

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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DEC 31 2014
SC Court of Appeals

Appeal from Lexington County
The Honorable Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2013-001726

THE STATE,

Respondent,

v.

BRIAN CURTIS MACK,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Appellant never complained below that the trial court failed to apprise him of the potential consequences of his guilty plea. Therefore, the question is not preserved for appellate review. Even if the matter had been raised, the claim would be without merit.

STATEMENT OF THE CASE

Appellant Brian Curtis Mack was charged with several offenses in Edgefield and Lexington Counties. On July 10, 2013, Appellant appeared before the Honorable Edward B. Cottingham in Lexington County to plead guilty to some of the offenses. Appellant pled guilty to a charge of Forgery (value less than \$10,000) from Edgefield County. (R. p. 20, Indictment.) As a result of the Edgefield plea, a charge of Forgery and a charge of Criminal Conspiracy were nolle prossed. (Tr. p. 8; R. p. 20-25, Indictments.) Appellant was also indicted in Lexington County for Criminal Sexual Conduct with a Minor (First Degree) and Financial Transaction Card Fraud. (Tr. p. 4; R. p. 20-25, Indictments.) He entered a plea of no contest to the reduced charge of Assault and Battery (Second Degree) and to Financial Transaction Card Fraud. (R. pp. 4-5.) Per the Lexington County plea, the solicitor nolle prossed charges of Criminal Domestic Violence of a High and Aggravated Nature, Criminal Conspiracy, and Financial Transaction Card Theft. (R. p. 8; R. p. 20-25, Indictments.) Appellant was sentenced to eighteen months suspended to time already served for Assault and Battery (Second Degree). Judge Cottingham pronounced concurrent sentences of five years each for Forgery (value less than \$10,000) and Financial Transaction Card Fraud. The Forgery sentence also included restitution in the amount of \$1600.00. (R. p. 9; R. p. 26, Sentencing sheet.) Thereafter, the court denied Appellant's motion to alter sentence in a written order dated July 23, 2013, and filed July 25, 2013. (R. p. 19, Order.)

ARGUMENT

Appellant never complained below that the trial court failed to apprise him of the potential consequences of his guilty plea. Therefore, the question is not preserved for appellate review. Even if the matter had been raised, the claim would be without merit.

The issue raised by Appellant here is not the issue he raised to the plea judge. After pronouncement of sentence, Counsel stated, “Your Honor, I know you’ve spoken, but could I withdraw my plea at this time?” (R. p. 13, lines 23-24.) The court denied this request, stating, “I would not permit you to withdraw your plea after you don’t like my sentence.” (R. p. 14, lines 12-14.)

Thereafter, Judge Cottingham issued an order filed July 25, 2013, and captioned “Order Denying Defendant’s Motion to Alter Sentence in Guilty Plea Pursuant to Rule 59.” (“Order”) (R. p. 19, Order.) In the Order, Judge Cottingham states, “counsel for the defendant filed a written motion to alter sentence... [In the motion] counsel suggests that the Court misunderstood the defendant’s prior record when sentencing the defendant.”¹ (R. p. 19, Order.) Judge Cottingham then noted his consideration of the offenses to which Appellant pled guilty and reiterated his sentiment that the sentence pronounced was appropriate.

Appellant asserts for the first time on appeal that his guilty plea should not have been accepted because he was unaware of the consequences of his plea. There is no reference in the record to Appellant asserting at any point that he was unaware of the potential consequences of the plea. While he may have been surprised to receive an active term of five years where he asked for a term suspended with service of probation,

¹ Undersigned counsel contacted the Lexington County Clerk of Court to request a copy of the motion filed by defense counsel in this case. The Clerk’s office is unable to locate any such motion but does have Order on file. The information available through the online Public Index Search does not show record of the filed motion but does reflect the filed Order.

he failed to express that he was unaware of the potential sentence. Even when the sentencing judge asked the solicitor whether the charges Appellant faced were “under the five-year statute,” plea counsel expressed no disagreement and continued his presentation. (R. p. 12.) Appellant’s generic request to withdraw the plea after sentence was pronounced failed to specifically set forth any basis for his request, and the only basis for the request to withdraw which can be inferred from the record is that Appellant believed the court’s sentence to be excessive, not that he did not understand the potential sentence.

