was sentenced to 30 months incarceration, with five separate probation violations which included re-incarceration.
3. Defendant has a federal record for assault resulting in serious bodily injury (USC 1153), for which he received 6 months in custody.
4. Defendant has a felony conviction from Lyman County, South Dakota for a 4th Offense D.U.I., conviction in 2012.
5. Defendant's state criminal history reflects a long criminal career, with no less than Twenty (20) arrests by local law enforcement agencies. These crimes included Escape, Failure to Appear, and False Personation.
6. Defendant has been arrested for (7) seven separate instances of assault and/or domestic violence.
7. The Defendant made misstatements to this Court concerning his living arrangements during a Bond Hearing in these proceedings and after such statements were investigated by Council, it was determined that the Defendant was not welcome by his family at the residence provided.
8. The Defendant committed contempt of court by extending his middle finger towards the Court as he was leaving the Courtroom at

sentencing which was observed by other members of the public present at that time.

The Court further finds that the Defendant's LSI shows that he is high risk on criminal history, education / employment, accommodation, alcohol/drugs. He is listed as a very high risk on leisure/recreation and on attitude and orientation. His overall risk level is listed as high on the level of service inventory.

It is therefore further:

ORDERED, that the Defendant Shawn Raynard Ross will serve five (5) years in the South Dakota State Penitentiary, there to be fed, kept, and clothed in accordance with the rules governing said institution.

ORDERED, that the Defendant shall serve thirty (30) days in the Brule County Jail for contempt of this Court, without credit for time served off of this sentence, and prior to commencement of his prison sentence herein, (see separate Findings of Fact and Conclusions of Law and Order of Contempt).

ORDERED, That Defendant will repay Brule County for Court Appointed Attorney Fees.

ORDERED, That Defendant shall pay restitution in the amount of $2,887.21 to the victim. (Jim Guest)

ORDERED, that the Defendant shall receive credit for 140 days served in the Brule County Jail prior to sentencing.

ORDERED, That Defendant is hereby remanded to the custody of the sheriff for carrying out the sentence.

Dated this 20 day of July, 2017

BY THE COURT:

Bruce V. Anderson
Circuit Court Judge

ATTEST:

Clerk of Courts

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF BRULE)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, vs. SHAWN ROSS, Defendant.	*	07CRI17-09 **ORDER GRANTING MOTION FOR RE-SENTENCING**

The Defendant appeared for Sentencing on June 13, 2017 with his advisory counsel, Theresa Maule. David Natvig, Brule County State's Attorney appeared on behalf of the State. Following sentencing the Defendant filed a motion for re-sentencing. The Court grants the request without further hearing.

The Defendant was charged by indictment for the charges of Third Degree Burglary and Intentional Damage to Property, both Class 5 Felonies. Theresa Maule was appointed as his court appointed counsel. On April 19, 2017 the Defendant filed a motion to change counsel along with an application for Court appointed counsel requesting the Court appoint Steve Smith, an attorney at law, from Chamberlain, South Dakota, be to be substituted as his Court appointed attorney. The Court held a hearing in accordance with *State v. Fender*, 484 NW2d 307, (SD 1992). After proper inquiry, the Court ruled that the Defendant could continue the case with his Court appointed attorney, Theresa Maule, hire his own attorney, or represent himself. The Defendant chose to represent himself. The Defendant was properly admonished of the pitfalls of self-representation but persisted in his request to represent himself. The Court ordered that Ms. Maule would continue as his advisory counsel.

The Defendant entered a plea agreement that was in writing and filed with the Court on May 10, 2017. The Defendant appeared for a change-of-plea hearing on May 16, 2017. The Court inquired if the plea was a knowing, intelligent, and voluntary plea and if the Defendant was

voluntarily waiving his statutory and constitutional rights. After such inquiry the Court was satisfied that the Defendant was making a knowing, intelligent, and voluntary plea and accepted the plea agreement and found the Defendant guilty of third-degree burglary. A presentence investigation was ordered and sentencing was set for June 13, 2017. At the Sentencing hearing the Court imposed a sentence of five (5) years in the State Penitentiary. Initially, the Court imposed a five year sentence with three and one half years suspended. However, the Defendant was held in contempt following the Court's pronouncement of sentence causing the Court to re-impose the suspended portion of the sentence. (See Findings of Fact and Conclusions of Law on Contempt on file)

DECISION

With respect to the Defendant's motion for resentencing, the sentence is left to the sound discretion of the Court. This Court imposed a lenient sentence, suspending three and one-half years of a five-year prison sentence. During the closing moments of the sentencing hearing the Defendant committed contempt of Court by extending his middle finger to the Court. Such behavior caused this Court to reconsider its sentence immediately after it had been imposed. Further, at the time of sentencing the Defendant was represented by advisory counsel which causes the Court other concerns despite the fact that he was properly advised of the pitfalls of self-representation and chose to persist in his self-representation. SDCL 23A-27-19 gives this Court authority to grant the request for a re-sentencing hearing. Under the circumstances here, the Court determines that the Defendant should be allowed another opportunity with substitute counsel to present his case for a possible different sentence.

