Circuit Court for Prince George's County
Case No. CT080866X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2340

September Term, 2019

GARY THEODORE MCKINLEY

v.

STATE OF MARYLAND

Graeff,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: December 21, 2021

On January 22, 2009, Gary Theodore McKinley, appellant, entered an *Alford* plea to second-degree murder and use of a handgun in the commission of a crime of violence in the Circuit Court for Prince George's County. On March 11, 2009, the court sentenced appellant to thirty years of incarceration for the murder charge and a consecutive twenty years for the use of a handgun in the commission of a crime of violence.

On March 8, 2018, appellant filed a Petition for Post-Conviction Relief, and on October 3, 2018, filed an Amended Petition for Post-Conviction Relief. On March 14, 2019, the circuit court held a hearing on his petitions. The court issued a written decision on October 3, 2019, granting appellant the right to file a belated application for leave to appeal. Appellant filed an Application for Leave to Appeal on November 1, 2019. This Court granted appellant's application on February 6, 2020, giving rise to the present appeal.

Appellant raises one question for our review:

> Was the record of the plea hearing sufficient to support a finding that [appellant]'s guilty plea [was] knowing and voluntary?

For the reasons set forth herein, we shall affirm.

I. BACKGROUND

A. The Murder Allegations and Appellant's Mental Status

On April 13, 2008, appellant flagged down Officer D. Clacken[1] of the Prince George's County Police Department in the 2200 block of Alice Avenue in Prince George's County, Maryland. Appellant told Officer Clacken that his girlfriend was "possibly dead" and was covered in blood. Appellant directed Officer Clacken to an apartment on Alice

[1] Officer Clacken's first name does not appear in the record.

Avenue, and Officer Clacken found the victim, Sheena Marie Day, "unconscious and unresponsive." Ms. Day had suffered a gunshot wound and was pronounced dead at the scene. Appellant made several statements to police officers at the scene and later at the Criminal Investigation Division ("CID") "implicating himself."

The police recorded an interview with appellant at CID, and appellant appeared "to be possibly disoriented and unable to comprehend his physical circumstances," telling police that he had previously heard voices. Appellant was arrested and charged with first-degree murder. On June 3, 2008, appellant was indicted on charges of murder and use of a handgun in the commission of a crime of violence.

During the course of the investigation, the State learned from appellant's family that appellant may suffer from schizophrenia. The State requested the Court to order that appellant be evaluated for competency and criminal responsibility. On October 6, 2008, the circuit court ordered appellant to undergo such evaluation. A psychiatrist evaluated appellant on November 6, 2008, and issued an opinion on December 4, 2008, finding appellant competent to stand trial and criminally responsible.

B. The Plea Hearing

On January 22, 2009, the circuit court held a plea hearing. As a preliminary matter, the prosecutor asked the court to find appellant competent based on a psychiatric evaluation by the Department of Health and Mental Hygiene, Perkins Hospital Center. Having reviewed the evaluation, the court found that appellant was "competent to stand trial and [was] criminally responsible[.]" The court then stated that it believed that defense counsel

was not disputing such finding, to which defense counsel agreed.

Defense counsel informed the court that the parties had come to a plea agreement and that appellant would tender an *Alford*[2] plea to the court on the charges of second-degree murder and use of a handgun in the commission of a crime of violence, with sentences of thirty years and twenty years, respectively, to be served consecutively. Appellant was free to allocute for less time and file for reconsideration. The court repeated the terms of the agreement for clarity, stated that it accepted the terms, and proceeded to question appellant. The following are relevant portions of the plea hearing.

> THE COURT: Good morning, Mr. McKinley. Would you state your full legal name and spell it?
>
> [APPELLANT]: Gary Theodore McKinley, M-C-K-I-N-L-E-Y.
>
> THE COURT: So, it's Mr. McKinley.
>
> [APPELLANT]: Yes, ma'am.
>
> THE COURT: How old are you?
>
> [APPELLANT]: 26.
>
> THE COURT: How far have you gone in school?
>
> [APPELLANT]: To the 12th grade until I got locked up, and I got my GED while I was locked up.
>
> THE COURT: When did you receive your GED?
>
> [APPELLANT]: In August '04.
>
> THE COURT: Are you currently on any medication or any drugs?
>
> [APPELLANT]: Yeah. They got me on Elavil.

