STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-00976

THE STATE, ...RESPONDENT,

v.

JAKE LAKE, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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The plea judge properly accepted Appellant's knowing and voluntary guilty plea to the crime of attempted murder where the record shows Appellant understood the charge against him and the waiver of rights which resulted from the plea

STATEMENT OF THE CASE

Appellant was indicted in Lexington County in October 2011 for attempted murder. On October 4, 2012, Appellant appeared before the Honorable Roger M. Young, Sr. for his plea hearing. Frank McMaster, Esquire, represented Appellant; assistant solicitor Suzanne Mayes, Esquire, represented the State. Appellant pled guilty to the charge and the plea judge sentenced Appellant to twenty-eight years' incarceration.

On October 9, 2012, Appellant filed a pro se motion for reconsideration of his sentence. (App.pp.8–9). On December 4, 2012, Appellant submitted a pro se motion to withdraw his guilty plea claiming he believed his counsel and the State had agreed upon a recommended sentence of five years' imprisonment. (App.p.10). On April 12, 2013, plea counsel sent a letter to the Lexington County Clerk of Court requesting notice for Appellant's future hearing on his motion to reconsider, explaining he planned to assist Appellant. (App.p.11). On March 4, 2014, plea counsel was placed on interim suspension by the South Carolina Supreme Court. In re McMaster, 407 S.C. 213, 755 S.E.2d 107 (2014). As a result, Sarah Mauldin of the Lexington County Public Defender's Office assumed representation of Appellant.

On March 5, 2015, Appellant filed an application for post-conviction relief (PCR). (App.pp.45–54). In his application, Appellant claimed plea counsel represented him during his plea, sentence, and post-plea motions. (App.p.54). Appellant also included his pro se motion for reconsideration of his sentence. (App.p.51). He further claimed plea counsel "was supposed to arrange a hearing with the [plea] judge" for his post-plea motions. (App.p.50).

Appellant's application also included two letters from the plea judge addressing his motions. In his January 12, 2015 letter, the plea judge noted the Lexington County Clerk of Court was not in possession of his motion for reconsideration of his sentence, but did have records of his motion to withdraw his plea. (App.p.53). He informed Appellant there were not

records of the first motion ever being filed, and the second motion was not based on after discovered evidence or timely filed. (App.p.53). He noted plea counsel, the attorney of record, was at that time suspended from the practice of law and recommended Appellant contact the assistant solicitor assigned to his case. (App.p.53). In his February 3, 2015 letter, the plea judge informed Appellant he received a follow-up letter from the Lexington County Clerk of Court noting both motions were barred for the issues stated in the prior letter. (App.p.54).

On September 4, 2015, attorney Jeffrey Bloom wrote a letter requesting PCR counsel be appointed to Appellant's case. (App.p.59). He noted Appellant's post-plea motions were filed pro se and that plea counsel was subsequently suspended from the practice of law. (App.p.59). The letter was sent to Judge Keesley and copied to Walt Whtimire, the State's attorney handling the PCR case. (App.p.59). On September 22, 2015, David Allen was appointed to represent Appellant in the PCR action. (App.p.63). On March 7, 2016, Judge Keesley entered a scheduling order, delaying the PCR action until Appellant's motion to reconsider his sentence was resolved. (App.p.63).

On April 1, 2016, Appellant, through counsel, filed a brief in support of his motion to reconsider his sentence, to which the State filed a response. (App.pp.12–24). By order filed April 28, 2016, the plea judge denied Appellant's motion to reconsider and dismissed the motion to withdraw the guilty plea as untimely. (App.p.25).

On May 6, 2016, Appellant filed and served a notice of appeal. Pursuant to Rule 203(d)(1)(B)(iv), SCACR, Appellant also filed a written explanation claiming his plea was not knowing and voluntary because he disputed the charges against him at the plea hearing.

On June 23, 2016, the State, due to Appellant's pending notice of appeal, filed its return and motion to dismiss Appellant's PCR application without prejudice. (App.pp,67–69). In its

return, the State incorrectly claimed "[Appellant], through counsel, moved to reconsider his sentence on October 9, 2012." (App.p.67).

On September 29, 2016, Judge Keesley, Appellant, Appellant's PCR Counsel, and Senior Assistant Attorney General Johanna Valenzuela signed a consent order dismissing the PCR application without prejudice until Appellant's direct appeal was resolved. (App.pp.71–72). The consent order claimed Appellant, through counsel, filed both of his post-plea motions. (App.p.71).

