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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from York County Court of General Sessions
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2023-001483

The State.....Respondent

v.

John Kenneth Totherow.....Appellant

INITIAL BRIEF OF APPELLANT

WILLIAM G. YARBOROUGH, III

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE GENERAL SESSIONS COURT ERRED AND WAS WITHOUT JURISDICTION TO ACCEPT APPELLANT'S GUILTY PLEA WHEN APPELLANT'S WAIVER OF HIS RIGHT TO A TRANSFER HEARING WAS IMPROPER AND INSUFFICIENT AND WHEN THE TRANSFER WAS MADE WITHOUT REQUISITE FINDINGS BY THE FAMILY COURT.**

- II. WHETHER THE GENERAL SESSIONS COURT WAS WITHOUT JURISDICTION TO ACCEPT APPELLANT'S GUILTY PLEA TO POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME WHEN THE CHARGE IS NOT AMENDABLE TO TRANSFER.**

STATEMENT OF THE CASE

Appellant was charged with the murder of his mother and possession of a weapon during the commission of a violent crime on May 3, 2022 in York County, South Carolina. (Indictments #2023-GS-46-05165, #05165A). Appellant was fourteen (14) years old at the time, and as a juvenile, he was detained at the Department of Juvenile Justice (DJJ) and York County Family Court had jurisdiction. S.C. Code Ann. § 63-3-510; § 63-19-1210. Appellant was represented by Nathan Sheldon, Esq. and Allison Franz, Esq. Senior Solicitor Whitney Payne and Senior Solicitor Erin Joyner of the Sixteenth Circuit prosecuted the case.

The State moved for waiver or transfer of the case to the Court of General Sessions for Appellant to be prosecuted as an adult pursuant to § 63-19-1210(5), but before the transfer hearing could be held, Appellant's Defense Counsel entered an agreement with the State in which Appellant would plead guilty to voluntary manslaughter and to the weapon charge for concurrent sentences of 339 months and 60 months, respectively.¹ (Plea Agreement; Family Court Hearing Transcript Sept. 7, 2023, p. 3, p. 6; Plea Hearing Transcript, September 12, 2023, p. 2, line 24—p. 3, line 3; Indictments #2023-GS-46-05165, #05165A)². A hearing on Appellant's waiver of his right to a transfer hearing was held on September 7, 2023 before the Honorable Debra A. Matthews in Chester County Family Court.³ On September 12, 2023, Appellant pleaded guilty and was

¹ Defense Counsel informed Judge Matthews that the plea was structured in a way where for SCDC computation purposes, Appellant would end up serving twenty-four (24) years and with credit for time served. (Family Court Hr'g Tr. p. 6, lines 15-25). During the colloquy, Appellant stated his understanding of the September 7, 2023 hearing was that he would be accepting 24 years. (Family Court Hr'g Tr. p. 8, line 14-16).

² Appellant waived presentment. (Indictments #2023-GS-46-05165, #05165A)

³ Defense Counsel and the State consented to the change of venue to Chester County to hold a special term of court to quickly schedule/accommodate the hearing. (Family Court Hr'g Tr. p. 3, line 25—p. 4, lines 1-3; p. 5, lines 6-22).

sentenced pursuant to the agreement before the Honorable Eugene C. Griffith, Jr. in York County Court of General Sessions. (Plea Hr'g Tr.; Sentencing Sheets #2023-GS-46-05165, #05165A). The sentences were ordered to run concurrent with 497 days credit for time served. (Plea Hr'g Tr., p. 32, lines 4-10; Sentencing Sheets #2023-GS-46-05165, #05165A).

A timely Notice of Appeal was filed by counsel. This appeal follows.

STANDARD OF REVIEW

The appellate court will affirm a transfer order unless the family court has abused its discretion. *State v. Miller*, 363 S.C. 635, 641, 611 S.E.2d 309, 312 (Ct. App. 2005) (citing *State v. Avery*, 333 S.C. 284, 292, 509 S.E.2d 476, 481 (1998)). *See also Id.* (citing *Engle v. Engle*, 343 S.C. 444, 449–50, 539 S.E.2d 712, 714 (Ct. App. 2000) (stating an abuse of discretion occurs when the court is controlled by an error of law or where the order, based upon the findings of fact, is without evidentiary support)).

The standard of review in criminal cases is limited to correcting errors of law and the appellate court is bound by the facts as the trial court found them unless clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

ARGUMENT

I. THE GENERAL SESSIONS COURT ERRED AND WAS WITHOUT JURISDICTION TO ACCEPT APPELLANT'S GUILTY PLEA BECAUSE APPELLANT'S WAIVER OF HIS RIGHT TO A TRANSFER HEARING WAS IMPROPER AND INSUFFICIENT AND THE TRANSFER WAS MADE WITHOUT REQUISITE FINDINGS BY THE FAMILY COURT.

