STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2019-001296

THE STATE,

Respondent,

vs.

CARL RAY FRALEY, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The plea judge did not abuse his broad discretion by ordering Appellant to register as a sex offender following Appellant's conviction for first-degree assault and battery because the facts and circumstances before him—including Appellant's unconditional entry of a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to an offense related to the sexual abuse of a toddler—established a good cause basis to believe Appellant was a risk to sexually reoffend, and his ruling in that regard was supported by the evidence and testimony presented during the circuit court proceedings.

STATEMENT OF THE CASE

In March of 2013, Appellant Carl Ray Fraley, Jr. was indicted by the Spartanburg County Grand Jury for two counts of first-degree criminal sexual conduct with a minor along with two counts of lewd act upon a child following an investigation into allegations he sexually assaulted his granddaughter when she was roughly two to three years old. On February 9, 2015, Appellant appeared in the Spartanburg County Court of General Sessions before the Honorable J. Derham Cole, circuit court judge, and—after waiving presentment—entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to the offense of first-degree assault and battery. At the conclusion of the plea hearing, the plea judge accepted Appellant's guilty plea, sentenced him to a ten-year term of imprisonment, and suspended the sentence to a period of home detention set to run through the remainder of the year coupled with a five-year term of probation. In addition to that, the plea judge directed Appellant to participate in a psychological sexual evaluation to determine whether he should be ordered to register as a sex offender, and that evaluation was subsequently conducted as mandated. Following the completion of the evaluation, the plea judge issued an order on August 16, 2017, requiring Appellant to register as a sex offender. Thereafter, Appellant filed a motion seeking reconsideration of that order, and a hearing was held on the motion on October 24, 2018. Subsequently, on July 24, 2019, the plea judge issued an order denying Appellant's motion for reconsideration. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

When she was roughly two to three years old, Appellant's biological granddaughter ("Victim") began displaying abnormal sexualized behavior that was not typical for a child of her age. (R. pp. 22-23). Around that same time, Appellant was frequently seeking out and availing himself of opportunities to spend time alone with Victim, and he aggressively resisted when Victim's parents sought to limit that alone time. (R. pp. 22-23). A short time after that, Victim disclosed she had been inappropriately touched by Appellant, whom she referred to as "Big Daddy." (R. p. 23). At that point, a criminal investigation was initiated into the matter. (R. p. 23).

During the course of the investigation, Victim was forensically interviewed on multiple occasions and, in several of the interviews, disclosed she was sexually abused by Appellant. (R. pp. 23-24). Likewise, Appellant was confronted with the allegations and agreed to submit to a polygraph examination in an effort to refute them. (R. p. 24). However, the results of that examination suggested Appellant engaged in deception when responding to questions related to whether he sexually assaulted Victim. (R. p. 24; p. 79). Appellant then retained his own private examiner to conduct another polygraph examination, but the results of that examination were "inconclusive." (R. p. 24; p. 79).

Ultimately, once the investigation was completed, Appellant was indicted for multiple criminal sexual offenses, including first-degree criminal sexual conduct with a minor. (R. pp. 2-9). However, before his case went to trial, Appellant was able to reach an agreement with the prosecutor through which Appellant would be permitted to plead guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to an indictment for first-degree assault and battery that alleged he injured Victim by non-consensually touching her private parts with lewd and

lascivious intent. (R. pp. 10-11; p. 13; pp. 18-19; p. 39). In exchange for entering the guilty plea, the prosecutor agreed to dismiss Appellant's other charges, and the parties settled on a negotiated sentence of a ten-year term of imprisonment, which was to be suspended to a period of home detention set to run through the remainder of the year along with a five-year term of probation. (R. p. 13). Furthermore, pursuant to the agreement, Appellant would be required to submit to a psychological sexual evaluation to determine whether he should be placed on the sex offender registry. (R. p. 13).

Subsequently, Appellant, who was sixty-seven years old at the time, appeared before the plea judge to enter a guilty plea pursuant to Alford in a manner consistent with the plea negotiations. (R. p. 13; pp. 18-21; p. 39). During the course of the plea proceedings, Appellant confirmed he understood he was charged with non-consensually touching the minor victim's private parts with lewd and lascivious intent, was aware of his potential sentence, and had reviewed his potential defenses to the allegations with defense counsel. (R. pp. 14-15). Additionally, Appellant affirmed he was fully aware he would be giving up his right to assert his potential defenses by entering the plea and would be authorizing the plea judge to impose sentence just as if he had been convicted by a jury. (R. p. 16). Furthermore, Appellant affirmed he understood his constitutional rights, including his right to a jury trial, and wished to relinquish those rights. (R. pp. 17-18). Appellant then requested the plea judge accept his guilty plea. (R. p. 22).

