

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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JAN 10 2014

S.C. Supreme Court

DARREN A. SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000204

SUPPLEMENTAL APPENDIX

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FILED

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
 2010 SEP 23 PM 4:34)

IN THE COURT OF GENERAL SESSIONS
 FOR THE NINTH JUDICIAL CIRCUIT

JULIE J. WRIGHT THONG
 CLERK OF COURT

[Signature]

Warrant Numbers: K609532, K609533, DIRIND1020

Indictment Numbers: 2010-GS-10-1722
 2010-GS-10-1723
 2010-GS-10-3109

STATE OF SOUTH CAROLINA)

vs.)

DARREN AULBRAY SIMMONS)

Defendant)

MOTION IN OPPOSITION TO RECONSIDER
 SENTENCE OR IN THE ALTERNATIVE
 WITHDRAW THE GUILTY PLEA

I. ISSUE

Is Darren Simmons entitled to withdraw his guilty plea following the circuit court's imposed sentence?

II. FACTS

Please see State's Motion in Opposition to Withdraw Guilty Plea and in the Alternative, Motion in Opposition to Reconsider Sentence for Lamar Jones for a full recitation of the underlying facts.

III. LAW/ANALYSIS

Motion in Opposition to Reconsider the Sentence

Simmons was arrested the night of the burglary and interviewed by Detective Holmes following Miranda warnings, which he voluntarily waived. During the videotaped interview, Simmons was evasive and provided a self-serving statement. Initially, Simmons told police "they had no lookout," and that there were only two other people involved in the burglary, Lamar

Jones and a girl named Jessica. Simmons drove the car from Summerville to the gun store, dropped off the girl and Jones, parked the car down the street, and then came back to the store. When he returned, one container was already open and he saw headlights and fled. He claimed the only equipment they had were bolt cutters and a bag. He denied Jones wore a black hoodie and stated it was a grey jacket. At this point Detective Holmes left the interview room and was updated by investigating officers that Chaplin was arrested and police found multiple firearms in the car. It is important to note at this stage of the interview Simmons denied they had a "lookout," denied Chaplin (his younger cousin) was there, denied cutting the locks to the second container, denied going into the containers, failed to mention he brought firearms to the crime, failed to mention the machete, ski-masks, gloves, walkie-talkies, stun gun, and claimed he could not remember whose idea it was to commit the burglary. When the interview continued Simmons was confronted about the guns in the car and admitted they were his. He was confronted about the person in the car and admitted it was his little cousin, Rodney Chaplin. Despite this, Simmons would not admit Chaplin was the lookout and contended he was "just there." Simmons tried to distance himself from the burglary by telling Detective Holmes "I didn't want more guns they wanted guns, I just went along."

When Kelly was interviewed by Detective Holmes, she immediately named all the co-defendants involved in the robbery. She admitted that she broke into one container along with Jones and that Simmons broke into and entered the other container. She told police that Chaplin was the lookout, Chaplin and Simmons had walkie-talkies, Jones' black hoodie got stuck on the fence, both she and Simmons had bags at the crime scene, the guns belonged to Simmons, and that she and Simmons mutually agreed to commit the burglary.

Ignoring the discrepancies in the facts, Simmons argues that he should have been entitled to the same benefit (sentence) as Jessica Kelly, who was sentenced by your honor to fifteen years suspended upon five years service followed by five years probation. Simmons was sentenced to fifteen years suspended upon ten years service followed by five years probation. Simmons contends that your honor was under a misconception that he had not cooperated with law enforcement and that your honor was not adequately aware of the extent of his cooperation.

Despite the videotaped evidence and Kelly's agreement to cooperate fully with the State, defense counsel wants this court to believe that (1) Simmons confessed to his role and implicated his co-defendants; (2) provided information that resulted in Chaplin's arrest; and (4) told police about the firearms in the vehicle before Chaplin was arrested.

Simmons' self-serving videotaped statement, contradicts the claims he is now asserting as facts. He denied breaking into one of the trailers and denied they had a lookout. The State recited the facts during the plea colloquy and neither Simmons nor his attorney challenged them. In fact, the evidence specifically showed that Simmons told police "they had no lookout." It wasn't until he was confronted about the guns and the person in the car that Simmons admitted the guns were his and that the person was his little cousin, Rodney Chaplin. Knowing this, Simmons still claimed Chaplin was only there because Simmons brought him along. Chaplin was his relative and he tried to conceal his identity and involvement. The videotaped evidence is clear, Chaplin's arrest was not the result of Simmons' cooperation and he certainly did not inform police about the firearms before Chaplin's arrest.