ORDER

Based upon the above and foregoing, it is hereby

ORDERED, that the Defendant's Motion for a re-sentencing hearing is granted, and it is further

ORDERED, that a re-sentencing hearing shall be held on August 22nd, 2017 at 1:30 PM or as soon thereafter as counsel may be heard, and it is further

ORDERED, that Tim Whalen, of Lake Andes, South Dakota is appointed substitute counsel to represent the Defendant, and it is further

ORDERED, that the Court Services Officer shall provide Tim Whalen with a copy of the Pre-sentence Report and all attachments.

This Decision shall constitute the Court's Findings of Fact and Conclusions of Law.

Dated this 21 day of July, 2017.

BY THE COURT:

Hon. Bruce V. Anderson
Circuit Court Judge

ATTEST:

Clerk of Courts

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss:	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	07CRI 17-000009
V.	)	AMENDED JUDGMENT OF CONVICTION
SHAWN RAYNARD ROSS, DOB: 10-7-1978	)	
Defendant.	)	

An Indictment was filed with this Court on the 17th day of January, 2017, charging the Defendant with the crimes of Count 1: 3rd DEGREE BURGLARY, (SDCL 22-32-8), a Class 5 Felony and 2: INTENTIONAL DAMAGE (SDCL 22-34-1(2)), a Class 5 Felony. The Defendant was arraigned on said charges on the 7th day of March, 2017. The Defendant,and his attorney, Theresa Maule, and Brule County State's Attorney, David V. Natvig, appeared at the Defendant's arraignment. The Court advised Defendant of his constitutional and statutory rights pertaining to the charges filed against him including but not limited to the right against self- incrimination, the right of confrontation and the right to a jury trial. The Defendant pled guilty to the charges at arraignment and a trial was scheduled. The Defendant filed a motion on April 19th, 2017 to change his court appointed attorney counsel. The Court held a hearing on his request May 2nd , 2017 and denied his motion to change counsel and gave him the choice to continue with present counsel, hire his own counsel, or to represent himself. The Defendant chose to represent himself and the Court ordered Theresa Maule to continue as advisory counsel. The Defendant entered into a plea agreement with the State on May 10, 2017 which was reduced to writing and filed with the Court. On May 16, 2017 the Defendant appeared in person with his Advisory counsel, Theresa Maule, and the Brule County State's Attorney, David Natvig, for a Change of Plea hearing.

The Court again advised the Defendant of his statutory and constitutional righs pertaining to the charge. The Defendant pled guilty to Count One of the indictment, Third Degree Burglary, in violation of SDCL 22-32-8.

It is the determination of the Court that the Defendant has been regularly held to answer to said offense, that the plea of guilty was knowing, intelligent and voluntarily made, and that a sufficient factual basis existed for the plea and the Defendant is hereby convicted of the offense of Third Degree Burglary as alleged in the Indictment.

On June 13,2017 the Defendant and his advisory counsel along with the Brule County State's Attorney appeared for Sentencing. The Court imposed Sentence and the Defendant then committed a contempt of Court in the presence of the Judge in an open courtroom. The Court imposed a sanction for such contempt in addition to the sentence and also re-imposed the suspended three and one half years of the initial sentence and entered separate Findings of Fact an Conclusions of Law on the contempt matter. Following the sentencing hearing the Defendant filed a motion to withdraw his plea and a separate motion for re-sentencing. The Court denied the motion to withdraw his plea but granted his request for a re-sentencing hearing and appointed Doug Papendick of Mitchell, South Dakota as his substitute court appointed counsel.

A re-sentencing hearing was held on September 5, 2017. Defendant appeared for the re-sentencing hearing with counsel, Douglas Papendick, and Brule County State's Attorney, David V. Natvig, appeared for the State. At the commencement of the hearing the Court announced that since it had granted the re-sentencing that it was vacating the prior Judgment and Sentence

and that the parties would start over with the Defendant represented by newly appointed counsel.

The Court inquired whether any just or legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

The Court finds, pursuant to SDCL 22-6-11 that aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under SDCL 22-6-11. The aggravated circumstances include:

1. Defendant has a significant criminal history including Escape.

2. Defendant has a federal felony record. Defendant was convicted of taking a motor vehicle by force or violence - carjacking 18 USC 2119. He was sentenced to 30 months incarceration, with five separate probation violations which included re-incarceration.

3. Defendant has a federal record for assault resulting in serious bodily injury (USC 1153), for which he received 6 months in custody.

4. Defendant has a felony conviction from Lyman County, South Dakota for a 4th Offense D.U.I., conviction in 2012.

5. Defendant's state criminal history reflects a long criminal career, with no less than Twenty (20) arrests by local law enforcement agencies. These crimes included Escape, Failure to Appear, and False Personation.

6. Defendant has been arrested for (7) seven separate instances of assault and/or domestic violence.

7. The Defendant made misstatements to this Court concerning his living arrangements during a Bond Hearing in these proceedings and after such statements were investigated by Counsel, it was determined that the Defendant was not welcome at the residence provided.

