STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PERRY DRAKE GILMORE, JR.,

APPELLANT

APPELLATE CASE NO. 2017-002283

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by denying Appellant's motion to withdraw his "no contest" guilty plea, where Appellant represented himself, and where the record showed that appellant wanted to enter a "guilty but mentally ill" plea?

STATEMENT OF THE CASE

During the September 2017 term, the Lexington County Grand Jury indicted Appellant for Assault and Battery, second degree; indecent exposure; and hit and run resulting in property damage. R. 53 – 58.

Appellant appeared on August 27, 2017 before the Honorable Willliam P. Keesley. R. 1. Bradley P. Pogue represented the state. Id. Appellant represented himself.[1] Id.

The state told the court that the plea offer given to Appellant was the same plea offer the state gave to his appointed attorney. R. 12, ll. 17 – 25. Appellant rejected the state's plea offer. Id.

Judge Keesley held a Faretta[2] hearing and determined that Appellant was capable of representing himself. R. 13, l. 15 – 14, l. 18.

After a short recess, Appellant and the state "worked out a guilty plea." R. 16, ll. 10 – 12. However after the court asked Appellant how he wanted to plead for indecent exposure, Appellant pleaded, "no contest but mentally ill." R. 16, l. 22 – 17, l. 12. Appellant explained that he wanted the court to recognize his diagnosed mental disorders for mitigation purposes. R. 17, ll. 14 – 17.

The court refused to accept a "no contest but mentally ill" plea and Appellant ultimately pled "no contest".[3] R. 19, ll. 4 – 5; R. 19, l. 15; R. 19, ll. 16 – 18; R. 20, l. 7.

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1 Appellant filed a motion to relieve his attorney and Judge Knie issued the order granting Appellant's motion on August 11, 2017. R. 3, ll. 8 – 14.

2 Faretta v. California, 422 U.S. 806 (1974).

3 A plea of "no-contest" is now normally called an Alford plea. North Carolina v. Alford, 400 U.S. 25 (1970).

The court accepted Appellant's plea as freely, knowingly, voluntarily, and intelligently made. R. 33, ll. 9 – 14; R. 33, ll. 24 – 25. Appellant explained to the court at the plea hearing, "I would also like to state that the reason I pled no contest is because of my uncertainty as to legal reasons." R. 36, ll. 13 – 15.

Judge Keesley sentenced Appellant to three years' imprisonment for assault and battery, second degree; three years' imprisonment for indecent exposure; and one year imprisonment for hit and run resulting in property damage. R. 36, l. 23 – 37, l. 4; R. 37, ll. 5 – 6. All of the sentences ran concurrent. R. 37, l. 7.

After the plea hearing, Appellant wrote a letter to Judge Keesley which the judge interpreted as, "a motion to withdraw [Appellant's] plea and a motion for a reconsideration of sentence." R. 38, ll. 1 – 7. On October 2, 2017, Appellant's motion to withdraw his plea and reconsider his sentence hearing was held. Id.

Judge Keesley issued an order denying Appellants motion on October 9, 2017. R. 47 – 52.

This appeal follows.

STANDARD OF REVIEW

"Once a defendant enters a plea of guilty, the decision whether to allow withdrawal of the plea is left to the trial court's sound discretion." State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002) (citing State v. Riddle, 278 S.C. 148, 292, S.E.2d 795 (1982); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. (citing State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001)). "The failure to exercise discretion, however, is itself an abuse of discretion." State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) (citing Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)).

ARGUMENT

The trial court erred by denying Appellant's motion to withdraw his "no contest" guilty plea where Appellant represented himself and where the record showed that appellant wanted to enter a "guilty but mentally ill" plea.

Relevant Facts

The facts alleged by the state are as follows. On July 29, 2016 in Lexington County, Appellant's car ran into another car. R. 22, ll. 14 – 19. Appellant allegedly fled the scene. R. 22, ll. 23 – 24.

On September 1, 2016, Appellant and another motorist got into an argument in a Walmart parking lot in the Columbia area. R. 24, l. 20 – 25, l. 8. Appellant's car and the motorist's car were in each other's way. R. 25, ll. 9 – 11. The motorist got out of his car and approached Appellant. R. 25, ll. 15 – 17. A verbal exchange took place, Appellant got out of his car, and an altercation ensued. R. 25, ll. 18 – 25. The motorist sustained injuries during the altercation. Id.

In regard to the indecent exposure charge, the state claimed that on November 23, 2016, in a different Walmart parking lot, Appellant masturbated in his car in view of another shopper. R. 27, ll. 9 – 18.

Pursuant to the plea agreement, Appellant had a separate indecent exposure charge and a separate ABHAN charge dismissed. R. 28, ll. 2 – 24.

The court accepted Appellant's plea as a free, knowing, voluntary, and intelligent decision. R. 33, ll. 9 – 25. However as Judge Keesley made that finding, Appellant interrupted him because he thought he was being sentenced already. R. 33, ll. 17 – 18. Judge Keesley explained he was only accepting the plea at that time. R. 33, ll. 20 – 22.

