ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Mark Hayes, II, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-001031

THE STATE, ...RESPONDENT

v.

CALVIN LEE PHILLIPS, III, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Appellant's claim that the plea judge abused his discretion in accepting his plea as knowing, intelligent, and voluntary because the judge (1) failed to specifically advise him of the elements the State would have to prove at trial for each charge and (2) failed to specifically advise him of the implication of his plea on his prior suspended sentence, is preserved for appellate review where this argument was never raised to or ruled upon by the plea judge. Even if preserved, whether the plea court properly exercised its discretion by accepting Appellant's guilty plea as being knowingly, intelligently, and voluntarily entered where Appellant affirmed he had a full understanding of the charges against him and the consequences of his plea, and acknowledged he had a chance to discuss the charges with his attorney. Finally, whether any error in not adequately advising Appellant of the elements or consequences of his plea is harmless where Appellant unequivocally admitted guilt for the convicted offenses.

STATEMENT OF THE CASE

Calvin Phillips, III, (Appellant)[1] was indicted by the Spartanburg County grand jury for first-degree burglary (2017-GS-42-3582), first-degree assault and battery (2017-GS-42-3583), kidnapping (2017-GS-42-3584), and armed robbery (count 1) and possession of a weapon during commission of a violent crime (count 2) (2017-GS-42-3585). He was represented by William G. Yarbrough III, Esquire. The State was represented by Assistant Solicitor Spenser H. Smith of the Seventh Circuit Solicitor's Office. On May 16, 2018, Appellant appeared before the Honorable J. Mark Hayes, II, and pled guilty to second-degree burglary as a lesser included offense of first-degree burglary; first-degree assault and battery; kidnapping; attempted armed robbery as a lesser-included offense of armed robbery; and possession of a weapon during a violent crime. (R.p.16-p.17; p.27). Judge Hayes sentenced Appellant to ten (10) years' imprisonment for first-degree assault and battery, twenty (20) years' concurrent imprisonment for kidnapping; twenty (20) years' concurrent imprisonment for attempted armed robbery, five (5) years' concurrent imprisonment for possession of a weapon during a violent crime, and fifteen (15) years' concurrent imprisonment for second-degree burglary, for an aggregate sentence of twenty (20) years' imprisonment. (R.p.37-p.38). Appellant was given credit for 381 days' time served.

At the time he committed these crimes, Appellant was already on probation for failure to stop for a blue light (2017-GS-42-0587), possession of a stolen vehicle (2017-GS-42-0588), and unlawful carrying of a pistol (2017-GS-42-0589). He had been previously sentenced by Judge Hayes to concurrent indeterminate terms of imprisonment under the Youthful Offender Act, with each sentence suspended to probation. (R.p.31). Upon finding the new convictions constituted

[1] Although Appellant's Notice of Appeal and several Orders from this Court granting extension requests refer to Appellant as **Calvin Lee Phillips, *II***, it appears the indictments and sentencing sheets consistently refer to him as **Calvin Lee Phillips, *III***; therefore, the State has identified him as such in the caption and the brief of respondent.

willful violations of the terms and conditions of Appellant's prior probation, Judge Hayes revoked probation and converted Appellant's sentences to determinate adult sentences, giving 381 days' credit for time served. Appellant filed a notice of appeal challenging his new convictions but not his probation revocation, and subsequently filed a brief in support of his appeal. This brief of respondent filed on behalf of the State now follows.

STATEMENT OF FACTS

The facts, as recited by the solicitor during the plea and agreed to as substantially correct by Appellant are as follows. (R.p.19-p.24). On April 24, 2017, around 5:00 AM, on Sprouse Road in Spartanburg County, Jacob Scottie Burns (Victim) was sitting in his car listening to the radio. Victim said that a vehicle pulled up and basically blocked his driveway. Victim backed up in his car to shine his headlights towards the driveway. (R.p.19).