8. The Defendant commited contempt of court by extending his middle finger towards the Court as he was leaving the Courtroom at his June 2017 sentencing hearing which was observed by other members of the public present at that time.

The Court further finds that the Defendant's LSI shows that he is high risk on criminal history, education / employment, accommodation, alcohol/drugs. He is listed as a very high risk on leisure/recreation and on attitude and orientation. His overall risk level is listed as high on the level of service inventory.

It is therefore:

ORDERED, that the Defendant, Shawn Raynard Ross, will serve Sixty (60) months in the South Dakota State Penitentiary, there to be fed, kept, and clothed in accordance with the rules governing said institution, and that Forty (40) months of said sentence are herby suspended on the condition that the Defendant comply in all respects with his parole supervision agreement and otherwise remain a law abiding citizen while under parole supervision, and it is further

ORDERED, that the Defendant shall receive credit for time served in the Brule County Jail of One Hundred Ninety-four (194) days; and it is further

ORDERED, that Defendant shall serve thirty (30) days in the Brule County Jail for contemp of this Court, without credit for time served off of the sentence, and prior to commencement of his prison sentence herein (see separate Findings of Fact and Conclusions of Law and Order of Contempt), and is not a part of the 194 days credit calculation herein, and it is further

ORDERED, that the Defendant will repay Brule County for his Court Appointed Attorney Fees as part of his parole plan; and it is further

ORDERED, That Defendant shall pay restitution in the amount of $2,887.21 to the victim, (Jim Guest) in accordance with a payment plan to be implemented as part of his parole supervision; and it is further

ORDERED, that Defendant is hereby remanded to the custody of the sheriff for carrying out the sentence.

BY THE COURT:

Bruce V. Anderson
Circuit Court Judge

RIGHT TO APPEAL

You, Shawn R. Ross, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Brule County States Attorney, PO Box 167, Kimball, SD, 57355 and the Attorney General of the State of South Dakota at 1302 E. Highway 14, Suite 1, Pierre, SD 57501-8501, by filing a copy of the same, together with proof of such service with the Clerk of this Court within thirty (30) days from the date that this AMENDED Judgment of Conviction and Sentence was signed, attested and filed.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28407

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SHAWN RAYNARD ROSS,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

THE HONORABLE BRUCE V. ANDERSON
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT AND APPELLANT

Notice of Appeal filed October 4, 2017

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28407

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SHAWN RAYNARD ROSS,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Shawn Raynard Ross, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name. The settled record in the underlying criminal case, *State of South Dakota v. Shawn Raynard Ross,* Brule County Criminal File No. 17-09, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." The various transcripts and other documents will be cited as follows:

Change of Plea Hearing – May 16, 2017 ..... CP

Sentencing Hearing – June 13, 2017 ..... SH

Findings of Fact & Conclusion of Law - July 20, 2017 .. FC

Resentencing Hearing – September 5, 2017 ..... SH2

All such references will be followed by the appropriate page designation as well as citation to the settled record.

JURISDICTIONAL STATEMENT

Defendant pled guilty to one count of Third Degree Burglary. CP 9, SR 166. An Amended Judgment of Conviction was entered by the Honorable Bruce V. Anderson, Circuit Court Judge, First Judicial Circuit, on September 28, 2017. *Id.* Defendant filed a Notice of Appeal on October 4, 2017. SR 74. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE TRIAL COURT IMPROPERLY INCREASED DEFENDANT'S SENTENCE AFTER HE HAD COMMENCED SERVING IT?

The trial court suspended a portion of Defendant's sentence, but reinstated the suspended portion after Defendant committed an act of contempt in the court's presence.

State v. Marshek, 2009 S.D. 32, 765 N.W.2d 743

State v. Ford, 328 N.W.2d 263 (S.D. 1982)

State v. Bucholz, 403 N.W.2d 400 (S.D. 1987)

State v. Weatherford, 416 N.W.2d 47 (S.D. 1987)

STATEMENT OF THE CASE AND FACTS

On January 24, 2017, at approximately 7:43 p.m., Defendant entered the Northside Car Wash, in Chamberlain, South Dakota, and tampered with a change machine, attempting to pry it off the wall. CP 8, SR 165. *See also* SR 2. He was unsuccessful in his attempt and

eventually left the car wash without obtaining any cash from the machine. CP 10, SR 167. *See also* SR 2. Damage to the change machine was approximately $2,887.21. SH 7, SR 184. Defendant was identified by security footage recorded during the burglary and apprehended by Chamberlain Police on February 3, 2017. CP 9, SR 166. *See also* SR 2.

