STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Edgefield County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE BANKS,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

DAYNE C. PHILLIPS
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion in finding Appellant knowingly, voluntarily, and intelligently pleaded guilty to burglary in the second degree where prior to Appellant's decision to plead guilty, the trial judge denied Appellant's motion for a continuance to relieve appointed counsel without conducting an adequate inquiry into Appellant's complaint that the attorney-client conflict resulted in a total lack of communication, thereby preventing Appellant an adequate defense?

STATEMENT OF THE CASE

On July 12, 2010, Appellant Robert Lee Banks was indicted by the Oconee County Grand Jury for burglary in the second degree (non-violent). R. 156. Appellant was again indicted by the Oconee County Grand Jury for the same charge on October 4, 2010; however, this indictment included elements of the charge that were missing in the previous indictment and it was now listed as a violent offense. R. 158.

On October 26, 2010, Appellant proceeded to trial before the Honorable Alexander S. Macaulay. R. 1–130. Appellant was represented by R. Daniel Day, and the State was represented by David Wagner. R. 1. However, Appellant decided to plead guilty to burglary in the second degree (violent) pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) on October 27, 2010. R. 131–145. Judge Macaulay subsequently sentenced Appellant to ten years imprisonment. R. 148, l. 25 – 149, l. 13.

This appeal follows.

STATEMENT OF FACTS

Relevant Facts

On the morning of trial, but prior to the call of the case, Appellant moved "for a continuance to allow [him] the opportunity to hire new counsel." R. 7, ll. 14-21. In a colloquy between the trial judge and appointed counsel, appointed counsel indicated that he had represented Appellant in a preliminary hearing and had received and reviewed discovery with Appellant. R. 8, l. 6 – 9, l. 14. The trial judge subsequently denied Appellant's motion relying on *Bozeman v. State,* 307 S.C. 172, 414 S.E.2d 144 (1992). R. 9, ll. 15-20.

Moments later, appointed counsel told the trial judge that "[Appellant] want[ed] to be excused [from the courtroom]. . . , *which would create a serious problem for [him] if [Appellant was] not gonna* (sic) *cooperate in his defense.*" R. 12, ll. 15-21 (emphasis added). Appointed counsel also explained to the trial judge that although Appellant wanted to be excused from the courtroom, Appellant wanted to be present for the *Jackson v. Denno* hearing since he was an essential witness. R. 13, ll. 2-5. Appellant confirmed that he was not satisfied with appointed counsel: "They can go to trial without me . . . . I can't go [to trial] with him representing me." R. 13, ll. 11-12.

After discussing whether Appellant wanted to waive his right to be present in the courtroom, Appellant simply stated, "*I want to fire my attorney.*" R.14, ll. 1-5 (emphasis added). In response, the trial judge stated, "Listen, Sir, I've denied that motion . . . . Now, if you're going to continue to disrupt this court by interfering with the progress of the trial, then I will remove you." R. 14, ll. 6-14. Appellant replied, "I would like new counsel, Sir." R. 14, ll. 16-18. Again, the trial court stated, "That's been denied. Now what do you want to

do?" R. 14, ll. 19-20. Ultimately, Appellant "decide[d] to stay in the courtroom and [to] participate in the trial." R. 16, 11, 8-10.

At the conclusion of the *Jackson v. Denno*, 378 U.S. 368 (1964) hearing, the trial judge found that he was "convinced by a preponderance of the evidence that before the statement or confession was obtained, the defendant was fully advised of his rights under the fifth and sixth amendments and that the defendant was advised of the constitutional safeguard required by *Miranda v. Arizona*[, 384 U.S. 436 (1966)]." R. 115, ll. 5-10. The trial judge also found that Appellant "knowingly and intelligently waived his rights under the 5th and 6th amendments . . . and [his] confession was freely and voluntarily given without duress [and] . . . was the product of the free and unconstrained will of the defendant." R. 115, l. 25 – 116, l. 9.

The morning of the second day of trial before the jury was sworn, Appellant pled guilty to burglary in the second degree pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). R. 131, l. 9 – 144, l. 10. After a colloquy with Appellant, the trial judge found that Appellant's "decision to plead guilty and consent to the imposition of sentence is freely, voluntarily, and knowingly and intelligently made with the advice [of] counsel . . . with whom [Appellant] says he is satisfied" and accepted Appellant's guilty plea. R. 144, ll. 17-22.

This appeal follows.