A passenger in the vehicle blocking Victim's driveway got out the vehicle and started coming towards him. Victim turned on his high beans and recognized the person coming towards him as "Trip", later identified as Calvin Phillips, III. Victim called out to Appellant, "What do you need?" Appellant responded that the wanted to speak to Scott, Victim's brother. Scott was asleep in the house at the time. Victim told Appellant "you need to go." Victim and Appellant ultimately got into a verbal altercation. Appellant then motioned for Destiney Matheny, codefendant, to get out of the vehicle. Matheny then produced a handgun and Appellant robs Victim of his wallet. (R.p.19-p.20).

Appellant and Matheny told Victim they were going inside the house. Victim entered the house first. Followed by Matheny and Appellant. Matheny entered the house with the gun visible. Victim slammed the door on the gun and knocked the gun from Matheny's hand. Appellant, Matheny, and Victim got into a struggle in the living room/kitchen area of the house.

The house was in the process of being painted at the time and the involved parties got covered in paint. During the struggle over the gun, Appellant got on top on Victim and assaulted him. (R.p.20-p.21).

Scott woke up during the struggle over the gun and went downstairs. Scott witnessed his brother being assaulted and got a shotgun. Scott came back to the living room/kitchen area and shot Matheny. Scott then told Appellant to get off of his brother. Appellant did not get off and Scott shoots Appellant in the back. Appellant and Matheny left the house and went to the hospital. (R.p.21). Appellant was unable to speak to law enforcement because of his condition. He went straight into surgery and stayed in the hospital until he was arrested on May 2, 2017. Matheny was not as badly injured from her gunshot wound compared to Appellant. She proved a statement to law enforcement soon after the incident. (R.p.22).

Matheny told law enforcement that she and Appellant "had been fighting, that they're not allowed to fight at the house, so they went out just riding around so they can figure out whatever their disagreement was. And then they decided to stop on the side of the road somewhere and smoke a cigarette and have an argument." (R.p.22, lines 6-11). She explained, "out of nowhere a car drives by and shot at her." (R.p.22, lines 2-14). Matheny further explained, she and Appellant ran into a field and there was a construction site where they got covered in paint. Law enforcement followed up on Matheny's story and found a construction site consisted with Matheny's story. The paint color used on the construction site did not match the color paint found on her following the incident. Scott later identified Appellant and Matheny from a lineup. Matheny was charged with the same offenses as Appellant and pleaded guilty to all charges expect the weapon charge. (R.p.22-p.23).

During Appellant's plea hearing, the plea judge addressed a group of individuals that planned on entering pleas by asking them to stand if any particular question applied to them. (R.p.4). The judge asked, "If this is a free and voluntary decision, please stand." (R.p.14, lines 17-18). The record reflected that Appellant stood. The judge also informed the group that by pleading they waived their right to a jury trial of which "it would be the State that has the burden of proof." (R.p.15, line 1). Appellant understood that by pleading he would give up his right to present evidence, which the Appellant or his lawyer might be able to establish a defense. (R.p.15). The judge also stated, "if ever during this process any of you wish to speak to your lawyer, just let me know and I'll let you talk to your lawyer in private." (R.p.16, lines 5-7). The plea judge inquired about Appellant's educational background. (R.p.17).

The solicitor then gave a detailed recitation of the facts of the offenses. This includes a brief summary of how those facts satisfied the elements of the crimes for which Appellant was pleading guilty. (R.p.19-p.24). Appellant agreed the facts as stated by the solicitor were "substantially correct." He did not ask any question about the elements of the crimes or the solicitor's matching of the facts to those elements. Several times the plea judge asked Appellant if he was able to talk to his lawyer about the consequences and ramifications of the offenses charged and he said he had. (R.p.25-p.26). Appellant then stated that he understood that by pleading guilty he would be in violation of his probation. (R.p.26). Appellant stated that he understood the potential sentence for each charge and that he was in fact guilty of all charges. (R.p.24-p.29). He subsequently stated: "I'd like to apologize to the victim personally." (R.p.35, lines 22-23). The judge accepted Appellant's plea. (R.p.37).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will review the totality of the circumstances to discern if a plea was entered into knowingly and intelligently." *State v. Tucker*, 376 S.C. 412, 419, 656 S.E.2d 403, 407 (Ct. App. 2008) (Citing *Hughey v. State*, 255 S.C. 155, 157–58, 177 S.E.2d 553, 555 (1970)). The judge's finding that the plea was knowingly and voluntarily entered is reviewed under an abuse of discretion standard. *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Bickham*, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009).

