

No. COA09-504

TWENTY FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

)

v.

)

FROM FORSYTH COUNTY

)

)

PAUL JOSEPH SALVETTI

)

BRIEF OF THE STATE

CLERK COURT OF APPEALS
OF NORTH CAROLINA

2009 JUL -6 A 8:31

FILED

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QUESTION PRESENTED

VI. MUST DEFENDANT'S PLEA AND JUDGMENT BE VACATED BECAUSE THE TRIAL COURT'S RULING DENYING HIS MOTION TO WITHDRAW PLEA WAS ERRONEOUS IN LAW?

STATEMENT OF THE CASE

The Defendant, Paul Joseph Salvetti was indicted for violation of N.C.G.S. § 14-318.4. Child abuse a felony, which provides, in pertinent part: "(a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the

child is guilty of a Class E felony, except as otherwise provided in subsection (a3) of this section."

The indictment stated that the Grand Jury found that the defendant did intentionally "inflict serious physical injury, STARVATION, on (deleted name) who was 13 years old thus under the age of 16 years of age. At the time the defendant inflicted the injury, the defendant was the child's parent." (R.p. 6).

The Grand Jury also indicted the Defendant, Paul Joseph Salvetti, for contributing to the delinquency of a minor in violation of N.C.G.S. § 14-316.1. Contributing to delinquency and neglect by parents and others, which provides: "Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty of a Class 1 misdemeanor."

The indictment stated that the Grand Jury found that the Defendant, Paul Joseph Salvetti, "did knowingly, while at least 16 years of age, caused, encouraged and aid, T.S., age 13, a juvenile, to be in a condition IN WHICH HE WAS NOT BEING EDUCATED OR PROPERLY CARED FOR, whereby the juvenile could be adjudicated neglected." (R.p. 6).

The Grand Jury also indicted the Defendant, Paul Joseph

Salvetti for violation of N.C.G.S. § 14-318.4. Child abuse a felony, which provides: "(a3) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony."

The indictment stated that the Grand Jury found that the Defendant, Paul Joseph Salvetti, "intentionally inflict, EMOTIONAL AND MENTAL INJURY, by starvation and isolation on T.S., who was 13 years of age and thus under the age of 16 years of age. At the time the defendant inflicted the injury the defendant was the child's parent." (R.p. 6).

At the October 6, 2008 session of Superior Court for Forsyth County, North Carolina, the Defendant entered an Alford plea to the Class E felony pursuant to a plea arrangement which allowed the Defendant to plead guilty to the first count of Felony Child Abuse with a maximum sentence of 89 months. The Court then entered a sentence of a minimum of 20 months and a maximum of 33 months. (R.pp. 15-16).

Two days later, on October 8, 2008, the Defendant, through counsel filed a Motion to Withdraw Guilty Plea and filed a Motion for Appropriate Relief (R.pp. 18-19).

On October 10, 2008, a hearing was held at which Counsel for Defendant argued that the basis for his Motion for Appropriate Relief was ineffective assistance of Counsel.

(R.pp. 23-25). Counsel for the Defendant did not wish to be heard on his Motion to Withdraw Guilty Plea. (R.p. 25). The Court denied the Motion to Withdraw Guilty Plea (R.p. 28). On the Motion for Appropriate Relief, the Court found that the Counsel for Defendant was not ineffective and denied that motion. (R.pp. 28-29).

STATEMENT OF THE FACTS

The Defendant, Paul Joseph Salvetti, entered a plea of guilty to the Felony of Child Abuse, a Class E felony, pursuant to a plea agreement on October 6, 2008. The only conditions noted on the plea agreement was "The defendant pleads guilty to the Class E felony of child abuse and that the State takes a dismissal of the other class C felony and misdemeanor contributing to the delinquency of a minor charges" (R.pp. 11-12).

At the hearing, the State presented testimony from DSS Attorney Terry Boucher to provide a factual basis. Attorney Boucher testified that Forsyth County DSS was contacted by T.S. in May, 2007 complaining about the treatment he was receiving from his adoptive father, Paul Joseph Salvetti and his wife, Debbie Salvetti. Ms. Boucher stated that the Defendant and his wife withdrew T.S. from the public schools in January of 2007 and thereafter confined him in a bedroom with dark windows and no

furniture for the next 3 months. She further testified that T.S. was given "very limited food" and "had to earn his way to have regular meals". Attorney Boucher stated that Forsyth County DSS took custody of T.S. in May, 2007 and sent him to N.C. Baptist Hospital, where T.S. gained 10 pounds in a week on a normal adolescent diet. (T.pp. 6-9).

