STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2013-001296

THE STATE, ...RESPONDENT

v.

MICHAEL E. HAWKINS, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Respondent's Statement of Issues on Appeal 1

Statement of the Case 2

Statement of Facts 3

Argument:

I. The plea court properly denied Appellant's motion to vacate or withdraw his guilty plea based on his claim of after-discovered evidence where: (1) that claim was not preserved for appellate review; and (2) Appellant failed to present sufficient evidence to support a grant of relief. 8

II. The trial court properly denied Appellant's motion to vacate or withdraw his guilty plea based on a claim of disparate sentencing where: (1) Appellant's sentence was not imposed after he exercised his right to a jury trial; (2) the plea judge gave Appellant the lowest possible sentence for his crimes; (3) a different judge sentenced Appellant's co-defendants; (4) Appellant's sentence was not disparate; and (5) the record reflected an appropriate basis for imposing a different sentence. 15

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) 13, 14
Neil v. Biggers, 409 U.S. 188 (1972) 5
North Carolina v. Alford, 400 U.S. 25 (1970) 2
Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975) 10
Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) 12
State v. Barton, 325 S.C. 522, 481 S.E.2d 439 (Ct. App. 1997) 11, 12
State v. Bickham, 381 S.C. 143, 672 S.E.2d 105 (2009) 11
State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013) 8
State v. Cantrell, 250 S.C. 376, 358 S.E.2d 189 (1967) 12
State v. Clark, 130 S.C. 149, 125 S.E. 297 (1924) 14
State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (2002) 16, 17
State v. Hazel, 317 S.C. 368, 433 S.E.2d 879 (1995) 16
State v. Herndon, 403 S.C. 84, 742 S.E.2d 375 (2013) 11
State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) 16
State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (Ct. App. 2002) 12
State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000) 12
State v. Rice, 401 S.C. 330, 737 S.E.2d 485 (2013) 9
State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982) 11, 12
State v. Rikard, 371 S.C. 295, 638 S.E.2d 72 (Ct. App. 2006) 11
State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012) 9
State v. Thomason, 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003) 12
Tollett v. Henderson, 411 U.S. 258 (1973) 10
United States v. Ruiz, 536 U.S. 622 (2002) 11

Statutes:

S.C. Code Ann. § 16-11-311(B) 16
S.C. Code Ann. § 24-21-410 16

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the plea court properly denied Appellant's motion to vacate or withdraw his guilty plea based on his claim of after-discovered evidence where: (1) that claim was not preserved for appellate review; and (2) Appellant failed to present sufficient evidence to support a grant of relief.

2. Whether the trial court properly denied Appellant's motion to vacate or withdraw his guilty plea based on a claim of disparate sentencing where: (1) Appellant's sentence was not imposed after he exercised his right to a jury trial; (2) the plea judge gave Appellant the lowest possible sentence for his crimes; (3) a different judge sentenced Appellant's co-defendants; (4) Appellant's sentence was not disparate; and (5) the record reflected an appropriate basis for imposing a different.

STATEMENT OF THE CASE

Appellant was indicted at the April 2012 term of the grand jury for Beaufort County for first-degree burglary (2012-GS-07-720), assault and battery of a high and aggravated nature (ABHAN) (2012-GS-07-722), criminal conspiracy (2012-GS-07-723), armed robbery (2012-GS-07-763), possession of a weapon during the commission of a violent crime (2012-GS-07-764), and two counts of kidnapping (2012-GS-07-721 & -923). He was represented by Christopher W. Lempesis, Jr, Esquire. Respondent (the State) was represented by Assistant Solicitor Mary Concannon of the Fourteenth Circuit Solicitor's Office. On April 18, 2013, Appellant pled guilty as charged pursuant to North Carolina v. Alford.[1] He was sentenced by the Honorable Carmen T. Mullen to fifteen (15) years' imprisonment for first-degree burglary, fifteen (15) years' concurrent imprisonment for ABHAN, five (5) years' concurrent imprisonment for possession of a weapon during a violent crime, five (5) years' concurrent imprisonment for criminal conspiracy, fifteen (15) years' concurrent imprisonment for armed robbery, and fifteen (15) years' concurrent imprisonment for each count of kidnapping, for an aggregate sentence of fifteen (15) years' imprisonment. (Tr.p.1; p.23, line 8-p.24, line 13; Indictments & Sentencing Sheets). Appellant timely filed a motion to vacate or withdraw his guilty plea (April 25, 2013, Motion to Vacate/Withdraw) and on April 29, 2013, Assistant Solicitor Meredith A. Bannon filed a response on behalf of the State. (Response to Defense Motion to Vacate Guilty Plea). In an Order dated May 13, 2012, and filed May 15, 2013, the trial court denied Appellant's motion. Appellant then filed a