ARGUMENT

Appellant's claim that the plea judge abused his discretion in accepting his plea as knowing, intelligent, and voluntary because the judge (1) failed to specifically advise him of the elements the State would have to prove at trial for each charge and (2) failed to specifically advise him of the implication of his plea on his prior suspended sentence, is not preserved for appellate review because this argument was never raised to or ruled upon by the plea judge. Even if preserved, the plea court properly exercised its discretion by accepting Appellant's guilty plea as being knowingly, intelligently, and voluntarily entered because Appellant affirmed he had a full understanding of the charges against him and the consequences of his plea, and acknowledged he had a chance to discuss the charges with his attorney. Finally, any error in not adequately advising Appellant of the elements or consequences of his plea is harmless where Appellant unequivocally admitted guilt for the convicted offenses.

Appellant contends the plea judge abused his discretion by accepting his guilty plea as being knowingly, intelligently, and voluntarily entered. Appellant claims he was not advised of the elements the State must prove beyond a reasonable doubt at trial for each charge nor was he advised about the implications of his guilty plea or his prior sentence under the Youthful

Offender Act. Appellant's argument is not preserved for appellate review because it was never raised to or ruled upon by the plea court. Also, Appellant's argument is without merit because the plea judge afforded Appellant his due process rights by ensuring the pleas were voluntarily, knowingly, and intelligently made. Appellant was advised he was waving his constitutional rights by pleading guilty. He was also made aware of the State's evidence which established both the factual basis of the plea and how those facts satisfied the crucial elements of the crimes. Finally, even if the plea judge somehow erred in failing to specifically and independently advise Appellant of the elements of the offenses for which he was pleading guilty, any error was harmless because Appellant made a free and voluntary admission he was in fact guilty of all crimes presented against him. Appellant's guilty plea and sentences should be affirmed.

Issue Not Preserved for Review

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Furthermore, "a party cannot acquiesce to an issue at trial and then complain on appeal." *State v. Rios*, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010).

The State submits Appellant's argument is not preserved for review because neither Appellant nor counsel ever objected to the advisements given by the plea judge, or otherwise complained that the plea judge's advice was inadequate. Instead, Appellant agreed with the factual recitation given by the solicitor without exception or objection. He then repeatedly assured the plea judge he and counsel had discussed the consequences and ramifications of each charge. (R.p.24-p.27). By acquiescing in the plea proceeding, Appellant may not now complain on direct appeal about the manner in which the plea court handled particular aspects of that

proceeding. *Rios*, *supra*. Appellant never gave the plea court the opportunity to correct any alleged deficiencies. To the extent Appellant has any valid complaints, which it appears he does not, they concern plea counsel and should be raised by way of post-conviction relief. Thus, Appellant's argument is not preserved for review. In any event, if this Court finds the argument is preserved, it is entirely without merit.

Appellant's Guilty Plea Was Properly Accepted

Appellant initially argues that his guilty plea was not voluntarily, knowingly, and intelligently given because he was not advised about the elements the State must prove at trial. However, the record reflects that the plea judge asked Appellant if his plea was made free and voluntarily, inquired about his level of education, questioned his ability to discuss the charges with his attorney, and provided Appellant the potential sentence for each crime charged.

The entry of a guilty plea involves Due Process Clause protections of the federal and state constitutions. *State v. Nesbitt*, 411 S.C. 194, 200, 768 S.E.2d 67, 70 (2015). "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)). Before accepting 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)). "It is unlikely that notice of the true nature, or substance, of a charge always requires a description of every element of the offense." *Anderson v. State*, 342 S.C. 54, 58–59, 535 S.E.2d 649, 651 (2000). "A guilty plea must be an informed and intelligent decision." *State v. Lopez*, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002).