Following that colloquy, the prosecutor presented the factual basis for the plea and recounted the details of Victim's disclosure of the sexual abuse along with the ensuing criminal investigation that led to the charges brought against Appellant. (R. pp. 22-25). After that, the plea judge queried Appellant as to whether he agreed with the facts as summarized by the

prosecutor, and Appellant responded he "guess[ed]" he did. (R. p. 39). At that point, defense counsel interjected and explained Appellant was pleading guilty pursuant to Alford as opposed to admitting his guilt. (R. p. 39). The plea judge then again asked Appellant if he agreed with the prosecutor's version of facts, and Appellant responded: "Yes, sir." (R. p. 39). Once again, defense counsel interjected and asserted Appellant did, in fact, deny the prosecutor's factual summary. (R. p. 40). Thereafter, following further prompting by the plea judge, Appellant finally personally asserted he disagreed he committed the acts alleged. (R. p. 41). However, Appellant stated he was nonetheless willing to be sentenced for the offense and also expressly affirmed he agreed there was a significant likelihood he would be convicted of the criminal sexual acts if the State's evidence was presented to a jury. (R. pp. 41-42). The plea judge then accepted Appellant's guilty plea as knowingly and voluntarily entered. (R. p. 42).

Once the plea had been accepted, defense counsel outlined the defense that was intended to have been presented had Appellant not elected to enter the guilty plea instead. (R. pp. 42-50). Specifically, defense counsel indicated the strategy would have been to attack Victim's mother based on purported psychiatric problems, challenge Victim's credibility based on inconsistencies in her disclosures, and attempt to weaken the credibility of a corroborative witness by suggesting she was simply a scorned ex-lover. (R. pp. 42-43). However, defense counsel acknowledged Victim was going to implicate Appellant if the case went to trial, and he further conceded Victim, who was just six years old by that time, had been diagnosed with post-traumatic stress disorder. (R. p. 22; pp. 51-52). Appellant then spoke on his own behalf, alleged Victim's mother was a danger to her children, and asserted the allegations only arose because Victim's mother wanted revenge against him. (R. p. 55; pp. 57-58).

At the conclusion of the plea proceedings, the plea judge imposed a sentence consistent with the plea negotiations and ordered Appellant to have no contact with Victim or her immediate family. (R. p. 13; p. 60). Likewise, he directed Appellant to participate in a psychological sexual evaluation to determine whether sex offender registration was appropriate under the circumstances involved. (R. p. 60).

Thereafter, Dr. Leilani Lee from the Medical University of South Carolina's Sexual Behaviors Clinic and Laboratory conducted a sexual behaviors consultation evaluation on Appellant that was focused on the question of whether Appellant should be required to register as a sex offender. (R. pp. 61-62). Through that evaluation, Dr. Lee reviewed numerous sources of information related to the case, interviewed Appellant for over six hours, and analyzed the results of several examinations that were conducted, including the results from both a visual reaction time test and a penile plethysmograph ("PPG") examination. (R. pp. 62-63). Significantly, amongst the risk factors uncovered during the evaluation, Appellant scored in the seventieth percentile on the visual reaction time test, which was a test in which higher percentages equated to a higher likelihood to reoffend. (R. p. 85). Additionally, during the PPG examination, Appellant—who had claimed to be incapable of achieving an erection without the use of medication—displayed "clinically significant arousal" to scenarios depicting coercion of a prepubescent male, coercion of a prepubescent female, and consensual activity with an adult female, and Appellant's maximum level of arousal was achieved during the scenario depicting coercion of a prepubescent female, which was considered to be a sign of deviant sexual arousal and was a risk factor for sexual recidivism. (R. p. 72; pp. 85-86; pp. 90-91). Beyond that, Appellant also moved his body on multiple occasions throughout the PPG examination despite

being instructed not to do so, and the likely cause for that behavior was determined to be purposeful manipulation and dissimulation. (R. pp. 86-87).