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970).

THE COURT: How do you spell that, do you know?

[APPELLANT]: Huh-uh.

THE COURT: No? You have to answer yes or no. You can't say huh-uh.

[APPELLANT]: No.

THE COURT: What kind of drug is it to your knowledge?

In other words, what is it for if you know?

[APPELLANT]: Doctor told me it was an antidepressant, and it helps me sleep, because I ain't got no sleep. Like the first seven days they told me they had to put me on some kind of medication. So they put me on Elavil. That's what he called it.

THE COURT: Are you fully aware of what is taking place here this morning?

[APPELLANT]: Yes, ma'am.

THE COURT: Does that drug have any impact on your ability to understand what is taking place here this morning?

[APPELLANT]: Not to my knowledge.

THE COURT: So you're fully alert and aware; is that correct?

[APPELLANT]: Yes.

THE COURT: Do you understand that you are entering a plea to second degree murder—[to defense counsel] count [o]ne is not second degree. It's first degree, is it not?

[DEFENSE COUNSEL]: Yes.

THE COURT: It would include second degree?

[DEFENSE COUNSEL]: Yes, Your Honor[.]

THE COURT: Okay. You are pleading guilty to second degree murder, which carries a maximum penalty of incarceration up to 30 years, and you are entering a plea of use of a handgun in the commission of a violent crime, which carries a maximum penalty up to 20 years.

Do you understand that you are entering a plea under [*North Carolina v. Alford*] to these two counts?

[APPELLANT]: Yes, ma'am.

THE COURT: By entering a plea under [*North Carolina v. Alford*], you are acknowledging that the State has sufficient evidence to sustain a guilty verdict if you go to trial, however, you are not admitting guilt.

Do you understand that that's essentially what it means to enter an [*Alford*] plea?

[APPELLANT]: **Yes, ma'am.**

THE COURT: **And you did frown a little bit.**

Have you discussed that with your counsel?

[APPELLANT]: **Yes. I discussed it with her over the weekend, but, I mean, I believe I understand it. The [*Alford*] situation kind of like—was a little bit different, but I totally understand it.**

THE COURT: Maybe I should make it—I want to make sure you understand fully by entering this [*Alford*] plea.

Well, you are saying that you recognize the State has enough evidence, and it is likely that if you go to trial that you would be found guilty, but you are maintaining that you did not commit the offense. Are you clear?

[APPELLANT]: Yes, guilty.

THE COURT: Excuse me?

[APPELLANT]: You say guilty.

THE COURT: **Are you clear as to what an [*Alford*] plea is, sir?**

[APPELLANT]: **Yes, ma'am.**

THE COURT: You want to take advantage of the offer that the State is making to you, recognizing that if you go to trial, that the likelihood is that you would be found guilty.

Do you understand that?

[APPELLANT]: Yes, ma'am.

THE COURT: **Do you have any questions about the plea agreement whatsoever?**

[APPELLANT]: **No, ma'am.**

THE COURT: All right. I want to make sure I go over it with you fully.

You are entering an [*Alford*] plea to second degree murder. The State would be requesting 30 years, and you are entering an [*Alford*] plea to use of a handgun in the commission of a crime, and that is a violent crime, and the State would be asking for 20 years, that the sentences would run consecutively.

You, through your [c]ounsel, are free to ask for less time. That's free to allocute. That's what she means, and that you may file a reconsideration of the sentence.

The State will not object on procedural grounds.

The Defense is also free to ask that you be placed in the Patuxent facility, and the State will remain silent if you choose to request placement in Patuxent.

Do you have any questions whatsoever about the plea agreement?

[APPELLANT]: **Only question I got is, you said due to the fact it's a violent crime, right?**

So basically that means that the State has asked for the max of 20 years as far as the weapon, right?

THE COURT: **Right.**

[APPELLANT]: **Okay.**

THE COURT: **Do you have any questions?**

[APPELLANT]: Huh-uh.

