

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court

The Honorable Roger L. Couch, Circuit Court Judge

Case Nos. 2011-GS-42-1414, 2011-GS-42-1415, and 2012-GS-42-0349

The State,

Respondent,

vs.

Charvus Tarrell Nesbitt,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ONLY SETTING ASIDE ONE OF THE APPELLANT'S FOUR GUILTY PLEAS WHEN THE NEGOTIATED PLEA WAS NOT FULLY AND PROPERLY PLACED ON THE RECORD?

STATEMENT OF THE CASE

On February 13, 2012, Charvus Tarrel Nesbitt (hereinafter "Appellant") came before the Court to enter into a plea on four charges: attempted armed robbery, murder, possession of a firearm during a violent crime, and attempted murder. He was prepared to plead in accordance with the procedure set forth in the Supreme Court case of North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

Prior to the call of the case, the State and Appellant reached an oral agreement to a negotiated sentence of forty years on all four charges. The Assistant Solicitor announced this agreement to the Court in the first moments of the hearing, referencing the four charges as part of the agreement.

During Appellant's plea colloquy, the Court went over three of the four charges in detail. The Court ensured Appellant knew of the maximum penalties on these three charges. The Court then announced it was accepting the negotiated sentence of forty years and allowed the Appellant to leave the Courtroom.

However, the Court did not discuss the charge of possession of a firearm during a violent crime with Appellant. It was only after Appellant left the Courtroom did the Court put his entry of guilt on the record.

Appellant filed a Motion to Reconsider his sentence and to set aside his plea. He subsequently filed an Amended Motion after receiving the Transcript from the plea hearing. Although five points were addressed by the Motion, only the fifth point was addressed at the Motion hearing.

At a hearing on April 26, 2012 on that Motion, the Court reviewed the transcript from the plea hearing and took oral argument from Appellant's attorney and the State Assistant Solicitor. The Court issued its Order on May 24, 2012 granting (in part) Appellant's motion. The Court threw out the sentence on the weapon charge. The Court denied the motion as to the remaining three charges, leaving the forty-year sentence intact.

Appellant filed his Notice of Appeal on June 7, 2012.

STANDARD OF REVIEW

When faced with appeals from criminal convictions or guilty pleas, the appellate courts may only review errors in law. State v. Kirton, 381 S.C. 7, 22, 671 S.E.2d 107, 114 (Ct. App. 2008) (citations omitted). The discretion to modify, change or set aside a sentence rests solely with the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). Appellate Courts may only overturn, this discretion by a finding of abuse of discretion. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-107 (1998). Such abuse occurs when the Court's conclusions are controlled by an error of law or lack evidentiary support. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010).

ARGUMENT

I. **BECAUSE THE NEGOTIATED PLEA NEVER BECAME ENFORCEABLE, THE TRIAL COURT ABUSED ITS DISCRETION BY NOT SETTING ASIDE APPELLANT'S FULL AND COMPLETE PLEA AND SENTENCE.**

The Circuit Court never heard the complete plea agreement between the State and Appellant; therefore, it cannot enforce any portion of that agreement. It is a fundamental principle of Constitutional Law that a guilty plea must be voluntary. When he pleads guilty, a Defendant must know the specific rights he is waiving by pleading guilty, including the right against self-incrimination, the right to a jury trial, and the right to confront witnesses who accuse him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

To ensure that a Defendant's plea is truly voluntary, the Court has a duty to ensure that the individual Defendant has a complete understanding of the consequences of his plea and the charges to which he is pleading. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citations omitted). Courts must examine the Defendant specifically about the punishment that the Court could impose upon him. Id. at 434-435, 405 S.E.2d at 392.

The Court must have a complete record showing the Defendant's plea is voluntary. State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). In South Carolina, "all plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement." State v. Thrift, 312 S.C.

282, 295, 440 S.E.2d 341, 348 (1994). As a result, no one – not the State, not the Court, not the Defendant – can enforce a plea agreement based on terms that are not on the record. Id. at 296, 440 S.E.2d at 349.