ARGUMENT

The trial court abused its discretion in finding Appellant knowingly, voluntarily, and intelligently pled guilty to burglary in the second degree where prior to Appellant's decision to plead guilty, the trial judge denied Appellant's motion for a continuance to relieve appointed counsel without conducting an adequate inquiry into Appellant's complaint that the attorney-client conflict resulted in a total lack of communication, thereby preventing Appellant an adequate defense.

The trial judge failed to adequately inquire about the conflict between Appellant and appointed counsel that resulted in a total lack of communication and prevented Appellant from receiving an adequate defense. *See State v. Sims*, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991) (providing a three factor test to evaluate when a trial court has abused its discretion in denying a defendant's motion for substitution of counsel). Therefore, the trial judge abused his discretion in finding Appellant knowingly, voluntarily, and intelligently pled guilty when prior to Appellant's decision to plead guilty, the trial judge denied Appellant's motion for a continuance to relieve appointed counsel. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (provides that a defendant's decision to plead guilty must be knowingly and voluntarily made); *see also State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (provides that the record must reflect that the defendant freely and intelligently waived his constitutional trial rights and had a full understanding of the consequences of the plea).

"The question of whether court appointed counsel should be discharged is a matter addressed to the discretion of the trial judge . . . [and] [o]nly in a case of abuse of discretion will this Court interfere." *Sims*, 304 S.C. at 414, 405 S.E.2d at 380. "In evaluating whether the trial judge abused his discretion in denying [Appellant's] motion for substitution of counsel, the Court may consider several factor: [1] timeliness of the motion; [2] adequacy of the trial judge's inquiry into [Appellant's] complaint; and [3] whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an

adequate defense." *Id.* (citing *United States v. Gallop*, 838 F.2d 105 (4th Cir. 1988)).

In this case, the trial judge prejudiced Appellant by preventing him from retaining private counsel and preparing for trial when he denied Appellant's motion for a continuance to relieve appointed counsel. R. 7, l. 14 – 9, l. 20. Specifically, the trial judge failed to adequately inquire about the conflict between Appellant and appointed counsel when he focused solely on whether appointed counsel had represented Appellant prior to trial and reviewed discovery with Appellant, instead of questioning Appellant regarding his ability to effectively communicate with appointed counsel. R. 8, l. 6 – 9, l. 14.

Furthermore, appointed counsel acknowledged the conflict between him and Appellant when Appellant wanted to be excused from the courtroom: this "*would create a serious problem for me if he is not gonna* (sic) *cooperate in his defense.*" R. 12, ll. 15-21 (emphasis added). Appellant also made it clear to the trial judge that a conflict existed between him and appointed counsel by continuing to tell the trial judge that he "wanted to fire [his] attorney" and "would like new counsel." R. 14, ll. 1-18. Thus, there is evidence that the conflict between Appellant and appointed counsel resulted in a total lack of communication, which prevented Appellant from receiving an adequate defense. *Sims*, 304 S.C. at 414, 405 S.E.2d at 380 (citation omitted).

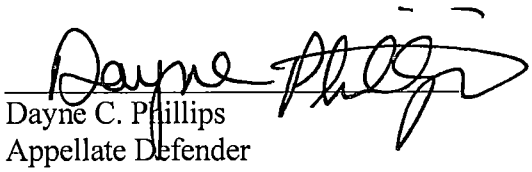
Accordingly, the trial judge abused his discretion in finding that Appellant knowingly, voluntarily, and intelligently pled guilty to burglary in the second degree where prior to Appellant's decision to plead guilty, the trial judge denied Appellant's motion for a continuance to relieve appointed counsel without conducting an adequate inquiry into Appellant's complaint that the attorney-client conflict resulted in a total lack of communication, thereby denying Appellant an adequate defense. *See Boykin v. Alabama*,

395 U.S. 238; *see also State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602; *Cf. Brady v. United States*, 397 U.S. 742, 758 (1970) (finding that "[g]uilty pleas are no more foolproof than full trials to the court or jury . . . Accordingly, we take great precautions against unsound results").

CONCLUSION

For the foregoing reasons, Robert Banks's convictions should be reversed and this case remanded to the Oconee County Court of General Sessions for a new trial.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of April, 2012.

STATE OF SOUTH CAROLINA
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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Lee Banks 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 Alexander S. Macaulay, which was held on October 27, 2010, 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 Robert Lee Banks.

Respectfully submitted,

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of April, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 17, 2012

Dayne C. Phillips
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Anders Brief of Appellant and Record on Appeal has been served on Robert Lee Banks, at Georgia State Prison, 300 1st Avenue South, Reidsville, GA 30453; this 17th day of April, 2012.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of April, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.