STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THEODORE GLOVER,

APPELLANT

APPELLATE CASE NO. 2018-000085

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by refusing to allow Appellant to withdraw his plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), where there is no evidence Appellant knowingly, intelligently, and voluntarily pled since the record failed to establish Appellant adequately understood that by entering an Alford plea he was waiving his right to a jury trial, particularly where Appellant pled after a jury had already been selected to try his case and the judge repeatedly told Appellant, "you're not pleading guilty" and his plea was "not a guilty plea?"

STATEMENT OF THE CASE

A Marlboro County Grand Jury indicted Appellant on June 6, 2017 for first degree criminal sexual conduct. R. 53-54. On December 12, 2017, Petitioner pled guilty as indicted pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) before the Honorable Roger E. Henderson. R. 1. Assistant Solicitor Shipp Daniel represented the state, and Delton Powers and Kirk Truslow represented Appellant. R. 1. Judge Henderson sentenced Appellant to ten years imprisonment suspended upon the service of five years and five years' probation. He was also ordered to register as a sex offender. R. 25, l. 19 – 26, l. 10.

On December 13, 2017, Appellant filed a motion seeking to withdraw his plea. R. 28-29. In this same motion, his counsel also moved to be relieved. R. 28-29. On January 3, 2018, a hearing was held on Appellant's motion before Judge Henderson. R. 30. Judge Henderson orally granted counsel's motion to be relieved. R. 36, ll. 2-4. However, he denied Appellant's motion to withdraw his plea finding Appellant pled guilty freely, voluntarily, and intelligently. R. 42, ll. 10-16.

On February 1, 2018, the court filed a written order denying Appellant's motion to withdraw his plea. R. 45-46. On that same date, the court filed a second written order granting counsel's motion to be relieved. R. 49-50.

This appeal follows.

STANDARD OF REVIEW

"'The withdrawal of a guilty plea is generally within the sound discretion of the trial judge.'" State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006) (quoting State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982)). "An abuse of discretion occurs when a trial judge's decision is unsupported by the evidence or controlled by an error of law." Id. (citing State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002)). "A determination the plea was voluntarily entered 'will normally show the trial judge did not abuse his discretion.'" Id. (quoting Riddle, 278 S.C. at 150, 292 S.E.2d at 796); See also State v. Cantrell, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967) ("A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of discretion, this court will not interfere.").

ARGUMENT

The trial judge abused his discretion by refusing to allow Appellant to withdraw his plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), where there is no evidence Appellant knowingly, intelligently, and voluntarily pled since the record failed to establish Appellant adequately understood that by entering an *Alford* plea he was waiving his right to a jury trial, particularly where Appellant pled after a jury had already been selected to try his case and the judge repeatedly told Appellant, "you're not pleading guilty" and his plea was "not a guilty plea."

Relevant Facts

On the day his case was to be called to trial, and after a jury had been selected, Appellant ultimately pled as indicted under North Carolina v. Alford, 400 U.S. 25 (1970). At the beginning of the hearing, Appellant unequivocally told the judge, "I'm not guilty." R. 5, ll. 6-8. The following colloquy then took place between Appellant and the judge:

> The Court: Okay. All right, sir. Do you understand what an Alford plea is?
>
> [Appellant]: Yes, I understand what it means now. It means it's just an Alford plea. **It is not saying that I'm saying I'm guilty**.
>
> The Court: Right. Let me tell you what my understanding of the Alford plea is so you'll clearly understand. **You're not admitting to anything.** ***You're not pleading guilty.*** **You're not admitting that you've done anything** but you['re] acknowledging to the Court that if you went to trial, in all likelihood because of the evidence that would be presented, you would be found or could very well be found guilty, you understand?
>
> [Appellant]: **Yes, *could be*, right**.
>
> The Court: Okay. But and I, the Court, acknowledges that **it's not an admission of guilt on your part at all**.
>
> [Appellant]: Right.

> The Court: But that **you acknowledge the fact that you *could be* found guilty in light of the testimony that the State has**, you understand that?
>
> [Appellant]: Yes, sir.

R. 6, l. 6 – 7, l. 1 (emphasis added).

Notably, the trial judge explicitly told Appellant, "You're not pleading guilty." R. 6, ll. 13-15. The judge then reviewed with Appellant his constitutional rights, including his right to a jury trial. During this colloquy, the judge reminded Appellant that a jury had already been selected in his case. He then advised Appellant:

> ***If you decide to go forward with the trial***, then you and your lawyers will be able to present a defense. The State would have to present the case. The State would have the burden of convincing that jury of your guilt beyond a reasonable doubt. And the State would have to convince all twelve jurors of your guilt before you can be found guilty . . ."

