STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUN 05 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001419

STATE OF SOUTH CAROLINA,

Appellant,

v.

JAMES A. SUMMERSETT,

Respondent.

INITIAL BRIEF OF RESPONDENT

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 FAX
tdslaw@shurlinglaw.com

ATTORNEY FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

STATEMENT OF THE ISSUE ON APPEAL 4

STATEMENT OF THE CASE 5

ARGUMENT 5

CONCLUSION 13

DESIGNATION OF MATTER 14

CERTIFICATE OF SERVICE ON OPPOSING COUNSEL 16

<u>TABLE OF AUTHORITIES</u>

Cases

State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (S.Ct. 2013)..6

State v. Kibler, 267 S.C. 250, 227 S.E.2d 199 (1976). .... *in passim*

State v. Munsch, 287 S.C. 313, 338 S.E.2d 339 (1985)...6,7

State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011)....................................9

State v. De La Cruz, 302 S.C.13, 15, 393 S.E. 2d 184, 186 (1990)................................9

State v. Standard, 351 S.C. 199, 569 S.E.2d 325(2002)...9

State v. Summersett, Jr., 2005-UP-373 (Ct. App. filed June 10, 2005)........................5,8

State v. Summersett, Jr., 2008-MO-025 (S.Ct. filed July 28, 2008)............................5,8

North Carolina v. Alford, 400 U.S. 25 (1970)..7

Hudson v. United States, 272 U.S. 45 (1926)...7

Constitutional Authorities

Amendment XIV, United States Constitution 10

Statutory Authorities

S.C. Code Ann. §17-25-45...4,6,9,10,12

1962 South Carolina Code of Laws, §17-504..10

S.C. Code Ann §17-23-40...12

STATEMENT OF THE ISSUE ON APPEAL

I.

The lower court properly found that a judgment obtained as a result of a *nolo contendere* plea to a felony should not be considered as a prior conviction of a most serious crime for purposes of S.C. Code Ann. Section 17-25-45, and therefore, properly exercised its discretion in vacating Appellant's life without parole sentence for voluntary manslaughter.

STATEMENT OF THE CASE

James A. Summersett was indicted in Charleston County for murder (2002-GS-10-5115) and possession of a firearm during the commission of a violent crime (2002-GS-10-5116). He proceeded to trial before the Honorable Daniel Pieper, and a jury, and was convicted as charged. He was sentenced to imprisonment for life. The convictions and sentences were affirmed by the South Carolina Court of Appeals, but reversed by the South Carolina Supreme Court. *See, State v. Summersett, Jr.*, unpublished Op. No. 2005-UP-373 (Ct. App. filed June 10, 2005); *State v. Summersett, Jr.*, Memo. Op. No. 2008-MO-025 (S.Ct. filed July 28, 2008).

Summersett thereafter proceeded to a bench trial before the Honorable J. C. Nicholson, Jr., and was found guilty of voluntary manslaughter as the lesser-included offense of murder. He was sentenced on January 26, 2010, to life without parole pursuant to S.C. Code Ann. Section 17-25-45 (Rev. 2014). Summersett, acting through Trial Counsel, filed a motion to reconsider the sentence on January 29, 2010. On November 13, 2013, a hearing was convened before Judge Nicholson on the motion for reconsideration. Respondent was represented at that proceeding by undersigned counsel, Tara Dawn Shurling. Respondent, through counsel, waived his right to be present for this proceeding. After the submission of memoranda by Respondent and the State, Judge Respondent's sentence of life without possibility of parole and granted a new sentencing proceeding. The State filed a notice of appeal on June 30, 2014. This appeal follows.

ARGUMENT

The findings of fact and conclusions of law found in Judge Nicholson's well reasoned Order vacating Respondent's Life without Parole sentence are both legally and factually sound. His finding of a due process violation in the use of a plea of *nolo*

contendere to a felony, most serious offense was predicated upon proper interpretations of existing precedents both from our state appellate courts and federal courts as well. The rulings made by Judge Nicholson were not based upon an erroneous interpretation of law and should not be disturbed on appeal.

Appellant has correctly summarized the law in South Carolina as it relates to statutory construction. Respondent is very aware of the language found in § 17-25-45 concerning pleas of *nolo contendere* and has not disputed that, under the language of the statute, a *nolo contendere* plea would constitute a conviction which could be applied as a strike under that code section. Respondent argues that, as found by the lower court, 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 this position, the order of the lower court noted that in *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (S.Ct. 2013), for example, our Supreme Court struck down as unconstitutional, under the due process clause, 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.

