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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Perry Gravely, Presiding Judge

Case No. 2021-000505

The State of South Carolina ....Respondent,

v.

Devin Middleton..Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether trial counsel was ineffective in allowing his client to enter an invalid guilty plea where there was not a strong factual basis, as required by *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970).

STATEMENT OF THE CASE

Petitioner Devin Middleton was indicted for murder in February 2016 in Charleston County. The indictment alleged he murdered Brandon Washington on May 23, 2015 by shooting him with a firearm. In April 2017 he was indicted for criminal conspiracy, alleging he conspired with another to commit an unlawful object on May 23, 2015. App. ___ (indictments). On June 16, 2017 he pled guilty before the Honorable Roger L. Couch. He pled guilty as indicted to criminal conspiracy and pled guilty pursuant to *Alford*[1] to the lesser included offense of voluntary manslaughter. He was represented by John Michael Apicella. Judge Couch sentenced Petitioner to 20 years in prison for voluntary manslaughter and five years in prison for conspiracy, to run concurrently. Petitioner did not appeal his conviction or sentence.

On December 21, 2017, Petitioner filed an application for post-conviction relief in the Charleston County Court of Common Pleas. He alleged, *inter alia*, that his counsel coerced him to accept the guilty plea under *Alford* when he knew that the state did not have evidence against him. He also alleged that his guilty plea was involuntary because the record did not contain evidence of actual guilt. His PCR attorney filed amendments to his application in March 2020.

A hearing was held before the Honorable Perry Gravely on December 8, 2020. The parties appeared via WebEx. James Falk represented Petitioner and Benjamin Limbaugh of the Attorney General's office represented the state. Petitioner, his trial counsel, and Marvin Johnson testified at the hearing.

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[1] *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970).

On April 26, 2021, Judge Gravely signed an order denying post-conviction relief.

ARGUMENT

Trial counsel was ineffective in allowing his client to enter an invalid guilty plea where there was not a strong factual basis as required by *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970).

Petitioner Devon Middleton was tried jointly with co-defendant Te'Quan Perry. The trial began June 12th 2017, but the jury heard very little of the state's evidence. For three days, reflected in the 1049-page transcript, the parties argued various motions and the judge heard from several witnesses during those pretrial motions.

As a result, the transcript does show what the evidence against Middleton would have been. From a reading of the transcript, it is obvious that the case against him was based on guilt by association, presence at the scene, and rumors. In fact, the basis of the arrest warrants and search warrants were rumors that the victim's mother had heard on the "street" about Middleton's involvement in the case.

There was sufficient evidence that codefendant Perry shot the victim, Brandon Washington. However, there was no evidence that Middleton shot Washington. The state's theory was that he was guilty under the doctrine of "hand of one is the hand of all." App. 432.

Middleton was friends with the victim Brandon Washington. App. 425. On the afternoon of March 23, 2015 Washington came to the area of Charleston known as " Back da Green"[2] on the west side of the peninsula, just north of the Crosstown, officially named the Septima P. Clark Parkway.

[2] In the transcript, it is incorrectly referred to as "Back to Green." The official name is Gadsden Green, but the locals call it "Back da Green," perhaps as a reflection of the Gullah-Geechee roots of its denizens.

The city's surveillance cameras, which apparently produced stilted and incomplete videos of activity, reflected numerous young Black men in the area around 6 pm. Then numerous men engaged in horseplay, referred to as "skylarking" in the transcript, with Washington. The horseplay escalated as indicated by Washington seen picking up a portion of a bedframe to use as a weapon. App. 61.

According to the state, the video showed co-defendant Perry wearing a tan jacket, the victim, and Middleton among the many participants. At some point, Perry ran into an alley or area between houses, which is off camera, and the victim ran after him. He is shot and killed in the alley. The man with the tan jacket, who the state produced evidence was Perry, is seen running out of the alley. App. 61. During the fighting, Middleton is seen with a black object in his hand, later determined to be pepper spray. App. 62.

