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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 04 2015

SC Court of Appeals

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL E. HAWKINS,

APPELLANT

APPELLATE CASE NO. 2013-001296

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the plea judge erred in denying Appellant's motion to vacate his guilty plea under *North Carolina v. Alford* based on after-discovered evidence because the judge found that Petitioner knowingly and voluntarily pled guilty.

II. Whether the plea judge erred in denying Appellant's motion to vacate his guilty plea under *North Carolina v. Alford* based on unsupported disparate sentencing for his codefendants because the judge found that Petitioner knowingly and voluntarily pled guilty.

STATEMENT OF THE CASE

The Beaufort County Grand Jury indicted Appellant Michael Hawkins for first degree burglary violent; two counts of kidnapping; possession of a weapon during the commission of a violent crime; criminal conspiracy; assault and battery of a high and aggravated nature; and armed robbery. R. 81. On April 18, 2013, Appellant appeared at a plea hearing before The Honorable Carmen T. Mullen. Christopher W. Lempesis, Jr. represented Appellant and Mary Concannon represented the State. R.1. At the conclusion of the hearing, the plea court imposed concurrent sentences of fifteen years' incarceration for each of the burglary, kidnapping, and assault and battery charges and five years' incarceration each for the weapons charge and the conspiracy charge. R.23, line 9—R.24, line 13.

ARGUMENTS

I. THE PLEA JUDGE ERRED IN DENYING APPELLANT'S MOTION TO VACATE HIS GUILTY PLEA UNDER *NORTH CAROLINA V. ALFORD* BASED ON AFTER-DISCOVERED EVIDENCE BECAUSE THE JUDGE FAILED TO CONSIDER ANY RELEVANT EVIDENCE ON THE ISSUE.

FACTS

At Appellant's plea hearing the State alleged that the afternoon on March 19, 2012, Appellant and three codefendants entered a residence on Saint Helena Island wearing bandannas on their faces. Inside they bound the residents, a husband and wife, using duct tape and took items from the home. Counsel for the State made a point to tell the plea judge of Appellant's alleged behavior during the incident: "Ms. [Loretta] Jackson is very vehement that Mr. Hawkins began mocking her when she began praying for her life, and this has really stuck with her." R.16, lines 7-20. Counsel for the State continued that the husband freed himself and called police. Before they arrived, the defendants fled in a van. Police located and chased the van before stopping it. The defendants fled on foot. Several hours later, police learned Appellant was walking down the road in the area and had entered an elder care facility. They arrested him although he said he had been riding with a friend who left him on the road after a fight. R.16, line 20—R.18, line 16.

Prior to Appellant's plea at the hearing, one of his codefendants entered a guilty plea. R.3, line 9—R.4, line 3. Appellant then pled guilty to the charges under *North Carolina v. Alford*¹ R.7, line 9—R.13, line 4. Plea counsel explained that Appellant had maintained his innocence but acknowledged the evidence could support a conviction. The plea judge imposed concurrent sentences of fifteen years' incarceration for the burglary,

¹ 400 U.S. 25 (1970).

kidnapping, armed robbery, and assault and battery charges; five years' concurrent for each of the weapons and conspiracy charges. R.23, line 8—R.24, line 13.

On April 25, 2013, Appellant filed with the plea court a motion to vacate his guilty plea based on newly discovered evidence. R. 62. Specifically, on April 23, 2013, during pretrial motions at the trial of Appellant's other two codefendants, Robert Lane and Veronica Mack, the court held a *Neil v. Biggers*² hearing. In the hearing Loretta Jackson appeared, and it was revealed that she was only able to identify the defendants after seeing them at bond hearings and after counsel for the State showed her mug shots of the defendants and asked her to match the pictures with the defendants. The trial court granted the codefendants' motions to suppress the identification, and the State offered them plea bargains. They received concurrent sentences suspended to five years and five and one-half years of incarceration with five years of probation for each. R. 57, line 1—R. 60, line 23.

In the motion Appellant claimed that throughout his proceedings, counsel for the State represented that Ms. Jackson had confidently identified all of the defendants and provided no information or materials indicating to the contrary. R. 64—66. Appellant argued that his plea should be vacated because he entered his plea and the plea court accepted it based on false information and without knowledge of all material facts. Additionally, the record did not support the disparate sentencing imposed on Appellant and Robert Lane and Veronica Mack. R. 67.

On April 29, 2013, the State filed a response to Appellant's motion arguing the plea court should deny the motion because Appellant entered his plea knowingly and voluntarily. R. 76—78. On May 15, 2013, the plea judge issued an order denying Appellant's motion.

² 409 U.S. 188 (1972).

The order stated the court considered the parties' motions and would not hold a hearing on the matter. The judge concluded Appellant knowingly and voluntarily entered his plea, and the court properly accepted it. R. 79.