Contrary to the assertions of Appellant, Judge Nicholson provided clear factual and legal analysis for his finding that the Respondent's plea of *nolo contendere* was not valid pursuant to *State v. Kibler, 267 S.C. 250, 227 S.E.2d 199 (1976).* Simply put, the decision in *Kibler* stands as a judicial denial of the acceptance of such pleas. Id, 267 S.C. at 254, 227 S.E.2d at 201.

The Appellant's reliance upon *State v. Munsch, 287 S.C. 313, 338 S.E.2d 339 (1985)* is misplaced. As noted in Judge Nicholson's order, the Supreme Court of South Carolina in Munsch, 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." *Munsch, 287 S.C. at 314, 338 S.E.2d at 330.* The Court in *Munsch* specifically stated,

> 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 guilt.

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

Respondent respectfully submits that Judge Nicholson correctly concluded 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." Order, pg. 5, para. 2. This interpretation of *Munsch* is logical and correct. In the landmark case of *North Carolina v. Alford, 400 U.S. 25 (1970),* the United States Supreme Court recognized that as far back as 1926 it had found 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 authorities the Court *for the purposes of the case* to treat him as if he were guilty." Id at 35, quoting *Hudson v. United States, 272 U.S. 45 (1926)* (*Emphasis added*). Thus it is clear that the finding in *Munsch* that a plea of *nolo contendere*, "admits all the elements of the offense charges" should be interpreted to mean that such a plea is sufficient to sustain a judgment for the crime on which the plea is entered and that the judgment may not thereafter be challenged on the basis of the sufficiency of the evidence to support the plea. As noted by Judge Nicholson in his order, although there is no transcript of the Defendant's 1994 *nolo contendere* plea before the court, the Defendant's position concerning the facts surrounding the shooting which lead to the 1993 charge of Assault and 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. The language found in these decisions makes it clear that the Defendant not only pleaded *nolo contendere,* but consistently 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. See, State v. Summersett, Jr.,* unpublished Op. No. 2005-UP-373 (Ct. App. filed June 10, 2005); *State v. Summersett, Jr.*, Memo. Op. No. 2008-MO-025 (S.Ct. filed July 28, 2008).

Respondent submits that the lower court was correct in concluding that his plea of *nolo contendere* to a felony was not valid under *Kibler* where his plea was entered after the judicial prohibition against the acceptance of such pleas arose. While the Court in *Kibler* ultimately found no error in the trial judge's acceptance of the *nolo contendere* plea entered in that case, "nor any prejudice to [*Kibler*]" the Court expressly found 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 (Emphasis added). Respondent further submits that Judge Nicholson correctly found that he, unlike *Kibler,* has demonstrated prejudice arising from the trial court's error in accepting his *nolo contendere* plea to a felony. Order, pg. 8, para. 2.

As acknowledged by Appellant, Respondent's Motion for Reconsideration of Sentence asked for reconsideration of sentence, "upon the grounds that the sentence imposed is unnecessarily severe under the circumstances, and upon such other and further grounds as may be hereinafter presented." Motion for Reconsideration of Sentence, dated January 28, 2010, para. 2. In light of the language of Respondent's motion, any assertion

that the grounds upon which resentencing was granted were not properly before the Court is meritless. Respondent's claims clearly fell within the language of the Motion for Reconsideration of Sentence where they go directly to the question of whether the penalty imposed was unnecessarily harsh in light of the circumstances in his case. Further, the relief granted went directly to the prayer for a reduction in sentence and the grounds upon which relief was granted fell within the ground specifically articulated in respondent's motion. While Respondent did renew the Motion for a New Trial made by Trial Counsel at the conclusion of his bench trial during his hearing on the Motion for Reconsideration of Sentence, that relief was not granted by Judge Nicholson. In light of that fact, any reliance by Appellant on this Honorable Court's decision in *State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011),* is misplaced.

Significantly, Respondent has never asserted that the use of a prior *guilty plea* as a strike could be challenged in a sentencing proceeding pursuant to § 17-25-45 by raising claims that the prior plea was not voluntarily entered. Thus, Appellant's reliance on *State v. De La Cruz, 302 S.C.13, 15, 393 S.E. 2d 184, 186 (1990)* and *State v. Standard, 351 S.C. 199, 569 S.E.2d 325(2002)* is misplaced as well. To the contrary, the fact that a plea of *nolo contendere* does not constitute an admission of guilt lies at the core of the arguments advanced by Respondent's Counsel in the Memorandum in Support of Motion to Reconsider Sentence filed on January 27, 2014 and in the rulings of Judge Nicholson in his Order filed June 20, 2014.

