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Dec 09 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL TIVEN BOLTON,

APPELLANT.

Appellate Case No. 2023-001327

INITIAL BRIEF OF RESPONDENT

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II.

Whether the trial court's opinion that a motion to withdraw a guilty plea was unheard of and would create a dangerous precedent that would allow anyone to withdraw a guilty plea was an error of law and an abuse of discretion?

III.

Whether the trial court erred in failing to conform appellant's sentencing sheet to reflect the court's verbal sentencing decision to grant appellant credit for time served while on monitored house arrest?

STATEMENT OF THE CASE

Michael Bolton (hereinafter "Appellant") was indicted for murder, attempted murder, and possession of a weapon during the commission of a violent crime. (2023-GS-10-03218; 2023-GS-10-03217). Appellant opted to accept a negotiated plea deal for the minimum sentence of 30 years from the murder charge. Petitioner's plea was bifurcated in advance so as to allow Petitioner to enter his plea on July 20, 2023, and return on August 7, 2023, for purposes of sentencing. (July Tr., p. 9). Appellant proceeded to his anticipated guilty plea hearing before the Honorable Bentley Price on July 20, 2023, and his negotiated plea was accepted by the court. Appellant was represented by Mark A. Peper, Sr., Esq. and the State was represented by Assistant Solicitor Jennifer K. Shealy.

In advance of the August 7, 2023, sentencing hearing, Appellant retained Eduardo K. Curry, Esq. as new counsel[1], and on behalf of Appellant, Mr. Curry filed a motion to withdraw his July 20th guilty plea. (Aug Tr., p. 3). That motion was heard and denied. After which, Judge Price proceeded to conduct the sentencing portion of Appellant's guilty plea. Pursuant to the negotiated plea, counsel requested that the court accept the negotiated 30-year sentence, and within its discretion, give Appellant credit for the 1,333 days served on GPS house arrest.[2] (Aug 7 Tr., p. 35). Pursuant to the negotiated sentence, Judge Price sentenced Appellant to 30 years imprisonment for the charge of murder and gave "credit under the – South Carolina Department of Corrections will deem appropriate, and I'll give him credit for what he's already served." Judge Price then sentenced Appellant to a concurrent 30 year sentence for his attempted murder charge[3].

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[1] At the time of the sentencing hearing, a substitution of counsel order had not yet been filed. (Aug 7, Tr., p. 34).

[2] This request was opposed by the State. (Aug 7 Tr., p. 35-36).

[3] The transcript would suggest that Judge Price stated that he was giving Appellant "38 years" imprisonment for the Attempted Murder charge. Such would exceed the maximum sentence for

The court issued a five year concurrent sentence for the possession of a weapon charge.

STATEMENT OF FACTS

The Guilty Plea Hearing

Judge Price began the proceedings by confirming Appellant's intentions to enter a guilty plea to his charges, and that he understood what the purpose of the court's proceedings. Appellant confirmed his intention and understanding. The court then listed his constitutional rights that must be waived in order to enter a guilty plea, including his right to a jury trial, the right to confront witnesses, and the right to remain silent. The court further confirmed that Appellant had discussed with his attorney all of his rights pertaining to the plea. (July Tr., p. 3). Judge Price next explained to Appellant that he was proceeding on a negotiated sentence, and that the court does not have the authority to alter or amend the agreed upon negotiated sentence, only the ability to either accept or reject it. Appellant again confirmed his understanding, and thereafter confirmed for the court that he was not under the influence of any drugs or alcohol, and that he was satisfied with the performance of his attorney. (July Tr., p. 3). Clarification was made by the State that, as to the charge of murder, Appellant was entering his plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The court followed by confirming that Appellant understood that even though he was accepting this deal under *Alford*, the court would still consider it a guilty plea. (July Tr., p. 4).

