THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Spartanburg County Court of General Sessions
The Honorable J. Mark Hayes, II Circuit Court Judge

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MAY 13 2019
SC Court of Appeals

Appellate Case No. 2018-001031

State of South Carolina,..Respondent.

v.

Calvin Lee Phillips, III,...Appellant,

FINAL BRIEF OF APPELLANT

WILLIAM G. YARBOROUGH, III & LAUREN C. HOBBIS

William G. Yarborough III, Attorney at Law, LLC
522 North Church Street Greenville, South Carolina 29601
Phone: (864) 331-1612 • Fax: (864) 370-0022

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE PLEA JUDGE ERR IN ACCEPTING APPELLANT'S GUILTY PLEA WHEN BEFORE ENTERING HIS PLEA, APPELLANT WAS NEITHER ADVISED OF THE ELEMENTS THE STATE WOULD NEED TO PROVE BEYOND A REASONABLE DOUBT AT TRIAL FOR EACH CHARGE NOR ON THE IMPLICATIONS OF HIS GUILTY PLEA ON HIS SUSPENDED SENTENCE AS IT RELATED TO SENTENCING FOR THE CHARGES FOR WHICH HE WAS PLEADING GUILTY, THEREBY RENDERING HIS GUILTY PLEA NOT KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY ENTERED?

STATEMENT OF THE CASE

The Spartanburg County grand jury indicted Appellant Calvin Phillips for first-degree assault and battery, kidnapping, armed robbery, possession of a weapon during a violent crime, and first-degree burglary. (ROA. pp. 40–48). Assistant Solicitor Spenser H. Smith prosecuted the case. The undersigned, William G. Yarborough III, represented Appellant.

On May 16, 2018, Appellant pleaded guilty before the Honorable J. Mark Hayes, II to the first-degree assault and battery charge as indicted; the kidnapping charge as indicted; attempted armed robbery as the lesser-included offense for Count One of indictment 2017-GS-42-3585; possession of a weapon during a violent crime (Count Two); and to the lesser-included offense of second degree burglary, violent. (ROA. p. 16, line 13; p. 17, line 8; p. 27). For each of the charges, the State made a sentencing recommendation of five (5) to twenty (20) years imprisonment. (ROA. p. 16, lines 17–18). At the time of the alleged offenses and guilty plea, Appellant was on probation as part of a Youthful Offender Act suspended sentence in an unrelated case. (ROA p. 28; p. 31). Judge Hayes found that the charges constituted a willful violation of probation and found full revocation of probation appropriate. (ROA. p. 37, lines 6 — p. 38, line 12). Judge Hayes ultimately imposed concurrent sentences of ten (10) years for the first-degree assault and battery charge; twenty (20) years for kidnapping;[1] twenty (20) years for attempted armed robbery; five (5) years for possession of weapon during a violent crime; and fifteen (15) years for second-degree burglary. (ROA. p. 37, lines 6 — p.38, line 12; pp. 40–48). Appellant was given 381 days credit for time served. (ROA. p. 37, lines 6 -- p. 38, line 12; pp. 40–48). This appeal follows.

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[1] As the State informed the court during the hearing, registration as a sex offender is inapplicable to the facts of the case and was not mandated as a part of any sentence. (ROA. p. 27, line 23 — p. 24, line 2).

STATEMENT OF THE FACTS

The charges arose from admittedly "complicated facts", in which Appellant himself was shot. (ROA. p. 36, lines 14–15). The State alleged that on April 24, 2017 at around 5 a.m., Jacob Burns was sitting in his car outside of his home listening to the radio when a car or truck pulled up and blocked his driveway. Burns then turned on his headlights, which allowed him to recognize the person walking toward him as "Trip", later identified as Appellant. Burns called out to Trip, asking "What do you need?" as in what type or quantity of drugs could Burns sell to him. The State explained Appellant responded that he wanted to speak to Burns's brother, Scott Burns, whom was asleep at the time. Burns and Appellant ultimately got into a verbal altercation, during which the State alleged that Appellant motioned for codefendant Destiney Matheny to exit from the other vehicle. Codefendant Matheny and Appellant were in a romantic relationship at the time. Codefendant Matheny approached Burns and robbed him of his wallet. Codefendant Burns then led Codefendant Matheny inside the house, with Appellant following behind her. Only Codefendant Matheny had a gun. (ROA. p.19, lines 1–24; p. 20, lines 1–17).

Burns saw Codefendant Matheny with her arms extended holding the gun and tried to slam the front door on her, which knocked the gun from her hands. (ROA p. 20, lines 16; p. 36, lines 1-- 6). A struggle between them then ensued, which ultimately migrated to the living room and kitchen of the Burns' home. (ROA. p. 20, lines 17–21). The home was in the process of being painted at the time. (ROA. p. 20, lines 23–24). The State alleged that during the struggle, Appellant assaulted Burns. (ROA. p. 21, lines 7–9). Burns's brother woke up during the struggle and came downstairs. After witnessing the situation, he retrieved a shotgun and shot Codefendant Matheny and Appellant. (ROA. p. 21, lines 10–17).