While Appellant cites to multiple cases for the proposition that South Carolina's recidivist offender law, "the strike law", found at S.C. Code § 17-25-45 has withstood attacks on constitutional grounds, none of these cases deals with the specific constitutional challenge before the Court in this appeal. Respondent does not challenge

the constitutionality of the entire recidivist law. Respondent asserts, as found by the Court below, that,

> 1) the use of his *nolo contendere* plea to a felony as a predicate most serious strike is improper where the plea was subject to judicial denial of acceptance pursuant to *Kibler*, *supra*, and Section 17-504 of the 1962 South Carolina Code of Laws and
>
> 2) that the use of any *nolo contendere* plea to support a life sentence imposed pursuant to § 17-25-45 would violate Respondent's right to due process of law as guaranteed by the Fourth Amendment to the United State's Constitution where, unlike a guilty plea, such a plea does not constitute an admission of the facts of the crime.

Appellant argues for a distinction between using the existence of the plea for purposes of "the strike law" and the use of such a plea as proof of the underlying facts supporting the judgment. There is no question that a plea of *nolo contendere* may be treated as the same as a guilty plea "in so far as the consequences *in the particular case in which it is pled.*" *Kibler, supra 267 S.C. at 254, 227 S.E. 2d at 201.* The issue is whether the State can use the fact of such a plea beyond *"the consequences in the particular case"* in which the plea was entered by submitting it as a predicate offense to justify a sentence of life without parole pursuant to §17-25-45. Respondent asserts that the lower court correctly found that it can not.

The lower court articulated sound legal analysis for its conclusion that use of Respondent's plea of *nolo contendere* as a most serious strike would violate his right to due process of law where the plea did not constitute an admission of guilt of the facts alleged in support of the underlying charge. As noted in *Kibler, supra*, and in the Order before this Honorable Court for review, there is a well established rule against the use of a *nolo contendere* plea as an admission against a defendant in civil litigation. *Kibler*, at fn 1 and Order at pg. 7, para 3.

Respondent argues that the State should be allowed to use the "existence" of the *nolo contendere* plea in question without such use constituting a claim of an admission of guilt. This distinction is not "critical" as argued by Appellant; it is non-existent in South Carolina. Appellant erroneously argues that once entered, a *nolo contendere* plea stands on the same footing as a conviction arising from a guilty plea or a jury verdict. Brief of Appellant, page 10, para. 2. In truth, such pleas stand on equal footing with judgments entered by way of jury verdict or guilty plea *only* as it pertains to "the consequences in the particular case in which it is pled." *Kibler, 267 S.C. at 254, 227 S.E.2d at 201.*

Respondent submits that Appellant erroneously concludes that the Supreme Court's decision in *Kibler* does not prohibit the acceptance of *nolo contendere* pleas in felony cases. In *Kibler* our Supreme Court noted that while Section 17-504 did not expressly prohibit pleas of *nolo contendere* to felonies, it only expressly authorized such pleas to misdemeanors. The Court went on to apply the maxim "*expression unius est exclusion alterious*" (expression of one thing is exclusion of another) in finding that the fact that 1962 South Carolina Code of Laws expressly permitted plea of *nolo contendere* to misdemeanors should be could be interpreted as limiting the acceptance of such pleas to misdemeanors. The Supreme Court specifically "that the proper procedure for our lower courts to follow is to refrain from accepting pleas of *nolo contendere* in felony cases until such are authorized by our legislature." Id, 267 S.C. at 254-255, 227 S.E. 2d at 201. Once again, Respondent would note that in denying *Kibler* relief, the Supreme Court emphasized that, prior to the decision in *Kibler*, there had been "no judicial denial of acceptance of such pleas..." Respondent therefore submits that the lower court correctly found that after the *Kibler* decision, which predated Respondent's plea by decades, there was a judicial ruling in place which found such pleas to be improper in

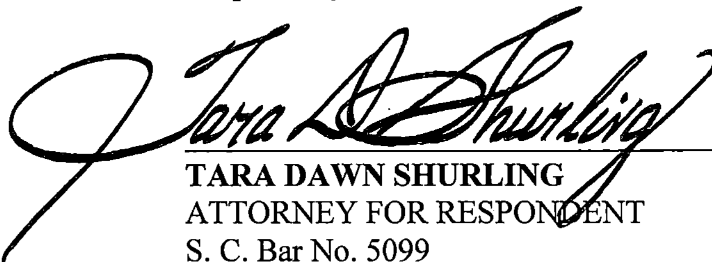
misdemeanor cases.