On February 27, 2017, Appellant, through appellate counsel, filed his initial brief and designation of matter in his direct appeal. On June 30, 2017, the State filed a motion to dismiss the appeal, claiming Appellant's post-plea motions, which were filed while Appellant was represented by counsel, were not timely, proper motions and thus the Court of Appeals lacked appellate jurisdiction over the case. (App.pp.1–26). Appellant filed a return to the motion, arguing judicial estoppel, laches, and abandonment by counsel legitimized the post-plea motions. (App.pp.27–74). On July 25, 2017, the State filed its reply. (App.pp.75–82). On August 9, 2017, the Court of Appeals dismissed the appeal finding the pro se motions were nullities which were "not proper, should not have been accepted, and should not have been ruled upon." App.pp.83–84) (citing State v. Miller, 388 S.C. 347, 697 S.E.2d 527 (2010)). Appellant filed a petition for rehearing, reiterating its prior arguments to the court. (App.pp.85-101). Rehearing was denied on October 18, 2017. (App.p.110).

Appellant submitted a Petition for a Writ of Certiorari to the Supreme Court of South Carolina, which was granted on March 28, 2018. Following briefing by the parties and oral argument, the Supreme Court reversed this Court's dismissal after finding the State failed to timely challenge the October 9, 2012 motion as a pro se filing. As a result, the court reversed the

dismissal and remanded to this Court to address the merits of Appellant's appeal. This Brief of Respondent now follows.

STATEMENT OF FACTS

On October 4, 2012, Appellant pled guilty to attempted murder before the plea judge. The plea judge informed Appellant he was indicted for an offense which carries a maximum sentence of thirty years' incarceration. After Appellant confirmed his intention to plead, the plea judge explained several concepts to Appellant. He noted Appellant was pleading to a "most serious" offense under South Carolina law and that a conviction for a second such offense would require a sentence of life without the possibility of parole. Appellant confirmed he spoke with his attorney about such offenses and that he still wished to plead. (Tr.p.1–Tr.p.5).

The plea judge also explained that attempted murder was a no-parole offense, requiring service of at least eighty-five percent of his sentence before he would be eligible for any early release. The plea judge stated that Appellant was entitled to a jury trial, at which time it would be the State's burden to convince a jury of his guilt beyond a reasonable doubt and he could challenge the State's evidence, put up evidence of his own, and testify in his defense if he so desired. The plea judge stressed a verdict of "guilty" must be unanimous and Appellant would have the right to appeal said verdict. However, pleading guilty operated as a waiver of these rights by Appellant. Appellant acknowledged he understood the plea judge's statements. Appellant also acknowledged he was satisfied with plea counsel's representation, and plea counsel had done everything he requested, including explain what was required of the State to prove guilt. After Appellant explained he was not under undue influence from any substances or from individuals pressuring him to plead, the plea judge found Appellant was "freely, voluntarily, and intelligently" pleading guilty. (Tr.p.5–Tr.p.9).

The plea judge allowed the State to explain the facts of the case. Anita Pritchett (Victim) dated Appellant for a period, but ended the relationship. Afterwards, Appellant began stalking

and harassing her and her family. On March 8, 2011, Victim's twenty-four-year-old daughter (Daughter) told police she had received numerous harassing phone calls and text messages from Appellant. She informed officers Appellant had physically assaulted Victim while they were dating and had been camping in the woods behind their home after the break-up. On April 6, 2011, Victim contacted police and informed them of several incidents of vandalism and harassment, including his constant presence in the woods near the house. Appellant even called Victim while officers were at the residence. Additionally, Appellant called Daughter and told her, "I'm not done with you and I'm not done with her, call and tell your mother good-bye, I'm going to kill her." (Tr.p.9–Tr.p.13).

On April 7, 2011, the day of the attack, Victim contacted law enforcement and informed them an individual had fired multiple shots at her, likely Appellant. She arrived home at approximately 1:45 p.m., and when she walked into her front gate she heard a gunshot which she believed was aimed at her. She ran inside the home, peeked out a window, and saw Appellant in the wooded area behind the home. Several minutes later, she heard a second shot and discovered it had entered through her bedroom window. Victim told officers Appellant knew her schedule and was aware that upon returning home she would sit near the window upon her return, and that he fired the bullet knowing such and having "the intention of killing her." Two nearby individuals, Thomas Lee and Richard Wright, both heard the gunshots, and officers confirmed the bullet hole in her window and traveled through multiple walls in the home. Officers found the vehicle a short distance from the house, occupied solely by Appellant and with a rifle in plain view. When told he was being arrested for shooting into someone's house. Appellant told the officer that if he had shot into someone's house, it was an accident which occurred when he was "sighting his rifle." (Tr.p.13–Tr.p.17).

Appellant's vehicle was searched, and officers found the rifle, a scope, a spent shell casing, an ammunition box, and two active rounds located in the rifle, a knife, a training sword, and an open case of Ice House beer. Additionally, the area around Victim's home was searched, and several "camps" were found in the area with cigarette butts matching Appellant's cigarette brand along with empty Ice House beer cans. Officers also took care to collect all of the text messages sent to Victim and Daughter by Appellant. (Tr.p.17–Tr.p.19).