Defense counsel then shifts her argument from factual to procedural. Ms. Mullaney contends that it was "always" Simmons' intention to accept responsibility and plead guilty. A claim that is contradicted by Simmons' videotaped statement. The State was asked by Ms.

Mullaney to place Simmons on the plea docket for March 18th, 2010. This was before his second appearance and before the videotaped interviews of Simmons and Kelly had been received by the State and provided to the defense. Ms. Mullaney asked the State to allow Simmons to plead to Burglary Third Degree. She was told there would be no reduction in the charges and that Simmons also had a felony gun charge. As stated in her brief, Ms. Mullaney admits that her client wanted a trial and refused to plead guilty when she learned of the felony gun charge. To argue that the State refused to provide sentencing sheets for a plea where defense counsel acknowledges she requested a trial is puzzling. Of more concern is Ms. Mullaney's lack of acknowledgement to the court that she never reached a plea agreement with the State and tried to force a plea without the entire discovery in her client's case.

Ms. Mullaney next complains that the direct indictment for Possession of a Weapon during a Crime of Violence was not supported by the evidence, a claim that ignores the facts of the case. Simmons admitted that the guns in the vehicle were his, the car did not belong to him, and he brought the guns to commit the burglary. On the night of the burglary, Simmons and Kelly planned to commit the burglary. All four co-defendants rode in the car from Summerville to the gun store. All defendants knew the guns were in the car, just as they knew the bolt cutters, ski-mask, walkie-talkies, and gloves were there. Simmons admitted he brought the guns and that there was a plan to commit burglary. Most troubling is that he would have had possession of those guns and more had he completed the crime and potentially used them in his escape. Given the facts, there was sufficient evidence to support that charge.

In the end Simmons was given a break by the State because his felony gun charge was reduced and the State only required he plea to one firearm offense when he admitted that both guns were his. It is because of this latitude that defense counsel is partly basing her motion:

Sentencing is within the discretion of the court and your honor exercised discretion by not imposing the maximum sentence available. Kelly was given a lesser sentence because of her immediate cooperation with police, acceptance of guilt early in the prosecution, and willingness to assist the State in furtherance of the prosecution. Simmons lied to police about his involvement, the involvement of his co-defendants, and whose idea it was to commit the burglary and therefore, his sentence was both warranted and appropriate.

Motion in Opposition to Withdraw the Guilty plea

During the Defendant's plea colloquy, your honor inquired about Simmons' age, education, marital status, and employment history. As to the specific charges, Simmons was informed that the plea was without negotiation or recommendation. Furthermore, Simmons was informed of the maximum possible sentence for each offense and the constitutional rights he waived by pleading guilty. Upon hearing the instructions, Simmons admitted his guilt to the charged offenses and indicated he wanted to plead guilty. Your honor determined Simmons' guilty plea was being entered into freely and voluntarily and the State gave a recitation of the facts

At the conclusion of the facts, the State argued this case was particularly troubling because the defendants brought multiple guns, a machete, a pocket knife, gloves, and a ski mask to commit a burglary. Additionally, the State voiced concerns that had the defendants been successful, the guns they targeted would have ended up on the streets for illegal sale.

Your honor was informed that Kelly was willing to cooperate with the State and because she had already pled guilty, only required sentencing. In regards to Jones, the State informed the court that he was given the chance to plead guilty and cooperate but refused. The State did not ask for his cooperation again. Jones' guilty plea was accepted by your honor after hearing the

factual basis for the plea and a determination it was made knowing and intelligently. Simmons was never asked for cooperation.

Simmons argues that this court erred in accepting his plea on the grounds that the sentencing sheets were marked "without negotiations or recommendations" and therefore the State implicitly agreed to make no recommendation with regard to sentencing. Simmons further argues that the State failed to honor its representation that it would not make a recommendation regarding sentencing when the State asked the court for active time during the plea colloquy.

A trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Additionally, to knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant has a full understanding of the consequences of her plea and the charges against her. *Simpson v. State*, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995). Moreover, the record in a guilty plea proceeding must establish a factual basis for the plea. *LoPiano v. State*, 270 S.C. 563, 569, 243 S.Ed.2d 448, 451 (1978); *State v. Armstrong*, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). In accepting a guilty plea, "the trial judge is free to use any appropriate procedure for determining the accuracy of the guilty party, but must be certain that the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea." *Armstrong*, 263 S.C. 598, 211 S.E.2d at 891. "All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001).

"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). An abuse of discretion

occurs when a trial judge'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). A determination the plea was voluntarily entered into "will normally show the trial judge did not abuse his discretion." *Riddle*, 278 S.C. at 150, 292 S.E.2d at 796; *see State v. Cantrell*, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967) ("A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of the clear abuse of discretion, this court will not interfere."). Once the plea judge finds the plea was voluntary and supported by a factual basis and formally accepts the plea of guilt, the defendant has forfeited his ability to withdraw the plea as a matter of right. *State v. Birkham*, 381 S.C. 143, 148, 672 S.E.2d 105 (2009).

Simmons plea was both voluntary and intelligently given. He demonstrated to your honor that he had a full understanding of the consequences of his plea and the charges against him by acknowledging the court when informed of the charges and penalties he was pleading guilty to. He further acknowledged that he was waiving certain constitutional rights by pleading guilty and in fact, stated to the court he was guilty of the charged offenses. The State recited the factual basis for the plea on the record and when given the opportunity to challenge those facts, Simmons offered nothing in response. Based on the affirmative showing that Simmons' plea was intelligent and voluntary, the court accepted his plea.

Despite this factual and procedural determination, Simmons argues that the State violated its agreement when it asked the court to impose an active sentence. In *State v. Rikard*, our Court of Appeals addressed this very issue with respect to marking the sentencing sheet "without negotiations or recommendation." *State v. Rikard*, 371 S.C. 295, 638 S.E.2d 72, 76 (2006)

The sentencing sheet offers three alternatives to designate the nature or status of the plea. Those alternatives provide that the

plea is: (1) without negotiations or recommendation; (2) a negotiated sentence; or (3) a recommendation by the State. It is axiomatic that the phrase "without negotiations or recommendation" means that the State and the defendant have not agreed on sentencing. Therefore, either party is free to request a favorable sentence. *State v. Rikard*, 371 S.C. 295, 638, S.E.2d 72, 76 (2006) (emphasis added).

Any belief that the State was prohibited from arguing for a favorable sentence is unsupported by the law and facts in this case. It is undisputed that Simmons' sentencing sheet was marked "without negotiations and recommendation." The record is also clear that there was no plea agreement between the State and Simmons regarding sentencing. A fact acknowledged in Simmons' brief. Because there was no agreement regarding sentencing *Rikard* dictates that the State and defense counsel are free to argue for a favorable sentence.

Although not relevant to the withdrawal of a guilty plea, defense counsel argues that the case should have been reassigned to the Attorney General's Office. Ms. Mullaney's reasoning for this is that the gun store owner is the father of Assistant Solicitor Tyler Whitaker, an employee in this office, and because of that the State treated Simmons differently. Importantly, Ms. Mullaney failed to use the appropriate mechanism recusing this office from the case when the issue was ripe and now that the time for recusal has expired she makes a 6th Amendment argument, which is a PCR issue.

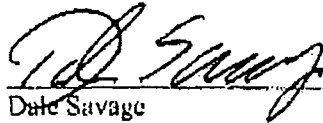
Kelly pled guilty earlier in the prosecution, was truthful with police, and as willing to fully cooperate with the State. Simmons feels he was entitled to the same benefit without fulfilling the same obligations or providing truthful information to law enforcement. "[A]n accused is not permitted to speculate on the supposed clemency of the judge and enter a plea of guilt with the right to retract it if he finds that his expectation was not realized." *State v. Cantrell*, 250 S.C. 376, 380, 158 S.E.2d 189, 191-192 (1967). Even during the plea before your

honor, Simmons was given an opportunity to be honest and forthcoming when asked "whose idea it was to commit the burglary." Again, Simmons failed to step up and assist in his defense and remained silent. Despite these disparities, Simmons asserts that his cooperation was somehow equal if not greater than that of Kelly's, a view clearly contradicted by the facts and evidence.