At the conclusion of the evaluation, Dr. Lee issued a detailed report outlining her findings. (R. pp. 61-93). In that report, Dr. Lee noted there was data suggesting Appellant was sexually aroused by children, data suggesting Appellant had sexual urges involving a prepubescent child, and data suggesting Appellant acted on his urges. (R. p. 89). However, Dr. Lee noted there was also other data inconsistent with a diagnosis of a pedophilic disorder. (R. p. 90). Ultimately, Dr. Lee opined Appellant met the criteria for a pedophilic disorder, which is associated with a risk of reoffending, and should be ordered to register as a sex offender if the plea judge believed the allegations were true in light of the risk factors associated with that disorder coupled with the other risk factors she detected through the evaluation. (R. pp. 90-92). Meanwhile, Dr. Lee opined Appellant should not be ordered to register as a sex offender if the allegations against him were not, in fact, true. (R. pp. 92-93).

Subsequently, after receiving and reviewing Dr. Lee's report, the plea judge issued an order requiring Appellant to register as a sex offender. (R. pp. 94-96). In doing so, the plea judge noted Dr. Lee opined Appellant should be required to register based on her evaluation if the allegations against Appellant were true. (R. p. 95). The plea judge further noted he accepted Appellant's guilty plea after finding a factual basis existed for the offense charged and after Appellant personally agreed the State had sufficient evidence to likely obtain a conviction at trial. (R. p. 95). Therefore, based on the results of Dr. Lee's evaluation coupled with Appellant's entry of a valid guilty plea, the plea judge determined Appellant should be required to register as a sex offender. (R. p. 96).

Following the issuance of that order, defense counsel filed a motion for reconsideration. (R. pp. 97-101). In seeking reconsideration, defense counsel alleged the plea judge erroneously interpreted Appellant's guilty plea as an admission of guilt even though it was entered pursuant to Alford and, thus, did not include such a direct admission. (R. p. 98; p. 100). Additionally, defense counsel suggested the plea judge improperly relied on the PPG results due to the purported unreliability of such testing and appeared to fault the plea judge for referencing the results of Appellant's polygraph examinations in the order. (R. pp. 98-100). Furthermore, defense counsel contended Dr. Lee's report contained "no recommendation at all," left the decision of whether Appellant should have to register as a sex offender to the plea judge, and "shifted the burden" of whether Appellant should so register based on a determination of guilt made without a trial. (R. p. 100). For those reasons, defense counsel asked the plea judge to either find Appellant should not have to register as a sex offender or allow a "full trial" during which the parties could present expert witnesses on the issue of the necessity for sex offender registration. (R. p. 100).

In response to the motion, the plea judge conducted a hearing on the matter, and, during the course of the hearing, Dr. Paul Gunter, who was a marriage and family therapist and licensed professional counselor, testified on Appellant's behalf as an expert in sexual treatment and diagnosis. (R. p. 103; p. 118). In offering his expert opinion, Dr. Gunter recounted he administered an Abel Assessment, which was a test designed to measure sexual interest, to Appellant in November of 2013.[1] (R. p. 103; pp. 108-109). Based on the results of that test coupled with the information contained in Dr. Lee's report, Dr. Gunter opined it would be "overreaching" to require Appellant to register as a sex offender. (R. p. 111; p. 115; p. 118).

[1] Notably, an Abel Assessment was also conducted as part of Dr. Lee's evaluation, but it was just one component amongst many in her thorough evaluation. (R. pp. 62-63).

Beyond that, Dr. Gunter asserted there was no "definitive data" to support a sexual offense had actually occurred aside from what had been disclosed by Victim, and he indicated he personally believed there were serious problems with the credibility of Victim's account, which he deemed "too sketchy." (R. pp. 115-117; p. 120). However, he acknowledged it was not up to him to decide whether the allegations should be believed, and he admitted he never evaluated Victim or even reviewed the full recordings of her forensic interviews. (R. p. 115; p. 131). Furthermore, he commended Dr. Lee's evaluation report as "one of the finest" he had ever seen and confirmed he believed the PPG examination had "impressive" reliability for measuring sexual interest. (R. pp. 106-107; pp. 109-110; p. 132).

