ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 18 2019
SC Court of Appeals

APPEAL FROM MARLBORO COUNTY
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2018-000085

The State of South Carolina, ...Respondent,

v.

Theodore Glover, ...Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM B. RODGERS, JR.
Solicitor, Fourth Judicial Circuit

Post Office Box 616
Bennettsville, SC 29512
(843) 479-6516

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2018-000085

The State of South Carolina, ...Respondent

v.

Theodore Glover, ...Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM B. RODGERS, JR.
Solicitor, Fourth Judicial Circuit

Post Office Box 616
Bennettsville, SC 29512
(843) 479-6516

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse its discretion in denying Appellant's motion to withdraw his plea under North Carolina v. Alford because Appellant told the trial judge he wanted to waive his right to a trial and any claim he did not understand the distinction between a guilty plea and an Alford plea is not preserved for review and antithetical to Appellant's express desire to receive the benefit of the plea bargain without admitting guilt.

STATEMENT OF THE CASE

Appellant was indicted by the grand jury for Marlboro County for first degree criminal sexual conduct. He was represented by Delton Powers, Esquire, and Kirk Truslow, Esquire. On December 12, 2017, Appellant pled guilty as indicted pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Honorable Roger E. Henderson sentenced Appellant to ten years' imprisonment suspended upon service of five years' imprisonment and five years' probation. On December 13, 2017, Appellant filed a motion to withdraw his plea. Following a hearing on Appellant's motion for reconsideration on January 3, 2018, Judge Henderson denied Appellant's motion to withdraw his plea.

STATEMENT OF FACTS

During the plea proceeding, the prosecution explained the facts in support of the charges: On August 15, 2014, Appellant Glover visited Victim in Dillion. Appellant helped Victim buy a new laptop and new clothes to start college the following day. On the way to the mall in Florence, Appellant and Victim made a detour to a trailer Appellant owned in Marlboro County. While at the trailer, Appellant sexually assaulted Victim. DNA evidence and other forensic evidence indicated a sexual assault occurred. R. p. 11. Victim was unable to finish college due to the ensuing trauma from the sexual assault. R. p. 19. Victim also continues to experience traumatic episodes on the anniversary of the assault, has trouble smelling certain scents that remind her of the assault, and is unnerved by the sight of the same type of car Appellant drove that day. R. p. 19.

On December 12, 2017, Appellant appeared before the Honorable Roger E. Henderson to plead pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). R. p. 4. Appellant claimed during the hearing he was not guilty. R. p. 12. However, Appellant recognized that if the case went to trial, the State's evidence was substantial enough for a jury to find Appellant guilty. R. p. 6. Ultimately, Appellant wanted to enter into the Alford plea, and Judge Henderson accepted his plea. R. p. 14. Prior to the hearing, Appellant and his attorneys reviewed what an Alford plea was, and Appellant signed an affidavit of a plea under Alford. R. p. 13. The trial court accepted the plea. R. p. 12. After hearing about the various mitigating and aggravating factors, Judge Henderson sentenced Appellant to ten years' imprisonment suspended upon the service of five years' imprisonment and five years' probation. R. p. 25.

On January 3, 2018, Appellant appeared again before Judge Henderson after filing a motion for reconsideration of his guilty plea. R. p. 33. Appellant claimed he did not know that by entering into a guilty plea under Alford he would be waiving his right to a jury trial. R. p. 33.

At the onset of the hearing, Appellant's counsel moved to be relieved because they previously certified to Judge Henderson they believed Appellant understood his rights and the significance of an Alford plea. Plea counsel recalled they provided Judge Henderson a six or seven page agreement they went through with Appellant. Thus, the attorneys felt ethically unable to continue as Appellant's counsel during the reconsideration hearing. R. pp. 33-34. The trial court granted the attorneys motion to be relieved. R. p. 36. At the reconsideration hearing, Appellant claimed because he was never involved in a criminal proceeding before, he did not know what he was agreeing to when he signed the plea. R. pp. 36-37. Appellant argued he thought he understood but did not actually understand, and claimed he was incompetent, presumably because of his inexperience in a criminal proceeding. R. p. 37. Judge Henderson noted during the plea hearing, he fully reviewed the plea affidavit and found "it was very thorough." R. p. 37, lines 10-23. Appellant claimed he did not know what he was signing. R. p. 37, lines 21-23. Judge Henderson determined Appellant was an intelligent person at the plea hearing, and he was satisfied Appellant understood the agreement, especially after the colloquy during which Appellant answered the questions appropriately. R. pp. 38-39. Therefore, the court denied Appellant's motion for reconsideration. R. p. 42.

ARGUMENT

The trial judge did not abuse its discretion in denying Appellant's motion to withdraw his plea under *North Carolina v. Alford* because Appellant told the trial judge he wanted to waive his right to a trial and any claim he did not understand the distinction between a guilty plea and an Alford plea is not preserved for review and antithetical to Appellant's express desire to receive the benefit of the plea bargain without admitting guilt.

On the day of the plea, Appellant told Judge Henderson he understood his trial rights and that he was waiving them by pleading under Alford. Later, he claimed he did not understand he would not have a trial. Judge Henderson chose to not allow Appellant to depart from the truth of his answers given during the Alford plea. This does not constitute an abuse of discretion.

STANDARD OF REVIEW

Once a plea of guilty is entered, the decision of 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). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements." Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007).