R. 8, ll. 6-12 (emphasis added).

The judge went on to advise Appellant of his right to confront the witnesses against him, present a defense, testify, or exercise his right to remain silent, which could not be held against him. R. 8, ll. 14-25. When asked whether he understood "that by pleading under Alford you waive or give up all of these rights, Appellant responded, "Right." R. 9, ll. 11-21.

The assistant solicitor then asserted the state's version of the facts. Appellant was a close family member to the complainant, Urissa Kelly. The day before Kelly was to start college at Francis Marion, Appellant drove down from where he lived in North Carolina to buy her a laptop and other supplies she needed for school. Kelly told Appellant she wanted a new pair of shoes and Appellant allegedly agreed to take her from Dillon to the mall in Florence. On the way, the pair made a detour to a piece of property and a trailer owned by Appellant. Inside the trailer, "a sexual assault" allegedly occurred. The solicitor claimed the investigation led to forensic evidence, including DNA. R. 11, ll. 2-22.

After this recitation, the trial judge questioned Appellant:

The Court: . . . after hearing the statement of the facts and after considering all of my other questions, **is it still your desire to enter a plea under Alford in this matter?**

[Appellant]: **No, I'm not entering a plea.**

The Court: Sir?

[Appellant]: **I'm not guilty. I'm not entering the plea.**

The Court: Listen to my question.

[Appellant]: Yes, sir.

The Court: I said after hearing that statement, after considering all the other questions - - -

[Appellant]: Yes.

The Court: - - - that I've already asked you - - -

[Appellant]: Okay.

The Court: - - - **is it still your desire to enter a plea under Alford** - - -

[Appellant]: **No, sir**.

The Court: - - - it's a guilty plea but a plea under Alford, is it still your desire to do that?

[Appellant]: No, sir.

The Court: You don't want to enter an Alford plea? Listen to me carefully.

[Appellant]: Okay.

The Court: Listen to me. Again, you heard the factual situation. I'm not asking you to agree with me - - -

[Appellant]: Yes, sir.

The Court: - - - but I'm asking you to consider that and all the other questions that I've already ask[ed] you - - -

[Appellant]: Yes, sir.

The Court: - - - okay. Is it still your desire to enter a plea under Alford? ***Not a guilty plea*** - - -

[Appellant]: Yes, sir.

The Court: - - - but a plea under Alford?

[Appellant]: Yes, I will go with what I'm saying from the beginning, a plea under Alford. Yes, sir.

R. 12, l. 1 – 13, l. 10 (emphasis added).

The trial judge ultimately concluded the facts as stated by the solicitor supported Appellant's plea. He further found Appellant's plea was freely, voluntarily, and intelligently entered and, therefore, accepted the plea pursuant to Alford. R. 14, ll. 12-17. Appellant was sentenced to ten years suspended upon the service of five years' imprisonment and five years' probation. R. 25, l. 19 – 26, l. 10.

Immediately after the hearing, Appellant told his counsel that he thought after pleading pursuant to Alford, his case would go before the jury, which had already been selected. R. 33, ll. 16-18; R. 28-29. Appellant did not understand that his Alford plea would render a guilty verdict. Instead, he was under the belief that a trial would be had in which any potential sentence would be limited to ten years suspended upon the service of five years' imprisonment and five years' probation. R. 28-29. The following day, Appellant filed a motion to withdraw his plea. R. 28-29.

During the subsequent hearing on Appellant's motion to withdraw, Appellant, acting *pro se*,[1] told the judge that he did not understand the terms of the Alford plea. He admitted that, while counsel had explained to him the concept of an Alford plea, he understood it to mean that he would still get a jury trial. R. 36, ll. 19-21; R. 39, ll. 10-12. Appellant asserted that he

[1] At the beginning of the hearing on Appellant's motion to withdraw his plea, counsel moved to be relieved arguing he could not ethically argue Appellant's position because counsel had previously "certified to the court that [Appellant] knew what he was doing." The trial judge granted counsel's motion. Consequently, Appellant proceeded *pro se*. R.33, l. 10 – 36, l. 4.

wanted a jury trial and that he had always wanted a trial. R. 37, ll. 4-7; R. 41, ll. 17-18. He explained, "I didn't know. I thought I knew but I was incompetent a lot more than I thought I were." R. 37, ll. 7-9. At sixty-one years old, with no prior record, the proceedings were "all new" to Appellant. Appellant further admitted, "I ain't a man of a whole lot of education." R. 38, ll. 5-10.

The trial judge ultimately found Appellant "did understand the agreement" and indicated he "was satisfied [Appellant] understood what [he] [was] doing." R. 38, ll. 11-25; R. 39, ll. 8-9. Consequently, the judge concluded Appellant "entered into the plea agreement freely, voluntarily, and intelligently. He entered his Alford plea before me freely, voluntarily, and intelligently." R. 42, ll. 10-16.

