STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL TIVEN BOLTON,

APPELLANT

APPELLATE CASE NO. 2023-001327

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

United States Supreme Court Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court abused its discretion by invading the attorney-client privilege in ruling on appellant's motion to withdraw his guilty plea?

2. 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?

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

STATEMENT OF THE CASE

Appellant was indicted for murder, attempted murder, and possession of a weapon during the commission of a violent crime following a shooting in Charleston County on December 22, 2019. R. 55-60. The state alleged Appellant and a companion, Michael Whitlock, opened fire following an argument with other patrons at a party. R. 3, l. 14 – 6, l. 18. The argument stemmed from the behavior of Phillip Green and Whitlock's girlfriend during the course of the party. R. 3, l. 23 – 5, l. 9.

During the shooting, the state alleged the weapon fired by appellant struck and permanently injured Phillip Green, the participant in the argument with appellant and Whitlock. R. 5, l 10 – 6, l. 6. The weapon fired by Whitlock struck and killed Shaquanna Myers who was rendering aid to the injured Green. R. 6, ll. 7 - 9.

Appellant's initial appearance on a negotiated sentence plea was conducted before the Honorable Bentley Price on July 20, 2023. R. 1. Appellant was represented by Mark Peper, and Jennifer Shealy appeared on behalf of the state. R. 1. Appellant indicated that he would be pleading guilty to attempted murder and the possession of a weapon charge, and entering an Alford[1] plea as to the murder charge, with a negotiated sentence of thirty years. R. 3, l. 3 – 4, l. 5. Finalization of the plea and sentencing was delayed until August 7, 2023.

By written motion filed by additional counsel, Eduardo Curry, appellant requested to withdraw his guilty plea on August 4, 2023. R. 48. During the hearing on August 7, 2023, Curry argued that appellant should be allowed to withdraw his plea due, in part, to appellant's confusion concerning the laws of self-defense and accomplice liability. R. 15, ll. 7 – 16. As noted by Curry, appellant's self-defense claim centered on the action of Green in reaching for something at his

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

waist during the heated argument. R. 16, l. 20 – 17, l. 2. The only basis for the murder charge was the allegation that appellant and Whitlock acted in concert since Whitlock opened fire after appellant had stopped firing. R. 17, ll. 3 – 11. As argued before the trial court, appellant was "not alleging ineffective assistance of counsel" but was asking for the withdrawal since the legal concepts were so "confusing that a layperson could not properly decipher it, even with a lawyer." R. 18, ll. 13 – 18.

In response, the solicitor suggested questioning Peper, who still represented appellant, concerning Peper's practices related to advising clients before guilty pleas:

> Also, your Honor, *I think it would be wise for us to inquire of Mr. Peper*. There is a practice amongst a bunch of criminal defense attorneys now to engage in advising their clients not only orally, but reducing that to writing. And if Mr. Peper in fact has that, if your Court -- if the Court just wants to look at it himself and not share it with others, that's fine.

R. 20, l. 24 – 21, l. 5 (emphasis added).

In response to the state's suggestion, Judge Price questioned appellant's counsel about his practices concerning advising clients.

> THE COURT: Mr. Peper, do you reduce any of those to writing or not? Is that a common practice or not something you engage in?
>
> MR. PEPER: It is a common practice of mine, Judge. It is. And there's a handful of lawyers around town that do it.
>
> THE COURT: All right. Do you have that document? I can take an in-camera review of it.
>
> MR. PEPER: I do. *You know, Judge, I'm in a weird spot here.*

R. 21, l. 16 – 23 (emphasis added).

Addressing the "weird spot" which the court was placing appellant's counsel, Judge Price acknowledged the problem the court was creating:

> Well, you are. And here's the reason why, which is why I'm not going to question you about anything apart from whether you have that document or not because obviously if this becomes an issue down the road, then he still has all his appellate PCR rights. So that's why the Court's just inquired whether you have it. Do you feel comfortable with me taking an in-camera review of it?

R. 21, l. 24 – 22, l. 5.

Peper indicated that "my only concern, to be candid to you, is because there hasn't been a sup [substitution] order filed or anything that, you know, I consented to that would be a privilege that still exists between us. I know once you file a PCR that goes away. But I'll do whatever the Court deems it wants to do." R. 22, ll. 6 – 11.