Defendant was charged by Indictment with one count of Third Degree Burglary, a Class 5 felony, in violation of SDCL 22-32-8, and one count of Intentional Damage to Property, a Class 5 felony, in violation of SDCL 22-34-1(2). SR 9-10. Pursuant to a written plea agreement, Defendant agreed to plead guilty to one count of Third Degree Burglary and pay restitution in the amount of $2,887.21. SR 33. *See also* CP 3-5, SR 160-62. In exchange, the state would dismiss the charge of intentional damage to property and decline any new charges arising from the incident. *Id.*

Under the plea agreement, both parties remained free to make sentencing recommendations to the judge. *Id.* Defendant expressed some confusion about the sentencing recommendations at his plea hearing, stating that he thought he would only get time served and no additional prison time. CP 5-7, SR 162-64. Both the State and Defendant's attorney assured the trial court that no promises were made to Defendant about avoiding additional prison time. CP 6, SR 163. The court explained to Defendant that he was still subject to the maximum

penitentiary sentence under the plea agreement, and his sentence was subject to the court's discretion. CP 7, SR 164. Defendant affirmed that he understood and proceeded to enter his guilty plea to Third Degree Burglary. CP 8-9, SR 165-66.

At his sentencing hearing, the trial court sentenced Defendant to five years in the state penitentiary, but suspended three and a half years of that sentence. SH 6, SR 183. The court also ordered him to pay restitution for the damaged change machine. SH 7, SR 184. After the sentence was pronounced, Defense counsel and the State asked some clarifying questions of the court regarding parole eligibility and court appointed attorneys fees. SH 8, SR 185. During the exchange, Judge Anderson observed Defendant "flip him the bird." SH 8, SR 185. Judge Anderson ordered Defendant back to the defense table and reinstated the suspended portion of Defendant's sentence, requiring him to serve the full five years.

Defendant responded to the reinstatement of the suspended sentence by stating, "Thank you. I'll get my day, same to you." SH 8, SR 185. The trial court held Defendant in contempt for this statement, sentencing him to thirty days in county jail. SH 9, SR 186. Defendant then told the trial court, "Well give me a year, I don't care. Do what you got to do." *Id.* The trial court sentenced Defendant to an additional thirty days in county jail for this act of contempt, but later reduced the

total sentence for the contempt findings to thirty days. *Id.* *See* SR 89-92.

Several weeks later, Defendant filed a motion asking for resentencing on the burglary conviction, and he was granted a hearing. SR 84, SH2 2, SR 191. The trial court granted the motion for resentencing, and sentenced Defendant to sixty months in the state penitentiary, with forty months suspended. SH2 15-18, SR 204-07. Defendant's adjusted sentence of twenty months in the penitentiary was two months longer than his original sentence of eighteen months. *Id.* Defendant filed a notice of appeal on October 4, 2017. SR 139.

ARGUMENT

THE TRIAL COURT DID NOT IMPROPERLY INCREASE DEFENDANT'S SENTENCE AFTER HE BEGAN SERVING IT.

Defendant argued at his resentencing hearing, and argues on appeal, that the trial court erred in immediately changing his sentence after his contemptuous behavior during his sentencing hearing. *See* SH2 5-6, SR 194-95, DB 6-9. Defendant contends that he had already begun serving his sentence when the trial court reinstated the three and a half year suspended portion. *Id.* Because he had already begun serving his sentence, Defendant theorizes that the trial court was without the authority to increase it. *Id.*

Defendant's argument fails for three reasons. First, Defendant's overall sentence was not increased, his suspended sentence was simply

reinstated. Second, Defendant was still in the courtroom and had not yet begun serving his sentence at the time he "flipped the bird" to the trial court. Third, his motion for a reduction of his sentence was granted by the trial court.

A. Standard of Review

"[This Court] generally [reviews] a circuit court's decision regarding sentencing for abuse of discretion." *State v. Talla*, 2017 S.D. 34, ¶ 8, 897 N.W.2d 351, 353 (quoting *State v. Rice*, 2016 S.D. 18, ¶ 11, 877 N.W.2d 75, 79). "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices.'" *Id.* (quoting *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83).

B. Defendant's sentence was not increased, and he had not left the courtroom or begun serving his sentence at the time the trial court reinstated the suspended portion of his sentence.

This Court has regularly held that "[A]s against an unwilling defendant, a valid sentence cannot be increased in severity after he has commenced the serving thereof . . ." *State v. Marshek*, 2009 S.D. 32, ¶ 10, 765 N.W.2d 743, 746 (quoting *State v. Ford*, 328 N.W.2d 263, 267 (S.D. 1982)). *See also State v. Hughes,* 255 N.W. 800, 802 (S.D. 1934); *State v. Jackson,* 272 N.W.2d 102 (S.D.1978); *Ex Parte Watt*, 44 N.W.2d 119 (S.D. 1950). "A defendant commences serving the sentence 'as soon as the prisoner suffers some confinement in the custody of a sheriff.'" *Id.*

Defendant contends that his supervision had been transferred to the executive branch and he had started serving his sentence when he

"flipped the bird" to the trial court and was called back to the defense table. DB 6-8. Defendant further argues that the trial court effectively revoked his suspended sentence without notice or hearing in violation of his right to due process when it reinstated the three and a half years of suspended time. *Id.* Defendant, therefore, concludes that the trial court abused its discretion in reinstating the suspended portion of his sentence. *Id.*

Defendant's argument rests entirely on two assertions: (1) that reinstatement of the suspended portion of his sentence effectively increased his sentence, and (2) that Defendant had begun serving his sentence even before he left the courtroom. This Court has never found a sentence to have been increased merely because a suspended portion of that sentence was reinstated. And while Defendant's sentence began as soon as he suffered "some confinement in the custody of [the] sheriff," *Marshek*, 2009 S.D. 32, ¶ 10, 765 N.W.2d at 746, this Court has never found a sentence to have commenced prior to the close of the sentencing hearing.