IV. CONCLUSION

Based on the above, the State opposes any changes in Simmons' sentence. Your honor exercised discretion by not imposing the maximum available sentence. The State asks this court to deny Simmons' Motion to Withdraw Guilty Plea. Simmons' plea was made knowingly and intelligently as determined by your honor and there is no evidence of abuse of discretion or error of law.

Respectfully Submitted,



Dale Savage
Assistant Solicitor, Ninth Circuit
Charleston, South Carolina, 9/23, 2010

FILED

2010 SEP 23 PM 1:34

JULIE B. AUSTIN
CLERK OF COURT

BY _____

STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON 2010-GS-10-1706
2010-GS-10-3108
2010-GS-10-7495
2010-GS-10-1722
2010-GS-10-1733
2010-GS-10-1715
2010-GS-10-3107
2010-GS-10-7496

STATE OF SOUTH CAROLINA)
) TRANSCRIPT OF RECORD
 -vs-)
) November 9, 2010
 LAMAR JONES, DARREN)
 SIMMONS, and JESSICA) Charleston, South Carolina
 KELLY,)
)
 Defendants.)

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Dale Savage, Assistant Solicitor
Attorney for the State

Ben Lewis, Esquire
Attorney for Defendant Jones

Mary Beth Mullaney, Esquire
Attorney for Darren Simmons

Jason King, Esquire
Attorney for Jessica Kelly

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (November 9, 2010.)

2 THE COURT: This is a motion to reconsider or
3 allow withdrawal of a plea for these three folks?

4 MR. LEWIS: It's actually somewhat different,
5 Judge. I think Mr. King's is just a motion to
6 reconsider?

7 MR. KING: We're not asking to withdraw, Your
8 Honor.

9 MR. LEWIS: Mine is a motion to withdraw,
10 and, in the alternative, a motion to reconsider, and Ms.
11 Mullaney's is the opposite, motion to reconsider and, in
12 the alternative, to withdraw.

13 MS. MULLANEY: Actually, Your Honor, I spoke
14 with Mr. Simmons this morning, and it's just a motion to
15 reconsider. He does not wish to withdraw his plea.

16 THE COURT: Okay. All right. Who wants to
17 go first?

18 MR. LEWIS: I do, Judge. Do you need the
19 facts again or are you familiar with them?

20 THE COURT: I'm vaguely familiar.

21 MR. LEWIS: I'll provide them to you again,
22 Judge.

23 On December 15, 2009 at 4 a.m., Carolina Rod
24 and Gun, four codefendants broke into two storage
25 containers behind the business. Kelly and my client used

1 bolt cutters to cut off locks of the storage building.
2 Simmons and juvenile codefendant parked vehicle, and then
3 Simmons came to the scene, joining Kelly and my client.
4 Simmons carried a walkie-talkie that was used to
5 communicate with the juvenile to act as lookout.

6 Silent alarm was triggered. All parties
7 fled. All were apprehended. Police discovered weapons
8 in the car, masks, bolt cutters, and machetes behind the
9 store. Simmons also had a pocketknife on him. Kelly
10 confessed and provided information about Simmons that
11 also implicated Lamarr.

12 The primarily reason I needed to address, in
13 addition to the facts, is I neglected to do so at the
14 plea to my client's detriment. What I need to do to set
15 the record straight, Judge, to provide on the record that
16 the event -- you specifically asked, who planned this
17 event, and no one responded. We all sat here quietly.

18 I failed my client by not putting on the
19 record that the two codefendants planned it and they had
20 planned it for months, per the videotaped confession. My
21 client was picked up on the day of the incident, learned
22 of what was to take place on the day of the incident, did
23 not know the guns were in the vehicle, did not provide
24 weapons, tools, or transportation to arrive at the
25 incident location.

1 I neglected to provide that information, and
2 I remained quiet and I should not have, and because of
3 that, I feel that my client was treated as more of a
4 primary in that incident. In addition, my client was
5 told had never been in a position to cooperate. He had
6 been subpoenaed. He was always under the impression he
7 would be ready and willing to cooperate if the State
8 needed him. It did not come to that because all three
9 pled, but he was prepared to cooperate and, in fact,
10 although he's not one of those that gave a statement, he
11 did at the end confess to Detective Cohen saying he was
12 involved, and I failed to bring that out in the plea as
13 well.