[1] 400 U.S. 25, 37-38 (1970) (holding the lower court committed no constitutional error in accepting a guilty plea despite the defendant's claim of innocence where there was a strong factual basis for the plea and where the defendant, advised by competent counsel, intelligently concluded that he should plead guilty to limit his possible sentence).

notice of intent to appeal his convictions and sentences and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On the afternoon of March 19, 2012, Appellant and three co-defendants, Eric Mack, Jamin Anderson, and Robert Lane, unlawfully entered the home of Loretta Jackson and Laron Jackson.[2] The intruders bound the Jacksons with duct tape and began taking items from the house. During the burglary, Appellant taunted Ms. Jackson because she was praying for her life. Mr. Jackson was eventually able to free himself from his restraints, jump from the second story balcony, and run to a neighbor's house to get help. By the time law enforcement officers arrived, the defendants had fled in a van Appellant borrowed from his girlfriend. Following an initial stop, the van sped away and the defendants led the police on a chase reaching speeds of 140 miles per hour. When the van was eventually stopped again, Appellant and a second co-defendant fled on foot. Several hours later Appellant was spotted walking down the road, wet from the waist down. He was apprehended and transported to the Sheriff's office where he gave a statement and was then charged with the crimes. (Tr.p.16, line 7-p.19, line 1).

On April 18, 2013, Appellant and codefendant Eric Mack appeared before the Honorable Carmen T. Mullen to enter pleas. After taking Mack's plea, Judge Mullen presided over Appellant's Alford plea. Appellant was sworn-in and answered a series of questions from the court. He said he wanted to plead guilty under Alford to all seven charges. Counsel explained that, based on his investigation, he believed the State had

[2] A fourth co-defendant, Veronica Mack, stayed outside in the van while the four men went inside. (April 23, 2013, Tr.p.50, lines 2-9).

adequate evidence to prove his client's guilt on all charges beyond a reasonable doubt. (Tr.p.3, line 1-p.6, line 19). Appellant testified he understood his Alford plea would be recorded as a guilty plea. He said he had not had any medications or alcohol in the previous 24 hours and was not suffering from any mental or physical condition that would prevent him from understanding the plea proceeding. The court then explained the charges and the possible sentences. Appellant testified he understood the charges and wanted to plead guilty to each charge under Alford. (Tr.p.6, line 20-p.13, line 12).

Despite entering an Alford plea, Appellant admitted he was in fact guilty of the two kidnapping charges. (Tr.p.8, line 14-p.9, line 3). Appellant testified he understood that by entering a plea he was giving up his right to a jury trial, which included his right to remain silent and his right to cross-examine the State's witnesses. He said he was completely satisfied with how counsel represented him. Appellant testified no one had promised him anything or pressured or threatened him to get him to plead guilty. He said no one from law enforcement or the Solicitor's Office had mistreated him in any way. Appellant testified he had understood all of the court's questions and had been truthful in his responses. (Tr.p.13, line 13-p.16, line 6). The solicitor then recited the facts (as described above). Appellant testified he was entering his Alford plea to the facts as stated. The court found there was a substantial factual basis for the plea and that Appellant's decision to plead guilty was made freely and voluntarily, and knowingly and intelligently, with the consent of competent counsel with whom he was satisfied. The court accepted the plea. (Tr.p.16, line 4-p.19, line 1).