Following the presentation of Dr. Gunter's testimony, defense counsel noted the plea judge ordered Appellant to register as a sex offender in part based on Appellant's acknowledgement the State likely had sufficient evidence to convict him of the charged offense but appeared to challenge that decision due to the fact Appellant's guilty plea was entered pursuant to Alford. (R. pp. 132-133). Furthermore, defense counsel contended he had what he believed was compelling evidence related to Victim's mother that could have been presented during trial had Appellant not elected to enter a guilty plea, and he introduced a psychiatric consultation record from October of 2009. (R. pp. 133-135). In rebuttal, the prosecutor noted a guilty plea entered pursuant to Alford was treated the same as a traditional guilty plea in South Carolina and Appellant had agreed there was a substantial likelihood a jury would have convicted him if his case had gone to trial. (R. p. 136). Ultimately, the prosecutor contended Victim's allegations, the guilty plea entered by Appellant, and the results of Dr. Lee's evaluation provided a sufficient basis for the plea judge's sex offender registration order and argued nothing

had been presented to warrant a change in the plea judge's "good cause" finding. (R. pp. 136-138).

Subsequently, after considering the matter, the plea judge issued an order denying the motion for reconsideration. (R. pp. 139-145). In denying the motion, the plea judge noted he reviewed and considered the reports of both Dr. Lee and Dr. Gunter, and he indicated he also considered the fact Dr. Gunter believed the PPG examination had "impressive" reliability and was an appropriate tool for evaluating sexual behaviors. (R. pp. 141-142). Additionally, the plea judge explained he did not consider Appellant's polygraph results at all in making his determination regarding sex offender registration and had only referenced those results in chronicling what occurred in Appellant's case. (R. p. 143). Furthermore, he noted Appellant's guilty plea was entered pursuant to Alford with a full understanding it was for all practical purposes the same as a traditional guilty plea and the fact Appellant denied his guilt while validly entering the plea in no way prevented him from being ordered to register as a sex offender. (R. pp. 144-145). Accordingly, based on Appellant's entry of the guilty plea coupled with the information presented in the evaluation reports, the plea judge found "good cause" had been shown for Appellant to be required to register as a sex offender. (R. p. 145).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016). When reviewing a sentencing issue on appeal, an appellate court will only interfere with a trial judge's sentencing decisions in rare and unusual circumstances in light of the broad discretion afforded to trial judges on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come."). Relatedly, an appellate court will not interfere with a trial judge's discretionary decision to order a criminal defendant to register as a sex offender absent an abuse of discretion. In re M.B.H., 387 S.C. 323, 327, 692 S.E.2d 541, 542-543 (2010); see State v. Fuller, 425 S.C. 468, 479, 822 S.E.2d 910, 916 (Ct. App. 2019) (recognizing an appellate court reviewing a discretionary decision regarding sex offender registration must apply a "deferential" standard of review). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ARGUMENT

The plea judge did not abuse his broad discretion by ordering Appellant to register as a sex offender following Appellant's conviction for first-degree assault and battery because the facts and circumstances before him—including Appellant's unconditional entry of a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to an offense related to the sexual abuse of a toddler—established a good cause basis to believe Appellant was a risk to sexually reoffend, and his ruling in that regard was supported by the evidence and testimony presented during the circuit court proceedings.

Appellant contends the plea judge erred as a matter of law by ordering him to register as a sex offender after he entered a "conditional" guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to a charge of first-degree assault and battery.[2] In support of that contention, Appellant maintains the plea judge's order was based on a "questionable" determination evidence existed to support a conclusion he actually committed the offense to which he pled guilty. Appellant further maintains the plea judge's order was erroneous because there was purportedly no evidence as a matter of law that would support a conclusion sex offender registration was warranted in light of his denial of guilt during the plea proceedings, his own expert's opinion he should not be required to register, and the allegedly equivocal and insufficient nature of the opinion issued by the expert who conducted the court-directed

