STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAKE LAKE,

APPELLANT

APPELLATE CASE NO. 2016-000976

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the plea judge err in accepting Appellant's guilty plea to attempted murder where the colloquy with Appellant and plea counsel indicated Appellant did not understand the charge against him because Appellant contended he did not intend to kill the complaining witness, but the charge of attempted murder requires a specific intent to kill?

STATEMENT OF THE CASE

A Lexington County grand jury indicted Appellant for attempted murder (2011-GS-32-3107) on October 3, 2011. R. 179-180. On October 4, 2012, Appellant appeared before the Honorable Roger M. Young, Sr., to enter a guilty plea to the charge of attempted murder. R. 1. Suzanne Mayes represented the state, and Frank McMaster represented Appellant. R. 1. Judge Young sentenced Appellant to twenty-eight years' imprisonment. R. 32, ll. 23-24; R. 181.

On October 9, 2012, Appellant filed a *pro se* motion for reconsideration. R. 35. On December 4, 2012, Appellant submitted a *pro se* motion to withdraw his guilty plea. R. 37. In the motion, Appellant stated he "was under the belief that a plea negotiation had been reached between the state and [his] attorney for a sentence of five (5) years." R. 37. On April 12, 2013, plea counsel sent a letter to the Clerk of Court noting his representation of Appellant at the guilty plea, his awareness of Appellant's filing of the motion to reconsider, and his request to be notified of the hearing on the motion so that he could assist Appellant. R. 38. On March 4, 2014, Appellant's plea counsel was placed on interim suspension. In the Matter of Frank Barnwell McMaster, Appellate Case No. 2014-000334 (S.C. Sup. Ct. filed Mar. 4, 2014). Thereafter, Sarah Mauldin of the Lexington County Public Defender's Office, was appointed to represent Appellant.

On April 1, 2016, Appellant, through counsel, filed a brief in support of motion to reconsider sentence. R. 39. The state filed a response. R. 61. By an order filed on April 28, 2016, Judge Young denied Appellant's motion to reconsider. R. 63. In the same order, he denied Appellant's motion to withdraw his guilty plea as untimely filed. R. 63. On May 6, 2016, Appellant filed and served a notice of appeal. Pursuant to Rule 203(d)(1)(B)(iv), Appellant filed a written explanation to show there was an issue to be reviewed on appeal. In the

explanation, Appellant asserted the guilty plea was not made knowingly and voluntarily because attempted murder requires a specific intent to kill and the record demonstrated Appellant did not understand the charge against him. Further, Appellant asserted it was structural error for the court to find the plea was freely, voluntarily and intelligently made prior to hearing the state's recitation of the facts.

Appellant now files this brief.

ARGUMENT

The plea judge erred in accepting Appellant's guilty plea to attempted murder where the colloquy with Appellant and plea counsel indicated Appellant did not understand the charge against him because Appellant and plea counsel contended he did not intend to kill the complaining witness, but the charge of attempted murder requires a specific intent to kill.

Relevant facts

The Clerk of Court called Appellant's case before Judge Young, and informed the judge that Appellant had been "indicted for attempted murder" and was "pleading guilty as charged." R. 3, ll. 1-4. Thereafter, the judge inquired of Appellant if he wanted to plead guilty to attempted murder, an offense "[t]hat carries a sentence of up to 30 years in prison." R. 3, ll. 16-21. Appellant responded that he did. R. 3, l. 22. The judge then informed Appellant that attempted murder "is a strike offense of most serious time." R. 3, l. 25 – R. 4, l. 1. When Appellant told the judge that he had discussed the "strikes" only "[a] little bit" with his lawyer, the judge explained the strike system using baseball as an analogy. R. 4, l. 1 – R. 5, l. 5. After this explanation, Appellant indicated he still wanted to plead guilty. R. 5, ll. 8-9. The judge also explained that Appellant would not be eligible for parole and would have to serve "at least 85 percent" of his sentence. R. 5, ll. 10-16.

Thereafter, the judge explained the rights that Appellant would "give up" by pleading guilty, including "the right to a jury trial," the ability to "challenge the state's evidence," to present his own evidence, and the right to testify or not in his defense. R. 5, l. 19 – R. 6, l. 8. Appellant indicated he wanted to "give those rights up and plead guilty." R. 6, ll. 11-13.

