

FILED

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON 20 PM 3:43 )

IN THE COURT OF  
GENERAL SESSIONS

JULIE J. ARMSTRONG )  
CLERK OF COURT )  
THE STATE OF SOUTH CAROLINA )  
BY AS )

Order Vacating Sentence  
and  
Granting New Sentencing Proceeding

v.

JAMES A. SUMMERSETT, 216032 )  
Defendant. )

2002-GS-10-5115

RECEIVED

JUN 30 2014

SC Court of Appeals

THIS MATTER comes before the Court by way of a Motion to Reconsider Sentence. A hearing was held on this motion on November 13, 2013, at which time the Defendant was represented by retained counsel, Tara Dawn Shurling, Esquire. The State was represented by Jennifer Blanchard McCoy, Assistant Solicitor. At the conclusion of this proceeding this Court requested memoranda from both sides addressing certain issues raised during the motion hearing. Having now reviewed those submissions, this Court finds that the Defendant has demonstrated just cause for the reconsideration of the life sentence imposed following his conviction for voluntary manslaughter. For the reasons set forth below, this Court now finds that the Defendant's sentence to life without parole based upon his previous plea of *nolo contendere* to a charge of Assault and Battery with Intent to Kill was erroneously entered.

**PROCEDURAL HISTORY**

The Defendant was indicted for murder (2002-GS-10-5115) and Possession of a Firearm during the Commission of a Violent Crime (2002-GS-10-5516) by the Charleston County Grand Jury. He proceeded to trial by jury on February 2, 2003, before the Honorable Daniel F. Pieper, then circuit court judge. He was represented at trial by Richard

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Buchanan, Esquire, and Edward Hawkins, Esquire. At that trial, Defendant was convicted as charged. The South Carolina Court of Appeals affirmed his convictions and sentences<sup>1</sup>; however, his judgments and sentences were subsequently reversed by the Supreme Court of South Carolina.<sup>2</sup> On remand, the Defendant had a bench trial before the undersigned circuit court judge. At the conclusion of his bench trial the Defendant was convicted of the lesser-included offense of voluntary manslaughter and was sentenced to life imprisonment pursuant to S.C. Code §17-25-45, on January 26, 2010. As is apparent from the record below, this Court was unaware that the State filed Notice of Intent to seek a life sentence pursuant to S.C. Code Ann. §17-25-45 until after judgment was announced by the Court. The Defendant filed a Motion to Reconsider Sentence on January 29, 2011. The Defendant was represented at trial by William J. Thrower, Esquire, of the Charleston County Bar. Attorney Thrower did not file a direct appeal on the Defendant's behalf.

The Defendant filed an Application for Post-Conviction Relief on October 1, 2010. In that application the Defendant generally alleged that he received ineffective assistance of counsel prior to and during his bench trial, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the U. S. Constitution as well as the South Carolina Constitution, and further, that trial counsel neglected to preserve his right to a direct appeal. The Respondent served its Return to this application on June 20, 2012.

Attorney Shurling was hired to represent the Defendant in his PCR action, and subsequently discovered that the Defendant's Motion to Reconsider Sentence was never heard. A hearing was convened on that matter in General Sessions Court on November 13, 2013. At the conclusion of that hearing, this Court requested memoranda on the issue of whether the Court of General Sessions properly accepted the Defendant's earlier *nolo*

<sup>1</sup> *State v. Summersett, Jr.*, unpublished Op. No. 2005-UP-373 (Ct. App. filed June 10, 2005),

<sup>2</sup> *State v. Summersett, Jr.*, Mem. Op. No. 2008-MO-025 (S.Ct. filed July 28, 2008).

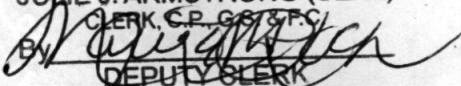
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*contendere* plea to a charge of Assault and Battery with Intent to Kill and accordingly, whether that judgment could be used by the State as a predicate offense to support a sentence of life without parole pursuant to South Carolina's strike law. The Defendant's judgment on that offense was the sole basis for his sentencing to life without parole for voluntary manslaughter pursuant to S.C. Code Ann. §17-25-45 (1995 as amended).