Judge Keesley sentenced Appellant to three years' imprisonment for assault and battery, second degree; three years' imprisonment for indecent exposure; and one year imprisonment for hit and run, property damage. R. 36, l. 23 – 37, l. 4; R. 37, ll. 5 – 6. All of the sentences ran concurrent. R. 37, l. 7.

Appellant filed a motion to withdraw his plea and for a reconsideration of his sentence. R. 38, ll. 8 – 12. On October 2, 2017, Appellant's withdrawal and reconsideration hearing was held. R. 38, ll. 1 – 7.

Appellant explained to the court that he did not want to withdraw his plea altogether, but rather he wanted to change his plea to reflect his original intent. Specifically, Appellant wanted to plead "guilty but mentally ill" instead of pleading "no contest." R. 38, ll. 8 – 12. However, Judge Keesley issued an order denying Appellant's motion on October 9, 2017. R. 47 – 52.

That was an error and that error prejudiced Appellant.

Discussion

A plea of "guilty but mentally ill" is proper if, "at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20(A). The burden of proof is on the state to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is on the defendant to prove by a preponderance of the evidence that when he committed the crime he was mentally ill." S.C. Code Ann. § 17-24-20(B).

Appellant explained to the court that he did not want to withdraw his plea altogether, but to plead "guilty but mentally ill" instead of pleading "no contest." R. 38, ll. 8 – 12. Appellant

was diagnosed with "impulse control disorder," sometimes called "Intermittent Explosive Disorder," and takes Remeron and Tegretol to treat it[4,5,6]. R. 7, l. 25 – 8, l. 10; R. 42, l. 14 – 43, l. 9. Appellant wanted to plead "guilty but mentally ill" so that he would be eligible to receive mental health treatment while incarcerated. R. 39, ll. 2 – 5. "It is well established that the purposes for the enactment of GBMI statutes nationwide are... (2) to insure that mentally ill defendants receive treatment while incarcerated for their benefit as well as society's. State v. Wilson, 306 S.C. 498, 503-504, 413 S.E.2d 19, 22 (1990).

The United States Supreme Court has held that "on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained *or given through ignorance, fear or inadvertence*. Such an application does not involve any question of guilt or innocence. The court in exercise of its discretion will permit... a trial if for any reason the granting of the privilege seems fair and just. Kercheval v. United States, 274 U.S. 220, 224 (1927); *see* Nagelberg v. U.S., 377 U.S. 266 (1964).

Furthermore, the Court has stated, "we have never held *pro se* prisoners to the standards of counseled litigants." Gonzalez v. Crosby, 545 U.S. 524, 544 (2005) (See, Haines v. Kerner,

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4 Remeron is the brand name for the drug Mirtazapine, which is used primarily in the treatment of depression. In addition to its antidepressant properties, mirtazapine has anxiolytic, sedative, antiemetic, antiallergenic, and appetite stimulant effects and is sometimes used in the treatment of anxiety disorders, insomnia, nausea and vomiting, and to produce weight gain when desirable. Sami A. K. Anttila & Esa V. J. Leinonen, *A review of the pharmacological and clinical profile of mirtazapine*. 7(3) CNS Drug Rev. 249–64 (2001).

5 Tegretol is the brand name for the drug Carbamazepine, which is a medication used primarily in the treatment of epilepsy and neuropathic pain. It is used to treat schizophrenia along with other medications and as a second-line agent in bipolar disorder. *Carbamazepine Monograph for Professionals*, https://www.drugs.com/monograph/carbamazepine.html (last updated Oct 3, 2017).

6 The court reporter made a clerical error in the transcript. Appellant was diagnosed with "Intermittent Explosive Disorder," not "intimate explosive disorder."

404 U.S. 519 (1972)). The Court also decided that all formalities, save failure to state a claim, should be relaxed when applied to *pro se* litigants. "As the Court unanimously held in Haines v. Kerner, a *pro se* complaint, "however inartfully pleaded," must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears." Estelle v. Gamble, 429 U.S. 97, 106 (1976).

In State v. Hazel, 275 S.C. 392, 393 271 S.E.2d 602, 603 (1980), Hazel challenged the denial of her request to withdraw her guilty plea to kidnapping, for which she received a sentence of life imprisonment. The Supreme Court of South Carolina found that trial counsel advised Hazel that the judge *might exercise discretion* in sentencing. Id. (emphasis added) However, that advice was incorrect because the statute that related to sentencing for kidnapping mandated a sentence of life imprisonment. Id.

The Court held that Hazel's plea was not knowing because it was entered without an understanding of the consequences for the offense to which she pled. Id. at 392, 271 S.E.2d at 603. *Citing* Boykin v. Alabama, 395 U.S. 238 (1969).

In Boykin, supra, the United States Supreme Court held that Boykin's guilty plea was invalid because the record did not show that Boykin had voluntarily and understandingly entered a plea of guilty. Id. Boykin was convicted of robbery and sentenced to death. Id. at 239.