14 In addition, he said that he was homeless and
15 looking for a place to stay and that he was going to be
16 provided with money to provide a place for him to live.
17 I failed to bring that up.

18 Judge, the next part of my motion was the
19 specific issue with what a plea without recommendation
20 means. The Supreme Court has provided in the Ricard case
21 that on a sentencing sheet if it's marked without
22 negotiations or recommendations that that is to be
23 treated as a plea where both sides battle it out.

24 Well, that was not my understanding. That
25 was not my client's understanding as to what that means.

1 If I may approach, Judge, and I've allowed Mr. Savage to
2 read that.

3 What I've handed you is a letter I provided
4 my client. He's waived confidentiality in regards to
5 that letter. Specifically, the highlighted portion
6 explains to my client the interpretation of what we were
7 going to be doing in court, that we were going to be
8 pleading straight up, and what I interpreted that to mean
9 is that I would be able to argue mitigation. The State
10 would present the facts but remain silent in regards to
11 aggravation. That was my interpretation of what we were
12 going to be pleading, or how we were going to be
13 pleading.

14 I've always had a good relationship with
15 Mr. Savage, and I'm not suggesting that he did anything
16 wrong in regards to my case. I simply didn't understand
17 where he was coming from with it, and because of that, my
18 client didn't understand how he was proceeding. That is
19 the basis for why I would ask to withdraw the plea,
20 because when he came out here, he hadn't been advised
21 correctly as to how the case would progress against him.

22 THE COURT: What did your client end up
23 getting?

24 MR. LEWIS: Fifteen suspended on ten with
25 five years' probation to follow with no prior record.

1 THE COURT: Okay.

2 MR. LEWIS: At this point I want to talk to
3 you about what Lamarr believed. You've got the letter
4 and I have talked to him since we've been to court.
5 Number one: He's not in the same position as the other
6 two codefendants because he did not plan the events, he
7 was not in the dating relationship with them, and he was
8 so poor he could not post bond where everybody else could
9 post bond, so he's the one that was under constant
10 pressure to get into court which we tried repeatedly to
11 do.

12 He believed that he was in a position to
13 cooperate because of the subpoena, and he was ready and
14 willing to do so, although it never came to fruition
15 again because the trial never happened. I needed to
16 clarify another point.

17 The State had said that that lawyer rejected
18 the plea when he failed to plead on June 22. What
19 actually happened, as you can see, if you've been able to
20 read over my affidavit, is that when he was advised he
21 could not receive probation, that probation would have
22 been an illegal sentence for burglary second, he withdrew
23 the plea. That is not a correct statement of the law,
24 and because of that, he stood down. He got scared and
25 said, Wait. That's not what my lawyer told me, and

1 backed out of the plea.

2 But repeatedly, constantly, I provided to the
3 State saying he was ready to plead guilty but not under
4 the circumstances where we pled guilty, and I was blind
5 sided.

6 Judge, because of these reasons, what I'm
7 asking for is a remedy is the right to withdraw the plea
8 and to proceed with the case. It may be that he at some
9 point decides that he still wants to plead under these
10 same rules, but that is not what he understood at the
11 time. So when he came into court, he had not been
12 properly advised as to what was going to happen. If the
13 Court is not comfortable with that resolution, because of
14 the reasons that I provided, that he was not as involved
15 as the other two codefendants and simply was ready to
16 cooperate and remained in custody, I would ask that if
17 you deny the first motion, I would ask that you consider
18 reducing his sentence and treating him more in lines with
19 Ms. Kelly who also had no record, or even less. He was
20 not one of the primary conspirators in this situation, so
21 I would ask you consider a much more lenient sentence if
22 you deny the motion.

23 Thank you, Your Honor.

24 THE COURT: Are you going next?

25 MS. MULLANEY: Yes, sir.

1 THE COURT: What is your client's name?

2 MS. MULLANEY: Darren Simmons.

3 THE COURT: How much time did he get?

4 MS. MULLANEY: He got the same amount of time
5 as Mr. Lewis's client, fifteen suspended upon the service
6 of ten with five years of probation to follow.