At the hearing held on the Defendant's Motion to Reconsider Sentence, Defendant submitted that this Court violated his right to due process of law by sentencing him to life without the possibility of parole under South Carolina's strike law where the earlier strike was predicated upon his plea of *nolo contendere* to Assault and Battery with Intent to Kill which is a felony in this state. In support of this argument the Defendant submitted a copy of the records of the Clerk of Court on Indictment No. 1994-GS-10-4837, which clearly indicate that the plea in question was entered as a plea of "no contest".

### FINDS OF FACT AND RULINGS OF LAW

The Defendant's plea to the predicate offense was entered on December 5, 1994. In *State v. Kibler*, 267 S.C. 250, 227 S.E.2d 199 (1976), our Supreme Court found that the Court of General Sessions had jurisdiction to accept a plea of *nolo contendere* inasmuch as the Court clearly had jurisdiction over the crime in question in that case, housebreaking, and had jurisdiction over the person of Defendant Kibler. *Id.* However, the Court went on to conclude that Section 17-504 of the 1962 South Carolina Code of Laws could be interpreted as limiting the acceptance of such pleas to misdemeanors where that statute expressly provided for the entry of pleas of *nolo contendere* to misdemeanor offenses and was silent on the propriety of such pleas to felonies. The High Court specifically ruled that it subscribed to that interpretation of this code section and found "that the proper procedure for our lower courts to follow is to refrain from accepting pleas of *nolo contendere* in felony

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cases until such are authorized by our legislature.” The Supreme Court ultimately denied relief to Kibler finding that they saw “error in the trial judge’s acceptance of the plea in the instant case nor any prejudice suffered by the Appellant.” 267 S.C. at 255, 227 S.E.2d at 201. It is important to note that earlier in the *Kibler* decision, our Supreme Court expressly noted that “until this case, there has been no judicial denial of acceptance of such pleas ...” 267 S.C. at 254, 227 S.E.2d at 201. It is equally important to note that to this day, §17-23-40, previously §17-504, has not been amended by our legislature to provide for the acceptance of *nolo contendere* pleas in felony cases.

As the Supreme Court stated in *Kibler*,

A plea of *nolo contendere* literally means ‘I do not wish to contend.’ For all practical purposes it is a plea of guilty in so far as the consequences in the particular case in which it is pled. ‘Like a plea of guilty (it) leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense.’

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Citing, *State v. Stokes*, 274 N.C. 408, 163 S.E.2d 770 (1968). Thus, while a plea of no contest allows a Defendant to plead while not admitting his guilt, it does not afford him the opportunity to subsequently challenge the sufficiency of the evidence. It has been argued that a subsequent decision of our Supreme Court, *State v. Munsch*, stands for the proposition that a plea of *nolo contendere* is an admission of elements of the offense for which he is charged. 287 S.C. 313, 338 S.E.2d 329 (1985). This Court does not find that interpretation of holding in *Munsch* to be convincing. A careful reading of the portion of that decision often cited for that conclusion reveals otherwise. In *Munsch*, the Supreme Court cited *Kibler* for the general principal that “a plea of *nolo contendere* leaves open for review only the sufficiency of the indictment and waives all other defenses.” 287 S.C. at 314, 338 S.E.2d at 330. For that reason, the Court went on to find that,

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A court cannot hear testimony after accepting the plea to determine either the fact or the degree of the defendant's guilt because the plea admits all the elements of the offense charges. In *Kibler, supra*, we stated that 'once a plea of *nolo contendere* is entered, it is beyond the province of the court to make any determination of the accused's guilt.'