[2] Significantly, although Appellant's now refers to his guilty plea on appeal as a "conditional" one, Appellant's guilty plea was not actually conditional and, instead, was simply a valid and unconditional guilty plea entered pursuant to Alford with no specified conditions attached to it. See State v. Legare, 935 N.W.2d 773, 776 (N.D. 2019) (recognizing a guilty plea entered pursuant to Alford is distinct from a conditional guilty plea); cf. State v. O'Leary, 302 S.C. 17, 17-18, 393 S.E.2d 186, 187 (1990) (finding a guilty plea to be improperly conditional because the plea was conditioned on the defendant's ability to subsequently appeal the constitutionality of a statute). However, assuming Appellant's guilty plea actually had somehow been a conditional one, that plea could not stand and would have to be vacated because conditional guilty pleas are *not* permitted in South Carolina. See Easter v. State, 355 S.C. 79, 81, 584 S.E.2d 117, 119 (2003) ("To be valid, a guilty plea must be unconditional."); O'Leary, 302 S.C. at 18, 393 S.E.2d at 187 ("Guilty pleas are unconditional and, if an accused attempts to attach any condition, the trial Court must direct a plea of not guilty."); cf. State v. Peppers, 346 S.C. 502, 505, 552 S.E.2d 288, 290 (2001) ("Because a defendant's guilty plea must be unconditional, Peppers' purported plea and sentence are VACATED.").

psychological sexual evaluation. To the contrary, the plea judge did not abuse his broad discretion by ordering Appellant to register as a sex offender following Appellant's conviction for first-degree assault and battery because the facts and circumstances before him—including Appellant's entry of a guilty plea to an offense of a sexual nature—established a good cause basis to believe Appellant was a risk to sexually reoffend, and his ruling in that regard was supported by the evidence and testimony presented during the circuit court proceedings. Under such circumstances, there is no proper basis upon which to disturb the plea judge's discretionary decision on appeal. Both Appellant's conviction and the order requiring sex offender registration should be affirmed.

When charged with a crime, a criminal defendant may choose to—and has a right to—enter a guilty plea to the offense.[3] See State v. Armstrong, 263 S.C. 594, 597, 211 S.E.2d 889, 890 (1975) ("Of course it is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced."). Typically, such a guilty plea involves "a solemn, judicial admission of the truth of the charges against an individual." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007). However, in order to be validly entered, a guilty plea need *not* include an actual admission of guilt. See James v. State, 377 S.C. 81, 84, 659 S.E.2d 148, 150 (2008) ("[A] defendant need not admit guilt in order to enter a valid guilty plea.").

Instead, as recognized by the United States Supreme Court in the Alford decision, a criminal 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); see North Carolina v.

[3] Although a defendant has a right to plead guilty, a trial judge is under no absolute obligation to accept such a plea. Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999).

Alford, 400 U.S. 25, 37 (1970) ("[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."); see also Baxley v. State, 255 S.C. 283, 286, 178 S.E.2d 535, 536 (1971) (recognizing the validity of guilty pleas entered pursuant to Alford in South Carolina). As a result, all that is necessary for a guilty plea to be validly entered is: (1) it was knowingly, voluntarily, and understandingly made by the defendant; and (2) there is a factual basis for the plea. Gaines v. State, 335 S.C. 376, 380, 517 S.E.2d 439, 441 (1999); see Zurcher v. Bilton, 379 S.C. 132, 136, 666 S.E.2d 224, 226-227 (2008) ("The Alford court 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.").

Importantly, a validly-entered guilty plea—including one entered pursuant to Alford—carries the same effect in the law in South Carolina as a guilty verdict returned by a jury and constitutes "a conviction that can deprive [a criminal defendant] of his liberty or other constitutionally protected interests." State v. Nesbitt, 411 S.C. 194, 200, 768 S.E.2d 67, 70 (2015); see Sanders v. Leake, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970) (explaining a guilty plea "has the same effect in law as a verdict of guilty"); see also United States v. Broce, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence."); Blohm v. Comm'r of Internal Revenue, 994 F.2d 1542, 1555 (11th Cir. 1993) ("A guilty plea's basic chemistry is not transformed by a concurrent claim of innocence. The collateral

consequences stemming from a guilty plea remain the same whether or not accompanied by an assertion of innocence."). In fact, entry of a valid guilty plea pursuant to Alford can lead to and result in the imposition of *the death penalty* in our state. State v. Ray, 310 S.C. 431, 435, 427 S.E.2d 171, 173 (1993).