Discussion

The basis of Appellant's motion was his not-credible claim he thought he still was going to get to have a trial. R. p. 36, lines 19-21. Appellant claimed he did not have a lot of education,

"but I got good common sense." R. p. 38, lines 8-10. Appellant claimed his misunderstanding that he was forsaking trial was his main mistake he made that day. R. p. 38, lines 8-10.

Now on appeal, opposing counsel claims Appellant did not understand the difference between an Alford plea and a guilty plea because of his low education level and the explanation by the judge he was not pleading guilty. This issue is not preserved for review. Lopez, (finding the claim that Lopez's plea was involuntary because of language and cultural barriers was not preserved for review). The appropriate avenue of relief for this matter is an application for post-conviction relief. State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982) (absent a timely objection at the plea proceeding, the unknowing and involuntary nature of a guilty plea can be attacked only through the more appropriate channel of post-conviction relief).

Further, the claim the judge "repeatedly" assured Appellant he was not pleading guilty is misleading – Judge Henderson made these assurances only because Appellant was obviously careful to ensure that he was not making an admission of guilt at the proceeding, something that clearly was important to him. Opposing counsel's argument about the unimportance of the distinction between an Alford plea and a guilty plea is clearly at odds with her client's view – the plea record indicates it was important to Appellant that he was not compelled to make an admission of guilt.

Instead, Appellant's claim during his motion for reconsideration was that he thought he was still going to have a jury trial. This issue seems to have now been abandoned on appeal. However, at the plea hearing, Judge Henderson explained to Appellant his right to trial and to compel the State to prove his guilt beyond a reasonable doubt to a jury (one was already selected): Judge Henderson also explained to Appellant his right to confront witnesses and present a defense to the charges, as well as the right to remain silent. R. p. 8. Judge Henderson

then asked Appellant, "Do you understand that by pleading under Alford you waive or give up all of these rights?" R. p. 9, lines 11-12. Appellant answered, "Right." He then agreed he was giving up all those rights to enter the Alford plea. R. p. 9, lines 14-21.

At the motion hearing, Judge Henderson engaged in the following colloquy with Appellant:

> The Court: I was satisfied you understood what you were doing.
>
> Mr. Glover: But I still thought I was gonna, get a jury trial. . . . [T]hat's what I thought.
>
> The Court: Well, there was no statement at any point in time during our colloquy that you would get a jury trial at all. I mean, we were accepting an Alford plea.
>
> Mr. Glover: Right.
>
> The Court: Which meant that you were not going to get a trial.
>
> Mr. Glover: Right.

R. p. 39, lines 8-19.

Judge Henderson ruled as follows:

> With regards to the motion for reconsideration, I'm satisfied that Mr. Glover entered into the plea agreement freely, voluntarily, and intelligently. He entered his Alford plea before me freely, voluntarily, and intelligently which I've already found previously and there was no problems with regards to the entry of that plea so his motion for reconsideration is respectfully denied.

R. p. 42, lines 10-16.

Appellate argues that because he continued to claim he was not guilty at the plea hearing and at one point told the judge he didn't want to enter a guilty plea meant his entire plea was invalid. However, after some apparent confusion seemingly due to his not listening closely to Judge Henderson, Appellant ultimately agreed he did want to enter into the Alford plea, telling

Judge Henderson, "Yes, I will go with what I'm saying from the beginning, a plea under Alford." R. p. 13, lines 9-10. He also admitted to understanding all the claims and conditions of the plea affidavit he signed. R. p. 13, lines 14-16. Note Appellant failed to designate the plea affidavit. This is fatal to his claim of error. Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999).

Furthermore, during the plea hearing, Judge Henderson engaged in a lengthy colloquy with Appellant and explained to Appellant the rights he was waiving. R. pp. 7-9. Judge Henderson specifically asked:

> The Court: ...do you understand these rights that you have?
>
> Mr. Glover: I understand.
>
> The Court: Do you understand that by pleading under Alford *you waive or give up all these rights?*
>
> Mr. Glover: *Right.*
>
> ...
>
> The Court: Are you telling me now, at this moment, *that you are freely and voluntarily giving up all of your rights in order to enter this Alford plea?*
>
> Mr. Glover: *Right.*

R. p. 9, lines 7-21 (emphasis added).

The Court further asked Appellant if his attorneys answered his questions about the affidavit, and Appellant admitted they had. R. pp. 13-14. The Court also asked the attorneys if they believe that Appellant understood what entering into the Alford plea meant, and they said they believed he did. R. p. 14. It is telling that defense counsel moved to be relieved at the reconsideration hearing to avoid being part of Appellant's frivolous motion. R. p. 4. Defense

counsel believed they would be in conflict because they had certified to the court that Appellant knew what an Alford plea was and they could no longer represent him in the reconsideration motion or on appeal. Defense counsel truly believed that Appellant knew what he was doing when he pled under Alford during the plea hearing. R. pp. 4-5.

Therefore, Judge Henderson's determination that Appellant pled freely and voluntarily is supported by the record and he did not err in declining to set aside Appellant's plea under Alford.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

WILLIAM B. RODGERS, JR.
Solicitor, Fourth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 18, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY
Roger E. Henderson, Circuit Court Judge

RECEIVED
APR 18 2019
SC Court of Appeals

Appellate Case No. 2018-000085

The State of South Carolina, Respondent

v.

Theodore Glover, Appellant.

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."

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

WILLIAM B. RODGERS, JR.
Solicitor, Fourth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 18, 2019