STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2016-000525

THE STATE, ...RESPONDENT

v.

RAYMOND L. ROBERSON, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Appellant's argument that the trial court violated his right to procedural due process by issuing a permanent restraining order against his daughter without proper notice and a hearing is preserved for appellate review where it was not raised to or ruled upon by the circuit court and where it amounts to an attempt to enter a conditional plea. Also, whether the circuit court acted in compliance with the statutory requirements and due process by imposing the restraining order at the time Appellant was convicted of the criminal offense committed against the complainant, and whether the doctrine of collateral estoppel bars Appellant's attempt to challenge the permanent restraining order because he has now pled guilty to violating that order during the pendency of this appeal.

STATEMENT OF THE CASE

Raymond L. Roberson (Appellant) was indicted at the April 2014 term of the grand jury for Greenville County for criminal domestic violence of a high and aggravated nature (CDVHAN) (2014-GS-23-2745) and unlawful conduct towards a child (2014-GS-23-2746). He was represented by John Crangle, Esquire. Respondent (the State) was represented by Assistant Solicitor Barbara Tiffin of the Thirteenth Circuit Solicitor's Office. On March 1, 2016, Appellant appeared in the Greenville County Courthouse before the Honorable Brian M. Gibbons and entered an Alford[1] plea to the indicted charges. He was sentenced to concurrent terms of five (5) years' imprisonment. As a special condition of the sentence, the court ordered the imposition of a restraining order by noting "r/o from victim" on the sentencing sheet for CDVHAN. (R.p.10-p.11; p. 24-32). In conjunction with the plea and the court-ordered special condition, the lower court then issued a "Permanent Restraining Order" (PRO). (R. p. 13-15).

On March 3, 2016, Appellant filed a "Motion to Reconsider Permanent Restraining Order." On the same day, by handwritten notation, the court denied the motion. (R. p.16-17). Appellant timely filed a notice of intent to appeal the PRO and on April 1, 2016, the State filed a "Motion to Dismiss Appeal as an Improper Conditional Guilty Plea." In an Order filed June 1, 2016, this Court denied the motion to dismiss and allowed the appeal to proceed. Appellant subsequently submitted a brief in support of his appeal. This Brief of Respondent now follows.

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

STATEMENT OF FACTS

At the call of the case, the charges were announced and Appellant was sworn by the clerk of court. His attorney, Mr. Crangle, then answered some general questions about Appellant's decision to plead. He advised the court Appellant wised to enter his plea pursuant to North Carolina v. Alford and said he agreed with Appellant's decision. (R.p.3). Appellant then testified he understood what he was doing in court, the charges against him, possible sentences, and the nature of an Alford plea. He testified nobody had promised him anything or held out any hope of reward to get him to plead and that he was satisfied with his attorney. Appellant testified he understood his trial rights and understood he was giving up those rights by pleading under Alford. Finally he testified he was not under the influence of anything that would make him not understand what he was doing. (R.p.3-p.6).

The solicitor then briefly recounted the facts of the underlying charges. She stated in part:

> [O]n or about February 18th of 2014 [Appellant] got into an argument with his live-in girlfriend's 20 year old son and they ended up exchanging blows, and when the victim tried to step in to assist her son she ended up getting thrown into the laundry room and injured. . . So after that occurred [Appellant] did agree to leave the residence and so the victim took him to a local Citgo station hoping that he would stay there and apparently he had been drinking, she wanted him to sober up and not come back to the residence. **The seven year old daughter of the victim and [Appellant] was in the home** and the victim's son, who I previously mentioned, and the victim. And later on they heard a loud noise and saw that [Appellant] was actually busting into the bedroom window in the back of the trailer and he was yelling that he was going to kill everyone in the house. The victim's son, the 20 year old, went back there to try to stop this from happening, he was trying to call the police, the victim also went back there. The victim's son, Matthew, ended up being taken to the ground with [Appellant], punches – [Appellant] was punching him, he also punched the victim. They ended up in the living room where the victim did grab a knife to protect herself and she ended up trying to run out the front door to go get help. The victim's son then being

> afraid when [Appellant] went out the door after the victim knowing that the victim had the knife in her hand and being afraid that [Appellant] was going to use the knife against his mother, ended up shooting [Appellant] with a shotgun that he had.