The State then proceeded to enter its recitation of facts for the court. In summary, Appellant and his friend, codefendant Whitlock, were attending a Christmas party being hosted at the

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the charge. However, the sentencing sheets clearly demonstrate that the attempted murder sentence was 30 years. Moreover, the circumstances of the negotiated plea and the lack of objection from any of the attorneys present would strongly suggest that this was merely a transcription error. (Aug 7 Tr., p. 37).

Suburban Lodge by codefendant's mother. Drinking was taking place, but witnesses reported that this was not a wild party. During the evening, codefendant Whitlock became jealous and angry with his girlfriend because he believed that she was "looking at" Phillip Green. An argument between Whitlock and his girlfriend first ensued, but soon after Whitlock became increasingly angry and Appellant, in support of his friend, joined him in directing that anger toward Phillip Green. (July Tr., p. 4-5).

Phillip denied having any interest in Whitlock's girlfriend. Phillip then left the Suburban Lodge and headed toward his parked car with Kevin, Anthony, and Shaquanna Myers. Appellant and Whitlock followed after him and continued the confrontation outside. Phillip again denied having any interest in Whitlock's girlfriend. As they were in the process of leaving, both Phillip and Anthony saw that Appellant and Mr. Whitlock had guns. The victims attempted to flee when Appellant began shooting at Phillip with his .40 Smith and Wesson. Appellant fired 11 rounds of ammunition and ultimately struck Phillip in the shoulder.[4] (July Tr., p. 6). Kevin and Shaquanna ran to help Phillip. At some point during the attack Mr. Whitlock likewise pulled out his 9-millimeter Glock and fired 14 rounds of ammunition and killed Shaquanna Myers. Appellant proceeded to flee to his vehicle and tried to call after Mr. Whitlock to follow. (July Tr., p. 7).

Appellant accepted the facts as they pertained to the attempted murder and possession of a weapon charges, and entered an *Alford* plea to the charge of murder. Prior to the completion of the hearing, Mr. Peper provides the court with some additional details as to the circumstances for why Appellant chose to enter a guilty plea. He informed the court that the *Alford* plea is being entered because he and Appellant believed that if the State's facts were to be presented to a jury, he would more than likely be convicted via accomplice liability – such is the result of considerable disputes

[4] Phillip Green lost all use of his dominant arm as a result of the injury.

over the caselaw between he and the solicitor's office. He further noted that despite there being no dismissed charges, the plea was favorable to Appellant as it would allow him to receive the minimum sentence and avoid the risk of a potential life sentence. (July Tr., p. 9-10).

With that, the court found that Appellant's plea was freely, voluntarily, knowingly, and intelligently given. He then adjourned until August 7, 2023, wherein the court would continue with the sentencing hearing.

The Motion Hearing

Newly hired counsel, Eduardo Curry, filed a motion to withdraw Appellant's guilty plea on August 4, 2023.[5] The hearing on the motion was conducted on August 7, 2023.

Mr. Curry argued on behalf of Appellant that this case was "obviously very, very complicated with regard to the factors" and that Appellant came to his office [presumably seeking new representation] and asking about topics like "self-defense" and "lesser-included [offenses]" on his mind. He then asserted that Appellant's basis for withdrawing his plea was: "he was actually confused."[6] (Aug Tr., p. 4-5). Mr. Curry then explained the supposed mindset of Appellant, knowing that he faced 1) the possession charge, 2) the attempted murder charge from firing his gun and injuring Phillip, and 3) inculpation for the murder charge via accomplice liability. (Aug Tr. p. 6). Mr. Curry then attempted to proffer Appellant's alleged version of facts, which included the proposition that Appellant saw Mr. Whitlock make a move for his gun in his waistband and

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[5] There are a number of errors relating to the Motion that were made known to the court. First, the date of the Appellant's guilty plea is misstated as being July 28, 2023. Second, the motion cites Judge Jennifer McCoy as being the court who heard the guilty plea. Third, as is made clear in the transcript, there was no order granting a substitution of counsel to relieve Mr. Peper.