Discussion

The trial judge abused his discretion by refusing to allow Appellant to withdraw his Alford plea where there is no evidence Appellant freely, voluntarily, and intelligently pled. Appellant entered the plea after his case had been called to trial and a jury had already been selected. Appellant repeatedly told the judge during the hearing that he was not guilty. The judge in turn told Appellant "you're not pleading guilty" and his plea was "not a guilty plea." With Appellant's limited education and no prior experience, it is unclear from the record whether Appellant understood by entering a plea pursuant to Alford that he was waiving his right to a jury trial.

In North Carolina v. Alford, 400 U.S. 25, 26 (1970), a grand jury indicted the defendant for first degree murder. His attorney recommended he plead guilty, and the prosecutor agreed to accept a guilty plea to second degree murder. Id. Alford, of his own volition, pled guilty to the reduced charge. Id. Prior to acceptance of the plea, the trial court heard testimony from a police officer and two witnesses that supported the narrative that shortly before the killing Alford took

his gun from his house, stated his intention to kill the decedent, and returned home with the declaration that he had carried out the killing. Id. at 28. Alford testified that he did not commit the murder but pled guilty because he faced a possible death sentence if convicted. Id. at 28-29. The trial court asked Alford whether he desired to plead guilty in light of his denial of guilt, and Alford confirmed that he did. Id. The trial court then sentenced Alford to thirty years' imprisonment. Id.

Alford later filed a habeas petition arguing his guilty plea was the product of fear and coercion, and therefore invalid. Id. The United States Supreme Court ultimately held the mere fact that Alford pled guilty primarily to limit a possible penalty did not necessarily demonstrate that his plea was not the product of free and rational choice. Id. at 31. The Supreme Court found the strong factual basis for the plea and Alford's expressed desire to enter the plea prevented any constitutional deprivation:

> Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, its validity cannot be seriously questioned.

Id. at 38 (internal citation omitted).

"The primary thrust of the Alford decision is that a defendant may voluntarily and knowingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit he participated in the acts constituting the crime." State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013) (citing United States v. Morrow, 914 F.2d 608, 611 (4th Cir. 1990)). The United States Supreme Court in Alford "reasoned that so long as a factual basis exists for a plea, the Constitution does not bar sentencing a defendant who makes a calculated choice to accept a beneficial plea arrangement rather than face overwhelming evidence of guilt." Id. at 93, 742

S.E.2d at 380 (quoting State v. Ray, 310 S.C. 431, 435, 427 S.E.2d 171, 173 (1993)). "The Alford plea is, in essence, a guilty plea and carries with it the same penalties and punishments." Id. at 91, 742 S.E.2d at 379; See Id. at 93, 742 S.E.2d at 380 (stating "in South Carolina there is no significant distinction between a standard guilty plea and an Alford plea."). Consequently, "circuit courts are under no duty to provide notice to Alford defendants any differently than the notice provided to defendants entering a standard guilty plea, or those defendants adjudicated guilty." Id.

"In general, a defendant's guilty plea is more than an admission of conduct; rather, it is a conviction that can deprive him of his liberty or other constitutionally protected interests." 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) and Boykin v. Alabama, 395 U.S. 238, 242 (1969)). "Therefore, the entry of a guilty plea implicates the protections of the Due Process Clause of the federal and state constitutions." Id. (citing U.S. Const. amend. XIV and S.C. Const. art. I, § 3). "Among these protections, the Due Process Clause requires that a defendant enter his guilty plea voluntarily, knowingly, and intelligently." Id. (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000)). "Thus, prior to receiving a defendant's guilty plea, the court must advise the defendant 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 he is waiving' by pleading guilty." Id. (quoting Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001)); See Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (stating that a defendant knowingly and voluntarily pleads guilty when he fully understands the consequences of his plea and the charges against him).

Here, the plea judge wholly failed to advise Appellant that there was no significant distinction between a standard guilty plea and an Alford plea and that an Alford plea carried with

it the same consequences and penalties as a standard guilty plea. Rather, the judge repeatedly assured Appellant that he was "not pleading guilty" and that his plea was "not a guilty plea." This advice was understandably confusing to a man with limited education and no prior experience with the criminal justice system. Appellant reasonably believed at the conclusion of the hearing that his trial, for which a jury had already been selected, would go forward, given that he had refused to admit any guilt whatsoever.

Consequently, there is no evidence to support the trial judge's finding that Appellant freely, voluntarily, and knowingly entered the Alford plea. Respectfully, this Court should hold the judge abused his discretion by refusing to allow Appellant to withdraw his plea, reverse his conviction and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of April, 2019.

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."

April 22, 2019

Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589