This Court addressed increases in sentences in *Ford,* 328 N.W.2d at 266 and *State v. Bucholz,* 403 N.W.2d 400 (S.D. 1987). In *Ford*, the jury convicted the defendant of unauthorized distribution of a controlled substance. *Ford*, 328 N.W.2d at 264. The trial court sentenced Ford to thirty-six months in prison with no time suspended. *Id.* Three days later the trial court brought Ford back and changed his sentence to ten years

in prison with no time suspended. *Id.* at 267. Ford contended, and this Court agreed, that the trial court was not permitted to increase a valid sentence after the defendant had already begun serving it. *Id.* at 266-68 (emphasis added).

In *Bucholz*, 403 N.W.2d at 401, the defendant was charged with two separate counts of DWI that occurred within approximately a week of each other. Bucholz pled guilty to both counts. *Id.* The trial court sentenced him to two concurrent five-month sentences in the Hughes County Jail based on witness testimony and Bucholz's own assertions that he had stopped drinking. *Id.* Immediately after the hearing, the trial court was approached by the deputy state's attorney and informed that Bucholz was seen in a state of intoxication a little more than a week before his sentencing hearing. *Id.* at 401-02.

Approximately one hour after the hearing, the trial court reconvened to announce that a second sentencing hearing would be held to consider Bucholz's misrepresentations to the trial court. *Id.* at 401. The trial court held a resentencing hearing and reinstated one five-month jail sentence for the first offense but resentenced Bucholz to a two-year penitentiary sentence for the second offense. *Id.* at 402. This Court found that the trial court inappropriately increased the defendant's sentence after the defendant had begun serving it. *Id.* at 403.

Unlike in *Ford* and *Bucholz*, the trial court did not increase the length of Defendant's sentence. The trial court merely reinstated the

suspended portion of the original five-year sentence. SH 8, SR 185. The trial court adjusted the terms of Defendant's confinement based on its conclusion that Defendant "would be problematic on parole supervision." FC1, SR 89.

The trial court noted in its Findings of Fact and Conclusions of Law that punishment of Defendant's contemptuous behavior was "necessary for control of the Court's decorum and to ensure that all litigants express proper respect towards the Court and towards judicial proceedings." FC 3, SR 91. The trial court's actions were rooted in its recognized authority to maintain order and decorum in the courtroom. In *State v. Weatherford*, while discussing the trial court's authority to require a defendant to wear leg irons, this Court acknowledged that "[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and can not [sic] be tolerated." 416 N.W.2d 47, 53 (S.D. 1987) (quoting *Illinois v. Allen,* 397 U.S. 337, 345, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353,359 (1970)).

This Court continued, "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id. See also State v. Ness*, 65 N.W.2d 923, 927 (S.D. 1954) (finding that, with regard to spectators, a trial judge has ample authority to enforce decorum in the

courtroom and that it is the duty of the court to exercise this power); *State v. Arguello*, 502 N.W.2d 548, 556 (S.D. 1993) (finding that, although it was not ideal for a trial judge to have an ex parte conversation with a jailer regarding manacling a Defendant, it was necessary to maintain order and control of the courtroom).

Justice Henderson's dissent in *Bucholz* further extolled the responsibilities and virtues of the trial court with regard to maintaining the dignity of the courtroom, explaining that legal rules cannot be "mechanically applied." 403 N.W.2d at 404 (Henderson, J., dissenting). Justice Henderson proceeded to acknowledge the "doctrine of inherent power" of the trial court, declaring that procedural justice must be subordinate to substantive justice. *Id.*

These cases elucidate the inherent authority of the trial court to maintain order and decorum in the courtroom. Here, Defendant literally raised his middle finger to that authority and scoffed at the trial court's generosity. SH 8, SR 185. The trial court acknowledged Defendant's financial hardship and fashioned a sentence that would require Defendant to spend the minimum time allowable in prison. SH 6-7, SR 183-84. Defendant rejected that gift and crudely insulted the authority of the trial court. SH 8, SR 185. The trial court was acting under its inherent authority to maintain order in the courtroom when it, without actually increasing Defendant's sentence, reinstated the suspended portion.