[6] It is also made known to the court that Mr. Curry was Appellant's *third* attorney for this case. His first was Mr. David Aylor who passed away during the pendency of this case, his second was Mr. Peper who represented him at the guilty plea hearing, and his third was Mr. Curry who represented him in the motion to withdraw and the sentencing hearing.

that Appellant felt he should defend himself. Mr. Curry does not elaborate as to whom Appellant felt he was protecting himself against, and acknowledged testimony that Appellant fired his gun and shot Mr. Green before Mr. Whitlock ever fired his gun. (Aug Tr., p. 6-7). Mr. Curry asserted that he did not believe Appellant ever "connected" with Mr. Peper, and that Appellant was confused as to whether accomplice liability would attach and whether self-defense could be raised to counter the accomplice liability complicity. (Aug Tr., p. 7). On those grounds, Mr. Curry presented Appellant's motion to withdraw his plea, and reiterated that "we're not alleging ineffective assistance of counsel. We're alleging that this was so confusing that a layperson could not properly decipher it, even with a lawyer."[7] (Aug Tr., p. 9). Mr. Curry later asserted that it came to Appellant's attention after the plea that the evidence was not conclusive as to which gun killed Ms. Myers, and suggested that such would go to his "line of thought" that there may not be a factual connection between the murder and his gun. (Aug Tr., p. 18-19).

The State opposed the motion, presented the sentencing sheets to the court, and argued that this case is one where, in anticipation of his sentencing, Appellant simply had buyer's remorse. (Aug Tr., p. 10). The State also suggested to the court that it inquire whether Mr. Peper memorialized in writing his advice to Appellant as it pertains to the rights and decisions involved in accepting a plea. (Aug Tr., p. 11). Mr. Peper informed the court that he did have such documentation, but felt that it put him "in a weird spot," especially since there had not yet been a substitution order filed replacing him as counsel. Mr. Peper believed that such would constitute privileged communications. The court acknowledged Mr. Peper's concern, noted that it would limit its inquiry and review the document in-camera, and sought to alleviate such concerns by

[7] The State later responded that while Mr. Curry may be denying any assertion of ineffective assistance of counsel now, the language and content of his motion does assert such a claim. (Aug Tr., p. 13).

further noting that such documentation is often entered into the record along with the sentencing sheets for the plea. (Aug Tr., p. 11-12). The State added that the issue is one left entirely to the court's discretion and that the documentation in question would likely directly address the alleged confusion that Appellant was attempting to raise by demonstrating whether a logical presentation of the consequences of the plea were made and advised accordingly by Mr. Peper. (Aug Tr., p. 13). Cognizant of the concern that this motion may be perceived as a claim of ineffective assistance of counsel, the court made it clear that though the concern has been raised, Appellant was "just saying that he was so confused." (Aug Tr., p. 14). The court then requested and received a copy of Appellant's affidavit, which served as plea acknowledgment for Mr. Peper's file, and took a brief recess to review the document.

When the proceeding resumed, the State reiterated that Appellant entered a proper knowing and voluntary plea and had not presented any reason supporting withdrawal. The State noted that the negotiated sentence, the constitutional rights, and the charges he faced were all made known to Appellant, along with the sentencing sheets for those pleas, Moreover, indicative of Appellant's actual understanding of the charges he faced and the care taken by defense counsel in explaining Appellant's case, is the fact that Appellant specifically understood the distinction in entering an *Alford* plea to the charge of murder. The State also noted that Mr. Peper articulated the issue of accomplice liability during the plea, the likelihood that the State could successfully present that theory to the jury, and the risk that Appellant was avoiding by taking the minimum sentencing for murder.[8] (Aug Tr., p. 15-16).