The evidence against Middleton, is reflected in the arrest warrant and affidavit. App. ___ Across the street, numerous Black men are seen observing the police response, shortly after the murder. App. 61. Middleton is seen using his cell phone. Upon questioning by police, Middleton admitted he was at Back da Green at that time, admitted to having pepper spray, identified himself on the video, and claimed he had no further involvement in Washington's death. App. 64.

Included in the warrant, though clearly not admissible at trial, was that the victim's mother told the detective that "she heard rumors that Brandon had been set up to be killed. She heard that he was called to the area and the subject [Middleton] acted in concert by attacking Brandon and then lured him into the alley where he was shot

and killed." App. 64. The state did not reveal any admissible evidence to support this theory. The police noted in their warrant that Middleton "hung out" with the group captured on the video and therefore, "acted in concert during their assault on Brandon" and then discussed their efforts on a cell phone. App. 63-65.

The state could produce no witnesses to the events in the alley, and there was no forensic evidence tying either Perry or Middleton to the murder. App. 426-430.

On March 25, 2015, Charleston city police investigators obtained a search warrant for Middleton's property, including his cell phone. They eventually obtained information about his Facebook page as well.

Perry was arrested a few months prior to Middleton. While Perry was in jail, a person who the state could show was Middleton, posted on Facebook about his friend, Perry. A person using a nickname, who the state could show was Middleton, posted about a person who was arguably Perry. The state could establish through posts and cell phone records that they were friends. Using rap lyrics, Middleton referenced the peril a snitch would face. App. 908. He called for Perry to be freed. App. 985. He arguably announced plans to intimidate or get rid of witnesses against Perry. App. 1015.

The record does show a sufficient factual basis for the case against Perry, who also pled guilty, after days of pre-trial motions, on June 16, 2017. App. 102. There was sufficient evidence that Middleton knew Perry, was an advocate for Perry, and was present at the scene, along with many others, on the evening of the murder. There was evidence Middleton engaged in horseplay, including spraying Washington's hair with

pepper spray. However, there was no evidence showing he participated in the murder. Additionally, there was not even evidence that he conspired to commit a crime on March 23, 2015 (the day of the murder), as the indictment alleged.

Nonetheless, Judge Couch found there was a factual basis based on the evidence found on the record from the hearings. App. 1043-1044.

At the PCR hearing, attorney Falk argued there was no factual basis for the plea and that trial counsel was ineffective in allowing his client to plead without a factual basis. App. 1074. When the assistant AG asserted this was a direct appeal issue, counsel framed it as trial counsel was ineffective for failing to recognize there was no factual basis. App. 1074-1075.

Trial counsel testified at the PCR hearing that after Judge Couch suggested the parties discuss a plea, he spoke to Middleton at the jail and told him the state would let him plea to voluntary manslaughter with a 20-year negotiated sentence. App. 1085-1086. Trial counsel believed the evidence the state could get admitted was enough to support a conviction. He believed this even though the state's witness who could possibly show Middleton was a participant in the murder could not be found and did not appear at the trial. App. 1086.

When asked upon what evidence he believed Middleton could have been convicted, trial counsel stated:

> He [Middleton] said that what he had in his hand was pepper spray. They were play fighting with the pepper spray. I believe the decedent was wearing a watch cap, wool type of head covering, and they found traces of Capsicum in that hat, which would be consistent with having been sprayed with pepper spray. So I think a competent solicitor could use

> that as evidence against Mr. Middleton for being more than
> just
> a bystander.

App. 1093, lines 10-17.

Counsel reiterated that he thought Middleton could be convicted because the shooting took place in front of him (and numerous other people) and his friend, Perry, walked out of the alley where the shooting occurred. App. 1089.