Appellant was in critical condition, requiring extensive surgery, and thus was unable to speak to law enforcement until his release from the hospital and subsequent arrest on May 2nd, 2017. Codefendant Matheny was not as badly injured from her gunshot wounds. She gave a statement to law enforcement soon after the incident and release from the hospital. Codefendant Matheny told police she and Appellant "had been fighting, that they're not allowed to fight at the house, so they went out just riding around so they can figure out whatever their disagreement was." She further explained that while riding around, they stopped on the side of the road to smoke a cigarette and continue the discussion, and then "out of nowhere, a car drives by and shot her." According to the State, Codefendant Matheny explained to police she and Appellant got paint on themselves because after being shot at, they ran "into a field and there was a construction [site] there where they got paint covered on them." Law enforcement followed up on her story in the following days and did find a construction site consistent with her story as well as paint at that site, but the color of paint used in the construction did not appear to match the color of paint found on her following the incident. (ROA. p. 22, lines 4–19). Codefendant Matheny did not provide any other information on the events. (ROA. p. 22, lines 21–22).

The Burns brothers later identified Codefendant Matheny and Appellant from a lineup. (ROA. p. 23, lines 1–8). Codefendant Matheny was charged with the same offenses as Appellant and had pleaded guilty to all charges but for the weapon charge before Appellant's plea hearing. Codefendant Matheny received a twenty (20) year sentence suspended to ten (10) years of active imprisonment with five (5) years of probation to follow her release. (ROA. p. 19, lines 11–14).

During the plea colloquy, the judge primarily did not question the Appellant and 18 other defendants before him individually, and instead addressed the entire group by asking them to stand if any question applied to them. (ROA. pp. 4–15). In response to the plea judge's other questions

directed at Appellant individually, Appellant agreed with the State's summation of the facts, and stated he understood the potential sentence for each charge and the trial rights he would be waiving. (ROA. pp. 24–29). The State, counsel, nor the judge explained to Appellant or ensured he understood the elements of each charge or what the State would have to prove should he decide instead to proceed to trial.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). Further, an appellate court will review the totality of the circumstances to discern if a plea was entered into knowingly and intelligently. *State v. Tucker*, 376 S.C. 412, 419, 656 S.E.2d 403, 407 (Ct. App. 2008) (citing *Hughey v. State*, 255 S.C. 155, 157–58, 177 S.E.2d 553, 555 (1970)). The plea judge's finding that the plea was knowingly and voluntarily entered is reviewed under an abuse of discretion standard. *E.g., State v. Riddle*, 278 S.C. 148, 292 S.E.2d 795 (1982).

ARGUMENT

I. THE PLEA JUDGE ERRED IN ACCEPTING APPELLANT'S GUILTY PLEA BECAUSE IT WAS NOT KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY ENTERED BECAUSE BEFORE ENTERING HIS PLEA, APPELLANT WAS NEITHER ADVISED OF THE ELEMENTS THE STATE WOULD NEED TO PROVE BEYOND A REASONABLE DOUBT AT TRIAL FOR EACH CHARGE NOR WAS HE ADVISED ON THE IMPLICATIONS OF HIS GUILTY PLEA ON HIS SUSPENDED SENTENCE AS IT RELATED TO SENTENCING FOR THE CHARGES FOR WHICH HE WAS PLEADING GUILTY.

Because a guilty plea is not only an admission to certain conduct but is also a "depriv[ation] of liberty or other constitutionally protected interests", due process protections attach to the entire plea process and certain precautions are taken before a guilty plea may be accepted and the sentence is imposed. *State v. Nesbitt*, 411 S.C. 194, 200, 768 S.E.2d 67, 70 (2015) (citing *Mabry v. Johnson*, 467 U.S. 504, 507, (1984); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). *See also* U.S. Const. amend. XIV; S.C. Const. art. I, § 3. It is fundamental that a trial judge cannot accept a guilty plea without first an affirmative showing that it was intelligent and voluntary. *E.g.*, *Boykin* 395 U.S. at 241. *See also State v. Lopez*, 352 S.C. 373, 378–79, 574 S.E.2d 210, 213 (Ct. App. 2002) ("A guilty plea must be an informed and intelligent decision.") (citing *Boykin*, 395 U.S. at 241–44). "Accuracy is paramount; force, threats, or lack of knowledge and understanding by the accused deprive a guilty plea of validity." *State v. Armstrong*, 263 S.C. 594, 597, 211 S.E.2d 889, 890 (1975). A defendant knowingly and voluntarily pleads guilty, and the guilty plea is thus valid, when he fully understands the consequences of his plea and the charges against him. *E.g.*, *Dover v. State*, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). Further, "[a] defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and 'may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both.'" *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (quoting *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Although the plea judge

remains "free to use any appropriate procedure for determining the accuracy of the guilty plea", there must be a factual basis for the plea, and the record must demonstrate that defendant has a "full understanding" of "the nature and *crucial* elements of the charges, the consequences of the plea [including any maximum and minimum penalties for the crimes], and the constitutional rights [waived]." *Id.* 263 S.C. at 598, 211 S.E.2d at 891; *Simpson v. State*, 317 S.C. 506, 455 S.E.2d 175 (1995); *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) (italics added). *See also State v. Lambert*, 266 S.C. 574, 578–79, 225 S.E.2d 340, 342 (1976) (holding a judge need not "direct the defendant's attention to each and every constitutional right and obtain a separate waiver of each" before accepting the guilty plea if "the record otherwise reveals affirmative awareness of the consequences of a guilty plea"); *but see Armstrong*, 263 S.C. at 598, 211 S.E.2d at 891 ("[A]bandonment of these rights cannot be due to ignorance or incomprehension for a plea of guilty is more than an admission of conduct, it is a conviction.").