Where Appellant failed to assert before the trial court that his guilty plea was not knowing and intelligent as required by Boykin v. Alabama, 395 U.S. 238 (1969), the issue is not preserved for appellate review, particularly where Appellant was represented by counsel. State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982); State v. Bradley, 263 S.C. 223, 209 S.E.2d 435 (1974). Moreover, Appellant’s request to withdraw came only after the pronouncement of sentence. The plea judge astutely observed that the request for withdrawal appeared to be an expression of displeasure with the sentence rather than an indication that the plea was not knowing and voluntary. “An accused is not permitted to speculate on the supposed clemency of the judge and enter a plea of guilty with the right to retract it if he finds that his expectation was not realized.” State v. Cantrell, 250 S.C. 376, 380, 158 S.E.2d 189, 191-192 (1967) (Where defendant did not move to withdraw guilty plea until judge indicated he would not give a probationary sentence, court found it implicit in the record that this was the reason for the motion to withdraw). See also State v. Barton, 325 S.C. 522, 481 S.E.2d 439 (Ct. App. 1997) (Defendant not entitled to withdraw guilty plea where he interjected only upon passing of sentence, did not voice any objection during taking of his guilty plea, and record

supported conclusion that he understood plea agreement and pled guilty freely and voluntarily).

Even if the generic request to withdraw the plea does preserve the issue of whether Appellant should have been permitted to withdraw his plea because he was not informed of the consequences, the record supports that Judge Cottingham's denial of the request was not an abuse of discretion. "All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001). Appellant expressed his desire to plead guilty and waive trial and even waived venue to enter pleas to the Edgefield charges. (R. pp. 5-7; p. 10.) The plea judge did mention the potential sentences of five years on each charge in open court (R. p. 12), and the sentencing sheets signed by Appellant noted the sentencing ranges in the upper corner. (R. pp. 26-28, Sentencing sheets.) It was noted prior to Appellant's affirmation that he wished to plead guilty to the Lexington charges that the Edgefield solicitor did not object to a sentence of time served, but the Lexington solicitor was leaving sentencing to the discretion of the trial court. (R. p. 9.) The record reflects that Appellant was aware that restitution would be part of his sentence. (R. p. 9, p. 12.) Defense counsel's comments also reflect that some discussion of prison time had occurred:

...in talking with [Appellant], he understands not only that he made a mistake, but he broke the laws of this state and that some penalty is appropriate, Your Honor. I think he's served enough time. I would suggest the Court give him some time. I don't even have a problem with three years if it's suspended, but whatever the Court thinks is appropriate, but --

(R. p. 12.) While this comment in isolation does not impart that Appellant was informed of the possible sentence of five years, in conjunction with the other elements of the record, including the judge's notation of the five year sentence potential, it is readily apparent that Appellant was apprised of the potential for prison time. He must surely have hoped for a suspended sentence, but his hope for less time does not amount to a complete lack of understanding of the consequences of his plea.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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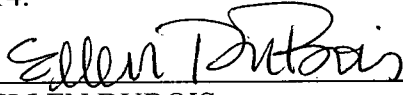
Appellant.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Benjamin Tripp, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 31st day of December, 2014.


ELLEN DUBOIS
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ATTORNEY GENERAL

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Benjamin Tripp, Esquire
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Division of Appellate Defense
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Columbia, SC 29211

RE: State v. Brian Curtis Mack
Appellate Case No. 2013-001726

Dear Mr. Tripp:

I am enclosing two (2) copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Mary W. Leddon
Assistant Attorney General
Bar # 76192

MWL/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services