

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SEP 17 2014

SC Court of Appeals

Appeal from Lancaster County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHAWN FOSTER,

APPELLANT

APPELLATE CASE NO. 2013-002749

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

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### STATEMENT OF ISSUE ON APPEAL

Did the plea judge abuse his discretion in sentencing Appellant where Appellant appeared before the judge for an opportunity to enter an *Alford* plea but where Appellant never actually pled guilty and where the plea judge never found that Appellant knowingly and voluntarily pled guilty?

### STATEMENT OF THE CASE

On January 10, 2013, the Lancaster County Grand Jury indicted Appellant Dyeshawn Foster on counts of attempted murder, possession of a firearm during the commission of a violent crime, and unlawful carrying of a pistol. R. 22-27. On December 9, 2013, Appellant appeared at a plea hearing before The Honorable J. Ernest Kinard, Jr. Mark Grier represented Appellant and Randall Newman represented the State. R. 1. Judge Kinard handed down concurrent sentences of eighteen years, five years, and time served for charges of assault and battery of a high and aggravated nature, possession of a firearm during the commission of a violent crime, and unlawful carrying of a pistol, respectively. App. 19, line 25—App. 20, line 5.

## ARGUMENT

**THE PLEA JUDGE ABUSED HIS DISCRETION IN SENTENCING APPELLANT BECAUSE APPELLANT NEVER ACTUALLY PLED GUILTY TO THE CHARGES, NOR DID THE JUDGE FIND APPELLANTLY KNOWINGLY AND VOLUNTARILY PLED GUILTY.**

### STATEMENT OF FACTS

Appellant appeared at the hearing before Judge Kinard for an opportunity to enter a plea pursuant to *North Carolina v. Alford*<sup>1</sup> without any recommendations from the State. App. 3, lines 2-13. The plea judge asked Appellant whether he understood the nature of an *Alford* plea; whether he understood the potential sentences for the charges; and whether he understood the trial rights he would waive by pleading guilty. App. 3, line 14—App. 7, line 4; App. 8, line 8—App. 9, line 10.

The State then alleged that on September 30, 2013, law enforcement officers responded to a report of a shooting in which witness allegedly observed Appellant with a gun near a car. Two victims inside the car suffered multiple gunshot wounds. App. 7, line 23—App. 9, line 25.

In response, counsel for Appellant elaborated that the shooting occurred at a cookout amongst friends and family members. No one involved in the case disputed that “the victim that was most seriously injured . . . pulled a gun out and started waving it and threatening and cussing everybody out that was out there.” The victim attempted to shoot Appellant, missed, and struck Appellant’s cousin. App. 14, lines 3-21. Appellant’s grandmother and mother then spoke in his defense. App. 16, line 11—App. 19, line 9.

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<sup>1</sup> 400 U.S. 25 (1970).

The plea judge then asked Appellant if he wanted to speak, and he responded, “Just say I love my family.” The judge replied, “Well, good people do bad things” before giving Appellant “slack for pleading guilty” and sentencing him. App. 19, line 11—App. 20, line 5.

### DISCUSSION

The plea judge abused his discretion in sentencing Appellant because Appellant never actually pled guilty to the charges, nor did the judge find appellant knowingly and voluntarily pled guilty. “[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 the trial judge is not required to accept a plea. *Id.* at 685, 511 S.E.2d at 401. *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 transcript shows Appellant never articulated to the judge a plea of guilty. Further, the events during the hearing show Appellant's hesitancy and reluctance to waive his trial rights and plead guilty. Appellant appeared at the hearing for in consideration of an *Alford* plea, and therefore patently claimed his innocence of the charges. Counsel for Appellant then described Appellant's version of the events in strongly suggesting that Appellant believed he acted in self-defense or in justifiable response to provocation. Appellant's grandmother and mother then spoke in his defense as well. Thus, the facts and circumstances of the incident suggest that Appellant did not believe that a plea was in his best interest with any degree of certainty.

The purpose of the plea hearing was to allow Appellant to knowingly and voluntarily waive his constitutional trial rights and accept punishment. A strong presumption against a waiver of such momentous rights existed, and it could not be overcome until Appellant affirmatively chose this path with unequivocal words on the record. Even standing before the plea judge, Appellant, like many defendants, appeared not to have firmly made this decision in his own mind. He did not assent to the option based merely on his presence in the courtroom. The plea judge asked Appellant whether he understood the nature of an *Alford* plea; whether he understood the potential sentences for the charges; and whether he understood the trial rights he would waive by pleading guilty. However, he never asked Appellant whether he actually waived his rights and pled guilty. Thus, the plea judge abused his discretion in summarily concluding Appellant made this decision and in sentencing him.

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 17th day of September, 2014.

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\_\_\_\_\_  
PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Deshawn Foster states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Ernest Kinard, Jr., which was held on December 9, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Deshawn Foster.

Respectfully submitted,

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

ATTORNEY FOR APPELLANT

This 17th day of September, 2014.

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APPELLATE CASE NO. 2013-002749

\_\_\_\_\_  
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Guilty Plea Hearing Transcript (December 9, 2013)

I certify that this designation contains no matter which is irrelevant to this appeal.

September 17th, 2014

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

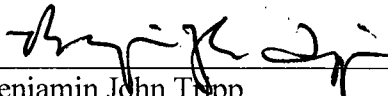
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

September 17, 2014

  
\_\_\_\_\_  
Benjamin John Trapp  
Appellate Defender

S.C. Commission on Indigent Defense  
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1330 Lady Street, Suite 401  
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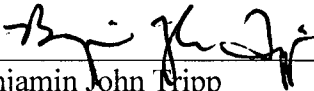
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DESHAWN FOSTER,

APPELLANT

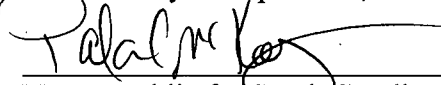
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Deshawn Foster, #358161 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 17th day of September, 2014.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 17th day of September, 2014.

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