DISCUSSION

The plea judge erred in denying Appellant's motion to vacate his guilty plea under *North Carolina v. Alford* based on after-discovered evidence because the judge failed to consider any relevant evidence on the issue. A plea of guilty in a state criminal trial involves a waiver of the Constitutional right to a trial by jury. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "The United States Supreme Court has declared that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Gustine v. State*, 325 S.C. 123, 127-28, 480 S.E.2d 444, 446 (1997) (quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747, 756 (1970)). Thus, a defendant may move a plea court to vacate or withdraw a plea in favor of a trial based on the defendant's failure to enter his guilty plea with full knowledge of all material circumstances. See *State v. Clark*, 130 S.C. 149, 125 S.E. 297 (1924) (holding where defendant consented to verdict of guilty midway through trial, motion for new trial based on exculpatory witness affidavit properly denied because evidence was within defendant's knowledge prior to trial); *State v. Bradley*, 263 S.C. 223, 209 S.E.2d 435 (1974) (holding no question preserved for review when "[n]o claim [was] asserted in the trial court that the plea was involuntarily entered"). "The withdrawal of a guilty plea is generally within the sound discretion of the trial [court]." *State v. Bickham*, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009). The mere recital of a discretionary decision

is not sufficient to bring into operation a determination that discretion has been exercised. *State v. Smith*, 278 S.C. 494, 498, 280 S.E.2d 200 (1981).

To obtain a new trial based on after discovered evidence, a defendant 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).

In this case, the plea judge abused her discretion by failing to consider any evidence relevant to the issue of whether Appellant was entitled to a new trial based on after discovered evidence. The record shows that Appellant was so entitled. He learned after his plea that Ms. Jackson's identifications were fatally flawed. Prior to the plea, he relied on numerous representations by the State that could confidently identify him, and therefore he had no reasonable means to discover her identification was based on highly suggestive procedures. Plainly, her inability to reliably put Appellant in her home would have affected the viability of the State's case at trial, and it would have certainly affected plea negotiations, as it did with Robert Lane and Veronica Mack. However, the plea judge failed to analyze any of these particulars in the case. She merely summarily stated that she found Appellant's plea was knowing and voluntary. Not only was this conclusion unsupported insofar as the parties agreed that Appellant was not aware of the unreliability of Ms. Jackson's identification, but it also was legally inapposite to the issue of whether Appellant was owed a new trial based on after discovered evidence.

II. THE PLEA JUDGE ERRED IN DENYING APPELLANT'S MOTION TO VACATE HIS GUILTY PLEA UNDER *NORTH CAROLINA V. ALFORD* BASED ON DISPARATE SENTENCING FOR HIS CODEFENDANTS BECAUSE THE JUDGE FAILED TO CONSIDER ANY RELEVANT EVIDENCE ON THE ISSUE.

FACTS

Robert Lane pled guilty to two counts of kidnapping, assault and battery of a high and aggravated nature, strong arm robbery, and criminal conspiracy. He received a sentence of twenty-five years' incarceration suspended to five and one-half years with five years of probation. Veronica Mack pled guilty to two counts of kidnapping, assault and battery of a high and aggravated nature, strong arm robbery, criminal conspiracy, and possession of a weapon during the commission of a violent crime. R. 57, line 1—R. 60, line 23.

DISCUSSION

The plea judge erred in denying Appellant's motion to vacate his guilty plea under *North Carolina v. Alford* based on disparate sentencing for his codefendants because the judge failed to consider any relevant evidence on the issue. "[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." *State v. Follin*, 352 S.C. 235, 257, 573 S.E.2d 812, 824 (Ct. App. 2002).

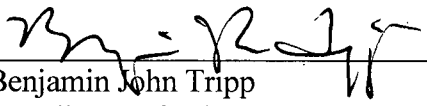
In this case, the plea judge abused her discretion by failing to consider any evidence relevant to the issue of whether Appellant received an impermissibly disparate sentence compared to Robert Lane and Veronica Mack. The record shows that no basis supported the disparity in sentences. Each was equally implicated in the crimes based on the State's allegations at Appellant's plea hearing and the identification evidence in the record. Each received similar charges and sentence lengths. Nevertheless, Appellant did not receive a suspension of his sentence to five years and probation. The plea judge failed to analyze any

of these particulars in the case. She merely summarily stated that she found Appellant's plea was knowing and voluntary. Again, this finding was legally inapposite to the issue of whether Appellant's sentence was impermissibly disparate from those of Robert Lane and Veronica Mack.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate his guilty pleas and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

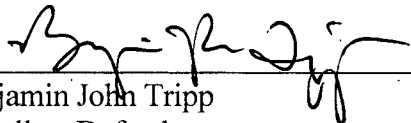
This 4th day of August, 2015.

CERTIFICATE OF COUNSEL

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

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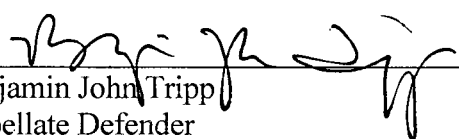
V.

MICHAEL E. HAWKINS,

APPELLANT

CERTIFICATE OF SERVICE

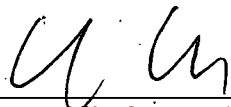
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of August, 2015.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of August, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.