THE COURT: You have to answer yes or no.

[APPELLANT]: **No, ma'am.**

* * *

THE COURT: You also have the right to challenge any defects in the

indictment, but by entering this guilty plea, you give up that right to challenge the defects.

I'm not suggesting there are defects in the indictment, but if there were, you would give up the right by entering a plea of guilty.

Have you read over the indictment?

[APPELLANT]: **Yeah, I have read it, but I don't—**

THE COURT: **Have you discussed it with your attorney?**

[APPELLANT]: **Yes, ma'am.**

THE COURT: **Have you gone over the evidence the State has against you?**

[APPELLANT]: **Yes, ma'am.**

THE COURT: **Have you discussed with your [c]ounsel possible defenses?**

[APPELLANT]: **Yes, ma'am.**

* * *

THE COURT: Have a seat for now. I'll hear from the State.

[PROSECUTOR]: Thank you, Your Honor.

Had the matter proceeded to trial, the following evidence would have been produced:

That on April 13th, 2008[,] at approximately 1:59 p.m., the [appellant] who is seated to my left in an orange jumpsuit, Gary Theodore McKinley, flagged down Prince George's County Police Officer Clacken in the 2200 Block of Alice Avenue, Oxon Hill, Prince George's County, Maryland.

The [appellant] stated that his girlfriend was possibly dead with blood all over her. The [appellant] then directed Officer Clacken to 2140 Alice Avenue, Apartment 101 in Oxon Hill Prince George's County, Maryland.

The officer called for backup. While the [appellant] remained outside of the apartment, **Prince George's County Police went into the apartment**

and located the victim, . . . in her bed suffering from a gunshot wound to the head.

Prince George's County Fire Department paramedics responded and pronounced the victim dead. She was subsequently transported to the office of the Chief Medical Examiner in Baltimore City where an autopsy was conducted by Dr. Greenberg.

The autopsy determined that the cause of death was a gunshot wound to the left side of the back of the head.

Recovered during the autopsy was a deformed copper jacket and multiple gray metal fragments. **Based on the nature of the injury and the recovered items, they are consistent with [the] use of a handgun in the commission of the homicide.**

The [appellant] made several statements to the officer both on the scene and subsequently at the police station, indicating that he took responsibility for the death of [the victim].

All events did occur in Prince George's County, Maryland.

THE COURT: [Defense counsel]?

[DEFENSE COUNSEL]: Since this is an [*Alford*] plea, we do agree that the State could present witnesses that would testify to such.

THE COURT: [Appellant], do you agree with your counsel's statement?

[APPELLANT]: Yes, ma'am.

THE COURT: **Are you fully satisfied with the services of your attorney, [appellant]?**

[APPELLANT]: **Yes, ma'am. She did all she could do so as far as her job. I'm very satisfied.**

* * *

THE COURT: The Court is satisfied that the State has provided an adequate factual basis to accept your plea, [appellant], and I find that your plea as you understand of [*North Carolina v. Alford*], is freely, voluntarily, and knowingly made, and therefore accept your [*Alford*] plea as to [c]ounts [o]ne and [t]wo.

(Emphasis added.)

On March 11, 2009, the circuit court sentenced appellant to thirty years' incarceration for the second-degree murder conviction and a consecutive twenty years for the use of a handgun conviction. As previously stated, appellant filed a Petition for Post-Conviction Relief on March 8, 2018, and an amended petition on October 3, 2018. On October 3, 2019, the court granted appellant the right to file a belated application for leave to appeal, which he did on November 1, 2019. This Court granted appellant's application on February 6, 2020. Additional facts shall be provided as necessary to our resolution of the question presented.

