

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Lexington County

Edward B. Cottingham, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

JUL 28 2014

**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

BRIAN CURTIS MACK,

APPELLANT

APPELLATE CASE NO. 2013-001726  
\_\_\_\_\_

INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

BENJAMIN JOHN TRIPP  
Appellate Defender

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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the plea judge abused his discretion in accepting Appellant's guilty plea where the judge only asked Appellant whether he was pleading freely and voluntarily and intended to waive his right to a jury trial but asked nothing further to discern whether Appellant understood the consequences of the plea?

## STATEMENT OF THE CASE

On July 11, 2012, the Edgefield County Grand Jury indicted Appellant Brian Curtis Mack on one count of forgery. R. \*. On April 8, 2013, the Lexington County Grand Jury indicted Appellant on one count of financial transaction card fraud \$500 or more and one count of first degree criminal sexual conduct with a minor under eleven years of age. R. \*.

On July 10, 2013, Appellant appeared at a plea hearing in Lexington County before the Honorable Edward B. Cottingham, Sr. Orin G. Briggs represented Appellant and Shannon A. Davis represented the State. Tr. 1. Appellant pled guilty to the forgery and financial transaction card fraud charges as indicted and to a reduced charge of second degree assault and battery. Tr. 7, lines 14-17; Tr. 10, lines 9-11. The plea judged sentenced him to eighteen months suspended to time served for the assault and battery charge and five years concurrent for each of the forgery and fraud charges. Tr. 13, lines 12-22.

## ARGUMENT

**THE PLEA JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA BECAUSE NOTHING IN THE RECORD SHOWS APPELLANT KNEW OF THE POTENTIAL SENTENCES HE WAS FACING.**

### STATEMENT OF FACTS

At the plea hearing the State alleged that between July 13 and July 14, 2012, Appellant and a codefendant spent approximately \$1000 at multiple stores using the debit card of a third person without her consent. The State also alleged that on July 23, 2012, Appellant presented to a grocery store two forged checks totaling approximately \$1600. Tr. 8, line 1—Tr. 9, line 8.

The plea judge's entire colloquy with Appellant consisted of three questions:

**The Court:** As to these other charges, are you guilty?

**Defendant:** Yes, sir, Your Honor.

**The Court:** You are pleading freely and voluntarily?

**Defendant:** Yes, sir, Your Honor.

**The Court:** Waiving your rights to trial by jury?

**Defendant:** Yes, sir, Your Honor.

Tr. 10, lines 9-17. The remainder of the hearing until sentencing consisted of allocution between plea counsel and the plea judge. Tr. 10, line 18—Tr. 13, line 3. Immediately after the plea judge stated the sentence, plea counsel attempted to withdraw the plea:

**Mr. Briggs:** Your Honor, I know you've spoken, but could I withdraw my plea at this time?

**The Court:** No, sir. No, sir. You can't do that. I'm not going to accept the plea and then let you withdraw it.

Tr. 13, line 23—Tr. 14, line 2.

## DISCUSSION

The plea judge abused his discretion in accepting Appellant's guilty plea because nothing in the record shows Appellant knew of the potential sentences he was facing. "[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct.App.1999). However, a defendant has no constitutional right to plea bargain. *Id.* at 685, 511 S.E.2d at 401. Furthermore, the trial judge is not required to accept a plea. *Id.*; *see also Santobello v. New York*, 404 U.S. 257 (1971) (holding defendant has no absolute right to have guilty plea accepted; court may reject plea in exercise of sound judicial discretion).

A trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary. 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. . . . "The judge 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."

*State v. Rikard*, 371 S.C. 295, 300-301, 638 S.E.2d 72, 75 (Ct. App. 2006).


"An abuse of discretion occurs when the trial court's ruling is based upon factual conclusions . . . without evidentiary support [or] when the trial court is vested with discretion, but the ruling reveals no discretion was exercised . . . ." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

In this case, the plea judge never questioned Appellant about whether he knew of the potential sentences for the crimes he was pleading guilty to. Indeed, the judge's three-line interaction with Appellant entailed only conclusory questions that did not provide a reliable basis for finding Appellant understood any consequence of the plea except that he would be waiving his right to a jury trial. *C.f. Boykin v. Alabama*, 395 U.S. 238, 243 (1969) ("Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered . . . [including] the privilege against compulsory self-incrimination . . . . [and] the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record." (citations omitted)). Further, nothing in the record provides a basis to infer that plea counsel specifically advised Appellant about the length of potential sentences or any other consequences. To the contrary, the dialogue suggests plea counsel did not satisfactorily advise Appellant insofar as upon hearing the sentence, counsel appeared surprised, unprepared for the situation, and asked to withdraw the plea in favor of a trial. Thus, the plea judge abused his discretion in accepting Appellant's plea as implicitly knowing without where he did not inquire into whether Appellant understood the potential sentence he was facing and where nothing else in the record suggests Appellant was fully informed in making the plea.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse his guilty plea and remand the case for trial.

Respectfully submitted,

  
\_\_\_\_\_  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of July, 2014.

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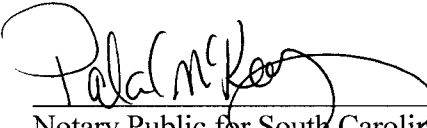
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of July, 2014.

  
\_\_\_\_\_  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 28th day of July, 2014.

  
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(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.