Continuing with the colloquy, Appellant indicated he was not "under the influence of drugs or alcohol," did not "take any kind of prescription medication," and did not "have any

mental, emotional, or physical condition" that kept him "from understanding" what he was doing that day. R. 6, l. 17 – R. 7, l. 1.

In response to the judge's leading questions, Appellant indicated plea counsel had reviewed the evidence with him and explained the offense of attempted murder. R. 7, ll. 11-17. Specifically, the judge asked if Appellant's counsel had "explained ... what this charge of attempted murder is about," and Appellant indicated plea counsel had done so. R. 7, ll. 15-17. The judge did not explain the elements of attempted murder or discuss the charge in any greater detail with Appellant or plea counsel. Instead, the judge asked plea counsel, "Mr. McMaster, does this gentleman understand what he's doing, waiving his right to a jury trial and pleading guilty today?" R. 9, ll. 6-9. Plea counsel responded, "He does, Judge." R. 9, l. 9. Immediately thereafter, the judge found Appellant's "plea's freely, voluntarily, and intelligently made." R. 9, ll. 10-11.

The judge then requested the state provide any "facts" to support the guilty plea. R. 9, l. 12. Thereafter, the solicitor engaged in a lengthy soliloquy regarding "an ongoing series of actions that had taken course over several months." R. 9, l. 14 – R. 23, l. 8. In reciting the factual basis for the guilty plea, the solicitor informed the judge that the charge of attempted murder involved Appellant's former girlfriend, Anita Pritchett. R. 9, ll. 14-15. Pritchett ended their relationship, and Appellant had "trouble accepting" her decision. R. 9, ll. 18-21. On April 7, 2011, the state claimed, Pritchett arrived home at 1:45 p.m. having been dropped off by her new boyfriend. R. 14, ll. 20-21; R. 16, ll. 1-8. Pritchett claimed that while "walking into her front gate, she heard a gunshot which she believed was directed towards her." R. 14, ll. 20-23. She ran inside her home and "peeked out of a window." R. 14, ll. 23-24. She claimed she could see Appellant walking in the wood line behind her house. R. 14, l. 25 – R. 15, l. 2. "[F]ive

minutes later she heard a second shot and discovered that it had been directed at her bedroom window." R. 15, ll. 3-5.

A short time after the shooting, the police stopped Appellant in his truck. R. 16, ll. 18-22. The officer who stopped Appellant saw a rifle in the truck. R. 16, ll. 22-23. The officer arrested Appellant for discharging a firearm into a dwelling. R. 17, ll. 10-14. Appellant told the officer that if he had shot into someone's home, then "it was an accident" because he had been "sighting his rifle." R. 17, ll. 12-18.

After the state's presentation, the judge remarked, "Well, Mr. McMaster, let's start with you. I notice[d] that throughout the litany of the factual presentation you and your client were both shaking your heads at numerous times, so what is it that you dispute about what she said?" R. 26, l. 25 – R. 27, l. 4. Initially, plea counsel responded that "there were some disputes as to the factual basis" and that Appellant indicated "[s]ome of the prior history" did not happen." R. 27, ll. 5-7. According to plea counsel, however, those disputes were not consequential. R. 27, ll. 5-8. He told the judge there was "just no disputing" the attempted murder charge. R. 27, ll. 9-10.

Plea counsel, who knew Appellant personally, described Appellant as "an avid deer hunter." R. 28, l. 7. He remarked that the two had hunted together. R. 28, ll. 7-8. Plea counsel continued,

> One thing I can tell you is from 100 yards, [Appellant] doesn't miss shooting a rifle. He does not miss. And in this situation - - I tell you, one time I even challenged him after I'd known he drank about a six pack at his brother's place, shooting targets at 100 yards, and he still whipped me. We were only shooting at something about the size of a silver dollar.

R. 28, ll. 8-15. According to plea counsel, the "point" of his sharing that story with the judge was that Appellant did "miss" Pritchett when he shot the rifle, showing he "just intended to scare

her or something." R. 28, ll. 16-17. In other words, Appellant did not intend to kill Pritchett. To plea counsel, however, Appellant's intent did not affect the case. R. 28, l. 18. He summed it up, "He picked up a deer rifle about 60 yards away and fired in her direction. That's all he did." R. 28, ll. 18-20.