(R.p.6, line 19-p.8, line 6) (emphasis added). Appellant testified he heard the facts alleged by the solicitor and still wished to plead under Alford. The court accepted the plea and also accepted Appellant's admission to violating the terms and conditions of his probation on a previous conviction for CDVHAN. Mr. Crangle asked the court to consider sentencing Appellant to a concurrent term of five years and terminating the probation case. The trial court ultimately imposed concurrent five-year terms of imprisonment for the new charges and revoked probation and reinstated five years' concurrent imprisonment for the prior conviction. The court concluded by stating: "No victim contact, restraining order for the victim." (R.p.8-p.10).

As soon as the court announced the sentence, the solicitor stated: "Your Honor, we also have this restraining order to hand up." She noted: "And Your Honor, since these are new I don't want to offend you but we've highlighted the area that you need to - -" (R.p.10, lines 11-18). The transcript then indicates a "Break in Proceedings." (R.p.10, line 19). When the plea proceeding resumed, Mr. Crangle, Judge Gibbons, and the solicitor briefly discussed the award of credit for time served. Mr. Crangle then stated: "**He just wanted to clarify the no contact order, he does have a child in common.**" Judge Gibbons responded: "He can go to the family court and work all of that out." (R.p.11, lines 7-10). The lower court then proceeded to issue a "Permanent Restraining Order" (PRO) which identified "Diane A. Lipscomb, **D R**, and Dennis M. Pace" as three "minor family member(s) or other protected persons," and which ordered in part: "That the above named Respondent be restrained from any contact with the Protected Persons as set forth on the attached pages." (R. p.13-15) (emphasis added). The PRO was issued during the plea proceeding and was filed with the Greenville County Clerk of Court the

following day, on March 2, 2016. (R. p.13-15). On March 3, 2016, Appellant filed a "Motion to Reconsider Permanent Restraining Order." On the same day, by handwritten notation, the court denied the motion. (R. p.16-17).

ARGUMENT

I.

Appellant's argument that the trial court violated his right to procedural due process by issuing a permanent restraining order against his daughter without proper notice and a hearing is not preserved for appellate review because it was not raised to or ruled upon by the circuit court and because it amounts to an attempt to enter a conditional plea. In any event, the circuit court acted in compliance with the statutory requirements and due process by imposing the restraining order at the time Appellant was convicted of the criminal offense committed against the complainant. Finally, the doctrine of collateral estoppel should bar Appellant's attempt to challenge the permanent restraining order because he has now pled guilty to violating that order during the pendency of this appeal.

Appellant argues due process was violated when he was not given proper notice and a hearing prior to his being issued with a permanent restraining order (PRO) against his daughter. He contends he did not receive the PRO until after his guilty plea and had no hearing or counsel in regard to the PRO. Appellant argues the right to counsel and a hearing are contemplated by S.C. Code § 16-3-1910, and because these rights were not provided, the State's failure to follow its own statute violated due process. He also contends that "without having counsel to represent him at a PRO hearing, the government denied appellant the effective assistance of counsel." The State submits Appellant's argument is wholly without merit and should be dismissed on several grounds.

First, the State submits Appellant's argument is 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). It should have been of no surprise to Appellant or counsel that his minor daughter, D.R., would be one of the subjects of the restraining order

sought by the State. Indeed, the indictment for unlawful conduct towards a child identified Appellant's minor daughter as the victim of his criminal act by alleging:

> That RAYMOND L ROBERSON did in Greenville County, on or about the 18th day of February, 2014, while being the legal custodian, parent, or guardian, place **the child, D.R.**, (1) at unreasonable risk of harm affecting the child's life, physical or mental health, or safety; or (2) unlawfully or maliciously do or cause to be done any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or (3) willfully abandon the child. This is in violation of § 63-05-0070 of South Carolina Code of Laws (1976) as amended.