Moreover, the minimal time lapse between the trial court's imposition of sentence and the reinstatement of the suspended portion of the sentence further validates the court's decision. In his dissent in *Bucholz*, Justice Henderson explains how critical the brief time frame was to his analysis. *Bucholz*, 403 N.W.2d at 404 (Henderson, J., dissenting). Immediately after discovering that fraud might have been committed in his courtroom, the trial judge initiated a hearing to determine the truth. *Id.* Justice Henderson found that the trial court's quick action to establish that the sentence had been voided by Bucholz's fraud supported the resentencing. *Id.*

This Court also found relevant a time lapse of only fifteen minutes when it upheld a trial court's clarification of an oral sentence after a sentencing hearing. *Lykken v. Class*, 1997 S.D. 29, ¶ 9, 561 N.W.2d 302, 305. In *Lykken*, the trial court issued an oral sentence on multiple convictions without clarifying whether the penitentiary periods were to run consecutively or concurrently. *Id.* The judge and the attorneys entered judge's chambers and reemerged a few minutes later at which time the judge announced he wanted to correct the previously stated oral sentence. *Id.* at n.1. Meanwhile, the defendant waited in the courtroom as his attorney hoped to speak with him after the hearing. *Id.* This Court held that the trial court was authorized to correct this clerical error. *Id.* at 307.

In contrast to *Ford* and *Bucholz*, Defendant had not even exited the courtroom when the trial court reinstated the suspended portion of his sentence due to his inappropriate conduct. SH 8, SR 185. While the defendants in *Ford* and *Bucholz* had left the courtroom and were confined to the custody of the sheriff, Defendant had not left the presence of the trial court at the time he made his offensive gesture, and the trial court imposed the suspended portion of his sentence. *Id.* *See Ford*, 328 N.W.2d at 267; *Bucholz*, 403 N.W.2d at 403.

Further, the trial court, defense counsel, and the State were still discussing the nuances of Defendant's sentence when the trial court saw Defendant raise his middle finger to the court. SH 8, SR 185. As Defendant was standing to exit the courtroom, defense counsel was clarifying with the trial court Defendant's likely parole eligibility date. *Id.* Then, the State asked about court appointed attorney fees, and the trial court clarified that those fees would also be part of the judgment. *Id.* While these clarifications continued, Defendant "flipped the bird" to the judge. *Id.*

Defendant had not begun serving his sentence at the time the trial court reinstated the suspended portion of his sentence because his sentence was still being clarified, he had not left the courtroom, and he was not suffering confinement in the custody of the sheriff. *Marshek*, 2009 S.D. 32, ¶ 10, 765 N.W.2d at 746. The trial court did not abuse its

discretion in reinstating Defendant's suspended sentence because he had not yet begun serving it.

Defendant similarly argues that the trial court abused its discretion a second time at his resentencing hearing on September 5, 2017. DB 8-9. During the resentencing hearing, the trial court resentenced Defendant to a sixty-month sentence with forty months suspended, ultimately sentencing him to serve two more months of his five-year sentence in the penitentiary. *Id.* Despite the trial court acting within its authority when it reinstated the entire suspended portion of Defendant's sentence, Defendant sought and the trial court granted his motion and suspended forty months of his five-year sentence. SH2 16-17, SR 205-06. Defendant has ostensibly already received the relief that he is seeking from this Court, and no further sentence reduction is necessary.

As stated above, the trial court was within its discretion to reinstate the suspended portion of Defendant's sentence, requiring him to serve the full five years in the penitentiary. The trial court did not increase Defendant's sentence but merely reinstated the suspended portion, which was already a part of Defendant's initial five-year sentence. Also, Defendant had not begun serving his sentence when the suspended portion was reinstated. Because the original five-year sentence was within the trial court's sentencing authority, there was no

error at the subsequent resentencing. Finally, the relief Defendant is requesting has already been granted by the trial court.

CONCLUSION

The State respectfully requests that Defendant's sentence in this matter be affirmed in all respects.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 2848 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 7th day of February 2018.

_____
Grant Flynn
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of February, 2018, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Shawn Raynard Ross* was served by electronic mail on Douglas N. Papendick at dpapendick@mitchelltelecom.net.

_____
Grant Flynn
Assistant Attorney General

IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

APPEAL #28407

****

State of South Dakota, Plaintiff/Appellee

vs.

Shawn Raynard Ross, Defendant/Appellant.

****

Appeal from the Circuit Court
of the First Judicial Circuit
Brule County, South Dakota

Honorable Bruce V. Anderson, Circuit Court Judge

****

REPLY BRIEF OF APPELLANT

****

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Notice of Appeal filed October 4, 2017.

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PRELIMINARY STATEMENT

For purposes of brevity and clarity, the Defendant and Appellant, Shawn Raynard Ross, will use the same abbreviations throughout this Brief as was used in his Appellant's Brief.

JURISDICTIONAL STATEMENT

The Defendant and Appellant will use the same jurisdictional statement as in his Appellant's Brief.

STATEMENT OF ISSUES

1.

Whether the trial court erred when it enhanced the Defendant's sentence immediately after he was held in contempt of court.

Answer: The trial court did enhance the Defendant's sentence after he was held in contempt of court.

2.

Whether the trial court erred when it enhanced the Defendant's sentence again after the re-sentencing hearing.

Answer: The trial court did enhance the Defendant's sentence again after the re-sentencing hearing.