The court then heard from Ms. Jackson, Appellant's counsel, and Appellant himself before imposing the fifteen year sentence. In regard to her ability to identify

Appellant as one of the assailants, Ms. Jackson said: "I stand before you again, Your Honor. This voice will be a voice that always will be embedded in my mind. When I close my eyes I can hear the voice so I just hope that justice is done because my life is shaken, it's torn." Counsel said he and Appellant had talked about Ms. Jackson's voice identification before Appellant chose to enter an Alford plea. He said they discussed the victim's identification in the context of a possible Neil v. Biggers[3] challenge. Counsel said he advised Appellant that there may be some question as to the admissibility of Ms. Jackson's identification; however, after weighing everything together, Appellant decided to take the Alford plea in order to avoid a sentence exposure of 120 years plus life in prison. (Tr.p.20, line 4-p.24, line 16). Appellant then offered an apology for his part in the crimes. He testified:

> You know, I'm just, I would like to apologize and say, you know, I'm sorry for the situation that happened and, you know, the tragic situation that they were exposed to or whatever. I have a family. I don't want these type events happening to them either, you know what I'm saying so, I'd like to say I'm sorry with everything that happened in the case or whatever.

(Tr.p.22, line 22-p.23, line 4) (emphasis added). At no point during the plea proceeding did Appellant object to or otherwise challenge either the solicitor's recitation of the facts or the victim's statement that she could positively identify Appellant by his voice. He also did not object to the sentence imposed and did not make a motion to withdraw his plea at the end of the plea proceeding.

Five days later, on April 23, 2013, the State called the case against co-defendants Robert Lane and Veronica Mack for trial before the Honorable J. Ernest Kinard, Jr. (April 23, 2013, Tr.p.1; p.50, lines 2-9). Counsel for Lane made a pretrial motion to

[3] 409 U.S. 188 (1972).

suppress Ms. Jackson's out-of-court and in-court identifications of Lane. Following a Neil v. Biggers hearing during which testimony was elicited from Ms. Jackson that she was only able to identify Lane by voice but not sight, the trial court granted Lane's motion to suppress. (April 23, 2013, Tr.p.28, line 19-p.36, line 15). The parties then participated in an off-the-record, in-chambers, conference with Judge Kinard. When they emerged from chambers, the solicitor announced a plea agreement had been reached. (April 23, 2013, Tr.p.42, line 18-p.19, line 3). Lane and Veronica Mack each pled guilty to second-degree burglary, two counts of kidnapping, possession of a weapon during commission of a violent crime, criminal conspiracy, ABHAN, and strong-arm robbery. (emphasis added). They admitted their guilt and listened to the solicitor's recitation of the facts before being sentenced. Lane was sentenced to concurrent terms of imprisonment for an aggregate sentence of twenty-five (25) years' imprisonment suspended upon the service five-and-a-half (5 ½) years' imprisonment and five (5) years' probation. Mack was sentenced to concurrent terms of imprisonment for an aggregate sentence of twenty-five (25) years' imprisonment suspended upon the service of five (5) years' imprisonment and five (5) years' probation. (April 23, 2013, Tr.p.43, line 1-p.60, line 14).

Two days after Lane's and Mack's guilty pleas, Appellant filed a motion with Judge Mullen to vacate or withdraw his own guilty plea on three grounds. First he asserted his plea should be vacated because of newly-discovered evidence concerning his identification by the victim. Appellant claimed Ms. Jackson's testimony at Lane's suppression hearing contradicted information previously offered by the State in discovery discussions, oral arguments to the court, and pleadings. He argued that neither he nor the

court was properly informed of the facts concerning the victim's ability to identify him and that the misinformation concerning these material facts deprived the court of the knowledge necessary to do justice, which effectively infringed on his constitutional rights. Second, Appellant asserted his plea should be vacated pursuant to Section 17-27-20(a)(4) of the Code based on the existence of these material facts which has not previously been presented. Finally, Appellant asserted his plea should be vacated due to an alleged disparity between his sentence and the ones given to codefendants Lane and Veronica Mack. (April 25, 2013, Motion to Vacate/Withdraw).