(Indictment No. 2014-GS-23-2746; R.p.27-28) (emphasis added). Likewise during the plea proceeding, the solicitor recited facts specifically noting Appellant's seven-year-old daughter was in the home during the commission of the crimes. (R.p.6-p.7). After the court accepted the Alford plea, the solicitor handed up a copy of the proposed PRO, highlighting areas of the form order the court would need to complete. There was then a break in the proceeding during which Appellant presumably had a chance to ask the judge or the solicitor to see the proposed order, which clearly identified D.R. as a protected person. After the break, Mr. Crangle even mentioned what he called "the no contact order" and noted Appellant's desire for clarification because he and the CDVHAN victim "have a child in common." Yet despite this request, Appellant failed to actually object to, or otherwise challenge, the trial court's decision to impose a restraining order involving the three victims of his crimes. Appellant, who was represented by counsel, did not demand any additional hearing on the State's request for a restraining order and did not object to the lack of such further hearing on either statutory or due process grounds. Appellant also did not move for a continuance or for any additional time to review or challenge the PRO. By failing to timely raise a due process or statutory challenge to the PRO at the plea proceeding, Appellant failed to preserve any such challenge for appellate review.

Although Appellant subsequently filed a "Motion to Reconsider Permanent Restraining Order" arguing the issuance of a PRO without any hearing on the merits is an abuse of discretion and a violation of due process rights, his motion came too late. (R. p.16-17). Attempting to raise an argument for the first time in a motion to reconsider does not save it from being unpreserved. 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). The merits of the argument now being raised in this appeal were never ruled upon by the circuit court either during the plea or when it denied the motion to reconsider. Therefore, Appellant's argument is not preserved for appellate review.

Second, the State also submits the argument is not preserved for review because Appellant affirmatively waived all constitutional due process rights as part of his Alford plea. The restraining order was part-and-parcel of the plea proceeding. See S.C. Code Ann. § 16-3-1910(B)(1) (Supp. 2016) ("To seek a permanent restraining order, a person must: (1) request the order in general sessions court or family court, as applicable, at the time the respondent is convicted for the criminal offense committed against the complainant . . . ."). South Carolina does not recognize conditional guilty pleas. State v. Rice, 401 S.C. 330, 331, 737 S.E.2d 485, 485 (2013); State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). Indeed, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights. Rice, 401 S.C. at 331-32, 737 S.E.2d at 485-86. Appellant's attempt to challenge the imposition of the PRO as a violation of his constitutional rights after he knowingly and voluntarily waived those rights and entered an Alford plea is akin to offering a conditional guilty plea. Thus, his argument should be denied and dismissed as unpreserved.

Third, the State submits the circuit court acted in compliance with both overall due process and the statutory requirements by imposing the restraining order at the time Appellant was convicted of the criminal offense committed against the complainants. As to the plea proceeding, Appellant argues that at the time of the plea he was only informed a restraining order would be sought concerning the victim of the CDVHAN and was not told his minor child would be included as a party; however, nothing in the plea transcript reflects these assertions. Rather, it appears there was a break in the proceedings which would have allowed time for the court to complete the highlighted portions of the form and for all parties to review the PRO. (R.p.10-p.11). Appellant also argues the State did not move for a PRO until after the guilty plea; however, the solicitor handed up the proposed order during the proceedings, prior to the break. (R.p.10, lines 5-12). Finally, Appellant argues he was not given a copy of the signed order at the time of the plea but then seems to acknowledge he was given permission to seek modification of the PRO from the Family Court to the extent it concerned his child. (Brief of Appellant, p.6). Thus, it appears Appellant was indeed aware the PRO was directed towards all victims of his crimes, including his child, prior to the conclusion of the proceeding. Because the request for a PRO and the decision to impose the PRO occurred during the plea proceeding (as contemplated by the statute), the State submits Appellant did have a hearing and that he was represented by counsel. Thus, the general procedural due process rights he claims to have been denied were in fact provided.