Here, there were significant defects in the plea colloquy that rendered Appellant's guilty plea not knowingly, intelligently, or voluntarily entered. *See In Interest of Arisha K.S.*, 331 S.C. 288, 291, 501 S.E.2d 128, 130 (Ct. App. 1998) ("The *Boykin* Court essentially made the requirements of Rule 11 of the Federal Rules...which commands an enumeration of the specific federal constitutional rights that are waived upon a guilty plea, applicable to the states....'*[P]rejudice inheres in a failure to comply with Rule 11*, for noncompliance deprives the defendant of....procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea'") (italics added) (citing *Brady v. United States*, 397 U.S. 742 (1970), then quoting *McCarthy v. United States,* 394 U.S. 459, 471–72 (1969)). Before pleading and the acceptance of Appellant's guilty plea, Appellant was not instructed as to what elements the State would need to prove beyond a reasonable doubt for each charge at trial. This integral part

of the plea colloquy is imperative to a knowingly and intelligently made waiver of Appellant's trial rights. *See State v. Thomason*, 341 S.C. 524, 534 S.E.2d 708 (Ct. App. 2000) ("'A plea of guilty and the ensuing conviction comprehend *all of the factual and legal elements necessary* to sustain a binding, final judgment of guilty and a lawful sentence'") (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989)). *See also generally, Gustine v. State*, 325 S.C. 123, 127–28, 480 S.E.2d 444, 446 (1997) ("'[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"). An explanation of Appellant's trial rights and the explanation on the waiver of these rights by of way of a guilty plea mean little during the plea colloquy without any advisement as to what the State would need to prove should he instead choose to proceed to trial. *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) ("Further, the record must clearly establish waiver") (subsequent history citing authority omitted); *see also Boykin*, 395 U.S. at 241–42 (applying the rule: "Presuming waiver from a silent record is impermissible" to the waiver of constitutional rights at guilty plea proceedings). *See also Gibson v. State*, 334 S.C. 515, 522–23, 514 S.E.2d 320, 323–24 (1999). This defect in the plea colloquy is compounded when considering that the advisement as to the elements the State would need to prove at trial is inherently implicated in the waiver of Appellant's trial rights and his very decision to plead guilty. *See Gibson*, 334 S.C. at 522–23, 514 S.E.2d at 323–34.

In conjunction with this defect, also absent from the plea colloquy is any advisement to Appellant on the implications of his guilty plea on his Youthful Offender Act sentence and probation. There is no indication in the record that before his guilty plea was accepted, Appellant had been informed or understood: (1) the admission of conduct inherent in pleading guilty would essentially constitute as an automatic willful violation of his probation; (2) which may result in

partial or full revocation of his suspended sentence; or (3) the probation violation or revocation's effect on his sentence for the charges for which he was pleading guilty. *See Riddle*, 278 S.C. at 151, 292 S.E.2d at 796 (finding the defendant's plea not entered knowingly because he misunderstood the scope of the plea agreement on sentencing) (Ness, J.J. and Harwell, JJ., dissenting). *See also generally*, *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980).

Such defects in the plea colloquy standing alone or in conjunction with one another rendered Appellant's guilty plea not knowingly, intelligently, or voluntarily made. The absence of advisement that even summarized the elements the State would need to prove for each charge should he choose trial and the absence of an advisement of his guilty plea's implications on his probation, as well as the consequences of probation revocation for the sentence, both strike at the validity of his plea. Both defects implicate Appellant's understanding and waiver of important constitutional rights, as well as the decision to plead guilty overall. The absence of such advisement before Appellant's guilty plea was accepted cannot readily deemed harmless; to do so would be to impermissibly presume a voluntary and intelligent waiver of crucial constitutional rights from silence. *See Boykin*, 395 U.S. at 241–42; *Lambert*, 266 S.C. at 578–79, 225 S.E.2d at 342.

CONCLUSION

For the foregoing reasons, the Appellant Calvin Phillips respectfully urges this Honorable Court to reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

WILLIAM G. YARBOROUGH III
LAUREN C. HOBBIS

By: Lauren C. Hobbis
Lauren C. Hobbis, SC Bar #103190

William G. Yarborough III, Attorney at Law, LLC
522 North Church Street Greenville, SC 29601
(864) 331-1612

COUNSEL FOR APPELLANT

Greenville, SC
May 8th, 2019