II. DISCUSSION

A. Standard of Review

We are tasked with determining whether appellant's *Alford* plea was knowing and voluntary under Maryland Rule 4-242(c). "When an appellate court reviews the application of the law to the facts of a case, a trial court receives no deference." *Tate v. State*, 459 Md. 587, 608 (2018). In addition, we review the circuit court's application of the Maryland Rules *de novo*. *Id.*

B. Analysis

Appellant argues that the record of the plea hearing was insufficient to support the court's finding that appellant "understood the nature of second degree murder and use of a handgun in the commission of a crime of violence." Appellant contends that under the totality of the circumstances, the record was insufficient because (1) appellant did not tell the court "that his attorney had explained to him the nature of the charges[;]" (2) defense

counsel did not inform the court that she had explained the nature of the charges to appellant; and (3) the trial court never explained the nature of the charges to appellant.

The State responds that the record reflects that appellant was "adequately apprised of the nature of the charges" because appellant had read the indictment, received advice from defense counsel about the State's evidence and his defenses, and heard a description of the charges in the statement of facts in support of the plea. The State argues further that there is a presumption that a defendant represented by counsel at the time of the plea was informed of the nature of the charges against him. The State concludes that appellant's plea was adequate under the totality of the circumstances.

A plea must be entered into knowingly and voluntarily in order to be valid. *Boykin v. Alabama*, 395 U.S. 238, 241 (1969); *State v. Priet*, 289 Md. 267, 275 (1981). Maryland Rule 4-242(c) outlines the procedural requirements for the circuit court's acceptance of a guilty plea:

> **The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court** conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, **the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea**; **and (2) there is a factual basis for the plea.** In addition, before accepting the plea, the court shall comply with section (f) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(Emphasis added.)

The Court of Appeals has stated that "[t]he fundamental rule outlined in our cases

is that 'a plea of guilty may be entered under circumstances showing a voluntary desire on the part of the accused to do so, with an intelligent understanding of the nature of the offense to which he is pleading guilty and the possible consequences of such a plea."' *Priet*, 289 Md. at 275 (quoting *James v. State*, 242 Md. 424, 428 (1966)). "[T]rial judges need not 'enumerate certain rights, or go through any particular litany, before accepting a defendant's guilty plea; rather, . . . the record must affirmatively disclose that the accused entered his confession of guilt voluntarily and understandingly.'" *State v. Daughtry*, 419 Md. 35, 51 (2011) (quoting *Davis v. State*, 278 Md. 103, 114 (1976)); *see Priet*, 289 Md. at 288 (stating that the precursor to Md. Rule 4-242 did "not impose any ritualistic or fixed procedure to guide the trial judge in determining whether a guilty plea is voluntarily and intelligently entered").

"[B]y its express terms, [Rule 4-242] mandates that a guilty plea not be accepted unless it is determined by the court, after questioning of the defendant on the record, that the accused understands the 'nature' of the charge." *Id*. "[T]he required determination can only be made on a case-by-case basis, taking into account the relevant circumstances in their totality as disclosed by the record, including, among other factors, the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea." *Id*.

In determining whether, under the totality of the circumstances, appellant understood the nature of the charges to which he entered an *Alford* plea, we are directed by *Priet* to consider from the record such factors as "the complexity of the charge, the personal

characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea." *Id.* To facilitate our analysis, we will reorder these three factors, as follows; (1) complexity of the charge, (2) factual basis proffered, and (3) personal characteristics of the accused.

1. Complexity of the Charge

In *Priet*, the defendant entered a plea of guilty to the charge of robbery with a dangerous and deadly weapon. 289 Md. at 270. In its analysis, the Court of Appeals observed that "[t]he nature of some crimes is readily understandable from the crime itself." *Id*. at 288. The Court then declared that "[t]he armed robbery charge was a simple one." *Id.* at 291. By contrast, in *Daughtry* the Court stated: "[W]e think it clear that the nature of 'first-degree murder' is not readily understandable from the label of the crime itself." 419 Md. at 72-73. Here, appellant argues that "second-degree murder, much like first-degree murder, is a complex charge[.]"[3]

The label "second-degree murder" does not convey which of the four different types of second-degree murder was committed by the accused. Depending on the level of intent,