Officers later discovered James Slice, Jr., the man with whom Appellant was living, reported his rifle, a scope, and ammunition stolen; the same items recovered from Appellant's vehicle. Patricia Loria, a friend of Appellant's, told officers she spoke with Appellant the day of the crime and Appellant informed her he was going to kill someone and then commit suicide because someone had "ruined his life." Appellant repeatedly claimed he was going to "kill that bitch," and noted Appellant always referred to Victim as a "bitch." Appellant also revealed to Loria he was watching Victim's home and had slashed the tires on her vehicle, along with those on Daughter's. (Tr.p.19–Tr.p.23).

Even after his arrest, and against a direct prohibition of doing so, Appellant continued contacting Victim, sending her numerous letters from jail, claiming he was "not accepting" of the end of their relationship and would not stop thinking of her until he died. (Tr.p.23–Tr.p.26).

At the conclusion of the State's presentation of the facts, plea counsel was permitted to make his own statements and dispute the State's description of events. Plea counsel began by noting he and Appellant disputed "[s]ome of the prior history," believing some of the events described did not occur, but were not of consequence to the plea. As to the attempted murder charge, plea counsel admitted "there's just no disputing that" he was stalking Victim and camping out near her home and had "no excuses for what happened . . . ." (Tr.p.26–Tr.p.28).

Plea counsel also elected to share purely anecdotal information regarding Appellant's skill with a gun: he claimed both he and Appellant were "avid" deer hunters and the latter "doesn't miss" targets one-hundred yards away and Victim was lucky Appellant somehow missed her. Counsel also made an off-hand comment that Appellant might have "just intended to scare her or something" but that it "d[id]n't change the facts" of the case. Counsel reiterated there were no excuses for Appellant's behavior; Appellant "knew what he was doing [when he] took a shot" at Victim and he accepted "total responsibility" for the attempted murder. (Tr.p.28–Tr.p.29).

Appellant also spoke at the hearing, claiming he was "truly [] sorry for what [he'd] done" and did not dispute the characterization of his actions by the State. Similarly, his father, a magistrate judge, did not challenge the presented facts. (Tr.p.31–Tr.p.32).

At the conclusion of the hearing the trial judge, the plea judge noted the facts provided showed a "frightening" level of premeditation by Appellant which merited twenty-eight years' incarceration. The plea judge explained he had never heard such a "litany of facts" indicating premeditation in any prior case before him. Acknowledging that Appellant likely pled guilty to spare Victim and her family from the trauma of trial, the plea judge decided against giving Appellant that maximum thirty-year sentence. (Tr.p.32).

On October 9, 2012, Appellant filed a pro se document titled, "Notice of Motion and Motion for Reconsideration of Sentence." Within it, he claimed his twenty-eight-year sentence should be reconsidered based on "additional factors," although no description of said factors was contained in the motion. On December 4, 2012, Appellant filed an untimely[1] "Motion to

[1] As noted by both the plea judge and the Supreme Court, Appellant's motion to withdraw his plea was filed months after his plea and was not preserved for this appeal. See State v. Lake, Op. No. 2019-MO-030 (S.C. filed June 19, 2019).

Withdraw a Guilty Plea," claiming he believed a plea negotiation had been reached between the State and plea counsel for a five-year sentence, and he believed his counsel had put said negotiation on the record at the plea hearing. On April 1, 2016, Appellant filed a brief in support of his motion to reconsider his sentence. At no point within the brief did Appellant dispute the knowing and voluntary nature of his plea; in fact, Appellant "expressed . . . his willingness to take responsibility for his mistakes" and "acknowledge[d] his conduct warranted a significant prison sentence." (App.pp.8, 10, 12–22).

On April 25, 2016, the plea judge issued his order denying Appellant's motions to reconsider his sentence and to withdraw his guilty plea, ruling against the former on its merits and finding the latter was not timely filed. (App.p.25).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

The plea judge properly accepted Appellant's knowing and voluntary guilty plea to the crime of attempted murder where the record shows Appellant understood the charge against him and the waiver of rights which resulted from the plea. Further, any issue regarding the knowing and the voluntary nature of the plea is not preserved for review.