[8] The Assistant Solicitor also noted that during their efforts of negotiating with Mr. Peper, Appellant personally came to her office. Appellant impressed upon her and her staff that he was an articulate, bright, and discerning individual. (Aug Tr., p. 18).

The court then stated for the record that in review, Mr. Peper had provided the court with a 19-section affidavit that he would accept and make a court's exhibit. The court noted for the record that it was doing so in light of the fact that in Section 3 Appellant explicitly acknowledged that the affidavit was given under oath with the understanding that it may be made part of the court record and public record of this matter in the future, if necessary. The court noted the necessity of the affidavit for addressing the motion to withdraw and noted that such a circumstance is the type for which the acknowledgment was intended. (Aug Tr., p. 20). The court then itemized each of the section's purposes without providing the details stated therein.[9] To wit, the court states in pertinent part:

> Line 5 goes over every single one of the charges. Line 6 indicates the exact date of the trial at which he would go forward if he wished to have a trial. It discusses all of his constitutional rights. Number 7 talks about all of the defenses that they have discussed, and he acknowledges that he has reviewed all of the discovery even as recently as the date of his signature, which was July 20, which was also the date which the plea was accepted.
> Section 9 goes over the amount of time that the offense carries. Number 10 talks about the fact that he will get credit for the time served. Section 11 talks about the day that he will have to report back to court for sentencing. It talks about that he is escaping the fact that it carries life in prison in Number 12. It then discusses in 13 what North Carolina versus Alford is. I accepted the plea under Alford.
> It then talks about in subsection 14 exactly – most people don't even tell their clients this, but it's day-to-day. Murder is the only offense that carries day-to-day. You will not be getting any type of early-release time.
> Fifteen says that – exactly what I go through with the colloquy: The only determination by the judge is that he can either accept or reject the negotiated sentence, that I cannot alter or amend it, and the only thing that will happen at the sentencing is that the Court's only decision at the sentencing phase of this case will be to grant or deny

[9] As Respondent argues below, this was an unnecessary level of precaution. The affidavit does not articulate the substantive details of the advice provided by counsel or the substance of any disclosures that Appellant made to counsel. The affidavit merely memorializes that the various necessary topics were discussed and that they were understood.

> in part or in whole the request for time-served credit while on the GPS monitoring.
> Number 16 says, "I wish to accept the State's deal and plead guilty under Alford." Number 17 talks about the communications between the attorneys, that he is satisfied with Mr. Peper's continuous representation. It talks about that he doesn't' need any more time with his attorney in subsection 18. And subsection 19 says that he thoroughly understands the terms and conditions of the document and signs it under oath.

(Aug Tr., p. 20-22). The court noted that in light of all of these acknowledgments, and in light of his colloquy, to grant a withdrawal in this case would "set a precedent that would be basically unheard of and uncanny" and that he is not going to "set that type of precedent and allow somebody to simply just say that they don't want to plead guilty anymore after they have already pled guilty." (Aug Tr., p. 22). The court then reiterated that it has accepted Appellant's plea and that such was entered knowingly, intelligently, and thoughtfully, and proceeded to conduct the sentencing hearing.

Appellant's Sentencing Hearing

The sentencing hearing proceeded with the victims and their family speaking as to the impact of Appellant's crimes on their lives. (Aug Tr., p. 23-34). After hearing victim impact testimony, the court reiterated its acceptance of the plea as being knowingly, intelligently, and voluntary and that it was inclined to accept the negotiated sentence between the parties. (Aug Tr., p. 34). The defense then requested that the court exercise its discretion in granting credit for time served, constituting 41 days in custody, 1,274 days on GPS monitoring, and an additional 18 days of time unspecified by counsel. In total, the defense asked for credit for a total of 1,333 days of time served.