[3] Appellant also entered an *Alford* plea to the charge of use of a handgun in the commission of a crime of violence. Appellant acknowledges that in *Daughtry*, the Court of Appeals stated that the crime of use of a handgun in the commission of a crime of violence "appears readily understandable from the charge itself[.]" 419 Md. at 73 n.20. Appellant, however, argues that, because the plea to the handgun charge is so intertwined with the plea to second-degree murder, "any finding that the plea to [second-degree] murder was involuntary would necessarily render involuntary the plea to use of a handgun." In light of our holding, *infra*, that appellant's plea to the charge of second-degree murder was knowing and voluntary, his plea to the handgun charge was also knowing and voluntary.

one can be guilty of second-degree murder (1) with intent to kill, (2) with intent to inflict grievous bodily harm, (3) with depraved heart, *or* (4) by felony murder. *Jones v. State*, 222 Md. App. 600, 610 (2015), *vacated on other grounds*, 451 Md. 680 (2017). Consequently, the nature of second-degree murder is not readily understandable by reference to its name alone. *See Henderson v. Morgan*, 426 U.S. 637, 647 n.18 (1976) (stating that "intent is such a critical element of the offense of second-degree murder that notice of that element is required").

In the instant case, the record discloses that the charge of second-degree murder was not referenced by its name alone. Appellant concedes, as he must, that he advised the trial court that he had discussed with defense counsel the indictment, the evidence that the State had against him, and the possible defenses to the charge. Nevertheless, appellant claims that the record is insufficient to support a finding that appellant understood the nature of second-degree murder, because (1) appellant never told the court that defense counsel had explained to him the nature of the charge, (2) defense counsel never informed the court that she had explained to appellant the nature of the charge, and (3) the court never explained to appellant the nature of the charge. We disagree.

When appellant advised the trial court that he had discussed with defense counsel the indictment, the State's evidence against him, and possible defenses, such discussion necessarily involved the nature and elements of the charge of second-degree murder. Here, the indictment charges appellant with murder using the "short-form" language approved by the Maryland Code. *See* Md. Code Ann., Crim. Law § 2-208(a). A short form murder

indictment includes, as a matter of law, first-degree murder, second-degree murder, and voluntary manslaughter. *Dishman v. State,* 352 Md. 279, 286-87 (1998). It follows that appellant's discussion of the indictment with defense counsel would include the charge of second-degree murder. Further, a discussion of the State's evidence against appellant necessarily involved a review of the evidence that the State would adduce to prove each element of second-degree murder. Similarly, a discussion of the possible defenses available to appellant involved a review of the evidence, or lack of evidence, that could raise a reasonable doubt as to one or more of the elements of second-degree murder. Finally, appellant advised the trial court that he had discussed the plea agreement with defense counsel, that he had no questions about the plea agreement,[4] and that he was "very satisfied" with the services rendered by defense counsel. Therefore, this Court has no hesitancy in concluding, from the record of the plea hearing, that defense counsel fully advised appellant of the nature of the charge to which appellant entered an *Alford* plea, to wit, second-degree murder.

Our conclusion is buttressed by the presumption articulated by the Supreme Court in *Henderson*, 464 U.S. at 647, and adopted by the Court of Appeals in *Priet*, 289 Md. at 290. "The *Henderson/Priet* presumption consists of the notion that ordinarily, 'defense counsel routinely explain the nature of the offense in sufficient detail to give the accused

[4] Appellant did ask a question about the handgun charge. Because the trial court said that the handgun charge was "a violent crime," appellant wanted to confirm that the State was seeking the maximum of 20 years' incarceration for that crime. The court told appellant that he was "right."

notice of what he [or she] is being asked to admit."' *Tate*, 459 Md. at 628 (quoting *Priet*, 289 Md. at 290, which in turn quoted *Henderson*, 426 U.S. at 647). In *Daughtry*, the Court of Appeals elaborated on the *Henderson/Priet* presumption by holding that the presumption will not be applied '"unless there is some factual basis in the record to support [the presumption]."' 419 Md. at 76 (quoting *Hicks v. Franklin*, 546 F.3d 1279, 1284 (10th Cir. 2008)). In *Daughtry*, the only factual basis to support the presumption was that the defendant was represented by counsel for the plea hearing and that the defendant discussed the plea with his attorney. *Id.* In the instant case, the record, as set forth above, is more than adequate to support the application of the presumption. Therefore, whether this Court draws rational inferences from appellant's plea colloquy or applies the *Henderson/Priet* presumption, we reach the same result – defense counsel fully advised appellant of the nature of the charge, second-degree murder, to which appellant entered an *Alford* plea.