Trial counsel testified he advised Middleton that he "could very easily be convicted [of murder]. You should strongly consider taking the plea. Middleton replied, "I didn't do anything. I am not taking the plea." App. 1095, lines 5-8. Eventually, based on trial counsel's statement that he would get 30 to life if convicted of murder, he took the plea to voluntary manslaughter. App. 1088.

PCR counsel Falk argued to the PCR judge that the evidence was insufficient to provide the factual basis for an *Alford* plea. App. 1106.

Judge Gravely denied relief at the hearing. In this written order, he found that Middleton's plea was voluntary. He further found that trial counsel's assistance was not ineffective. App. 1114. Judge Gravely found that Middleton also failed to meet the prejudice prong, stating that he did not present any evidence that he would not have pleaded guilty and would have insisted on going to trial had it not been for trial counsel's error. App. 1116. He also mistakenly found that "applicant acknowledged that he wished to enter a plea of guilty to (sic) because he was guilty." App. 1120. He further found there was a sufficient factual basis for the plea. App. 1120. This was error.

Trial counsel was ineffective in allowing his client to enter an invalid guilty plea where there was not a strong factual basis, as required by *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970). Clearly, had trial counsel properly advised Middleton that the state's evidence was insufficient to support a conviction for murder, he would not have pleaded guilty to it.

An *Alford* plea is "an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest." *United States v. Mastrapa*, 509 F.3d 652, 659 (4th Cir.2007) (quoting *Alford*, 400 U.S. at 37, 91 S.Ct. 160) (emphasis omitted); *United States v. Taylor,* 659 F.3d 339, 347 (4th Cir.2011) (citing *Alford*, 400 U.S. at 37, 91 S.Ct. 160). A trial court may accept an *Alford* plea when: (1) the defendant "intelligently concludes that his interests require entry of a guilty plea;" and (2) "the record before the judge contains strong evidence of actual guilt." *Mastrapa*, supra.

The "distinguishing feature" of an *Alford* plea is that the defendant does not confirm the factual basis underlying his plea. *United States v. Alston*, 611 F.3d 219, 227 (4th Cir.2010), abrogated on other grounds by *United States v. Royal*, 731 F.3d 333 (4th Cir.2013).

As "long as there is in fact a strong factual basis supporting a guilty plea, it is valid even if the defendant protests his innocence." *Government of Virgin Islands v. Berry*, 631 F.2d 214, 220 n. 3 (3d Cir.1980). *Alford* and the numerous state and federal cases that have interpreted it make clear that "there must always exist some factual basis for a conclusion of guilt before a court can accept an *Alford* plea; indeed, a factual

basis for such a conclusion is 'an essential part' of an Alford plea." *United States v. Mackins*, 218 F.3d 263, 268 (3d Cir. 2000).

The entry of a "guilty plea implicates the protections of the Due Process Clause of the federal and state constitutions." *State v. Nesbitt*, 411 S.C. 194, 200, 768 S.E.2d 67, 70 (2015) (referencing U.S. Const. amend. XIV and S.C. Const. art. I, § 3 (providing states may not deprive a person of life, liberty, or property without due process of law)).

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985); *Alford*, 400 U.S. 25 at 31, 91 S.Ct. at 164,); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969); *Machibroda v. United Stat*es, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473 (1962).

Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). A petitioner that pleads guilty on counsel's advice may only collaterally attack the voluntary and knowing nature of his guilty plea by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Roscoe v. State*, 546 S.E.2d 417, 419 (2001). The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel in a

criminal prosecution. *McMann,* 397 U.S. at 771. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 205, 280 L.Ed.2d 674 (1984), in order to show ineffective assistance of counsel, a petitioner must show deficient performance and resulting prejudice. Counsel's assistance is ineffective when the performance "[falls] below an objective standard of reasonableness," but there is a "strong presumption" that counsel's performance was professionally reasonable. *Id.* at 688–89.

Prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. To prevail on a claim of ineffective assistance of counsel pertaining to a guilty plea, a petitioner must show both that his lawyer's performance was incompetent and "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 56–57, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985).

