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QUESTION PRESENTED

Is the issue of whether the plea judge erred in accepting Petitioner's plea of guilty but mentally ill preserved for appeal?

STATEMENT OF THE CASE

The Appellant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's order of commitment. Appellant was indicted at the May 2008 term of the York County Grand Jury for Armed Robbery (2008-GS-46-2086), two counts of Possession of a Weapon During the Commission of a Violent Crime (2008-GS-46-2086(A), 2090(A)), three counts of Assault and Battery with Intent to Kill (2008-46-2087, 2089, 2090), Kidnapping (2008-GS-46-2091), and Attempted Armed Robbery (2008-GS-46-2092). Douglas F. Gay, Esquire, represented him on these charges. On April 27, 2009, the Appellant pled guilty but mentally ill to all charges as indicted. The Honorable Lee S. Alford sentenced the Appellant to a mandatory sentence upon the Appellant for life without parole pursuant to §17-25-45. The direct appeal was not properly perfected.

The Appellant filed an Application for Post-Conviction relief on September 17, 2010. The State filed its return on or about November 9, 2011. An evidentiary hearing was convened on October 9, 2012 at the York County Courthouse. The Appellant was represented by Leah Moody, Esquire. The State was represented by J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General. The Honorable Edgar W. Dickson, granted Appellant this belated review of direct appeal issued pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974) in an order dated January 9, 2013. The Appellant filed a Brief of Appellant on October 9, 2013. This Brief of Respondent follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct.App.2003). The appellate court is limited to determining whether the trial court abused its discretion. State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998); State v. Bowie, 360 S.C. 210, 216, 600 S.E.2d 112, 115 (Ct.App.2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793–94 (Ct.App.2003).

ARGUMENT

The issue of whether the plea judge erred in accepting Petitioner's plea of guilty but mentally ill is not preserved for appeal.

Appellant argues that, "[t]he judge erred in accepting pleas of guilty but mentally ill when there was no evidence of mental illness and the lack of capacity to conform as required by S.C. Code §17-24-20(D)." (Appellant Brief p. 5).

"To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). This issue was not raised, objected to, or rule on by the plea court. Therefore, it is not preserved for review on appeal.

Nevertheless, the plea court satisfied S.C. Code § 17-24-20 when it found the State consented to a finding that Appellant was guilty but mentally ill when he committed the crimes for which he pled guilty. S.C. Code 17-24-20 states, in part:

> (B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).
>
> (D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

As to subsection (B), the Appellant admitted his guilt by admitting that he had committed the crimes as read by the State during the guilty plea. See App. p. 15 lines 19-21 (The Court:

"Are you, in fact, guilty of these offenses?" The Defendant: "Yes, sir."); p. 18 lines 17-21 (The Court: "Mr. Watts, you have heard the facts with regard to these charges today in these cases that the solicitor has just gone over. Do you disagree in any way with what they say happened as to these charges?" The Defendant: "No, sir."). Thus, the first prong of 17-24-20(B) was satisfied as the State no longer had the burden of proving the Appellant's guilty beyond a reasonable doubt. Next, the second prong of 17-24-20(B) was satisfied as the State consented to the Appellant's claim that he was mentally ill at the time the crimes were committed. This alleviated the Appellant's burden of proving by preponderance of the evidence that he was mentally ill at the time the crimes were committed. See App. p. 6 lines 19-21 (State: "And as [the Solicitor] indicated, [Appellant] wished to assert that he was mentally ill at the time, and the State will not contest that."). Therefore, both prongs of subsection (B) were satisfied.

As for subsection (D), the plea court made a finding, both during the hearing and on the sentencing sheets that Appellant pled guilty but mentally ill to these charges. Towards the end of the plea hearing the plea court stated, "Let me say for the record as well as the State does not oppose it, but there is no evidence that he is, in fact, mentally ill, as I understand it, and so – but the State does not oppose that." (App. p. 35 line 23- p. 36 line 1). The plea court then stated, "Of course, that would entitle [Appellant] to receive mental health treatment while he's incarcerated. That's what that would do." (App. p. 36 lines 6-8). The plea court then concluded, "All right. Guilty but mentally ill is the plea." (App. p. 36 lines 11-12). As stated above, the State consented to Appellant pleading guilty but mentally ill, thus, alleviated the Appellant of his burden of proof as required by both subsections (B) and (D). Clearly, the plea court made a finding upon the record that Appellant's plea was that of guilty but mentally ill. Further, the

sentencing sheets plainly state the Appellant pled guilty but mentally ill to charges. See App. pp. 64-72). Therefore, subsection (D) was satisfied. As such, there is ample evidence in the record to show the plea court properly accepted Appellant's guilty but mentally ill plea pursuant to S.C. Code § 17-24-20.

CONCLUSION

For all the foregoing reasons stated above, Respondent respectfully requests the judgment of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 20, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2012-213513

Phillips Watts..... Petitioner,

v.

State of South Carolina ..... Respondent.

PROOF OF SERVICE

I, J. Rutledge Johnson, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Katherine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served, this 20th day of December, 2013.

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