On April 29, 2013, Assistant Solicitor Meredith A. Bannon filed a written response on behalf of the State. She gave a detailed account of the facts of the crimes and described a pretrial conference with Judge Mullen where the identification issues were discussed with counsel for each of the four remaining co-defendants (Anderson, had already entered an Alford plea). The solicitor noted the Jacksons were adamant in their identifications of the defendants and that the State had a good faith basis to believe Ms. Jackson. She described the likely defense each defendant would raise at trial and explained Appellant was "fully aware of all the evidence the State was intending to present at trial when he decided to plead guilty." (Response to Defense Motion to Vacate Guilty Plea). In an Order dated May 13, 2012, and filed May 15, 2013, the plea court held:

> After consideration of the briefs provided by counsel the motion to vacate or in the alternative to withdraw the guilty plea is denied without a hearing. This court finds that the Defendant knowingly intelligently, willingly and voluntarily entered his guilty plea and his plea was properly accepted.
>
> Accordingly, the motion to reconsider is DENIED.

(May 13, 2013, Order).

ARGUMENT

I.

The plea court properly denied Appellant's motion to vacate or withdraw his guilty plea based on his claim of after-discovered evidence where: (1) that claim was not preserved for appellate review; and (2) Appellant failed to present sufficient evidence to support a grant of relief.

Appellant argues the plea judge erred in denying his motion to vacate his guilty plea based on after-discovered evidence. He contends the judge abused her discretion by failing to consider any evidence relevant to the after-discovered evidence issue. Appellant claims that in deciding to enter a plea he relied on numerous representations from the State that the victim could confidently identify him, and therefore he had no reasonable means to discover her identification was based on what he now alleges are "highly suggestive procedures." (Brief of Appellant, p.8). The State disagrees and submits Appellant's argument should denied and dismissed on several grounds.

Not Preserved for Review

First, the State submits that despite attempting to avoid a preservation problem by framing his argument as an allegation of after-discovered evidence, the argument is simply not preserved for appellate review because it was not timely raised to and ruled upon by the lower court. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements to preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court). At the plea proceeding, counsel said he and Appellant had talked about Ms. Jackson's voice identification before Appellant chose to enter an Alford plea. He said they discussed the victim's identification in the context of a possible Neil v.

Biggers challenge. Counsel said he advised Appellant that there may be some question as to the admissibility of Ms. Jackson's identification; however, after weighing everything together, Appellant decided to take the Alford plea in order to avoid a sentence exposure of 120 years plus life in prison. (Tr.p.20, line 4-p.24, line 16). Thus, both counsel and Appellant knew Ms. Jackson's identification was not necessarily admissible and they knew Appellant could challenge it if he wished to do so. Instead, even with this knowledge, Appellant elected to waive any such challenge and entered a plea to avoid the likelihood of facing life in prison. Appellant did not object to or otherwise challenge either the solicitor's recitation of the facts or Ms. Jackson's statement that Appellant's voice would always be embedded in her mind. Instead, Appellant first complained to the plea judge about the victim's identification in his post-plea motion to vacate, and that complaint was based entirely on the results of Lane's decision to challenge a similar identification in his own pretrial hearing—a challenge which, with the exact same information that was available to Lane, could have been raised by Appellant. Appellant's failure to raise the known identification issue before the plea court accepted his Alford plea precludes review of Appellant's issue on appeal. See State v. Taylor, 399 S.C. 51, 63-64, 731 S.E.2d 596, 603 (Ct. App. 2012) (holding that an issue first raised in a post-trial motion is insufficient to preserve it for review on appeal where it was not first raised at trial).

In South Carolina, a guilty plea constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013). "'A guilty plea represents a break in the chain of events which has preceded it in the criminal process.'" Id. at 332, 737 S.E.2d at 486 (quoting

Tollett v. Henderson, 411 U.S. 258, 267 (1973)). By entering a guilty plea, "[a]n accused [ ] waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions." Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (citation omitted). After affirmatively waiving his rights to trial and the incidents thereof, Appellant now contends the plea court erred in not allowing him to withdraw his knowing and voluntary waiver. The State submits Appellant's argument is not preserved for appellate review.