The State opposed the award of credit for time served. The State noted that Appellant had not been exemplary while on bond, having violated his GPS monitoring requirements on multiple

occasions for purposes of transporting his children. The State further argued that as much of that time was during COVID, his life with GPS monitoring was not much different than a large portion of society during the time, and it was in no way analogous with having awaited trial in jail. In response, the Court ruled: "[p]ursuant to the negotiated sentence, I'm going to submit Mr. Bolton to the South Carolina Department of Corrections for a term of 30 years. I'm going to give him credit under the – South Carolina Department of Corrections will deem appropriate, and I'll give him credit for what he's already served." The State sought clarification on the issue of credit for time served. The transcript reads as follows:

> MS. SHEALY: Your Honor, Just to make sure I understand you,
>
> you are giving him – not giving him –
>
> THE COURT: No, the Department of Corrections will –
>
> MS. SHEALY: -- credit while he was out on bond?
>
> THE COURT: Yeah, they'll do all that.
>
> MS. SHEALY: Okay.
>
> THE COURT: All right.
>
> (End of proceedings.)

(Aug Tr., p. 37).

STANDARD OF REVIEW

"The withdrawal of a guilty plea is generally within the sound discretion of the trial judge." *State v. Bickham*, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009) (citing *State v. Riddle,* 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Lopez,* 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct.App.2002)." "The determination of whether the privilege applies is within

the sound discretion of the trial judge and his decision will not be reversed absent an abuse of that discretion." *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 383–84, 453 S.E.2d 880, 884–85 (1994) (citing *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980)).

ARGUMENT

I. The substance of Appellant's affidavit does not constitute attorney-client privilege communications and the trial court did not abuse its discretion in reviewing and entering Appellant's plea affidavit as a Court exhibit for purposes of ruling upon Appellant's motion to withdraw his guilty plea.

The trial court did not abuse its discretion in this matter. The court was entirely within its discretion to review in-camera Appellant's sworn affidavit and then admit it as court's exhibit evidence pertinent to Appellant's alleged assertion that he was confused by the nature of his case. The court was likewise within its discretion to conclude that the affidavit was not covered by attorney-client privilege, and based upon the evidence and arguments presented by the parties, deny the motion to withdraw the plea.

"In South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *State v. Rice*, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485 (2013). "A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973). Appellant's argument was a challenge to the knowing or intelligent nature of his plea, but it was not a claim against the standard of representation he received; it was purely a request to withdraw his plea on

the basis that he was confused by the nature of his case and defenses. The nature of this claim draws into question the same type of matters that are addressed by plea counsel, the defendant, or both during a plea colloquy. As demonstrated below, such matters are not shielded by attorney client-privilege in such circumstances, and they are especially not so protected when the defendant has specifically brought them into dispute. *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (noting that not all communications between attorney and client are privileged); *United States v. Zolin*, 491 U.S. 554, 565, 109 S. Ct. 2619, 2627, 105 L. Ed. 2d 469 (1989) (noting that there was no provision within the federal rules of evidence that would preclude in-camera review of materials claimed under attorney-privilege, and that prohibiting such by way of federal common law would be unwise). "The determination of whether the privilege applies is within the sound discretion of the trial judge and his decision will not be reversed absent an abuse of that discretion." *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). Here, the court exercised that discretion appropriately by first reviewing the affidavit in-camera, finding it unprotected by privilege, and then admitting it as evidence along with a thorough recitation of why the affidavit defeated a claim for withdrawal.

Appellant's argument that his affidavit (or its general subject-matter) is protected under attorney-client privilege is erroneous on multiple grounds. First, it should be noted that neither Appellant nor his newly retained attorney Mr. Curry, objected to the in-camera review of the affidavit, nor did they object to its introduction as a court exhibit. Only Mr. Peper raised any concern of attorney-client privilege, and he was not representing Petitioner for purposes of the motion. Attorney-client privilege can only be waived by the client, and the failure to address the issue or object in any way constitutes a failure to preserve for appellate review this claim of error by the trial court and a waiver of any supposed privilege.