Again, the state pushed for Judge Price to review the written documentation regarding Peper's protected consultations with Appellant:

> And if Mr. Peper's document that he uses is similar to other ones that I've seen, I think it will show us whether or not -- and when I say "us," your Honor can look at it and obviously not share that with either me – I guess Mr. Curry would want to see it, but I don't necessarily need to see it.
>
> But it would explain whether or not there was a logical presentation made to Mr. Bolton as to consequences of what he's pleading to, and if in fact the crimes were separate and he was advised accordingly, and that the sentence that was part of the plea deal. That would be the best evidence right now.

R. 23, ll. 2 – 13.

Judge Price acknowledged he was, in effect, operating as a PCR judge by invading the attorney-client privilege. "Yeah, but I'm concerned to the extent that I'm putting myself as the PCR judge at this point in time if that's what he's going to assert later on down the road." R. 23, l. 25 – 24, l. 2.

Despite the objections that it invaded the attorney-client privilege and that the court was stepping into the role of a PCR judge, Judge Price received the affidavit created by Peper that allegedly memorialize his discussions with appellant regarding the guilty plea.[2] Judge Price then quoted extensively from this affidavit, that was protected by the attorney-client privilege, to reject appellant's motion to withdraw. R. 30, l. 6 – 32, l. 5. In addition, Judge Price opined in ruling on the motion to withdraw the plea "that the request by the defense would set a precedent that would be basically unheard of" and that he was not going to set a precedent that would "allow somebody to simply just say that they don't want to plead guilty anymore after they have already pled guilty." R. 32, l. 22 – 33 l. 4.

Following victim impact evidence and witnesses in mitigation, Judge Price sentenced appellant to the negotiated term of thirty years for murder. R. 46, ll. 3 – 8. For the other two charges, which did not have negotiated sentences, Judge Price sentenced appellant to thirty-eight years for attempted murder and five years for the weapon charge. R. 46, ll. 8 – 11.

This appeal follows.

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2 Court's Exhibit 1 is the affidavit prepared by Peper and signed by appellant and is included in the Record on Appeal.

ARGUMENT

1. The trial court abused its discretion by invading the attorney-client privilege in ruling on appellant's motion to withdraw his guilty plea.

A. Standard of Review.

"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); State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006). "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. Bickham, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009).

B. Invading the attorney-client privilege in ruling a motion to withdraw a guilty plea was an abuse of discretion.

The attorney-client privilege is vital to the proper functioning of our legal system. "This privilege is based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence should not be abused by permitting disclosure of such communications." State v. Love, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980)(quoting S.C. State Highway Dep't v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973)). "The privilege belongs to the client and, unless waived by him, survives even his death." State v. Doster, 276 S.C. 647, 650–51, 284 S.E.2d 218, 219 (1981).

Here, the trial court abused its discretion by invading the attorney-client privilege and requiring testimony and documentation from Appellant's attorney regarding discussions protected by the attorney-client privilege in ruling upon the motion to withdraw the plea. Curry, appellant's additional counsel who argued to withdraw the plea, specifically told the court appellant "came to

me because he wanted me to file a motion to withdraw his plea. Judge, 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." R. 19, ll. 14 – 17. Curry asked the court to exercise discretion, allow the withdrawal, and set the matter for immediate trial. R. 19, l. 23 – 10, l. 8.

At this stage, the court could have exercised its discretionary judgment and either granted or denied the motion under State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982). Instead, at the prompting of the solicitor, the trial court elected to examine appellant's attorney, Peper, about his typical approach in dealing with guilty pleas and Peper's specific interactions with appellant, including having appellant sign a lengthy affidavit allegedly memorializing those conversations before the initial plea hearing. R. 21, l. 16 – 23. The trial court obtained a copy of the affidavit signed by appellant and entered several portions of the affidavit into the record. R. 29, l. 5 – 31, l. 6. No testimony was provided regarding whether appellant fully understood the content of the affidavit or was merely presented with a document to sign by his attorney.

The testimony and documentation elicited by the trial court from appellant's counsel on this point was a matter more properly addressed in a post-conviction relief action rather than a motion to withdraw the guilty plea. *See* State v. Bonilla, 429 S.C. 253, 273–74, 838 S.E.2d 1, 11 (Ct. App. 2019) ("As such, because [appellant] is challenging the actions of his attorney, his claim regarding Rule 1.6 would best be addressed in an action for ineffective assistance of counsel, which this court is precluded from hearing on direct appeal."). During a post-conviction relief action, when ineffective assistance of counsel forms a basis for relief, the "applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant,

to the extent necessary for prior counsel to respond to the allegation." S.C. Code Ann. § 17-27-130 (1976 as amended).