7 THE COURT: Okay.

8 MS. MULLANEY: And I'm asking the Court -- I
9 have spoken to my client. He does not wish to withdraw
10 the plea, but I am asking the Court to reconsider his
11 sentence and to sentence him more in line with the
12 sentence that Ms. Kelly got, because --

13 THE COURT: What did she get?

14 MS. MULLANEY: She got -- I believe she
15 got --

16 MR. KING: Fifteen suspended to five active
17 plus five years' probation.

18 THE COURT: Okay.

19 MS. MULLANEY: Because I -- at the plea, I
20 should have cleared it up. I think that there was this
21 misconception at the plea that Mr. Simmons did not
22 cooperate and did not accept responsibility with regards
23 to his role in this incident, and I'd like to point out
24 that Mr. Simmons was the first to give a statement, and
25 as a result of his statement and his confession,

1 Mr. Chaplin was arrested shortly later and that
2 Mr. Simmons told the police during his videotaped
3 confession, he told the police that he drove a red Ford
4 Focus, he told the police where the Ford Focus was
5 parked, and he also told the police that there were guns
6 in the Ford Focus.

7 And I know that in Mr. Savage's motion he
8 disputes that; however, I think it's clear in the police
9 report, and if I just may read from the police report
10 that was taken that night, it says, Detective Holmes
11 interviewed Darren Simmons. The responding officer
12 watched on the monitor, and the subject stated that they
13 were driving a red Ford Focus and that it was parked on
14 the same street that the gun store was on. He also
15 stated that there were guns in the vehicle and that the
16 guns in the vehicle were his.

17 And then it says, see Detective Holmes'
18 supplemental. The responding officer then relayed this
19 information to Lieutenant Ambrose who located the vehicle
20 with the juvenile, and then it says see Lieutenant
21 Ambrose's supplemental. All four subjects were charged
22 with burglary second, and Darren Simmons was also charged
23 with unlawful possession of a firearm.

24 Your Honor, I also wanted to clarify I think
25 that during the presentation of the plea that Your Honor

1 was concerned that they had brought -- and rightly so --
2 that they had brought guns with them when they went to
3 break into this storage container, and at the time I
4 don't think that I clarified that the guns were
5 incidental to this crime, that my client brought the
6 shotgun with him.

7 He was drive his aunt's Ford Focus. He was
8 bringing the shotgun from his aunt's home to his home.
9 The shotgun was in the trunk, and the pistol was a gun
10 that he carries with him and that he legally bought and
11 that they were not intended to be used in part of the
12 crime, and that is why they remained in the car.

13 Mr. Simmons always wanted to plead guilty in
14 this case, Your Honor. He was incarcerated up until he
15 posted bond in March. What happened was I contacted
16 Mr. Savage, and Mr. Savage put this case on the docket
17 for a guilty plea March 18th in front of Judge Hughston.
18 My client was in jail at the time and was ready to plead
19 guilty.

20 I was then told that my client could not
21 plead guilty because they were investigating bringing
22 additional charges. So it was then that I spoke with my
23 client and my client's mother, saying that I did not know
24 how long it would be, and it was then that he posted
25 bond, I believe, on March 26th.

1 It was also then that I became concerned that
2 this case was being treated differently because the
3 victim in this case, Neil Schachte, is the father of
4 assistant solicitor Tyler Whitaker and --

5 THE COURT: I had no knowledge of that when I
6 sentenced them or even up until, what, two seconds ago.
7 It didn't have an impact on me. It might have had an
8 impact on Mr. Savage, I suppose, if that is what you're
9 alleging.

10 MS. MULLANEY: I guess my point is, it did
11 have an impact with regard to the solicitor because we
12 weren't able to plead guilty on March 18th, and then
13 because they were bringing additional charges, had this
14 been the first time that something like that happened to
15 me in my career as an assistant public defender, being
16 told that I couldn't plead guilty because they were still
17 investigating the case, that is when I asked Mr. Savage
18 to reassign this case to the AG's office, and I
19 contact -- Mr. Savage declined, and Mr. Pennington
20 contacted Ms. Wilson and asked her to reassign it, and
21 she declined.

22 Shortly after that, my client was indicted
23 for another charge, which he was not originally charged
24 with, which was possession of a weapon during a violent
25 crime. Once he was charged with that, it was a mandatory

1 minimum of five years and could run consecutive to any
2 time that he got, so as a result of that, that is when I
3 requested a trial, because I didn't feel, as his
4 attorney, that the facts in the case supported that, and
5 I felt like that was a charge that my client had a good
6 chance of being acquitted on.