A Defendant has no constitutional right to have a Court accept their guilty plea. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed. 2d 427 (1971). Courts have the authority under the Constitution to either accept a plea or reject it. Id. However, the United States Supreme Court has defined the moment when a plea becomes a Constitutionally protected right:

A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.

Mabry v. Johnson, 467 U.S. 504, 507, 104 S. Ct. 2543, 2546, 81 L.E.2d 437, 442 (1984).

South Carolina has expounded upon the U.S. Supreme Court's definition. As this State's Courts have explained, it is very much akin to contract law. A plea agreement is the equivalent of an "offer" that the Defendant accepts by pleading guilty. Reed v. Becka, 333 S.C. 676, 689, 511 S.E.2d 396, 402 (Ct. App. 1999) (citation omitted). Therefore, until the Court formally accepts the plea agreement, the agreement "binds no one, not the defendant, the State, or the court." Id. Although similar to contract law, plea agreements "must be more stringent than a contract because the rights involved are fundamental and constitutionally based."

State v. Thrift, 312 S.C. 282, 293, 440 S.E.2d 341, 347(1994) (citing United States v. Ringling, 988 F.2d 504 (4th Cir. 1993)). Furthermore, the government must be “held to a higher degree or responsibility than the defendant for imprecisions or ambiguities.” Id.

In looking at Appellant’s plea colloquy, it is clear that the Court did properly discuss three of the four charges. The Court advised him of the indictment for murder and explained that the murder charge carried a sentence of thirty years to life.¹ R. p. 15, lines 16-18. Appellant testified he understood that charge and the potential sentence involved. R. p. 15, line 21- p. 16, line 1. The Court advised him of the indictment for attempted murder and explained that this charge carried a maximum sentence of thirty years.² R. p. 15, lines 18-21. Again, Appellant testified he understood that charge and the potential sentence involved. R. p. 15, lines 18-21. Finally, after the Court went over numerous rights Appellant was waiving and after the Court heard the facts behind the charges, the Court advised Appellant of the indictment for attempted armed robbery and explained that this charge had a sentencing range of up to twenty years.³ R. p. 33, line 22-p. 34, line 7.

The record also indicates that as to these three charges Appellant gave up certain rights. Included among those rights were his right to trial by jury,

¹ S.C. Code Ann. § 16-3-20(A).

² S.C. Code Ann. § 16-3-29.

³ S.C. Code Ann. § 16-11-330(B).

subpoena witnesses, confront witnesses, present defenses, and remain silent. R p. 35, line 1-p. 36, line 14.

The Court specifically, and correctly, advised Appellant that because this was a plea on a negotiated sentence, the Court could accept or reject the negotiated sentence. R. p. 36, lines 6-12. The Court also informed Appellant that if the Court decides to reject the negotiated sentence, Appellant could withdraw his plea. R. p. 36, lines 16-20. However, the Court accepted the negotiated sentence.⁴ R. p. 38, lines 14-20. Appellant left the Courtroom at this time. R. p. 38, line 24.

At this point, the Assistant Solicitor notified the Court of the weapon charge. R. p. 39, line 2-5. The Court acknowledged not seeing the sentencing sheet for that charge. R. p. 39, lines 6-9. The Court did not bring Appellant back into the Courtroom, but announced the sentence to the weapon charge would be concurrent to the other charges. R. p. 39, lines 11-12. The Court did not explain the charge to Appellant and did not explain the potential sentence.⁵

On hearing Appellant's Motion for Reconsideration, the Court acknowledged that Appellant's attorney "did not waive [his] presence with regards to the discussion of that particular charge." R. p. 5, lines 30-31. The Court further acknowledged that it did not question Appellant about his plea to the

⁴ The Court sentenced Appellant to forty years on the murder indictment. R. p. 38, line 18. The other sentences – twenty years on the attempted armed robbery and thirty years on the attempted murder – ran concurrent with the murder sentence. R. p. 38, line 14-21.

weapons charge. R. p. 5, lines 31-32. However, The Court below found that because the Court never questioned Appellant about the weapons charge, it was therefore not of the plea agreement. R. p. 6, lines 9-12).