Regardless, Respondent would argue that attorney-client privilege simply does not attach here. Most obviously, attorney-client privilege does not attach to the affidavit because the affidavit itself expressly states that privilege would not attach. Appellant provided a sworn acknowledgment that the affidavit: "will be used in connection *with the above-referenced matter*, including the fact that it may be filed with the Court and made part of the public record of *this matter*[10] in the future, if necessary." (Court's Exhibit 1, p. 1). The very purpose of a sworn affidavit is that its authenticity and reliability *can be made known to others,* such a purpose is the antithesis of confidentiality. The plea court's reference to subsection 3 and its reliance upon that clause in finding the affidavit not protected by attorney-client privilege was a decision made well within the court's discretion.

Next, Respondent would argue that the substance of the affidavit, and as a practical matter the substance of all plea colloquies, is simply not protected communications under the attorney-client privilege. Attorney-client privilege "is not absolute: Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice." *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (internal citations omitted). The substance of plea colloquies is a perfect example of where the public policy need for assuring the proper administration of justice makes exception for the most basic communications concerning a client's representation. The need for administration of justice in such circumstances flows for the constitutional protections afforded a defendant under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[10] The nature of the phrasing here demonstrates that the affidavit was not referencing "new matters" such as potential PCR actions.

In this case, as is true for most cases, the superficial nature in which these topics are examined demonstrates that they bear no confidentiality – collectively they merely demonstrate that 1) Appellant was criminally charged, 2) that he was represented by counsel in relation to those charges, 3) that his attorney discussed the relevant discovery, defenses, consequences, and constitutional rights that derive, and 4) that Appellant understood those discussions. The failure to articulate any specific details to those topics leaves no question that the content of the affidavit is not confidential in nature. "Attorney-client privilege protects a client and any other person from disclosing *confidential* communications made to counsel relative to a legal matter." *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (citing generally *McCormick on Evidence* § 87 (E. Cleary, 3rd Ed.1984)). In all guilty plea proceedings, the substance of this disputed affidavit is the same substance as the permissible and indeed encouraged colloquy questions of the court, and both the defendant and counsel are compelled to answer the court's questions for the purposes of confirming the defendant's understanding of his rights and consequences of his plea, as well as confirming that counsel has independently advised his client on these matters so that the defendant can make an informed decision. *United States v. Thompson*, No. 08cr209, 2009 WL 212076, at *1, 2009 U.S. Dist. LEXIS 7304, at *1–*2 (D. Me. Jan. 29, 2009) (plea court asked defense counsel "Are you satisfied that the Defendant has pleaded guilty because he is actually guilty" and noting defense counsel's unsuccessful assertion of attorney-client privilege in response); *Carbajal v. United States*, No. 4:11cr186, 2016 WL 3912049, at *1–*3, 2016 U.S. Dist. LEXIS 93803, at *2–*6 (E.D. Tex. June 21, 2016), report and recommendation adopted, No. 4:11cr186(1), 2016 WL 3901009, U.S. Dist. LEXIS 93196 (E.D. Tex. July 18, 2016) (unpublished) (noting that the colloquy with defense counsel regarding the defendant's competency, discussions with the defendant, and agreement with the defendant's plea).

Stated simply, a defendant cannot on the one hand demand that his plea only be accepted if demonstrated to be knowingly, voluntarily, and intelligently entered, and on the other hand refuse to answer (and prohibit counsel from answering) the specific types of questions that would establish or defeat that standard. The substance of this case is simply one of ensuring that the most basic fundamentals of attorney representation have been satisfied, it does not peel away protection of confidential communications that would reveal additional criminality, liability, personal matters, legal strategies, or substantive discussions of evidence. [11] As can be seen from the record testimony and the affidavit itself, the substance is unremarkable for any other purpose other than establishing the necessary findings for a knowingly, voluntary, and intelligently entered guilty plea.