By entering a valid guilty plea regardless of the manner in which it is entered, a criminal defendant waives all non-jurisdictional defects and defenses and leaves open for review only the sufficiency of the indictment. State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000); see State v. Munsch, 287 S.C. 313, 314, 338 S.E.2d 329, 330 (1985) (explaining a defendant "waived any right to complain of the sufficiency of the evidence against him with his plea of nolo contendere"); State v. Snowdon, 371 S.C. 331, 333, 638 S.E.2d 91, 92 (Ct. App. 2006) ("Generally, a knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations."). Thus, once a guilty plea has been entered, nothing remains but for a circuit court judge to enter judgment against the defendant and determine the appropriate punishment for the defendant's crime. See Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."). Moreover, irrespective of whether the plea involved a direct admission of guilt or was made pursuant to Alford, the defendant becomes estopped from further litigating the issue of guilt upon entry and acceptance of a valid guilty plea. See Zurcher, 379 S.C. at 136, 666 S.E.2d at 226-227 ("[S]o long as a defendant has entered a guilty plea freely and voluntarily, an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty. . . . An Alford plea is not distinguishable from a standard guilty plea in this regard." (footnote omitted)); see also Argot v. State, 583 S.E.2d 246,

249 (Ga. Ct. App. 2003) ("An Alford plea is . . . a guilty plea and places the defendant in the same position as if there had been a trial and conviction by a jury."); Klose v. State, 752 N.W.2d 192, 199 (N.D. 2008) ("An Alford plea is a final plea of guilty[.]").

Significantly, one potential consequence of a criminal conviction in South Carolina is the offender may be ordered to register as a sex offender. S.C. Code Ann. § 23-3-430(A). If an offender is convicted of certain specified offenses, a trial judge must order that offender to so register. S.C. Code Ann. § 23-3-430(C). Meanwhile, if an offender is convicted of a crime not automatically mandating registration, a trial judge has discretionary authority to order that offender to register as a sex offender "if good cause is shown by the solicitor." S.C. Code Ann. § 23-3-430(D); see M.B.H., 387 S.C. at 327, 692 S.E.2d at 542 ("[A] finding of good cause in this context means only that the judge must consider the facts and circumstances of the case to make the determination of whether or not the evidence indicates a risk to reoffend sexually."). Significantly, such a registration order is non-punitive in nature and may—and potentially must—be imposed regardless of whether the offender's conviction resulted from a jury verdict, guilty plea, adjudication of juvenile delinquency, or plea of nolo contendere. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); see S.C. Code Ann. § 23-3-430(A) (making sex offender registry requirements applicable to offenders who are "convicted of, adjudicated delinquent for, pled guilty or nolo contendere to" certain offenses); see also Silmon v. Travis, 741 N.E.2d 501, 504 (N.Y. 2000) ("Like any other guilty plea, [an Alford plea] may be used as a predicate for civil and criminal penalties . . . .").

In the case sub judice, Appellant was convicted of first-degree assault and battery after he entered a valid, unconditional guilty plea pursuant to Alford to that offense. By entering that guilty plea, Appellant was guilty in the eyes of the law of the offense to which he pled, and that

offense—as directly acknowledged by Appellant during the plea proceedings—involved the non-consensual touching of Victim's private parts with lewd and lascivious intent. See Zurcher, 379 S.C. at 137, 666 S.E.2d at 227 ("[T]he entry of an Alford plea at a criminal proceeding has the same preclusive effect as a standard guilty plea."); State v. Allen, 261 S.C. 448, 451, 200 S.E.2d 684, 686 (1973) ("Where a defendant voluntarily, intelligently and understandingly enters a plea of guilty, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment."); see also Carroll v. Commonwealth, 701 S.E.2d 414, 419 (Va. 2010) ("A defendant's protestations of innocence under an Alford plea extend only to the plea itself. . . . Whatever the reason for entering an Alford plea, the fact remains that when a defendant enters such a plea, he becomes a convicted sex offender and is treated no differently than he would be had he gone to trial and been convicted by a jury." (quoting State ex rel. Warren v. Schwarz, 579 N.W.2d 698 (Wis. 1998))). Therefore, based on Appellant's entry of the guilty plea, the plea judge had a valid basis upon which to believe Appellant was, in fact, guilty of committing a sexual offense upon his minor granddaughter and to treat Appellant just as he would any other offender convicted of such an offense.[4] See Herndon, 403 S.C. at 93, 742 S.E.2d at 380