MOST RELEVANT CASES, STATUTES & CONSTITUTIONAL PROVISIONS

State v. Marshek, 2009 S.D. 32, 765 N.W.2d 743

STATEMENT OF THE CASE

The Defendant and Appellant Ross relies upon the Statement of the Case set forth in his Brief.

STATEMENT OF FACTS

The Defendant and Appellant Ross relies upon the Statement of Facts set forth in his Appellant's Brief.

ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ENHANCED THE DEFENDANT'S SENTENCE IMMEDIATELY AFTER HE WAS HELD IN CONTEMPT OF COURT.

We contend that the Court erred when it revoked the suspended portion of the sentence without affording the Defendant any due process hearing for a violation of said sentence. We maintain the same argument as previously provided in Appellant's Brief. However, we wish to address some of the cases cited by the State in their Appellee's Brief.

Simply, we contend that after Defendant Ross had been sentenced and had been remanded to the custody of the Sheriff, that he was in the custody of the executive branch, began serving the sentence and had the right to not have the sentence enhanced. The Trial Court abused its discretion in doing so.

First of all, the State contends that the Defendant's sentence was not increased. (See Appellee's Brief, p. 5) They argue that the suspended sentence was simply reinstated. However, that would require revocation proceedings. The Court would have had to provide the Defendant with due process. The Court would have had to advise the Defendant of his constitutional and statutory rights. The Defendant would have been entitled to a trial on whether or not a violation of his probation occurred. None of that occurred.

Secondly, the State contends that the Defendant had not yet begun serving his sentence at the time he "flipped the bird" to the trial court. (See Appellee's Brief, p. 6) Again, it is well-settled in South Dakota that a defendant's sentence commences immediately after the oral sentence is pronounced and he is in the custody of the Sheriff. State v. Ford, 328 N.W.2d 263, 267 (S.D. 1982). The Trial Court in this case pronounced the sentence and stated, "You'll be remanded to the custody of the Sheriff for execution of the sentence." SH1, p. 7. After Defendant Ross and the Court discussed issues of parole eligibility, the Court stated, "Well. That's my sentence. That concludes the matter." Id. At that point, according to the transcript, the Defendant left from the counsel table. SH1, p. 8.

The Court indicates in its Findings of Fact and Conclusions of Law and Order of Contempt as follows:

> "2. Following the Court's pronouncement of sentence, and while the Court was continuing to discuss details of the sentence with counsel, the Defendant stood up, walked around the bar and was being escorted by Law Enforcement towards the door of the courtroom and was saying things under his breath. When he was midway through the courtroom, the Defendant raised his left hand and extended his middle finger to the Court. … ."
>
> SR 89, Brief of Appellant Appendix, Tab 2.

The Court stated, "For the record, the Court observed Mr. Ross flip him the bird *as he was leaving the courtoom*." SH1, p. 8. Emphasis added.

There is no question that the Defendant began serving his sentence.

> It is a well-established rule in South Dakota that "as against an unwilling defendant, a valid sentence cannot be increased in severity after he has commenced the serving thereof."

Litschewski v. Dooley, 71 F.Supp.3d 977, 980 (2014), citing State v. Hughes, 62 S.D. 579, 585, 255 N.W. 800, 802 (1934), partially cited with approval, State v. Sieler, 1996 S.D. 114, ¶ 10, 554 N.W.2d 477, 480 (1996).

> A defendant commences serving the sentence "as soon as the prisoner suffers some confinement in the custody of a sheriff."

State v. Marshek, 2009 S.D. 32, ¶10, 765 N.W.2d 743, 746 (citing State v. Hughes, 62 S.D. 579, 584, 255 N.W. 800, 802 (1934); State v. Jackson, 272 N.W.2d 102 (S.D. 1978); Ex Parte Watt, 73 S.D. 436, 44 N.W.2d 119 (1950)).

In *Marshek*, the Supreme Court determined that "the circuit court did not attempt to resurrect a sentence that had already passed. Here, the circuit court *continued* proceedings until it was able to obtain additional information about the character of the defendant and his ability to reimburse the victims for their losses." Id. 2009 S.D. 32 at ¶12, 765 N.W.2d at 746. That case is distinguished from this case simply because the sentencing hearing for this Defendant was already pronounced. It had not been continued.

The South Dakota Supreme Court has recognized SDCL 23A-31-2, which provides that "[c]lerical mistakes in judgments, orders or other parts of a record and errors in a record arising from oversight or omission may be corrected by a court at any time and after such notice, if any, as the court orders." Lykken v. Class, 1997 S.D. 29, ¶10, 561 N.W.2d 302, 305. The State in their Appellant's Brief focuses on the time lapse in *Lykken* of only fifteen minutes from after the oral sentencing hearing to the time the court reconvened to clarify said sentence. (See page 11 of Appellant's Brief.)

