STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Appellate Case No. 2017-002283

THE STATE, ...RESPONDENT

v.

PERRY DRAKE GILMORE, JR., ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly denied Appellant's motion to withdraw his "no contest" plea and substitute a plea of guilty but mentally ill where Appellant voluntarily and knowingly pled nolo contendere and admitted his guilt, the trial judge accepted the plea, and Appellant presented no credible basis for the trial judge to allow withdrawal and substitution of a plea of guilty but mentally ill.

STATEMENT OF THE CASE

Perry Drake Gilmore (Appellant) was charged in Lexington County with second-degree assault and battery. (2017-GS-32-02177), indecent exposure (2017-GS-32-02179), and hit and run resulting in property damage (2017-GS-32-02180). Although Appellant originally had appointed counsel, his motion to relieve counsel was granted by the Honorable Grace G. Knie and he elected to represent himself. (Tr.p.3, lines 1-16). The State was represented by Assistant Solicitor Bradley P. Pogue. On August 23, 2017, Appellant waived presentment to the grand jury pled guilty to all three offenses. (Tr.p.13, lines 13-25; p.31, line 13-22).[1] He was sentenced by the Honorable William P. Keesley to three (3) years' imprisonment for second-degree assault and battery, three (3) years' concurrent imprisonment for indecent exposure, and one (1) year's concurrent imprisonment for hit and run.

Within ten (10) days of the plea, Appellant wrote a letter to the plea court which was interpreted by Judge Keesley as a motion to withdraw his guilty plea and a motion for reconsideration of his sentence. (Tr.p.38, lines 2-7). On October 2, 2017, a hearing was convened at the Lexington County Courthouse. Appellant was present and appeared *pro se*. The State was again represented by Assistant Solicitor Pogue. At the conclusion of the hearing, the plea court took the motions under advisement. (Tr.p.44, lines 18-21). In a six-page order issued October 9, 2017, and filed October 12, 2017, the plea court denied Appellant's motions and left the sentence in place. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

[1] Although the copies of the indictments for indecent exposure and hit and run which were obtained from the Lexington County Clerk of Court indicate they were presented to the grand jury and were true billed, they are dated September 12, 2017, after the plea court accepted Appellant's August 23, 2017, plea, but before the October 2, 2017, hearing on Appellant's motion to withdraw his plea and for reconsideration of his sentence. Thus, it appears Appellant validly waived presentment prior to the indictments going before the grand jury.

STATEMENT OF FACTS

On July 29, 2016, Appellant was driving in West Columbia when he hit another vehicle with his black Chevrolet Tahoe. Investigator Morris was nearby conducting a traffic stop when this occurred and observed the incident happen. Susan Smith's (Victim 1's) car then veered off the road and hit a tree. Appellant fled the scene; however, an on-scene witness followed his vehicle and notified law enforcement of his location. Officers conducted a traffic stop and when Appellant was ordered out of his car, he made a comment about "doing the victim a favor" by leaving the scene because she was the driver at fault. Officers placed him under arrest for hit and run. Victim 1 suffered serious injuries from this accident including fractured sternum, three fractured ribs, and contusions on her pelvis. (Tr.p.22-p.24).

On September 1, 2016, Appellant and another individual, Zachary Morgan (Victim 2), were driving in a Walmart Parking lot on Harbison Boulevard in Columbia. Victim 2 was attempting to turn down one of the lanes when Appellant pulled out in front of him in the middle of the lane. Appellant motioned for the victim to go, but Victim 2 could not get around his car. Victim 2 got out of his vehicle and motioned his hands in a gesture like "what is going on." Appellant and Victim 2 had a verbal exchange, and Appellant got out of his vehicle and began punching Victim 2 in the face. Victim 2 suffered a broken nose and multiple face lacerations. (Tr.p.24-p.25).

On November 23, 2016, Appellant was parked in a Walmart parking lot at 2401 Augusta Road, West Columbia. Amy Carter (Victim 3) called police when Appellant's car pulled up next to hers and Appellant took out hair gel, fixed his hair, drank from a liquor bottle, and then began masturbating. When officers arrived, they asked Appellant if he did the acts Victim 3 alleged and he claimed he was checking himself for STDs. (Tr.p.26-p.28).

Appellant also had a second indecent exposure charge and an assault and battery charge; however, they were dismissed pursuant to the plea agreement. (Tr.p.28). During the plea proceeding, Appellant initially stated "I would like to plead no contest," but then said "actually, it's not contest for mentally ill as mitigating, but not as a defense." The plea judge explained there was difference between alleging mental illness as a factor in mitigation and entering a plea of guilty but mentally ill, and questioned Appellant in an attempt to ensure Appellant understood there was no such thing as a plea of "no contest for mentally ill." Appellant said he understood and simply wanted to plead no contest. (Tr.p.17-p.19). Ultimately, Appellant pled "no contest" [nolo contendere] to the charges and was sentenced as described above. (Tr.p.36-37).