287 S.C. at 314, 338 S.E.2d at 330.

Therefore, this Court finds that a fair reading of this portion of the *Munsch* decision, in context, makes clear that by entering a plea of *nolo contendere* a defendant waives his right to challenge the sufficiency of the evidence to establish guilt. As both *Kibler* and *Munsch* clearly indicate, although a defendant does not acknowledge his guilt by entering a *nolo contendere*, he waives his right to have the court review the sufficiency of the evidence and any other defenses he might have otherwise raised but for his decision to enter such a plea. As stated in both cases, for "all-practical purposes it is a plea of guilty in so far as the consequences *in the particular case in which it is pled*." Long ago, the United States Supreme Court held that such a plea "like a plea of guilty, is admission of *guilt for the purposes of the case*." *Hudson v. United States*, 272 U.S. 451, 455. (1926) (Emphasis added). In so ruling, the Court noted the limited use of such a plea in another legal action, finding that such a plea did not, for example, "estop the defendant to plead and prove his innocence in a civil action." *Id.* at 455. South Carolina recognizes this limitation on the use of a judgment entered pursuant to a plea of *nolo contendere*. See *Kibler*, 267 S.C. at 253, 227 S.E.2d at 201, fn.1. In the landmark case of *North Carolina v. Alford*, 400 U.S. 25 (1970), The United States Supreme Court cited *Hudson, supra*, for the proposition that a plea of *nolo contendere* was a plea by which the defendant did not expressly admit his guilt but "nonetheless waives his right to a trial and authorizes the court *for purposes of the case* to treat him as if he were guilty." *Id.* at 35. (Emphasis added).

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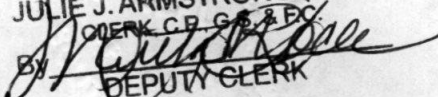
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The use of judgments entered by way of a plea of *nolo contendere* for purposes beyond “the purposes of the case” in which the plea was entered has recently been called into question in a case from the Fourth Circuit Court of Appeals. In *United States v. Davis*, 679 F.3d 177 (2012), the court found that Davis’ “no contest” plea in state court “could not alone provide the necessary evidentiary basis to support” a sentence enhancement under a provision of the federal sentencing guidelines. *Id.* at 187. In analyzing this important issue, the Fourth Circuit observed that a defendant in North Carolina did not “admit any facts alleged in the charging indictment” by his plea of “no contest.”<sup>1</sup> In so ruling the Court noted that some states, such as Virginia<sup>3</sup>, have expressly found that a defendant entering a plea of *nolo contendere* admits the truth of the charge. *Id.* at 186. In the case before the Court, the State has taken the position that the language addressed herein from the *Munsch* decision stands for the proposition that South Carolina takes the same approach to a plea of *nolo contendere*. The Defendant has strongly contested that view and argues that a close reading of South Carolina case law addressing *nolo contendere* pleas supports his position that the State is overreaching in its assertion that *Munsch* stands for that proposition. This Court agrees.

Similarly, the Fourth Circuit found that an enhanced sentence under the Career Criminal Act may not rest on a conviction based on a guilty plea tendered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), unless “the Defendant’s own admissions or accepted finding of fact confirm the factual basis of a valid plea.” 611 F.3d at 226. *United States v. Alston*, 611 F.3d 219 (4<sup>th</sup> Cir. 2010). While there is no transcript of the Defendant’s 1994 *nolo contendere* plea before this Court, the Defendant’s position concerning the facts surrounding the shooting which lead to the 1993 charge of Assault and

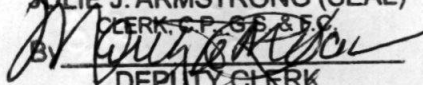
<sup>3</sup> See, *United States v. DeJesus Ventura*, 565 F.3d 870, 879 (D.C.Cir. 2009).

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Battery with Intent to Kill was discussed at length in the decisions of the South Carolina Court of Appeals and the Supreme Court of South Carolina following the Defendant's initial conviction inasmuch as they were the subject of debate during the Defendant's original trial. It is clear from these decisions that the Defendant not only pleaded *nolo contendere*, but asserted the shooting in question was accidental. Thus, it is clear that the Defendant made no admissions of the truth of the charges found in the indictment to which he pleaded *nolo contendere*.