The York County Court of General Sessions erred and was without jurisdiction to accept Appellant's guilty plea to voluntary manslaughter and to the weapons charge because the transfer from Family Court was made without requisite findings and Appellant's waiver of his right to a transfer hearing was made without sufficient advisement on the record.

First, the colloquy during the Family Court hearing on his waiver of the transfer hearing was deficient and the record is otherwise incomplete regarding Appellant's understanding of the rights he was waiving and implications of the agreement. "A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between the court and defendant, between court and defendant's counsel, or both." *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001) (citing references omitted)). Although Appellant was asked whether he understood that he was foregoing his right to have a transfer hearing and whether it was in his best interests, he was not advised of the distinctions between the Family Court and General sessions or of the crucial sentencing implications. In addition to the treatment and rehabilitative-based alternatives available to the Family Court, there is an absence in the record of Appellant's understanding that if the Family Court retained jurisdiction, the Family Court judge could have only committed him to DJJ for an indeterminate sentence not extending beyond the his twenty-second birthday, which is far less of a sentence than the total 24 year sentence in the plea agreement. The Appellant's responses during the colloquy that he believed the agreement made by his attorneys and the State was in his best

interests is therefore nondeterminative without his understanding of this crucial consequence of the agreement. This implication is so fundamental to a knowing and voluntary waiver of Appellant's right to a transfer hearing that without his understanding, there cannot be a knowing and voluntary waiver of the right to a transfer hearing. *See In Int. of Arisha K.S.*, 331 S.C. 288, 292, 501 S.E.2d 128, 130–31 (Ct. App. 1998)(“[T]he ‘court's warning should include an explanation of the defendant's waiver of constitutional rights and a realistic picture of all sentencing possibilities.’”) (quoting *State v. Armstrong*, 263 S.C. 594, 598 211 S.E.2d 889, 891 (1975)). Transfer to York County Court of General Sessions and his subsequent guilty plea were thus improper and without jurisdiction. *See Austin v. State*, 352 S.C. 473, 575 S.E.2d 547 (2003) (holding the unlawful waiver of jurisdiction over a juvenile does not confer subject matter jurisdiction on the court of general sessions).

The transfer through the agreement in this case is also improper in several other significant respects. Before approving of the agreement and transfer, the Family Court did not conduct a full investigation, evidentiary hearing, or make the requisite findings on the record that retaining jurisdiction was contrary to the best interest of the child or of the public. *See* § 63-19-1210. *See also State v. Pittman*, 373 S.C. 527, 559, 647 S.E.2d 144, 160–61 (2007) (“The family court must provide a sufficient statement of the reasons for the transfer in its order. ‘The order should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court.’”) (quoting *State v. Avery*, 333 S.C. 284, 292-93, 509 S.E.2d 476, 481 (1998)). The statutory requirements and safeguards involved in a transfer from a Family Court cannot be so swiftly foregone even in the case of consent or waiver, “a juvenile may not initiate the waiver of jurisdiction.” *In re Kevin R.*, 409 S.C. 297, 309, 762 S.E.2d 387, 393 n. 14 (2014).

The Court of General Sessions was thus without jurisdiction and erred by accepting Appellant's guilty plea. Appellant accordingly urges this Court to vacate his convictions and sentences and remand to the Family Court for a transfer hearing.

II. THE GENERAL SESSIONS COURT WAS WITHOUT JURISDICTION TO ACCEPT APPELLANT'S GUILTY PLEA TO POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME BECAUSE THE CHARGE IS NOT AMENDABLE TO TRANSFER.

Appellant was fourteen years old at the time of the instant offenses. The applicable transfer statute thus provides:

If a child fourteen, fifteen, or sixteen years of age is charged with an offense which, if committed by an adult, would be a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more, the court, after full investigation and hearing, may determine it contrary to the best interest of the child or of the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

§ 63-19-1210(5). Possession of a weapon during the commission of a violent crime carries a mandatory penalty of five years in addition to the punishment provided for the principal crime. SC Code Ann. §16-23-490(A). Possession of a weapon during the commission of a violent crime is a Class F felony. S.C. Code Ann. §§16-1-90(F); 16-1-20(A)(6). Therefore, because Appellant was fourteen years old at the time of the instant offenses, and possession of a weapon during the commission of a violent crime is not a Class A, B, C, or D felony or a felony that provides a maximum term of fifteen years or more, the charge is not subject to transfer to General Sessions.

The Court of General Sessions was thus without jurisdiction and erred by accepting Appellant's guilty plea to possession of a weapon during the commission of a violent crime. Appellant accordingly urges this Court to vacate this conviction and applicable sentence and remand to the Family Court for further proceedings.

CONCLUSION

In light of the foregoing, the Appellant respectfully urges this Court to vacate his convictions and sentences and remand to the Family Court for further proceedings.

Respectfully Submitted,

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