Appellant subsequently wrote a letter to the plea court moving to withdraw his guilty plea, reconsider his sentence, and substitute a sentence of guilty but mentally ill. (Tr.p.38, lines 2-7). Following a motion hearing on October 2, 2017, the plea court issued a six-page order denying Appellant's motions. (Tr.p.32-p-45; Order dated October 9, 2017).

ARGUMENT

The trial court properly denied Appellant's motion to withdraw his "no contest" plea and substitute a plea of guilty but mentally ill where Appellant voluntarily and knowingly pled nolo contendere and admitted his guilt, the trial judge accepted the plea, and Appellant presented no credible basis for the trial judge to allow withdrawal and substitution of a plea of guilty but mentally ill.

Appellant argues that the trial court erred in denying his motion to withdraw his "no contest" guilty plea, claiming that the record shows that Appellant wanted to enter a guilty but mentally ill plea instead, but did not know the proper legal terms because he represented himself. The State disagrees and submits Appellant's argument is without merit. There is ample evidence in the record supporting the plea court's finding that Appellant voluntarily and knowingly entered a nolo contendere plea for the crimes charged. The trial judge discussed with Appellant the different types of pleas, including a plea of guilty but mentally ill, but Appellant continually stated that he wanted to plead "no contest." Moreover, Appellant has shown no evidence that his *pro se* status should implicate the validity of the nolo contendere plea. Furthermore, in the reconsideration hearing, Appellant provided no evidence of his alleged mental illness to support which would support changing his plea from no contest to guilty but mentally ill. For these reasons, Appellant's request to vacate the lower court's ruling and grant his motion to withdraw his "no contest" guilty plea and substitute it with a plea of guilty but mentally ill should be denied. Appellant's convictions and sentence should be affirmed.

STANDARD OF REVIEW

"A plea of nolo contendere is for all practical purposes a plea of guilty in the case which it is pled." *State v. Munsch*, 287 S.C. 313, 314, 338 S.E.2d 329, 330 (1985) (citing *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976); S.C. Code Ann. § 17-23-40 (1976)). Thus, like a guilty plea, a "nolo contendere plea leaves open for review only the sufficiency of the indictment

and waives all other defenses." *Id.* Once a plea of guilty is entered, the decision of whether to "allow withdrawal of the plea is left to the trial court's sound discretion." *State v. Lopez*, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002) (citing *State v. Riddle*, 278 S.C. 148, 292 S.E.2d 795 (1982) & *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000)). When an appellant seeks to reopen a guilty plea proceeding, the inquiry is generally confined to whether the plea was knowingly and voluntarily entered. *State v. Thomason*, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (2000).

Guilty but Mentally Ill

At the plea proceeding, Appellant stated he had been diagnosed with having an impulse control disorder he later described in the motion hearing as "intimate explosive disorder." (Tr.p.36; p.42). However, Appellant offered no evidence of this diagnosis at either the plea hearing or the hearing to withdraw the nolo contendere plea. Under S.C. Code Ann. § 17-24-20, in order to be found guilty but mentally ill, a defendant has the burden to prove beyond a preponderance of the evidence that, when he committed the crime, he was mentally ill. A defendant is mentally ill under the statute if he or she has the "capacity to distinguish right from wrong, or to recognize that the act is wrong...but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20. Appellant did not present any evidence that he suffered from his alleged mental illness at the time the crimes were committed, and he offered no medical evidence to support the alleged diagnosis at the time of the hearings. During the hearing for the motion to withdraw his plea Appellant stated that he attempted to get his prison medical records but the doctor would not release them. (Tr.p.42-p.43). However, Appellant did not ask for a continuance, an order requiring the prison to disclose the records, or any other specific relief. Because Appellant could

not produce evidence of his mental illness at the hearings, he failed to prove that he was mentally ill when committing the crime beyond a preponderance of the evidence. Thus, Applicant has failed to present any basis on which the plea court could grant his request to allow a guilty but mentally ill plea. The plea court properly denied his motion and this Court should similarly deny Appellant's request relief on appeal.

Voluntariness of the "No Contest" Plea

On appeal from a guilty plea, the Court should only look at whether the defendant entered into the plea knowingly and voluntarily. *State v. Thomason*, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (2000). "To find that a guilty plea was voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). Appellant argues that because he stated incorrect language to describe his plea at the hearing, it shows he was confused about the proper legal terms, and thus the plea should now be vacated. (Brief of Appellant, p.9). However, not knowing the proper legal definitions of the different pleas is simply a danger and consequence of someone choosing to proceed as a *pro se* litigant.