[4] In arguing the plea judge's decision to order him to register as a sex offender was controlled by an error of law and lacking in evidentiary support, Appellant focuses on appeal on the fact he expressly denied guilt while entering his guilty plea pursuant to Alford and, by doing so, ignores the fact his entry of that guilty plea—regardless of how he chose to enter it—conclusively established his guilt for the offense to which he pled for all legal purposes. See Herndon, 403 S.C. at 93, 742 S.E.2d at 380 ("[U]nder South Carolina law, the Alford plea does not create a special category of defendant exempt from the punishment applicable to her conviction."); Shelnut v. State, 247 S.C. 41, 45-46, 145 S.E.2d 420, 422 (1965) (By their voluntary *submission to a verdict of guilty*, the defendants admitted all material allegations of the indictment, including those relating to the situs of the crime, thus waiving a trial and the presentation of evidence. These admissions are as conclusive upon them as the verdict of a jury would be." (emphasis added)); see also State v. T.D., 944 A.2d 288, 297 (Conn. 2008) ("If a defendant has been convicted of criminal conduct, following either a guilty plea, Alford plea or a jury trial, and the defendant does not challenge that conviction by timely appealing it, *then the conviction conclusively establishes that the defendant engaged in that criminal conduct*." (emphasis

("[U]nder South Carolina law, the Alford plea does not create a special category of defendant exempt from the punishment applicable to her conviction."); see also Haffner v. Saulters, 77 S.W.3d 45, 48 (Mo. Ct. App. 2002) (rejecting Haffner's contention he could not be required to register as a sex offender due to the fact he entered his guilty plea pursuant to Alford and instructing Hafner's plea subjected him "to the criminal penalty for abuse of a child" because "[a] plea of guilty is a plea of guilty"); cf. United States v. Glenn, 744 F.3d 845, 848 (2d Cir. 2014) ("[U]nder Connecticut procedure, acceptance of an Alford plea represents a conclusion on the part of the court and the defendant himself that the evidence of guilt is so strong that a jury is likely to find the defendant guilty beyond a reasonable doubt. As such a conclusion is constitutionally sufficient to permit entry of a judgment of guilt, a later court does not abuse its discretion by relying on such a plea to determine by a preponderance of the evidence that the defendant committed the charged offense.").

Likewise, based on Dr. Lee's findings during her psychological sexual evaluation of Appellant, the plea judge had evidence before him supporting a conclusion Appellant was a risk to sexually reoffend. Specifically, amongst the risk factors Dr. Lee identified, Dr. Lee confirmed in her thorough report Appellant scored in the seventieth percentile on a test in which higher percentages equated to a higher likelihood to reoffend. Similarly, Dr. Lee reported Appellant displayed during a PPG examination—which was an examination Appellant's own expert characterized as having "impressive" reliability—signs of clinically-significant deviant sexual arousal to scenarios involving the coercion of prepubescent children, which she explained was

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added)); People v. Jones, 789 N.Y.S.2d 382, 383 (N.Y. App. Div. 2005) (explaining evidence the prosecutor asserted during the plea hearing was going to be presented if the case proceeded to trial was "deemed established" for purposes of sex offender classification by Jones's entry of a guilty plea pursuant to Alford).

associated with a risk for sexual recidivism.[5] See State v. Cantrell, 250 S.C. 376, 379-380, 158 S.E.2d 189, 191 (1967) ("Highly relevant, if not essential, to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."); see also In re Commitment of Sandry, 857 N.E.2d 295, 309 (Ill. App. Ct. 2006) (explaining "a significant subset of experts considers PPG testing a useful tool for treating and evaluating sex offenders"). Furthermore, Dr. Lee directly opined Appellant would meet the criteria for a pedophilic disorder and should be ordered to register as a sex offender if the plea judge believed the allegations were true, which the plea judge certainly could have legitimately done in light of the fact Appellant was *convicted of* a criminal offense stemming from those allegations. See Herndon, 403 S.C. at 95, 742 S.E.2d at 381 ("[A]n Alford plea is merely a guilty plea with the gloss of judicial grace allowing a defendant to enter a plea in her best interests. . . . [T]he defendant entering an Alford plea is *still treated as guilty* for purposes of punishment, and simply put, is not owed anything merely because the State and the court have agreed to deviate from the standard guilty plea." (emphasis added)); Zurcher, 379 S.C. at 136-137, 666 S.E.2d at 227 (explaining a defendant who decides to enter a guilty plea pursuant to Alford in order to receive the benefit of a plea arrangement "must likewise accept the collateral consequences of that decision"); see also State v. Johnson, 413 S.C. 458, 468, 776 S.E.2d 367, 372 (2015) ("[T]here is no requirement under the law that the trial court must believe a criminal defendant's version of events.").