In *Lykken*, the Court pronounced its oral sentence, but neglected to indicate whether two of the sentences were concurrent or consecutive. The Court's notes reflected they should have been consecutive. Fifteen minutes after the oral sentence was pronounced, the

Court clarified that the sentences were to run consecutively. Id. This case is inapplicable to *Lykken* in that the trial court in *Lykken* was not enhancing Lykken's sentence, but was merely making a clarification. There was an oversight by the trial court in *Lykken* at the time when the sentence was pronounced. The South Dakota Supreme Court did not base its opinion in *Lykken* on the fifteen minute time lapse.

The State further implies that a defendant has to leave the courtroom before he is considered to have begun serving his sentence. (See Appellee's Brief, page 12) In *Ford*, the trial court pronounced sentence and he was remanded to the custody of the sheriff for execution of the sentence. State v. Ford, 328 N.W.2d at 266-267 (S.D. 1982). Three days later and prior to the written judgment, the trial court enhanced the sentence. Id. The State here fails to recognize that a "sentence commences *as soon as the prisoner suffers some confinement* in the custody of the sheriff." Emphasis added. Id. at 267 (citing also State v. Hughes, 62 S.D. 579, 584, 255 N.W. 800, 802 (1934); State v. Jackson, 272 N.W.2d 102 (S.D. 1978); Ex Parte Watt, 73 S.D. 436, 44 N.W.2d 119 (1950).

Finally, the State wishes this Court to adopt Justice Henderson's dissenting opinion in State v. Bucholz, 403 N.W.2d 400, 404-405 (S.D. 1987). In *Bucholz*, the trial court pronounced sentence and immediately afterwards was informed of some false representations. One hour later, the Court called the parties back into the courtroom and announced that the sentence would be vacated and a resentencing hearing would be held in one week. At the resentencing hearing, the sentence was enhanced. The majority opinion of this Court was that once the defendant was remanded to the custody of the sheriff, he started serving the jail sentence. Id. at 403. Justice Henderson dissented from the majority opinion primarily on the basis that fraudulent misrepresentations had been made by the

defendant and his wife and that it should be considered an invalid sentence. Id. at 404. Justice Henderson wrote:

> There is room in the *Ford* decision for my concept of a "valid sentence." In *Ford*, 328 N.W.2d at 267, it was stated: "[A]s against an unwilling defendant, a *valid sentence* cannot be increased in severity after he has commenced the serving thereof…."

Id. at 405. Emphasis added.

Assuming arguendo that this Court wishes to follow Justice Henderson's position concerning a "valid sentence", it should be noted that the Trial Court in this case did hand down a valid sentence. It was not based upon fraudulent representations.

Accordingly, we argue that the Trial Court did enhance Defendant/Appellant Ross' sentence for all of the reasons set forth above and in our Brief of Appellant.

2. THE TRIAL COURT ERRED WHEN IT ENHANCED THE DEFENDANT'S SENTENCE AGAIN AFTER THE RE-SENTENCING HEARING.

The State's third and final contention is that the Defendant's motion for a reduction of his sentence was actually granted by the trial court. (See Appellee's Brief, p. 6) We agree that the Court did, in fact, reduce the sentence from the written and signed Judgment of Conviction. However, it was still an enhanced sentence from the Court's oral sentence. On June 13, 2017, the Court orally pronounced a 5 year Penitentiary sentence with 3 years, 6 months suspended. On September 5, 2017, the Court sentenced the Defendant to 60 months (5 years) with 40 months (3 years, 4 months) suspended. Accordingly, the sentence was increased by two months.

We contend that the Court abused its discretion by illegally enhancing the Defendant's sentence at the resentencing hearing for the same reasons as stated above and in Appellant's Brief.

CONCLUSION

For each of the reasons set forth above, it is requested that the Amended Judgment of Conviction be reversed and this matter be remanded for further proceedings with the Trial Court.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument on all of the issues set forth herein.

Dated this 20th day of February, 2018.

_____

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CERTIFICATE OF COMPLIANCE

I, Douglas N. Papendick, attorney for Appellant, hereby certify that the Reply Brief of Appellant complies with the type volume limitation as set forth within SDCL 15-26A-66(b) in that it contains no more than the greater of 5,000 words or 25,000 characters, to-wit: 2,308 words or 11,863 characters (no spaces) or 14,351 characters (with spaces). I have relied upon the word and character count of our word processing system used to prepare this Brief.

Dated this 20th day of February, 2018.

_____

Douglas N. Papendick
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Douglas N. Papendick, hereby certify that on the 20th day of February, 2018, I caused the original and two hardcopies of the Reply Brief of Appellant to be mailed, postage prepaid, by U.S. mail, to the following:

Supreme Court Administrator
c/o Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol
Pierre, South Dakota 57501

I, Douglas N. Papendick, hereby certify that on the 20th day of February, 2018, I electronically filed the Reply Brief of Appellant by submitting the same by email attachment with the number of the case appearing in the subject line to:

SCClerkBriefs@ujs.state.sd.us

I, Douglas N. Papendick, hereby certify that on the 20th day of February, 2018, I served a true and correct of the Reply Brief of Appellant upon Marty J. Jackley, Attorney General, and David V. Natvig, Brule County State's Attorney, by the electronic service to the following last known email addresses, to-wit:

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