Boykin was appointed counsel and a few days later pled guilty to five indictments. However, the record showed the judge asked no questions of Boykin and Boykin did not address the court. Id. Therefore because the record was unclear as to whether Boykin fully understood the consequences of his plea, the Court overturned his guilty plea as involuntarily given. Id. at 244.

In Henderson v. Morgan, 426 U.S. 637 (1976), the United States Supreme Court found that Morgan did not receive adequate information about the offense to which he pled guilty. Therefore, his plea was involuntary and the conviction was entered without due process of law. Id. at 647.

Henderson pled guilty to second degree murder without being informed that intent to cause the death of the decedent was an element of the offense. Id. at 643 – 644. At the sentencing hearing Henderson's attorneys made a statement that explained his version of the offense, noting that he "meant no harm to [the decedent]." Id. at 643. At Henderson's evidentiary hearing, Henderson testified that he would not have pled guilty if he had known an intent to cause the death of the decedent was an element of second-degree murder. Id. at 643 – 644.

In the present case, Appellant's "no-contest" plea was not freely, knowingly, voluntarily, or intelligently made. Appellant, a pro se litigant, articulated a plea during the plea hearing that closely resembled "guilty but mentally ill." R. 17, ll. 11 – 12. Appellant explained he was diagnosed with "impulse control disorder," otherwise known as "Intermittent Explosive Disorder." R. 7, l. 25 – 8, l. 3; R. 42, ll. 15 – 17. He then told the court that he wanted his mental disorders to not be used as a defense, but rather be used as a mitigating factor that explained his conduct. R. 17, ll. 14 – 17. While Appellant pled inartfully during the plea hearing, his intentions were clearly evidenced during Appellant's motion to withdraw his plea and reconsider his sentence hearing, when Appellant explicitly stated, "I wanted to plead guilty but mentally ill." R. 38, ll. 11 – 12

Appellant showed confusion throughout the plea hearing. R. 17, ll. 11 – 18, l. 5; R. 33, ll. 17 – 19; R. 36, ll. 13 – 18. Appellant specifically informed the court that, "the reason I pled no contest is because of my uncertainty as to legal reasons." R. 36, ll. 14 – 15.

Pleading "guilty but mentally ill" is the plea that Appellant was describing at the plea hearing. R. 17, ll. 11 – 17. He did not dispute his guilt, nor did he assert that his mental disorders prevented him from being guilty. R. 36, ll. 15 – 17. Rather, Appellant accepted his responsibility in the alleged incidents, but argued that his mental disorders played a role in his conduct. R. 38, ll. 15 – 17.

Appellant filed the motion to withdraw his guilty plea and reconsider his sentence to correct the misstatement he made during the guilty plea hearing. R. 38, ll. 8 – 12. Appellant's initial description of the plea he intended to submit more closely conformed to a plea of "guilty but mentally ill" rather than "no-contest." R. 17, ll. 9 – 18. Appellant represented himself *pro se* and, reasonably, made a clerical mistake when expressing to the judge how he wanted to plead. The judge explained to him the difference between not guilty by reason of insanity and "guilty but mentally ill," but did not explain the difference between "no-contest" and "guilty but mentally ill." R. 17, l. 19 – 18, l. 12. Had Appellant known that pleading "no-contest" was the equivalent of pleading guilty, he would not have entered that plea. Moreover, since pleading "no-contest" is a functional equivalent to pleading guilty, a plea of, "no-contest but mentally ill" should be understood as "guilty but mentally ill."

Appellant was hopelessly confused, and the judge should not have accepted his plea of no contest, and rather accepted a plea of "guilty but mentally ill" or stood Appellant aside. The lower court's denial of Appellant's motion to withdraw his plea was an error because it wrongfully held Appellant, a *pro se* litigant, to the same standard as a represented litigant. Gonzalez v. Crosby, 545 U.S. 524, 544 (2005) (*See*, Haines v. Kerner, 404 U.S. 519 (1972)). Appellant's plea may have "in artfully" made at his plea hearing, but he should not be unduly punished for that. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

Appellant's intention to plead "guilty but mentally ill" was evinced throughout the plea hearing. R. 17, ll. 11 – 18. Appellant's confusion as to the exact terms of art he needed to use to plead how he intended was exemplified through the colloquy and through his own admission that he pled "no-contest," because of, "uncertainty as to legal reasons." R. 36, ll. 14 – 15. A plea of "no-contest" is treated as the equivalent as a plea of guilty. Kibler v. State, 267 S.C. 250, 254, 277 S.E.2d 199, 201 (1976). Appellant's initial plea was "no contest but mentally ill," the only valid plea that resembles that is "guilty but mentally ill." Therefore, because Appellant's guilty plea was made through "ignorance, fear or inadvertence," the lower court should have granted his motion to withdraw his plea of "no-contest" and substitute that for, the plea he originally intended to give, "guilty but mentally ill."

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this court vacate the lower court's ruling and grant Appellant's motion to withdraw his "no contest" guilty plea and substitute it with a plea of "guilty but mentally ill."

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of December, 2018.

CERTIFICATE OF COUNSEL

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

December 3, 2018.

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