As to the particular language of the PRO statute, Appellant argues it contemplates representation by counsel and requires that a defendant be served with a summons and complaint "along with a notice of the date, time, and location of the hearing . . . ." He again claims he did not get the PRO until after his guilty plea and had no hearing or counsel in that regard and that

because the State failed to follow the statute his right to due process was violated. (Brief of Appellant, p.6). Yet, as noted above, Appellant was in fact represented by counsel, at a hearing, when the PRO was imposed. Thus, he was not denied the right to either a hearing or counsel. Furthermore, Appellant seems to confuse the statutory procedures described for a PRO imposed at the time of conviction (S.C. Code § 16-3-1910(B)(1) (Supp. 2016)) with those described for a PRO which is NOT imposed at the time of a conviction (S.C. Code § 16-3-1910(B)(2) (Supp. 2016)). It is where an individual is not already at a hearing, being represented by counsel, that the statute requires the filing of "a summons and complaint in common pleas court." S.C. Code Ann. § 16-3-1910(B)(2) (Supp. 2016). And it is only in relation to the filing of this "complaint" that the statute contemplates the "right to retain counsel" and mandates that the complainant serve "his summons and complaint for a permanent restraining order along with notice of the date, time and location of a hearing on the complaint." S.C. Code Ann. § 16-3-1910(D)(4) & -1910(G) (2003). The statute attaches no similar requirements where the request is made in general sessions court at the time of conviction, likely because a criminal defendant is already appearing in court either with counsel or after having knowingly or voluntarily waived counsel when the PRO is requested. For all of these reasons, the State acted in compliance with the statute and due process was not violated when the plea court imposed the restraining order at issue in this case.

Finally, the State submits the doctrine of collateral estoppel should bar Appellant's attempt to challenge the permanent restraining order because he has now pled guilty to violating that order during the pendency of this appeal. In 2016, Appellant was charged with "violation of an order of protection" in regard to the PRO with is the subject of his current appeal before

this court. (Indictment No. 2016-GS-23-06338; R. p.24).[2] On August 9, 2016, he waived presentment to the grand jury, pled guilty as charged, and was sentenced by the Honorable Letitia Verdin to five (5) years' imprisonment suspended upon the service of sixty-nine (69) days' imprisonment and three (3) years' probation, with special conditions of "random drug/alcohol testing, "no contact with victim," and "GPS monitoring for first year of probation." Appellant was later arrested for violating the terms and conditions of his probation and on November 10, 2016, he was revoked in full. (R. p.20-21; R. p.22-23 & R. p.25). Appellant is currently incarcerated in the South Carolina Department of Corrections where he is serving the remainder of his five-year sentence for violating the permanent restraining order which is the subject of the current appeal. The State submits that where, during the pendency of the current appeal, Appellant pled guilty to violating the PRO without a challenge to the validity of that order at the time of his plea on due process or any other grounds he is barred by the doctrine of collateral estoppel from **continent** to pursue this appeal. State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014). Similar to the analysis in Hewins, the use of offensive collateral estoppel in the posture of this case, to bar further pursuit of an issue on direct appeal from a guilty plea, does not eliminate a jury's consideration of substantive elements of the charged offense. Id. at 11, 760 S.E.2d at 823. Indeed, this appears to be one of the "extremely rare" instances where the doctrine's application would be permissible. Id. at 111-12, 760 S.E.2d at 823.

For all of the foregoing reasons, the State submits this appeal should be denied and dismissed. To the extent this Court disagrees and finds the alleged error is preserved, and finds

[2] Although the indictment, sentencing sheet, probation arrest warrant, probation violation report, and probation revocation order associated with the 2016 offense were obviously not before the plea judge in the current matter, the State has designated them for inclusion in the Record on Appeal and asks that this Court take judicial notice of these records because they are indisputable and bear directly on the issue of collateral estoppel that is being raised in the current criminal appeal. See Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("[A]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable.").

prejudicial error in the procedure followed by the circuit court in imposing the PRO in this case, the State submits any grant of relief must include an entirely new sentencing proceeding with reconsideration of both the term of years imposed and the terms and conditions of the restraining order.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the conviction, sentence, and restraining order issued by the lower court be affirmed.

Respectfully submitted,

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April 12, 2017

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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