7 It was only when Mr. Savage said that he
8 would reduce that charge to the unlawful carrying, and
9 that is when we went forward with the plea.

10 I realize, Your Honor, that my client made a
11 terrible mistake on December 15th and did something he
12 never should have done; however, prior to that, for 25
13 years, he lived a very good life. He graduated from high
14 school. He went to college. He was in college. He had
15 a good job at Dorchester School District Two where he
16 worked as a janitor.

17 As a result of this, you know, he will never,
18 of course, be able to work in the school district again.
19 He helped his mom. She is a single mom, and he took care
20 of his 20-month-old son. When he was caught, he admitted
21 his responsibility to the police and has always wanted to
22 plead guilty. He's very sorry and very remorseful, and
23 I'm asking Your Honor to reduce his sentence and to
24 sentence him more in line with the sentence that
25 Ms. Kelly received.

1 THE COURT: All right. Mr. King?

2 MR. KING: Thank you, Your Honor. Ms. Kelly
3 did get the best sentence of the group based on her
4 cooperation. She did give a taperecorded, video recorded
5 statement the night of her arrest, and she pled guilty
6 early. She pled guilty -- we just did the sentencing in
7 front of Your Honor. She pled guilty in front of Judge
8 Jefferson a couple weeks before and was going to
9 cooperate with the State.

10 I actually went on vacation. The day after
11 the plea, I went on vacation. I had found out that
12 Ms. Mullaney and Mr. Lewis were filing motions. I filed
13 a motion as well. I wanted Ms. Kelly to be included in
14 anything so when I got back I could see if there was
15 anything I could argue, and when I went over it this
16 morning, she does not want to withdraw the plea.

17 She wants -- I wanted her to preserve her
18 spirit of cooperation, and if Your Honor were to allow
19 the codefendant to withdraw and it goes to trial, Ms.
20 Kelly is still prepared to testify if the State calls her
21 to the stand, and she'll tell the truth.

22 But I want her to be included in what is
23 going on today and at least in the motion to reconsider
24 part, Your Honor. She's been in the Department of
25 Corrections for 67 days now. Her mother has told me

1 she's grown up a lot. She's taking GED classes. She's
2 going to church. She's been talking to older inmates who
3 have a lot more experience than she has about the wrong
4 choices she could make in her life, and I could tell she
5 has matured a good bit in that short amount of time, and
6 her mother can tell you the same thing.

7 So we're just asking, Your Honor --
8 essentially, she doesn't want to withdraw. She still
9 wants to cooperate, but, you know, I did want her to be
10 included in case Your Honor felt that the sentence was
11 originally too harsh and was inclined to reduce
12 sentences, I wanted her to get the benefit of that, and
13 she would respectfully request, Your Honor, to knock some
14 time off of her sentence.

15 THE COURT: Okay. Mr. Savage?

16 MR. SAVAGE: I guess in regards to Mr. Jones,
17 in fact, for all defendants, I think the sentences were
18 appropriate, given the facts of the case and given the
19 situation about how the events occurred. Mr. Jones was
20 afforded the opportunity to cooperate, just like
21 Ms. Kelly was.

22 In fact, they were both on the plea docket on
23 the same day at the same time. Ms. Kelly accepted that
24 and entered a plea of guilty, holding off on sentencing,
25 with no reduction in charges and no promises except to be

1 told the judge, whoever that may be at the time of
2 sentencing, that she cooperate with the State and use
3 that as mitigation.

4 Mr. Jones was afforded the exact same deal,
5 no reduction, no recommendation, except you get to
6 tell the judge -- the judge gets to hear from the State
7 that he provided cooperation in this case.

8 He said yes to pleading guilty to the burg
9 second charge, and when it came to the possession of
10 tools of crime, he then said not guilty, and that's when
11 Judge Jefferson asked him to step down and did not accept
12 plead and that is where that came about. He was not
13 afforded another opportunity by me to cooperate. He was
14 given his chance, and he blew it, and that's why he was
15 standing next to Mr. Simmons, and that's why he got the
16 same sentence as Mr. Simmons.

17 Regarding Mr. Simmons, Ms. Mullaney, I think,
18 is trying to mislead this Court into what the actual
19 facts were. There was a recorded statement that has been
20 provided to Ms. Mullaney, as well as all the other
21 codefendants in this case. In that recorded, statement
22 he was asked by Detective Holmes about the incidents of
23 the case and who was involved.