A defendant must have a full understanding of the consequences of his plea and of the charges against him." *Roscoe v. State*, 345 S.C. 16, 20 n.6, 546 S.E.2d 417, 419 n.6 (2001). Erroneous advice may render a plea invalid where the record shows the defendant's plea was induced such that, but for the erroneous advice, the defendant would not have pled guilty but would have insisted on going to trial. *Alexander v. State,* 303 S.C. 539, 402 S.E.2d 484 (1991); *Ray v. State,* 303 S.C. 374, 401 S.E.2d 151 (1991); *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989).

In this case, trial counsel asserted wrongly that there was a strong factual basis for the plea. In pleas entered pursuant to *Alford,* it is particularly important that there exist and strong factual basis. This is obviously required to overcome the defendant's protestations of innocence and to prevent wrongful convictions of innocent defendants based on coerced pleas. The *Alford* Court "did not state just how strong this factual basis must be, but it would appear that when a pleading defendant denies the crime the factual basis must be significantly more certain than will suffice in other circumstances. Wayne R. LaFave et al., § 21.4(f) Determining factual basis of plea, 5 Crim. Proc. § 21.4(f) (4th ed.) at 247-248.

The courts agree that establishment of factual bases takes on added significance with *Alford* pleas, based on the fact that the Supreme Court in *Alford* stated that 'strong' and 'overwhelming' evidence against the defendant provided a sufficient factual basis for the trial court to accept the defendant's guilty plea although it was accompanied by a denial of guilt. Curtis J. Shipley, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063, 1071–72 (1987). The precise definition of "strong factual basis" has not been addressed in South Carolina.

It is clear that when a defendant pleads to a lesser-included offense, as Middleton did, the test is whether the factual basis supports the original charge. *Rollison v. State,* 346 S.C. 506, 510–11, 552 S.E.2d 290, 292 (2001). Here, the state did not produce evidence of participation in Washington's murder that would have survived a directed verdict motion. That should be determinative of whether there is a strong factual basis, as required by *Alford.*

If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, a directed verdict motion cannot be granted. "Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." *State v. Buckmon,* 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001)

While the state did have sufficient circumstantial evidence to show that Perry committed murder, there was insufficient evidence to support a conviction of Middleton under the "hand of one, hand of all" theory.

Under the hand of one is the hand of all theory, a person "who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276-277 (2017); *State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." *Id.* at 262, 647 S.E.2d at 705.

For a person "who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged, or advised the killing. Also, the courts have required that the alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions." *State v.*

Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) (citing 40 Am. Jur. 2d Homicide).

In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the state need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *State v. Gibson,* 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010).

As discussed above, no evidence, circumstantial or direct, showed that Middleton and Perry made any arrangements to attack Washington. In contrast, the evidence only showed that Middleton, who was friends with Washington, as well as Perry, was part of a large group of men who engaged in play fighting.

Other than the word on the street, which of course was not competent evidence, the state had absolutely no evidence that Middleton had any arrangement with Perry. The evidence that Middleton was involved in a very large street fight and that he was friends with Perry insufficient to show accomplice liability. It is fundamental to the American system of justice that a person cannot be convicted on rumor and mere association with criminals. The judge would have been compelled to grant the directed verdict of acquittal motion had the case gone to trial.

If Middleton's trial counsel had properly evaluated the admissible evidence, he would have known it was not sufficient to support a conviction. He would have not advised him to enter a plea and he would not have allowed him to enter a plea where there was not a strong factual basis. It is obvious that if Middleton had been properly

advised on the insufficiently of the evidence he would not have pled guilty. Therefore, both deficiency and prejudice have been shown, as required by *Hill v. Lockhart, supra.*

CONCLUSION

The petition should be granted so that this issue can be briefed in more detail. Petitioner is entitled to post-conviction relief.

Respectfully submitted,

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