"The test established by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) is whether the record establishes that a guilty plea was voluntarily and understandingly made. In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980). He must also have an understanding of the charges against him. *State v. Lambert*, 266 S.C. 574, 225 S.E.2d 340 (1976)." *Dover v. State*, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). This test "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (quoting *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "A defendant assumes the risk of error in either his or his attorney's assessment of the law or the facts when he enters a plea of guilty. The reverse would be true when he withdraws it." *State v. Armstrong*, 263 S.C. 594, 597, 211 S.E.2d 889, 890 (1975).

As a matter of law it cannot be said that the plea judge erred in accepting Appellant's guilty plea. The plea court asked Appellant and his attorney numerous questions to determine whether Appellant freely and voluntarily decided to plead guilty to all charges. Appellant's guilty plea was knowingly, intelligently, and voluntarily entered. Before accepting Appellant's guilty plea, the plea judge asked Appellant multiple times if had the ability to talk with his lawyer about the consequences and ramifications of the charged offenses. Appellant was made aware that the State had the burden of proof and the State would have to convince a jury that he was guilty of each charge beyond a reasonable doubt. The plea judge also afforded Appellant the opportunity to speak with his lawyer in private if he so desired at any point during the plea hearing. The solicitor gave a detailed recitation of the facts of the offenses. This included a brief summary of how those facts satisfied the elements of the crimes for which Appellant was

pleading guilty. (R.p.19-p.24). Appellant agreed the facts as stated by the solicitor were "substantially correct." Given the steps taken to ensure the protection of Appellant's rights, the record establishes Appellant was adequately advised of the elements the State would need to prove beyond a reasonable doubt at trial for each charge.

Appellant further argues his plea was not voluntary and intelligent because he was not advised during the plea colloquy about the implications of his guilty plea on his Youthful Offender Act sentence and probation. Appellant argues there is no indication in the record that he was informed or understood: (1) pleading guilty would constitute a probation violation; (2) partial or full revocation of his suspended sentence; or (3) the probation violation or revocation's effect on his sentence for the charges for which he was pleading guilty.

Yet, during the plea colloquy the judge asked Appellant, "you also understand that by entering a plea will be a violation of your present probation case?" (R.p26, lines 21-23). Appellant replied "yes, sir" but still desired to enter his guilty plea. (R.p.26, line 24). Appellant claims are without merit because the record indicates that he knew pleading guilty would violate his probationary sentence under the Youthful Offender Act. Appellant also understood the consequences the violation of probation would be revocation.

Thus, both of the alleged defects in the plea colloquy are without merit. The plea judge properly found Appellant's plea was knowingly, intelligently, voluntarily made. Appellant was advised of his rights. He heard the facts that would be presented at trial by the State and how those facts made him guilty of the crimes. The plea judge inquired about Appellant's level of education. Appellant was made aware that the State would have to prove all element each charge beyond a reasonable doubt if he decided to go to trial. Appellant was given a chance to speak with his lawyer about the ramifications and consequences of pleading guilty. He was

made aware that pleading guilty would violate his probationary sentence. Appellant was made aware of the potential sentence for each crime as charged. Therefore, Appellant's convictions and sentences should be affirmed.

Harmless Error

Even if this Court determines the plea judge erred by failing to adequately advise Appellant of the elements of each offense and the impact on his suspended sentence, any error was harmless because Appellant made a free and voluntary admission that he was guilty of all crimes presented at his plea hearing. "Whether error is harmless depends on the circumstances of the particular case." *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). "A defendant's guilty plea is more than an admission of conduct; rather, it is a conviction." *State v. Nesbitt*, 411 S.C. 194, 200, 768 S.E.2d 67, 70 (2015). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

Here, Appellant first said he was in fact guilty of each offense. (R.p.27). He then said: "I'd like to apologize to the victim personally." (R.p.35, lines 22-23). As a result, any defect in the plea colloquy was entirely harmless because Appellant unequivocally admitted guilt. For all of these reasons, Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, Respondent respectfully submitted that Appellant's guilty plea, convictions, sentences, and probation revocations be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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