24 He stated who the other two people were,
25 Ms. Kelly and Mr. Jones, failed to mention his little

1 cousin, Mr. Chaplin. It wasn't until Detective Holmes
2 challenged him, said, Who is the kid in the car, that is
3 it when it came about. The police already knew about
4 that before it came about, and it's in the recorded
5 statement. That's is not something that I'm making up or
6 changing the facts.

7 That's with what all these co-defendants have
8 been provided. He also told the detective that it wasn't
9 his idea to go and do the robbery. He doesn't know who
10 it was. He said he didn't go in there. That was
11 disputed by Ms. Kelly. Ms. Kelly told the officer and
12 was going to testify at trial that it was actually
13 Mr. Simmons's idea to hit the store. He located it. He
14 provided the ammunition and the tools, and that's where
15 it came about and that is where we are.

16 So to claim that he was more cooperative than
17 Ms. Kelly is just misstating the facts to this Court and
18 is just not true.

19 THE COURT: All right.

20 MR. SAVAGE: I have spoken to the victim in
21 this case, or the store owner, and he's on board with the
22 sentence. He doesn't want any reductions. He was
23 pleased with the sentence Your Honor gave on that day and
24 would ask that Your Honor uphold that sentence.

25 MR. LEWIS: I have one additional thing to

1 add. One other important part that I tried to stress at
2 the original plea, and I don't know if that came across,
3 was the suggestion that these guns were specifically
4 going to be hitting the street with the intention of
5 committing other violence crimes.

6 As I told you before, specifically in regards
7 to Lamarr, he was homeless. His goal was not to try to
8 make money off of selling these guns himself, but he
9 believed he would be provided with a place to stay. The
10 suggestion that an 18-year-old with no prior record is
11 going to be the heart of the armed robberies and the
12 murders and the other violent crime in the community, I
13 think, is taking it too far.

14 I understand that these guns get on the
15 street, but they get on the street from other places.
16 They're stolen from other communities. They're not all
17 stolen from gun stores, and the belief that he was making
18 a stupid decision to accompany these codefendants on that
19 day, I think, is taking it too far. I just wanted to add
20 that, Judge.

21 THE COURT: Well, you know, I don't know
22 whether or not that happened or not, but it certainly is
23 a strong possibility. You know, the old discussion,
24 philosophical discussion about a butterfly flaps his
25 wings and a hurricane starts, you can trace just about

1 any action back to something, and whether or not that
2 happened, I don't know. I remember that it was a strong
3 argument that the State made at the time, and, you know,
4 it had something to do with my sentence reflecting that.

5 You know, the facts of the case are nothing
6 has really changed that I heard new today from what I
7 heard then. My real problem with this case, I think, is
8 something that I thought at the time of the sentencing
9 and didn't express it then, but, ultimately, I think if
10 there ever is really a problem with the plea down the
11 road is, you know, all three being represented by the
12 public defender's office.

13 I understand that the, you know, chief
14 justice has sent down word that, you know, times are
15 tough, and maybe everybody should not put conflicting
16 cases out so quickly, but, frankly, this is one that I
17 think probably should have had some lawyers conflicted
18 out on in order to, you know, maybe have people
19 aggressively selling out other clients because I'm not so
20 sure the strategy worked, at least insofar as Mr. Jones
21 and Mr. Simmons goes.

22 Ms. Kelly, you know, I think she got a
23 sentence that was reflecting her cooperation, which was
24 early and, you know, consistent throughout. The other
25 folks, I don't necessarily second guess what you did and

1 why you did it, but, you know, ultimately, you know, it
2 resulted in a sentence that I gave, and I still think
3 that based on everything I heard then and everything I
4 heard now, today, it's still an appropriate sentence
5 reflecting the level of activity that everybody had along
6 the way, so the motions are all denied.

7 MR. SAVAGE: Thank you, Judge.

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9 (Whereupon, the proceedings were concluded.)

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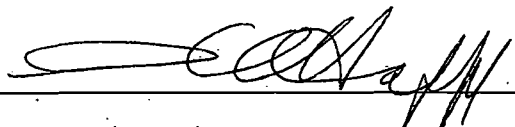
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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 9th of November 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 2, 2013



Circuit Court Reporter

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