At the conclusion of the presentations by the state and plea counsel, the judge explained his decision to sentence of twenty-eight years' imprisonment: "I'm sitting here listening going what can I possibly do to give you the benefit of the doubt, but the only thing I can come up with is you pled guilty to spare this lady and her family the trauma of going to court, and for that I will knock two years off the maximum." R. 32, ll. 11-15. The judge then stated that the complaining witness and her family did not "ever need to worry about [Appellant] again." R. 32, ll. 15-16. He further stated that he did not know if "what ail[ed]" Appellant "can be fixed. R. 32, l. 17. The only thing the judge knew to do was to lock up Appellant. R. 32, l. 18.

Discussion

Due Process & Guilty Pleas

"Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999)(citing Boykin v. Alabama, 395 U.S. 238 (1969)); see also Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). Before a judge can accept a guilty plea, a defendant must be advised of the constitutional rights being waived, including his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Pittman, 337 S.C. at 599, 524 S.E.2d at 624; see also Boykin, 395 U.S. at 243-244. The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278

S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975).

"A trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary." State v. Rikard, 371 S.C. 295, 300, 638 S.E.2d 72, 75 (Ct. App. 2006)(citing Boykin, 395 U.S. at 241). "In accepting a guilty plea, 'the trial judge is free to use any appropriate procedure for determining the accuracy of the guilty plea. The judge must be certain that the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea.'" Id. at 301, 638 S.E.2d at 75 (quoting State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975)). Before a judge may accept a guilty plea, the judge must be certain "'the defendant understand[s] 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[s] a factual basis for the plea.'" Id. (quoting Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001)); see also Pittman v. State, 337 S.C. 597, 598, 524 S.E.2d 623, 624 (1999); Dover v. State, 304 S.C. 433, 434-435, 405 S.E.2d 391, 392 (1991); State v. Hazel, 275 S.C. 392, 394, 271 S.E.2d 602, 603 (1980).

The trial court must assure itself "'that the plea was voluntary and intelligently entered with full knowledge of the nature of the offense.'" Gaines v. State, 355 S.C. 376, 380, 517 S.E.2d 439, 441 (1999)(quoting State v. Lambert, 266 S.C. 574, 580, 225 S.E.2d 340, 342 (1976)). "To ensure that the defendant understands, the trial judge usually questions the defendant about the facts surrounding the crime and the punishment which could be imposed." Id. A guilty plea "cannot be due to ignorance or incomprehension for a plea of guilty is more than an admission of conduct, it is

a conviction." Armstrong, 263 S.C. at 597, 211 S.E.2d at 891. Therefore, "before a guilty plea may be accepted, the court must be certain the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea." Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

Attempted Murder – Specific Intent to Kill

The South Carolina General Assembly recently created the crime of attempted murder. Lawmakers defined the offense as: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). The statute became effective on June 2, 2010. According to the Act, attempted murder replaced the common law crime of assault and battery with intent to kill: "wherever in the 1976 Code reference is made to the assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29." 2010 Act No. 273, § 7.C. Thus, the General Assembly was aware of the prior offense of assault and battery with intent to kill and the case law defining the common law offense.

Previously, assault and battery with intent to kill was defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Hinson, 253 S.C. 607, 611, 172 S.E.2d 548, 550 (1970). Although assault and battery with intent to kill was a common law offense, a statute provided for its punishment: "The crime of assault and battery with intent to kill shall be a felony in this state and any person convicted of such crime shall be punished by imprisonment not to exceed twenty years." S.C. Code Ann. § 16-3-620 (2009).

In State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), the South Carolina Supreme Court analyzed the offense of assault and battery with intent to kill and discussed the required elements of the offense. Based upon the traditional comparison of assault and battery with intent to kill to

murder – that if the offense would have been murder had the victim died – and the lack of a specific intent requirement for murder, the Court held "the logical inference is that, likewise, a specific intent is not required to commit" assault and battery with intent to kill. Id. at 14-15, 479 S.E.2d at 51. The Court explained that although the offense required both an intent to kill and malice, the offense did *not* require a *specific intent to kill.* Id. at 15, 479 S.E.2d at 51. Thus, the Court held it sufficient "if there is some general intent, such as that heretofore applied in cases of murder in this state." Id.