Ultimately, the questions of whether waiver of privilege arose by way of the affidavit's own text or by circumstantial necessity, or whether the affidavit is *inherently* not a privileged communication, are all academic for purposes of this appeal. The facts and law demonstrate the plea court was *within its discretion* to find the affidavit unprotected by privilege and within its discretion to appropriately rely upon it in denying the motion to withdraw. Appellant's arguments to the contrary demonstrate the completely incongruous nature of his position. Appellant has failed to demonstrate a basis to rescind his plea and the ruling of the court should therefore be affirmed.

II. There was no abuse of discretion in the court's denial of Appellant's motion to withdraw his guilty plea.

Appellant moved for withdrawal of his plea on the grounds that his case was so complex that he could not come to understand the intricacies of his defenses, and therefore did not enter an

[11] Ironically, Mr. Curry's arguments for withdrawal disclosed *in far more detail* communications that were shared between attorney and client regarding the intricate nature of his defenses, their perceived likelihood of success, and his alleged confusion regarding the case. Such provides a perfect demonstration of the faulty nature of Appellant's argument for privilege in this case.

intelligently made guilty plea. After receiving the motion to withdraw, and its facially doubtful foundation, the plea court nevertheless conducted a thorough hearing on the alleged merits of Appellant's motion and heard the State's case in opposition. The court also received and considered evidence in the form of Appellant's own affidavit which directly contradicted his stated arguments under the motion. (See Court's Exhibit 1, p. 2, subsection 8). With the arguments and evidence before it, and with explicit notice from the parties that the issue is one within the court's discretion, the court denied the motion while making factual findings relating to the evidence presented and the motives for the motion. The court's findings were not in conflict with any law, were well supported by the record, and the court's denial of relief was therefore *precisely* an exercise of discretion.

"The withdrawal of a guilty plea is generally within the sound discretion of the trial judge." *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). A determination the plea was voluntarily entered "will normally show the trial judge did not abuse his discretion." *Id.* Abuse of discretion only arises when the decision is not supported by the evidence, or controlled by an error of law. *State v. Lopez*, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Jamison v. State*, 410 S.C. 456, 471, 765 S.E.2d 123, 130 (2014).

The court's articulation of its ruling and its denial of the motion were a proper exercise of discretion under the guiding law. In the case at hand, the court conducted a thorough recitation of the information that was derived from the colloquy and affidavit. In consideration of that information, and in satisfaction of *Riddle*, the court reiterated that it found the plea to be knowingly, voluntarily, and intelligently entered. (Aug Tr., p. 20-23). The court further found that

the affidavit was a thorough demonstration of Appellant's understanding of the consequences of his plea, and that the release on bond was likely a cause for Appellant changing his mind. The court then rightfully articulated that a defendant is not entitled to withdraw his plea simply because he wants to. Though the court did not provide a citation to this legal maxim, its ruling was a reiteration of our Supreme Court's ruling in *Jamison*. The court's reference to "unheard" of precedent was apt, as to grant relief *despite its factual findings* would have been contrary to existing law.

Discretion does not afford the court with complete authority to rule in whatever way it wishes; it is still governed by the evidence presented and the applicable and controlling law. The court found that Appellant had not presented a valid basis for withdrawal and that his motion was simply one based on personal desire. The court rightfully noted that such does not entitle Appellant to relief and that the court would not set new precedent to the contrary. The ruling to deny the motion was an entirely appropriate exercise of discretion and should be affirmed.

III. The court did not err in "failing to conform Appellant's sentencing sheets," the sentencing sheets are a demonstration of the court's intentions during the hearing.

The court did not err in its sentencing of Appellant and in executing the sentencing sheets to reflect its ruling. The court's verbal articulation was unclear; it did not present an intent to grant credit for time served on monitored release. However, the issue is not preserved for appeal, as there was no motion filed to rectify Appellant's concern for the alleged discrepancy. Nevertheless, if the merits of the argument were to be reached, the other facts from the record demonstrate a stronger case that the court did not intend to grant credit for time served while on monitored release and sentencing sheets control in the event of ambiguity.