Underlying Guilt

Additionally, Appellant's challenge on appeal is not proper because it relates to the underlying issue of his guilt or innocence. Appellant eliminated this issue when he pled guilty to the charges, admitted guilt to the kidnappings, and apologized for his actions. He cannot admit his guilt and then question the judgment on the ground that a witness who unequivocally claimed to be able to identify Appellant's voice subsequently had her physical identification of a codefendant suppressed in another proceeding. The inconsistent positions argued by Appellant cannot stand.

Appellant's complaint to the plea judge was that the solicitor effectively misrepresented material facts by repeatedly claiming the victims could positively identify the defendants. But in regard to Ms. Jackson's voice identification, these representations were entirely true. In fact, they were consistent with Ms. Jackson's unchallenged statement at Appellant's plea as well as her testimony at Lane's Neil v. Biggers hearing. She consistently maintained she could identify Appellant's voice based on the things he said when she was being bound, robbed, and taunted. In any event, the Constitution does not require that the prosecutor disclose all information that might be useful to a defendant

prior to entering a guilty plea, as this information is related to the fairness of a trial, not the voluntariness of a plea. United States v. Ruiz, 536 U.S. 622, 633 (2002). Furthermore, even if this Court determines Appellant's testimony does not constitute an actual admission of guilt in the context of his Alford plea, this still makes no difference in the overall analysis. See State v. Herndon, 403 S.C. 84, 95, 742 S.E.2d 375, 381 (2013) ("the defendant entering an Alford plea is still treated as guilty for the purposes of punishment, and simply put, is not owed anything merely because the State and the court have agreed to deviate from the standard guilty plea.").

The decision of defense counsel to allow his client to plead guilty is best addressed in a post-conviction relief proceeding and not on direct appeal. State v. Barton, 325 S.C. 522, 529-30 n.6, 481 S.E.2d 439, 443 n.6 (Ct. App. 1997) (stating that proper avenue through which to challenge a guilty plea which was not objected to at the time of its entry is through post-conviction relief). Because Appellant already pled guilty, with an understanding there were possible challenges he could raise to the victim's identification, he waived any objection to his sentence and cannot assert a violation of his rights in a post-plea motion or on appeal. To the extent this Court determines Appellant's argument is preserved for appeal, the State submits it is nevertheless without merit.

Standard of Review

Once a defendant has entered the plea of guilty, the decision on whether to allow withdrawal of the plea was left to the trial judge's sound discretion. State v. Bickham, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009); State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982); State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006); Barton, 325 S.C. at 529, 481 S.E.2d at 443. In the absence of a clear abuse of that

discretion, the appellate court will not interfere. State v. Cantrell, 250 S.C. 376, 378, 358 S.E.2d 189, 191 (1967). 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 "will normally show the trial judge did not abuse his discretion." Riddle, 278 S.C. at 150, 292 S.E.2d at 796.

Discussion / Analysis

Appellant could not withdraw his plea as a matter of right. Rolen v. State, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009); State v. Thomason, 355 S.C. 278, 285, 584 S.E.2d 143, 147 (Ct. App. 2003). Here, the trial judge conducted a thorough plea colloquy and found Appellant's guilty plea was intelligently and voluntarily entered. As abundantly confirmed by the record, Appellant's choice was voluntary, knowing, and intelligent, with sufficient awareness of the relevant circumstances and likely consequences. The plea judge, having already found Appellant's guilty plea was voluntary, saw no reason to allow the plea to be withdrawn for the stated reasons. Her finding is supported by the record and her review of Appellant's motion to vacate or withdraw demonstrates she considered all evidence relevant to the issue raised. Given Appellant's failure to object at any point before the guilty plea was accepted and he was sentenced, and his knowledge that he could raise a challenge to Ms. Jackson's identification at trial, the plea judge did not abuse her discretion when she refused to reconsider the guilty plea and allow it to be withdrawn. State v. Mansfield, 343 S.C. 66, 87, 538 S.E.2d 257, 268 (Ct. App. 2000); see also Barton, 325 S.C. at 531, 481 S.E.2d at 444 (finding no error in trial judge's refusal to allow the defendant to withdraw a guilty

plea where defendant failed to object at any point before the trial judge accepted his guilty plea and trial judge considered evidence presented by defendant, allowed defendant to testify about the nature of the guilty plea, and thoroughly questioned defendant during the guilty plea).