The trial judge informed Appellant that his initial plea of "no contest but mentally ill" was not a proper plea, and then proceeded to explain the difference between guilty, guilty but mentally ill, and not guilty by reason of insanity. (Tr.p.17-p.18). Indicating he understood, Appellant then continued with the proceeding and said he wanted to plead "no contest." (Tr.p.18). He further stated that he only wanted his mental illness to be a "mitigating factor" in the judge's *determination of his sentence*. (Tr.p.18) (emphasis added). Appellant agreed he understood that he was pleading "no contest" and not pleading "guilty but mentally ill."

(Tr.p.18). Appellant then pled no contest to all the charges, again confirming he undestood his plea. (Tr.p.19-p.22).

Later, during Appellant's reconsideration hearing, he stated that at the plea hearing "he wanted to admit culpability to take responsibility for [his] wrongdoings," however the prosecutor mischaracterized his intention by telling the plea court "the fact that [he] pled no contest indicates that I didn't want to take responsibility for my crime." (Tr.p.38). Appellant argued this characterization improperly affected his sentence. (Tr.p.38). On the contrary, Appellant's argument simply shows that the only reason Appellant is attempting to change is plea is because he believes that his sentence will be reduced. Appellant goes on to say that his ultimate desire is to "get sentenced to a more therapeutic setting" (T.p.39) and he wants to plead guilty to "be placed on probation until [he] satisfies [the court's] order that [he] receive mental health counseling...until [he] finishes receiving anger management counseling...and then be discharged for all sentences." (Tr.p.39-p.40). Indeed, it is not Appellant's intention to obtain help for his alleged mental illness. Instead, he appears to believe that changing his plea to guilty but mentally ill would reduce his sentence, which is not so.

Under S.C. Code Ann. § 17-24-70, a defendant who receives a verdict of mentally ill must be "sentenced as provided by law for a *defendant found guilty*," but if the sentence includes incarceration, "the defendant must be taken to a facility for treatment" until the staff determines the defendant is safe to be moved to general population of the Department of Corrections. (emphasis added). As noted above, a plea of nolo contendere is, "for all practical purposes a plea of guilty," and the sentences for guilty but mentally ill and guilty are essentially the same. Thus, even if the trial court erred in denying Appellant's motion to withdraw his "no contest" plea and allowing him to substitute a guilty but mentally ill plea, then it was harmless error because any

sentence would not be reduced. The trial judge knew of Appellant's alleged mental illness when sentencing him after his initial plea hearing. (Tr.p.36). Thus, Appellant's sentence was given in light of his mental illness, and there is no basis on which to vacate that sentence.

Absence of Counsel

"The absence of counsel does not generally invalidate a plea so long as the defendant has been advised of his right to counsel and has voluntarily waived it." *State v. Lambert*, 266 S.C. 574, 577, 225 S.E.2d 340, 341 (1976) (citing *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)). Here, the court advised Appellant of his right to counsel and the consequences of choosing to proceed without counsel, and Appellant elected to proceed *pro se*. (Tr.p.9-p.10. The plea court conducted a full *Faretta* hearing. At the conclusion of the hearing, the judge determined, and the record establishes, that Appellant knew of the dangers and disadvantages of self-representation and he competently and intelligently waived his right to counsel. (Tr.p.3-p.14). Appellant did request to have the public defender as standby counsel, and the court granted this request. (Tr.p.13-p.14). The trial court again asked Appellant if he wanted an attorney at the plea hearing, and Appellant confirmed he did not. (Tr.p.17). The court advised Appellant of his right to counsel, and he voluntarily and knowingly waived that right. The absence of counsel does not invalidate his plea. For all of these reasons, Appellant's motion to withdraw his "no contest" guilty plea and substitute it with a plea of guilty but mentally ill was properly denied. Appellant's convictions and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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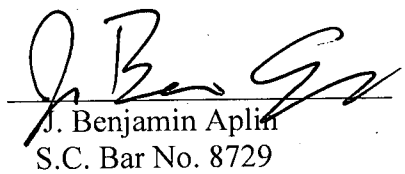
BY: 
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Columbia, South Carolina
October 15, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Appellate Case No. 2017-002283

THE STATE, ...RESPONDENT

v.

PERRY DRAKE GILMORE, JR., ...APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated October 15, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Victor R. Seeger, Esquire
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I further certified that all parties required by Rule to be served have been served. This 15th day of October, 2018.

Troyeshi Brailey
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ALAN WILSON
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October 15, 2018

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Re: The State v. Perry Drake Gilmore, Jr.
Appellate Case No. 2017-002283

Dear Mr. Seeger:

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
Senior Assistant Deputy Attorney General
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JBA/tb
Enclosures

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