By contrast, here the Record is devoid of any testimony surrounding appellant's understanding of the discussions, the setting of those discussions, the explanations offered by Peper surrounding the affidavit, any pressures or assertions that signing was mandated, or any other information that would provide this Court guidance on whether appellant had knowingly, intelligently, and voluntarily waived the attorney-client privilege. As such, this Court would not be able to review waiver of the attorney-client privilege on direct appeal, in contrast to Bonilla where the trial court conducted a hearing and made findings of fact on waiver. It was improper for the trial court to invade the attorney-client privilege, including questioning Peper regarding his direct communications with appellant and the affidavit concerning those discussions. The trial court noted this created a problem for appellant's counsel and that it delved into matters proper reserved for post-conviction relief:

The trial court acknowledged the problem this inquiry would create:

> Well, you are [in a weird spot]. And here's the reason why, which is why I'm not going to question you about anything apart from whether you have that document or not because obviously if this becomes an issue down the road, then he still has all his appellate PCR rights. So that's why the Court's just inquired whether you have it. Do you feel comfortable with me taking an in-camera review of it?

R. 20, l. 24 – 21, l. 5.

The trial court's concern was well founded. "Although the Sixth Amendment right to counsel is distinguishable from the attorney-client privilege, the two concepts overlap in many ways. The right to counsel would be meaningless without the protection of free and open communication between client and counsel. The United States Supreme Court has noted that

'conferences between counsel and accused ... sometimes partake of the inviolable character of the confessional.'" State v. Quattlebaum, 338 S.C. 441, 446, 527 S.E.2d 105, 107–08 (2000) (*quoting* Powell v. Alabama, 287 U.S. 45, 61 (1932)).

The trial court's action of questioning appellant's counsel regarding conversations protected by the attorney-client privilege and the related documentation without a proper basis, such as the statutory waiver of the attorney-client privilege found in S.C. Code Ann. § 17-27-130, was an abuse of discretion. This error of law impacted the trial court's discretionary ruling, as the trial court read into the record several portions of the protected material in support of its ruling. R. 30, l. 6 – 32, l. 5.

This Court should reverse.

2. 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.

As noted, the "withdrawal of a guilty plea is generally within the sound discretion of the trial judge." Riddle, 278 S.C. at 150, 292 S.E.2d at 796. However, the "failure to exercise discretion amounts to an abuse of that discretion." State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (*quoting* Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). Thus, the use of restraints on the accused during a jury trial, while a discretionary matter, required the court to make a ruling on their necessity. *See* State v. Heyward, 441 S.C. 484, 494, 895 S.E.2d 658, 663 (2023). During sentencing, the failure to exercise statutory discretion by interpreting such discretion as being mandatory is an abuse of discretion. *See* State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (holding the trial court erred in believing its discretion in ruling on early parole was constrained by the language of the statute).

Here, the trial court did not acknowledge that allowing a withdrawal of a guilty plea was a discretionary ruling. In fact, the trial court indicated "that the request by the defense would set a precedent that would be *basically unheard of*" and that the court was not going to "allow somebody to simply just say that they don't want to plead guilty anymore after they have already pled guilty." R. 32, l. 22 – 33 l. 4. These statements establish that the trial court misconstrued the discretionary nature of allowing the withdrawal of a guilty plea.

To the contrary, motions to withdraw a plea are neither "unheard of" nor do they establish a precedent allowing universal withdrawal. In fact, trial counsel would have been ineffective had he not filed a motion to withdraw the guilty plea. Our Supreme Court noted the proper response of plea counsel when the client indicates that they have changed their mind about pleading guilty

is a motion to withdraw the plea. Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009). In Rolen, after family members of the victim addressed the court, the defendant told the court "All right, this has went on far enough, I didn't kill this man." Id., 384 S.C. at 411, 683 S.E.2d at 473. Rather than step in and move to withdraw the plea, plea counsel did nothing since he believed "once the plea was accepted, it was final and could not be withdrawn." Id., 384 S.C. at 412, 683 S.E.2d at 473. Our Supreme Court found counsel was deficient for failing to move to withdraw the plea, and ultimately remanded the matter to the trial court for a hearing on whether the plea court would have allowed a withdrawal of the guilty plea had the proper motion been made. Id., 384 S.C. at 413–14, 683 S.E.2d at 474.