After-Discovered Evidence

"Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal quotations omitted). However, the traditional, five-factor newly discovered evidence test is not the proper test for analyzing whether a defendant is entitled to relief on the basis of newly discovered evidence following a guilty plea. Id. at 468, 765 S.E.2d at 129. When an individual who pled guilty seeks relief on the basis of newly-discovered evidence, relief is appropriate only where evidence is presented showing both that: (1) the newly-discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea and (2) the newly-discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the interest of justice requires the guilty plea to be vacated. Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014). The South Carolina Supreme Court has cautioned that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly-

discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. Id.

First, Appellant failed to show he could not have discovered the evidence before entry of the plea by the exercise of reasonable diligence. Although he complains the State effectively misrepresented material facts by repeatedly claiming the victims could positively identify the defendants, these representations were in fact true in regard to the voice identification. To the extent Appellant feels the strength of Ms. Jackson's ability to identify him by voice was impugned by her testimony at Lane's suppression hearing, there is no reason given and no reason to believe why this "material fact" could not have been discovered by the exercise of reasonable diligence prior to the plea. Indeed, it appears Appellant knew all the same facts known by Lane, but he chose a different course of action. The only new fact he could not have known before his plea was Judge Kinard ruling on Lane's motion to suppress, which is not predictive of how Judge Mullen would have ruled if Appellant pursued a similar motion rather than seeking the benefits of a plea. Appellant already possessed or could have readily discovered all the evidence he now claims he could not have known before his plea; therefore, it was not after-discovered evidence. See State v. Clark, 130 S.C. 149, 125 S.E. 297, 298 (1924) ("The evidence relied upon is therefore lacking in the most important essential, want of knowledge, on the part of the defendant and his counsel, of the evidence.").

Second, Appellant failed to show the newly-discovered evidence was of such weight and quality that the interests of justice required that his plea be vacated. By the time Appellant filed his post-plea motion to vacate or withdraw, Veronica Mack and

Robert Lane had pled guilty and admitted their participation in the crimes. Both would have been available to testify against Appellant. Anderson and Eric Mack has also pled guilty and could have been called as witnesses. Also, even if Ms. Jackson's physical identification of Appellant was suppressed, there is no reason to believe she would not have been permitted to identify Appellant solely by voice at trial. Finally, Appellant himself admitted he was guilty of the kidnappings and he apologized for the crimes, both of which could be introduced as admissions at trial. Given these facts and circumstances, the interests of justice would not have been served by vacating Appellant's plea and the plea judge properly denied Appellant's motion.

II.

The trial court properly denied Appellant's motion to vacate or withdraw his guilty plea based on a claim of disparate sentencing where: (1) Appellant's sentence was not imposed after he exercised his right to a jury trial; (2) the plea judge gave Appellant the lowest possible sentence for his crimes; (3) a different judge sentenced Appellant's co-defendants; (4) Appellant's sentence was not disparate; and (5) the record reflected an appropriate basis for imposing a different sentence.

Appellant argues the plea judge erred in denying his motion to vacate his guilty plea based on disparate sentencing for his codefendants. He contends the judge abused her discretion by failing to even consider or analyze any evidence relevant to the issue of whether he received an impermissibly disparate sentence. Appellant claims the record shows that no basis supported the disparity between his sentence and those imposed against Robert Lane and Veronica Mack. The State disagrees and submits Appellant's argument should be denied and dismissed for several reasons.