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The Defendant has acknowledged that the statute under which he was sentenced to life without the possibility of parole, §17-25-45, does expressly provide for judgments for most serious and serious offenses entered as a result of a plea of *nolo contendere* to be applied as "strikes" under the terms of that sentencing provision. The Defendant argues that the fact that the legislature saw fit to draft such a provision and make it law does not mean that the provision is constitutionally sound. In support of his position, the Defendant notes that, for example, just last year our Supreme Court struck down a sentencing provision that called for the lifetime electronic monitoring of individuals convicted of First Degree Criminal Sexual Conduct with a Minor or Lewd Act on a Minor without provision for judicial review as unconstitutional under the due process clause. *See State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (S.Ct. 2013).

Our judicial system has long protected a Defendant from the use of such a plea as an admission in a subsequent civil proceeding. It is irrational to suggest that a defendant should be protected against the use of such a plea to establish civil liability, but that he can be deprived of liberty for the rest of his life, arguably decades longer than his sentence otherwise would have been for voluntary manslaughter, based on the same type of plea. The Defendant has acknowledged that the case law is clear that such a plea has the same

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consequences as a guilty plea as it relates to the charge on which it was entered; however, Defendant argues that this proposition does not support the use of such a plea as the foundation for the imposition of a life without parole sentence in a subsequent case. This Court is convinced of both the logic and wisdom of this position.

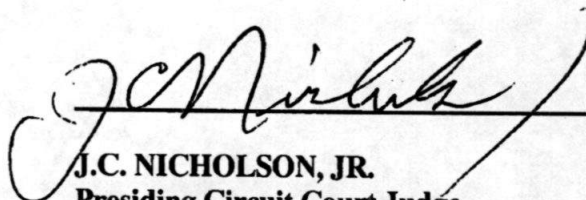
As of the *Kibler* decision in 1976, *nolo contendere* pleas were not supposed to be accepted in our courts in felony cases unless and until the legislature saw fit to change §17-23-40 to expressly permit them on felony charges. While, as in *Kibler*, the Defendant may not be able to demonstrate prejudice in his Assault and Battery with Intent to Kill case arising from the Court's acceptance of his *nolo contendere* plea on that charge, he clearly has been substantially injured by application of that prior judgment to the imposition of sentence in the case currently before this Honorable Court.

The Defendant has submitted that the use of a plea in which he in no way admitted the truth of the allegations against him to support his sentence of life without parole pursuant to §17-25-45 violates his rights pursuant to the due process clause of the United States Constitution. U.S.C.A. Const. Amend.14. The Defendant further argues that such a conclusion would not result in defendants being able to use a plea of *nolo contendere* to insulate themselves from sentencing under our statutory strike law inasmuch as our Courts clearly have to consent to the entry of such a plea under §17-23-40. This Court agrees.

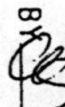
This Court finds that the record before this Court, at the time of Defendant's receipt of the life sentence in dispute, did not demonstrate that either "the Defendant's own admissions or accepted finding of fact" confirmed the factual basis of a valid plea." *United States v. Alston*, 611 F.3d 219, 226 (4<sup>th</sup> Cir. 2010). Therefore, this Court finds that the life without parole sentence imposed for voluntary manslaughter violated the Defendant's right to due process of law. This Court now grants the Defendant's request that the sentence

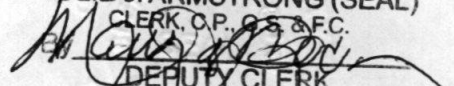
previously entered on the his judgment for voluntary manslaughter be set aside and orders that the Defendant be resentenced for that offense within the statutory sentencing scheme for that crime provided by S.C. Code Ann. §16-3-50 at the time of his conviction, on January 26, 2010. A new sentencing hearing is to be schedule before me as soon as practical.

**IT IS SO ORDERED.**

  
**J.C. NICHOLSON, JR.**  
**Presiding Circuit Court Judge**  
**Ninth Judicial Circuit**

This 19 day of June, 2014.

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