Respondent would note that affirming the Order issued below would not open the Courts to a flood of challenges to life sentences imposed pursuant to § 17-25-45. Pleas of *nolo contendere* in felony cases post *Kibler* are exceedingly rare. It is highly unlikely that many, if any, other such cases exist. Likewise, as recognized by Judge Nicholson in the Order before this Court, no future defendant could utilize the decision of the court in this case to avoid accruing strikes as defined by § 17-25-45 where our courts must consent to the entry of such a plea pursuant to §17-23-40. Likewise, even if the Court were to consent to entry of a *nolo contendere* plea to a felony, the State could properly object to the acceptance of the plea pursuant to Kibler.

CONCLUSION

For all the reasons set forth herein, as well as those articulated by the lower court in its Order filed June 20, 2014, Respondent submits that Appellant has failed to demonstrate that the lower court's ruling constituted an abuse of discretion based upon an error of law. The Order entered in this matter is based upon sound legal analysis supported by the lower court's accurate interpretation and application of existing authorities. Respondent asks that the Order of the lower court be affirmed on the grounds advanced herein, as well as any other grounds appearing in the Record on Appeal pursuant to Rule 220 (c) , SCACR.

Respectfully submitted,



TARA DAWN SHURLING
ATTORNEY FOR RESPONDENT
S. C. Bar No. 5099

This 3rd day of June, 2015.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

RECEIVED
JUN 05 2015
SC Court of Appeals

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001419

STATE OF SOUTH CAROLINA,

Appellant,

v.

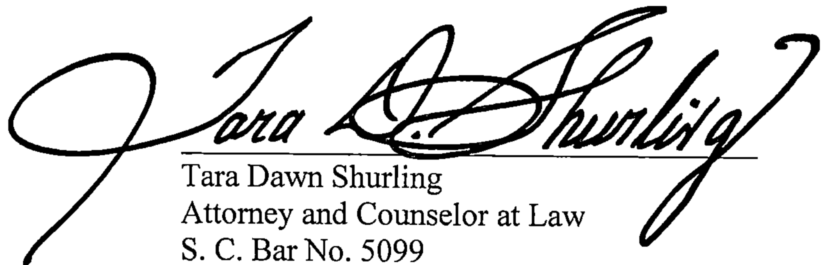
JAMES A. SUMMERSETT,

Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Respondent's Initial Brief and Designation of Matter in the above-entitled case have been served upon opposing counsel, this 3rd day of June, 2015, by depositing in the U.S. Mail, postage prepaid, properly addressed to:

Salley W. Elliott
Senior Assistant Deputy Attorney General
Office of the Attorney General
P O Box 11549
Columbia, SC 29211-1549



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

Attorney for Respondent.

SWORN TO BEFORE me this 3rd day
of June, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

LAW OFFICE OF

TARA DAWN SHURLING, PA

Attorney and Counselor at Law
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204

E-Mail: tdslaw@shurlinglaw.com

(803) 738-8622
(Fax) (803) 738-1600

June 3, 2015

RECEIVED
JUN 05 2015
SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State of South Carolina v. James A. Summersett; Appellate Case 2014-001419.

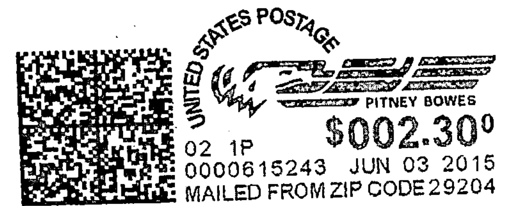
Dear Ms. Kitchings:

Enclosed please find for filing the original of the Initial Brief of Appellant and Designation of Matter in the above captioned matter. We would appreciate your clocking and returning the extra copy in the enclosed self-addressed, stamped envelope. With my best regards, I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/
Enclosures
cc: Salley W. Elliott, Senior Assistant Deputy Attorney General (w/enclosures)
James A. Summersett 216032 (w/enclosures)
Quincy Summersett (w/enclosures)



Law Office of
TARA DAWN SHURLING, PA
3614 LANDMARK DRIVE, SUITE D
COLUMBIA, SOUTH CAROLINA 29204

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JUN 05 2015
SC Court of Appeals