A trial judge abuses his discretion in sentencing when he considers the fact that the defendant exercised his right to a jury trial. State v. Hazel, 317 S.C. 368, 370, 433 S.E.2d 879, 880 (1995). In Hazel, the Supreme Court explained: "courts have long adhered to the principle forbidding a trial court from improperly considering the defendant's exercise of his constitutional right to a jury trial as an influential factor in determining the appropriate sentence." Id. (emphasis added). Here, Appellant did not exercise his constitutional right to a jury trial. Instead, he waived that right and entered an Alford guilty plea. Thus, it is impossible for the plea judge to have improperly considered Appellant's decision in imposing his sentence. See State v. Follin, 352 S.C. 235, 257, 573 S.E.2d 812, 824 (2002) ("We rule a sentencing judge may NOT improperly consider a defendant's decision to proceed with a jury trial."). It is likewise impossible for the plea judge's sentence to be an abuse of discretion where she imposed the minimum. Judge Mullen sentenced Appellant to only fifteen years' imprisonment, the absolute minimum sentence which could be imposed for his crimes. See S.C. Code Ann. § 16-11-311(B) ("Burglary in the first degree is a felony punishable by life imprisonment. . . . The court, in its discretion, may sentence the defendant to a term of not less than fifteen years."); See also State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) (affirming the circuit court's order finding that a sentence for a conviction for first degree burglary may not be suspended according to section 24-21-410 of the South Carolina Code).

In any event, any claim of disparate sentencing must fail because the co-defendants' sentences were imposed by a different judge. Nothing in the record suggests Judge Kinard knew Appellant's sentence when he sentenced Robert Lane and Veronica Mack, and Judge Mullen certainly could not have known what sentence Lane and Mack

would receive at the time she imposed Appellant's sentence. Even when Judge Mullen later learned of those sentences, she was under no obligation to modify the appropriate sentence she gave Appellant in an effort to match what Judge Kinard had given Lane and Mack. Additionally, the State submits that while Appellant's sentence is indeed different, it is not any harsher than the sentences given to Lane and Mack when considering the entire sentence structure. Although Appellant was given more active prison time, Lane and Mack were given significantly longer suspended sentences which could ultimately result in them serving sixty-six percent (66%) more prison time than Appellant.

Finally, even if the sentences are disparate, the record reflects an appropriate basis for imposing different sentences. Appellant's sentence included convictions for first-degree burglary and armed robbery while his co-defendants sentences included convictions for second-degree burglary and strong-arm robbery. Also, Appellant was the only co-defendant who taunted Ms. Jackson during the crimes. This cruel behavior combined with the different convictions would justify giving Appellant a harsher sentence. See Follin, 352 S.C. at 257, 573 S.E.2d at 824 ("[W]hen the record clearly reflects an appropriate basis for a disparate sentence, the sentencing judge may impose a different sentence on a co-defendant in a criminal trial."). For all of these reasons, the decision to deny Appellant's motion to vacate or withdraw his plea should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the convictions and sentences of the lower court be affirmed.

Respectfully submitted,

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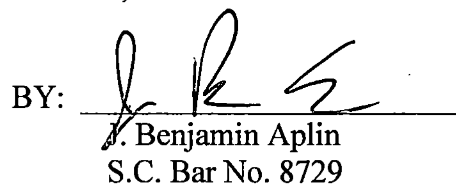
BY: 
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Columbia, South Carolina
July 17, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2013-001296

THE STATE, ...RESPONDENT

v.

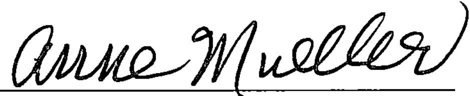
MICHAEL E. HAWKINS, ...APPELLANT.

PROOF OF SERVICE

I, Anne Mueller, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated July 17, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Benjamin J. Tripp, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 17th day of July, 2015.



Anne Mueller
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
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JUL 17 2015
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

July 17, 2015

Benjamin J. Tripp, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

Re: The State v. Michael E. Hawkins
Appellate Case No. 2013-001296

Dear Mr. Tripp:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services