The State then called on T.S. to read a "victim impact statement". T.S. testified that he was born in Russia and adopted by the Defendant, Paul Joseph Salvetti and his then wife, Leslie Salvetti. He said that Leslie Salvetti died and the Defendant married Debbie Salvetti. He testified further that after the Defendant married Debbi Salvetti, she made him eat poisoned fish, drink his own urine and hit him with a baseball bat and a frying pan. (T.pp. 13-15). T.S. then testified that Debbie Salvetti had hit him with a baseball bat and a frying pan when he was in the seventh grade. (T.p. 17). He stated he was taken out of school in January, 2007 so he couldn't tell on his parents any longer. He then stated he was being kept locked in his room for 23 hours a day. (T.p. 17). He said that after his parents took him to see Dr. Dr. Federici, his life got worse. He only had a mattress on the floor with no covers and a Bible. He testified that he felt trapped and that he was hungry and cold and felt helpless. (T.p. 17). T.S. stated, his father and his wife took him out of school and took him to see a Doctor named Federici. (T.p. 17). T.S. said that from

February to May of 2007 he was "hungry and cold", that he lost weight, that he had to earn food by working, and suffered headaches and stomach aches. (T.pp. 19-20).

The Court stated it was going to pronounce sentence and Defendant's attorney and his wife's attorney objected on the grounds that what Ms. Boucher and T.S. had said was not true. (T.pp. 21-26). The Trial Judge then asked defense counsel why they were entering a guilty plea and not trying the case. (T.p. 30). Counsel for the Defendant, Paul Joseph Salvetti stated that the plea was being entered against his advice to this client. He stated that the Defendant was entering the plea for two reasons. Number one, his children and number two his wife. He said that apparently the Defendant's wife could not get a plea arrangement unless the Defendant pled guilty as well. (T.p. 30).

Both Defendants called Dr. Ronald Federici, a pediatric neuropsychologist with a specialty in foreign adoption medicine and a private child psychology practice in McLean, Virginia. Dr. Federici was received by the Court as an expert in child psychology and adoptive medicine. Dr. Federici stated he had done a psychological evaluation on T.S. in February, 2007 over a period of three days. He stated that T.S. appeared to be in good health and no sign of starvation or malnutrition at that time. Dr. Federici stated he had reviewed T.S. records and did a complete psychological evaluation and did intensive one on one sessions with

T.S. and the Salvettis. (T.pp. 39, 48, 53, 59-60).

Dr. Federici testified that T.S. had average intelligence, but substantial psychological and developmental problems, including organic mood affective disorder, ADHD, transient reality impairment, pseudo-psychotic logic and mild fetal alcohol related disabilities. (T.pp. 38, 41, 57, 63-64). He said T.S. had a lack of self control, inappropriate behavior, lack of reasoning, impaired thought and mood disorders. (T.pp. 38, 63-65). Dr. Federici stated he did not believe the Salvettis had withheld food from T.S. Dr. Salvetti's opinion about the Salvettis was that they were overwhelmed by a difficult disturbed child. (T.p. 47). The Court admitted some documents into evidence including a copy of a page from T.S. diary stating that "I am a natural liar" and records showing the Defendant and his wife explored sending T.S. to a residential school. (T.p. 70).

Two days later, on October 8, 2009, the Defendant, through Counsel, filed a Motion to Withdraw Guilty Plea and a Motion for Appropriate Relief. (R.pp. 17-19)

On October 10, 2008, L. Todd Burke, Superior Court Judge presiding, held a hearing at which he denied both of Defendant's Motions. Defendant appeals this ruling. At this hearing, Judge Burke found that "when persons pleading guilty, the guilty plea is what it is, a guilty plea. And I don't see any reason why he should be allowed to withdraw his plea at this stage. You know, if you were

to do this, it would compromise the integrity of the judicial system to allow a person to just plead guilty and then withdraw the pleas. The plea was their informed choice. The defendant answered all the questions and at no time said he felt like he was threatened or being coerced into pleading guilty.

And at no time during the questioning by the Court did the defendant express changing his plea during questioning by the Court. The defendant does not state a legitimate basis as to why the plea should be withdrawn or the plea be stricken, rather the defendant seems to not like the sentenced that was pronounced for his wrongdoing, which was an active sentence." (R.pp. 26-27).

STANDARD OF REVIEW

The standard of review in this matter is de novo.

DISCUSSION

The Defendant, in his brief, made arguments in regards to the Motion for a Writ of Certiorari in arguments 1-5. The State responded to those arguments in the Response filed by the State on June 15, 2009. The only argument brought forth by the Defendant on this appeal is set forth on page 29 of Defendant's brief captioned as "II. DEFENDANT'S ARGUMENT ON DIRECT APPEAL", under which the Defendant sets forth his only issue on this appeal.

VI. DEFENDANT'S PLEA AND JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT'S RULING DENYING HIS MOTION TO WITHDRAW PLEA WAS ERRONEOUS IN LAW.

Assignment of Error Nos. 1, 5, R.p.34

The Defendant in this argument is contending that the Trial Court erred in denying the Defendant's Motion to Withdraw Guilty Plea.

The Defendant's Motion to Withdraw Guilty Plea was improper in this case. Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. *N.C. G.S. § 15A-1411(a)*. The Trial Court acted properly in denying the Defendant's Motion to Withdraw Guilty Plea in that it was not a proper motion to seek post-judgment relief. Only the Defendant's Motion for Appropriate Relief would be the proper motion and Defendant is not asserting that the Trial Court's denial of that motion was error in this argument.