The trial court's assertion that the motion to withdraw was "unheard of" and would establish a dangerous precedent indicates a failure to exercise the proper discretion inherent in a plea setting: allowing a withdrawal of the plea on motion as a discretionary ruling. R. 32, l. 22 – 33 l. 4. As a failure to exercise discretion is an abuse of discretion, this Court should reverse the decision of the trial court and remand the matter for a new hearing on appellant's motion to withdraw his guilty plea.

3. The trial court erred in failing to conform appellant's sentencing sheets to reflect the court's verbal sentencing decision to grant appellant credit for time served while on monitored house arrest.

Prior to sentencing appellant, the trial court heard argument from the state and appellant's counsel regarding credit for the 1,333 days appellant spent under house arrest pending sentencing. R. 44, l. 1 – 46, l. 1. In announcing the sentence, the trial stated:

> Pursuant 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.*

R. 46, ll. 2 – 7 (emphasis added).

The solicitor then requested clarification on the credit for time spent under house arrest pursuant to S.C. Code Ann. § 24-13-40 (2023). In reply, the trial court ruled that appellant was entitled to credited for the time spent while appellant was "out on bond":

> MS. SHEALY: Your Honor, just to make sure I understood 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.

R. 46, ll. 15 – 20 (emphasis added).

Despite orally ruling that appellant was entitled to credit for the period he was on bond under house arrest, the sentencing sheets failed to properly reflect this ruling. R. 61-66. "[D]ue process requires the judge's oral pronouncement control over a conflicting written sentencing order." Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010). Here, the sentencing sheets

failed to properly credit appellant with time served pursuant to S.C. Code Ann. § 24-13-40 (2023) as mandated by the trial court's oral ruling.

This Court should reverse the trial court and remand this matter for correction of the sentencing sheets to properly reflect the trial court's oral ruling regarding credit for time served under S.C. Code Ann. § 24-13-40 (2023).

CONCLUSION

Based upon the foregoing arguments, this Court should reverse the decision of the lower court and remand this matter for a new hearing on appellant's motion to withdraw his guilty plea. Additionally, a remand is appropriate to conform the sentencing sheets to the oral ruling regarding appellant's credit for time served while under house arrest.

Gary H Johnson
Appellate Defender

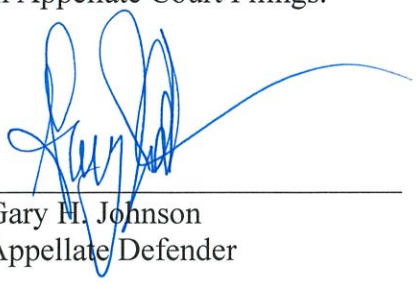
ATTORNEY FOR APPELLANT

This 28th day of January, 2025.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 28, 2025.



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STATE OF SOUTH CAROLINA

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Appeal from Charleston County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

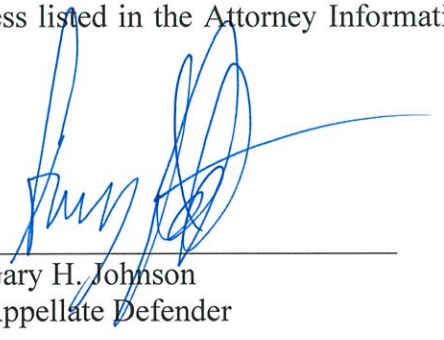
MICHAEL TIVEN BOLTON,

APPELLANT

APPELLATE CASE NO. 2023-001327

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 28th day of January, 2025.



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From: Leverett, Scott
To: jmaye@scag.gov
Cc: SC - D"ALESSIO DONNA; Johnson, Gary
Subject: 2023-001327 - State v. Michael T. Bolton - Final Brief of Appellant
Date: Tuesday, January 28, 2025 3:38:00 PM
Attachments: 2023-001327 - State v. Michael T. Bolton - Final Brief of Appellant.pdf

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Dear Mr. Maye,

Attached please find a copy of the Final Brief of Appellant in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Gary Johnson
Appellate Defense