[5] Significantly, since the plea judge was directly presented with Appellant's own expert's opinion regarding the "impressive" validity and reliability of PPG examinations, there certainly was not a total absence of any foundation in Appellant's case for the plea judge to find the PPG examination results were sufficiently reliable to be considered. Cf. Billips v. Commonwealth, 652 S.E.2d 99, 102 (Va. 2007) (holding the results of a PPG examination were improperly admitted during the sentencing proceedings in Billips's case because the record in that particular case was "devoid of any evidence of the reliability of plethysmograph testing").

Based on Appellant's conviction for a sexual offense involving a minor coupled with the existence of the risk factors identified through the psychological sexual evaluation, the plea judge had a legitimate basis upon which to find good cause existed to believe Appellant was a risk to sexually reoffend, and, therefore, the plea judge properly could and did order Appellant to register as a sex offender pursuant to South Carolina law. S.C. Code Ann. § 23-3-430(D); see Fuller, 425 S.C. at 481, 822 S.E.2d at 917 ("[T]he trial court acted within its discretion in ordering Fuller to register as a sex offender because of evidence that the kidnapping charge of which he was convicted included an attempted criminal sexual offense."); cf. State v. Francis, 76 A.3d 744, 748 (Conn. App. Ct. 2013) (rejecting Francis's appellate contention the trial court judge's factual findings were clearly erroneous because Francis's entry of a guilty plea pursuant to Alford "furnished an ample basis for the court, in the adjudicative phase of the [probation revocation] proceeding, to find that he violated his probation"). Furthermore, because the plea judge properly considered all the facts and circumstances before him and had factual support for his determination, the plea judge in no way abused his discretion or committed any other legal error by doing so.[6] See M.B.H., 387 S.C. at 327, 692 S.E.2d at 542-543 (holding the family court judge did not abuse his discretion by discretionarily ordering M.B.H. to register as a sex offender when "[t]he judge relied on the professional findings and recommendations in [an evaluation] report in concluding good cause existed for placing [M.B.H.] on the registry" and

[6] Notably, in ordering Appellant to register as a sex offender, the plea judge specifically explained he did not consider Appellant's polygraph results. (R. p. 143). Thus, even if it would have been improper for him to base his decision in whole or in part on those results, the plea judge obviously did not err in a manner prejudicial to Appellant by *not* doing so in Appellant's case. Cf. Sandry, 857 N.E.2d at 307 ("[W]e do note that the trial judge expressly disavowed any reliance on the results of the polygraph examination in making his decision, emphatically stating that petitioner would never be required to pass a polygraph test before the court would find him eligible for conditional release. . . . Quite simply, the trial court did not rely on this evidence, and petitioner was therefore not prejudiced by its admission. Any alleged error was harmless, and we need not consider this issue further.").

"the judge considered all the facts and circumstances of [M.B.H.'s] case, both aggravating and mitigating, in determining that there is a risk of sexual reoffense"). Accordingly, although the plea judge potentially could have theoretically reached a contrary conclusion without abusing his discretion, his factually-supported discretionary decision was not erroneous simply because Appellant would have preferred a different outcome following his conviction for a sexual offense. See Fuller, 425 S.C. at 479, 822 S.E.2d at 916 (recognizing a circuit court judge's discretionary decision regarding sex offender registration must be afforded deference on appeal); cf. In re Care & Treatment of Kennedy, 353 S.C. 394, 398, 578 S.E.2d 27, 28-29 (Ct. App. 2003) ("While there may be some evidence supporting Kennedy's claim that he is not a sexually violent predator, including a normal PPG test result, there is more than enough evidence to support the decision reached by the trial court. . . . [I]n light of our limited scope of review, we find the trial court did not err in concluding Kennedy was a sexually violent predator and in committing him to the DMH for treatment."). Both Appellant's conviction and the order requiring sex offender registration should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 8, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2019-001296

THE STATE,

Respondent,

vs.

CARL RAY FRALEY, JR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies 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."

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