Defendant's Motion to Withdraw Appeal recites that the Defendant was charged with felony child abuse in that he allegedly starved his adopted son T.S. over a period of months in early 2007, that Defendant entered an Alford plea against advice of counsel, and that the Defendant agreed to this plea to help his co-defendant wife, who wished to avoid trial. Defendant then asserted that the presentation of the 'victim impact statement' dealt with matters far outside of the purview of the alleged offense and that the Court told the counsel for Defendant that his case should be tried in front of a jury. (R.p. 17). The Defendant entered his plea voluntarily and did

not attempt to withdraw the plea until after he was sentenced. Nowhere in the said Motion to Withdraw Guilty Plea does Defendant state any facts that would constitute manifest injustice. The Defendant offered an expert witness to mitigate the information claimed in the "victim impact statement". (R.pp 31-68). In spite of his alleged concerns, defendant proceeded to voluntarily enter his Alford plea.

Superior Court Judge L. Todd Burke, made it clear at the hearing on the Defendant's guilty plea that he was only considering the evidence of the acts with which the Defendants were charged, to-wit, starving the child. He made it clear he was not considering all of the allegations contained in the statement of DSS Attorney Theresa Boucher and contained in the victims "impact statement". (R.p. 21).

The case cited by the Defendant in his brief as supporting his contention that denial of the Motion to Withdraw Guilty Plea was erroneous in law is *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990). Defendant's reliance on this case is misplaced. Quite the contrary, *Handy* holds that "Had defendant waited to challenge his plea of guilty until after the jury had recommended and the trial court had imposed a sentence, it would have required the filing of a motion for appropriate relief. A motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for

appropriate relief." *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159 (1990).

"A fundamental distinction exists between situations in which a defendant pleads guilty but changes his mind and seeks to withdraw the plea before sentencing and in which a defendant only attempts to withdraw the guilty plea after he hears and is dissatisfied with the sentence. This distinction creates the need for differing legal standards for adjudicating such motions to withdraw guilty pleas, a distinction recognized by most courts."

In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason.

On the other hand, where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice." *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990), citing *State v. Olish*, 164 W. Va. 712, 266 S.E.2d 134 (1980).

Defendant in his brief alleged that the Court failed at the plea proceeding to adjudicate, accept, make statutorily required determinations about and inform and advise defendant about the plea and there was an insufficient factual basis to support the plea. The Transcript of Plea (AOC-C-300) appears at pages 9 through 12 of the record. This transcript shows that all required questions were asked and the defendant answered each of the questions in making

his guilty plea. On line 22 of this Transcript, the defendant specifically swore that he agreed that there were facts to support his plea and consented to a summation of the evidence related to the factual basis. This Transcript of Plea is sworn to and signed by the Defendant, Paul Joseph Salvetti, his attorney, Pete Clary, and contains a Plea Adjudication which was entered by Trial Judge L.Todd Burke, Superior Court Judge Presiding. (R.pp. 9-12).

Defendant's allegations regarding any defect in the plea agreement are without merit as is shown on the face of the Transcript of Plea.

Should the Appellate Court find that this assignment of error should be considered, the State argues as follows: The Trial Court considered the Defendant's Motion to Withdraw Guilty Plea and denied it on October 10, 2008. Counsel for Defendant, Attorney Pete Clary, after arguing ineffective assistance of counsel on the Motion for Appropriate Relief, stated: "My other motion was just a motion withdrawing the guilty plea, and I don't wish to be heard on that, but if you Honor denies that, I would enter notice of appeal on that." (Vol. 1 R.p. 6).

The Trial Court gave due consideration to defendant's Motion, stating: "And at no time during the questioning by the Court did the defendant express changing his plea during questioning by the Court. The defendant does not state a legitimate basis as to why

the plea should be withdrawn or the plea be stricken, rather the defendant seems not to like the sentence that was pronounced for his wrongdoing, which was an active sentence." (Vol. 1 R.p. 8).

Since Counsel for Defendant did not make an argument regarding this motion, it is unclear what justification defendant is arguing for this Motion to Withdraw Guilty Plea other than the grounds stated in the Motion itself.

The Trial Court acted properly in denying the Defendant's Motion to Withdraw Guilty Plea.

CONCLUSION

The Defendant, Paul Joseph Salvetti, received a fair and impartial trial in this case based on his guilty plea, free from any error. The Judgment of the Forsyth County Superior Court should be affirmed in this case.

ROY COOPER
ATTORNEY GENERAL

By:  _____

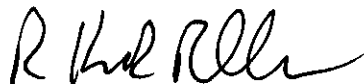
R. Kirk Randleman
Assistant Attorney General
N.C. Bar # 9428
952 Old US 70 West
Black Mountain, North Carolina 28711
Telephone: (828)-669-3388 Ext. 218
Fax: (828)-669-3365
Kirk.Randleman@ncmail.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of the same in the United States Mail, first-class postage prepaid addressed to his ATTORNEY OF RECORD as follows:

Daniel Pollett
Office of the Appellate Defender
123 West Main Street, Suite 500
Durham, North Carolina 27701

This the 30 day of June, 2009.



R. Kirk Randleman