Appellant relies upon *Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) for

his position, but he is twice mistaken in doing so. First, *Boan* is a review of a post-conviction relief hearing, and the Court explicitly notes that "[i]f trial counsel had made the appropriate motion regarding the sentencing discrepancy, the oral pronouncement would have controlled and Petitioner would have received the twenty-year sentence." Therein, the Court has demonstrated the necessity that such a dispute be addressed by motion, and Appellant failed to file such a motion before seeking appellate relief. The issue is therefore unpreserved for direct appellate review.

Regardless, if the merits of the argument are considered, Appellant's argument still fails. The record demonstrates that the request for credit under S.C. Code Ann. § 24-13-40 was clearly before the court, and the statute delineates mandatory credit for time served in custody, and discretionary credit for time served on monitored release. The court's repeated reference to SCDC calculating the credit for time served strongly supports that the court did not intend to grant time for monitored release, especially in the absence of a ruling that SCDC be provided the bondsman's documentation to facilitate calculations beyond Appellant's time in custody.

Boan articulates that oral sentencing controls when in conflict with written sentencing, but it does not address circumstances where the oral sentencing is ambiguous. Our courts hold differently when the matter is one of ambiguity, as opposed to incongruence. "Under ordinary circumstances, SCDC must determine the sentence imposed by the trial court from the sentencing sheets. *If there is some ambiguity in the sentencing sheets*, SCDC may examine the transcript of record to determine the intent of the sentencing judge. *Tant v. S.C. Dep't of Corr.*, 395 S.C. 446, 449, 718 S.E.2d 753, 755 (Ct. App. 2011), aff'd as modified, 408 S.C. 334, 759 S.E.2d 398 (2014) (citing *Major v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 384 S.C. 457, 471, 682 S.E.2d 795, 802 (2009) (Pleicones, J., dissenting) ("[O]nly if there is an ambiguity in the sentences, must the Department or the court ascertain the intent of the judge....") (emphasis added). The Court in *Tant*

noted that "in this case, there is no ambiguity. Therefore, SCDC was limited to interpreting the sentencing sheets."

Nowhere in the record does the court explicitly say that it is granting credit for time under monitored release. Instead, the court persistently referenced that SCDC would calculate and determine credit for time served. Such statements are *consistent with not granting credit for monitored release,* and such is consistent with the sentencing sheets in two ways. The sentencing sheets contain a specific box that is to be filled out which then permits credit for time served "to be calculated and applied by SCDOC." That box was uniformly checked on all three sentencing sheets. However, the sentencing sheets also contain a separate box immediately below that permits credit for time served for monitored release. That box was uniformly left unchecked on all three sheets. Such is consistent with the court's persistent reference to allowing SCDC to calculate his time served, and is consistent with the absence of an explicit award of credit for monitored house arrest.[12] While oral pronouncement of sentencing may control when the sentencing was clear, here the oral pronouncement is vague, the sentencing sheets are independently clear, and they more aptly provide clarity as to the court's intention *against* credit for time served under monitored release.

Appellant's argument in this matter is unpreserved for failure to first raise the dispute to the plea court's attention via motion. Appellant's argument would seek to have this court rely upon the unclear verbal communication of the court, at the expense of the clear and consistent sentencing sheets that are, in fact, arguably consistent with the stronger interpretation of the plea court's verbal

[12] According to SCDC calculations, Appellant's current projected release date is July 3, 2053. As, Appellant's sentencing hearing was conducted on August 7, 2023, this would suggest that Appellant has received slightly more than a month of credit for time served, which is largely consistent with the supposed 41 days in custody referenced by defense counsel.

commentary. As such, Appellant is not entitled to relief in the form of credit for time served on monitored release.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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December 9, 2024