2. Factual Basis Proffered

Appellant argues that the statement of facts proffered by the State in support of the plea "did not describe second-degree murder in 'sufficient detail to pass muster.'" Specifically, appellant claims that the facts could have described specific intent second-degree murder, "but they also could have described a scenario in which [appellant] killed the victim in self-defense or in response to adequate hot-blooded provocation and thus was guilty of voluntary manslaughter or was not guilty of any homicide." We again disagree.

The facts proffered by the State at the plea hearing, in our view, clearly describe specific intent to kill or inflict serious bodily harm second-degree murder committed by

appellant. The victim was found by the police dead "*in* her bed," not on or on top of her bed. The cause of death was "a gunshot wound to the left side of the *back* of the head." Appellant had "flagged down" a police officer, told the officer that "his girlfriend was possibly dead with blood all over her[,]" and directed the officer to the victim's apartment. Appellant also made statements "both on the scene and subsequently at the police station, indicating that he took responsibility for the death of Ms. Day."

These facts clearly indicate that appellant shot Ms. Day in the back of the head while she was lying face down in her bed. The specific intent to kill or inflict serious bodily harm can be inferred from firing a deadly weapon at a vital part of the human body. *See Chisley v. State*, 202 Md. 87, 105 (1953) (stating that "the inference of malice [defined as 'the intentional doing of a wrongful act'] may be drawn from the fact of the use of a deadly weapon directed at a vital part of the body."). There is nothing in the proffer of facts stating that appellant committed a felony or acted with a depraved heart. Moreover, the facts do not suggest that appellant's actions were taken in self-defense or in hot-blooded response to legally adequate provocation. Thus the statement of facts proffered in support of appellant's plea adequately describe specific intent to kill or inflict serious bodily harm second-degree murder.

3. Personal Characteristics of Appellant

Appellant argues that his "personal characteristics" made it less likely that he understood the nature of the charges against him. In support, he contends that "it is clear that he had significant mental health issues," because he had a history of "hearing voices"

and "being 'unable to comprehend his physical circumstances.'" The State counters by pointing to the evaluation performed by the Department of Health and Mental Hygiene that found appellant both competent and criminally responsible, and to the plea colloquy where appellant "responded to the judge's questions lucidly and coherently[.]" We agree with the State.

It is undisputed that at one time the State was concerned about appellant's mental status and had requested an evaluation of appellant's competency and criminal responsibility. At the plea hearing, the trial court referred to the evaluation conducted by Dr. Monica Polk at the Perkins Hospital Center. The court stated: "[T]he report is clear that the doctor [found] based on the evaluation, . . . that it's in the doctor's opinion to a reasonable degree of medical certainty, that [appellant] is competent to stand trial and is criminally responsible." Defense counsel then indicated to the court that she was not going to make any argument disputing these findings.

Furthermore, during the plea colloquy appellant advised the court that he was 26 years old and had received his GED about four and one-half years earlier. Appellant told the court that he was taking the anti-depressant Elavil, but that this medication did not have any impact on his ability to understand the proceeding. Appellant answered "yes" when the court asked him, "Are you fully aware of what is taking place here this morning?," and "So you're fully alert and aware; is that correct?" Therefore, based upon the record of the plea hearing, we conclude that the personal characteristics of appellant did not interfere or lessen his ability to understand the charges against him.

C. Conclusion

Upon consideration of the totality of the circumstances, including the complexity of the charge of second-degree murder, the factual basis proffered by the State in support of the plea, and the personal characteristics of appellant, we hold that there was a sufficient factual basis in the record for the trial court to find that appellant understood the nature of the charges to which he was entering an *Alford* plea. Accordingly, the trial court correctly concluded that appellant's plea was made knowingly and voluntarily, and thus was valid.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.