In State v. Sutton, 340 S.C. 393, 398, 532 S.E.2d 283, 286 (2000), the South Carolina Supreme Court refused to recognize the offense of attempted murder. The Court explained that an attempt to commit murder requires a specific intent to kill. Specifically, the Court stated "[i]n general, '[a]ttempt is a specific intent crime.'" Id. at 397, 532 S.E.2d at 285 (citing 21 Am.Jur.2d Criminal Law § 176 (1998)). Further, the Court explained "'[t]he act constituting the attempt must be done with the intent to commit that particular crime.'" Id. (quoting 21 Am.Jur.2d Criminal Law § 176). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." Id. at 397, 532 S.E.2d at 285. The Court then distinguished attempted murder from assault and battery with intent to kill: "Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not." Id.

Repeatedly, South Carolina's appellate courts have held that attempt crimes require specific intent to complete the acts comprising the principal offense. See State v. Green, 397 S.C. 268, 283, 724 S.E.2d 664, 671-672 (2012); State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011); State v. Evans, 216 S.C. 328, 332, 57 S.E.2d 756, 758 (1950)(stating "[t]he law

does not concern itself with the mere guilty intention, unconnected with any overt act"); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942)(same); State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The clear and unambiguous meaning of the statute concerning attempted murder is a requirement of specific intent: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). Even if the statute were ambiguous, then a review of South Carolina's case law would demonstrate the legislature intended to require a specific intent to kill when it created attempted murder. The Supreme Court had held repeatedly that attempted murder required a specific intent to kill. In fact, our appellate courts had long maintained that attempt crimes are specific intent crimes. The legislature was aware of South Carolina's case law concerning attempted murder specifically, and attempt crimes in general. Therefore, the legislature

understood that by creating the crime of attempted murder, the legislature was requiring a showing of specific intent.

On April 22, 2015, this Court decided State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015)[1] and held the phrase "with intent to kill" failed to "clearly indicate what level of intent the Legislature meant to require the state to prove because the word 'intent' can mean anything from purpose to negligence." Id. at 192. Thus, this Court "look[ed] beyond the words of the statute and use[d] our rules of statutory construction to determine what the Legislature intended." Id. Relying upon the Legislature's undisputed knowledge of the history of our courts requiring the state to prove specific intent as an element of attempt crimes, this Court held the Legislature intended to require a showing of specific intent for the offense of attempted murder. Id. This Court found the trial judge erred in failing to charge the jury that attempted murder required the state to prove specific intent. Thus, this Court reversed King's conviction. Id.[2]

In Pittman, the South Carolina Supreme Court granted Pittman a new trial where the record showed, among other things, that the trial judge did not advise Pittman of the crucial elements of the charged offenses. Pittman, 337 S.C. at 625, 524 S.E.2d at 600. Pittman had signed a document called a "checklist of guilty plea," but the list did not include the crimes for which he was charged or the elements of the charged offenses. Id. at 625, 524 S.E.2d at 600-601.

The trial judge erred in accepting Appellant's guilty plea as voluntarily, knowingly, and intelligently entered where plea counsel stated that Appellant did not intend to kill the complaining witness and the specific intent to kill was a necessary element of the offense. The judge noted that

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[1] On March 28, 2016, the South Carolina Supreme Court granted the state's petition for writ of certiorari. The Court heard oral arguments on September 7, 2016.

[2] Appellant benefits from the King ruling as his case was pending on direct review and the issue was preserved for review. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987); State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009).

Appellant and plea counsel were in disagreement with the prosecutor's recitation of the facts and asked for an explanation of the disagreement. During this colloquy with plea counsel, the judge learned that the defense position was that Appellant did not intend to kill Pritchett; rather, his intent was only to scare her. However, plea counsel indicated this fact made no difference – this was an error, and the judge should have refused to accept the plea in light of plea counsel's misunderstanding of the law. Additionally, the judge should have ensured Appellant understood the crucial elements of the offense, which necessarily included a specific intent to kill the complaining witness, prior to finding the guilty plea voluntarily, intelligently and knowingly entered. Neither the judge nor plea counsel may hide behind the fact that the guilty plea was entered prior to King. As discussed, South Carolina appellate courts had ruled that attempt crimes required a specific intent to kill, and the Legislature created the offense of attempted murder with the knowledge of the existing case law. Thus, it was a surprise to no one when this Court held the statutory offense of attempted murder required a specific intent to kill.

CONCLUSION

Appellant respectfully requests his guilty plea be vacated and his case be remanded for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of December, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

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