

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Knox McMahon, Circuit Court Judge

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JUN 10 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MARVIN BROCK JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-002435

FINAL REPLY BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

The issue of whether the trial court erred in failing to exercise its discretion in its refusal to accept an Alford¹ plea in Appellant's case is preserved for appeal. See Brief of Respondent, p. 8. When trial counsel asked the trial judge if he would "entertain an Alford plea," the trial judge responded "No, sir" and explained his "Alford plea policy" of only accepting them if the defendant does not remember the offense. R. 61, ll. 8-13. At that point, the trial judge had ruled and it would have been improper for trial counsel to argue with him, no matter how nonsensical the judge's reasoning. See Rule 18(a), SCRCrimP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."). Contrary to Respondent's contention, trial attorneys are not required to engage in such futile and potentially antagonistic acts as arguing to a trial judge, after he or she has ruled, that his or her rulings constituted a failure to exercise or abuse of discretion in order to preserve the matter for appeal. See Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review."); Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 329, 333, 730 S.E.2d 282, 285, 287 (2012) (recognizing that error preservation is a critical part of the appellate process to ensure that the appellate courts do not reach issues that were not ruled upon by the trial court but is not a "'gotcha' game with attorneys.").

While Respondent's on-line research regarding the "hidden costs" of shoplifting is perhaps interesting, it is irrelevant to the fact that the trial judge's "Alford plea policy"

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

constituted a failure to exercise discretion. See Respondent's Brief, p. 11-13. Respondent boldly proclaims that "[a]llowing Johnson to plead guilty yet protest his innocence would demean the trial court's role to the end stage of a cat and mouse game rather than provide the forum for a proper recognition of the societal impact of his crime or the platform for Johnson to express moral atonement for his crime." Respondent's Brief, p. 13. Respectfully, neither justice nor judicial economy were served in this case by expending jurors' time and finite court resources and forcing a fifty-five year old man with a ninth grade education to proceed to trial because of the trial judge's arbitrary limitation on the acceptance of Alford pleas. This case begged for resolution by an Alford plea, which would have afforded both the State and Johnson a benefit without penalizing Johnson for his belief that he had successfully abandoned any intent to steal prior to being apprehended.

Further, Respondent is incorrect in stating that "[t]he trial court . . . was reasonable to believe no extraordinary circumstance existed to agree to accept and Alford plea in the instant case." The trial judge expressed no such "belief;" rather, he failed to exercise his discretion altogether. A failure to exercise discretion amounts to an abuse of that discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.").

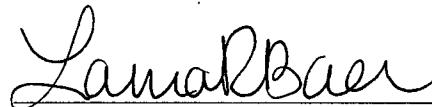
Lastly, Johnson was indeed punished for going to trial. The trial judge previously told Johnson that if he accepted the plea offer, with credit for time-served, he would be

released in just forty (40) days. R. 4, l. 4 – 7, l. 4. After being found guilty at trial, Johnson was sentenced to six years incarceration. R. 169, ll. 1-5.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Marvin Brock Johnson respectfully requests this Court reverse his conviction and grant him a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

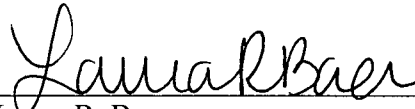
ATTORNEY FOR APPELLANT.

This 10th day of June, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

June 10th, 2016



Laura R. Baer
Appellate Defender

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