Appellant argues the plea judge erred in accepting Appellant's guilty plea because Appellant did not understand his charge including the requisite specific intent to kill, rendering his guilty plea unknowing and involuntary. The State disagrees with this allegation of error. Initially, the State notes any issue regarding the voluntary and knowing nature of the plea is not preserved for Appellate review because such issues were not raised to the plea judge. As to the merits of his claim, Appellant plea counsel both accepted the State's version of events, which contained overwhelming evidence of Appellant's specific intent to kill Victim.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is

required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

"To find a guilty plea is 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) (citing Boykin v. Alabama, 395 U.S. 238, 242–43 (1969)). "To ensure the defendant understands the consequences of his guilty plea, the trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Id. at 34, 528 S.E.2d at 421 (citing Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). The record should indicate a defendant pleading guilty was fully aware of the consequences of such a plea. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). Whether a waiver of statutory or constitutional rights is knowing and voluntary must be established by the complete record, including "colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). To challenge the knowing and voluntary nature of his plea on direct appeal, a defendant must make a contemporaneous objection before the trial judge; absent a timely objection, a guilty plea may only be attacked through Post-Conviction Relief proceedings. State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982).

In State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976), the South Carolina Supreme Court explained a voluntary and knowing guilty plea is made when the record demonstrates a defendant possessed knowledge of the crime charged and "affirmative awareness of the consequences of a guilty plea." Id. at 578–79, 225 S.E.2d at 342. Applying said standard to the facts of Lambert, it found the defendant's admissions to breaking into a home at nighttime and removing an item was proof of defendant's intent to commit the crime and that Lambert's plea was "voluntary and intelligently entered with full knowledge of the nature of the offense," because "(p)roof of intent necessarily rests on inference from conduct." Id. (citing State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971)).

Issue Preservation

In McKinney, the defendant alleged, for the first time on appeal, that his guilty plea was not knowingly and intelligently entered. Id. at 108, 292 S.E.2d at 599. The Supreme Court dismissed the appeal because McKinney was required to raise the issue before the plea judge, particularly noting he was represented by counsel at the plea and any failures by counsel could "only be attacked through the more appropriate channel of Post-Conviction Relief." Id. Similarly, in State v. Bickham, 381 S.C. 143, 672 S.E.2d 105 (2009), the defendant raised a new issue on appeal; that he was not eligible for life without parole at the time of his plea and the plea court abused its discretion in refusing to allow him to withdraw his plea. Again, the Supreme Court found that failure to raise this issue to the plea court precluded the defendant from arguing it on appeal. Id. at 149 n.2, 672 S.E.2d at 108 n.2.

In the instant case, any issues regarding the knowing and voluntary nature of Appellant's guilty plea are not preserved for review because they were never raised to the plea judge. Appellant never argued his plea was unknowing or involuntary at the plea hearing or even in his

post-plea motion. The plea judge cannot possibly have erred in failing to rule on an issue which was never raised to him. Accordingly, this Court should find this issue unpreserved for appellate review.

Knowing and Voluntary Plea

Appellant argues the plea judge erred in accepting his guilty plea because plea counsel stated Appellant did not intend to kill the complaining witness. Admittedly, plea counsel did share anecdotal evidence regarding Appellant's general skill with a gun, claiming he personally saw that in the past Appellant was very accurate with a rifle. Based on this prior experience, plea counsel claimed Appellant either missed Victim or "just intended to scare her or something . . . ." This offhand comment, not originating from any discussion with Appellant. In fact, both plea counsel and Appellant confirmed they did not disagree with the State's recitation of facts surrounding the attack; plea counsel himself noted "there's just no disputing" the attempted murder charge and that Appellant "knew what he was doing." Appellant himself accepted the State's recitation of facts and characterization of his actions, noting he was sorry for what he had done and wish he could undo his actions. As noted above, Appellant did not dispute the State's recitation of facts or the characterization of his actions as attempted murder in any of this post-plea filings. Just like the defendant in Lambert, Appellant and plea counsel acknowledged Appellant attempted to shoot and kill Victim and that he did not dispute his responsibility for such actions. Thus, the only evidence presented at the plea hearing indicates Appellant, both knowingly and voluntarily, admitted to actions which constituted the attempted murder of Victim. See Lambert, 266 S.C. at 578–79, 225 S.E.2d at 342.

Accordingly, the plea judge properly found Appellant's plea to be knowing and voluntary.

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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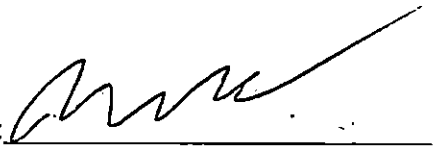
BY: 

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October 15, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-00976

THE STATE, ...RESPONDENT,

v.

JAKE LAKE, ...APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served this 15th day of October, 2019.

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October 15, 2019

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RE: State v. Jake Lake – Appellate Case No. 2016-000976

Dear Ms. Hackett:

I am enclosing two copies of the Motion to File Initial Brief of Respondent and Designation of Matter Out of Time, Initial Brief of Respondent, and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher
Assistant Attorney General
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WFS/ssm
Enclosures

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