However, in finding that the weapons charge was ultimately not part of the negotiated plea, R. p. 6, lines 15-16., the Court misconstrued the Supreme Court's ruling in Thrift. The Ruling in Thrift mandates full disclosure of plea agreements and ensures that no one can enforce them unless it is completely within the record. In this case, the record was clear as to what Appellant's full and complete plea agreement was. It was four charges, not three. Once one portion of the complete plea agreement became invalid, there was no plea agreement to enforce. The Court lost its ability to enforce the four-term plea agreement, and it had no jurisdiction to enforce a three-term plea agreement.

In its decision, the Court relied upon Phillips v. State, 281 S.C. 41, 314 S.E.2d 313 (1984). R. p. 6, lines 16-19). In Phillips, the Defendant pled guilty to two charges: assault and battery of a high and aggravated nature ("ABHAN") and robbery. Id. at 42, 314 S.E.2d at 313. He was initially indicted for kidnapping instead of ABHAN, but in plea negotiations the charge was reduced to ABHAN. Id. at 42, 314 S.E.2d at 313-314. He received consecutive sentences on the two pleas – five years on the ABHAN and ten on the robbery. Id. at 42, 314 S.E.2d at 313. The Court threw out the ABHAN plea (but not the robbery plea) in the

5 Convictions for Possession of a Weapon during the commission of a violent crime is punishable by up to five years in prison "in addition to the punishment provided for the principal crime." S.C. Code Ann. § 16-23-490.

Defendant's Post-Conviction Relief case because the ABHAN charge never went before the grand jury. Id. at 42-43, 314 S.E.2d at 314.

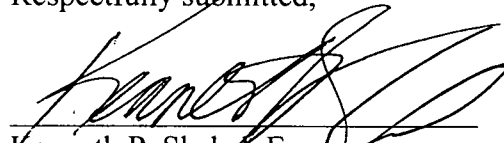
The nature of the sentences given in Phillips makes that case easily distinguishable from Appellant's case. The pleas in Phillips led to two separate, consecutive sentences. Appellant had a four-term plea agreement to forty-years, without any separate allocation as to any one individual charge. It was simple for the Supreme Court to differentiate between the two charges because one sentence stood separate from the other in all facets. For Appellant, although he was set to receive a forty year negotiated sentence, there was no evidence on the record what portion of the forty years was for which charge. There was no evidence on the record that any of the charges were to run concurrent or consecutive as part of the plea agreement. There was no allocation as to how many years were associated with each charge.

Thrift requires full disclosure of all terms of a plea agreement. As such, the higher degree of responsibility for the imprecisions and ambiguities of Appellant's plea agreement rests with the State, not with Appellant. The Court cannot substitute its own opinions as to the nature of the agreement when the record does not fully explain the terms. When one of the four charges of Appellant's negotiated plea became unenforceable, the Court could not enforce any portion of the negotiated plea unless the record was clear as to how the negotiated plea actually divided the charges.

CONCLUSION

For the above stated reasons and on the grounds stated, Appellant respectfully requests that the Court reverse the decision of the trial court and grant Appellant's Motion for Reconsideration of his sentence, throwing out the entire sentence for failure to comply with the negotiated plea agreement.

Respectfully submitted,



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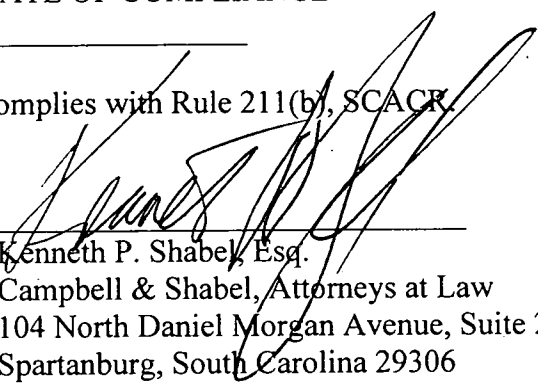
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CERTIFICATE OF COMPLIANCE

I certify that this Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

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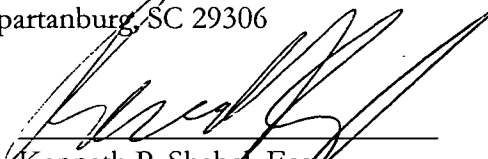
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