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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
OCT 31 2013
SC Court of Appeals

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BORIS PHILLIPS,

APPELLANT

Appellate Case No. 2013-000338

INITIAL BRIEF OF APPELLANT

WANDA H. CARTER
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STATEMENT OF ISSUE ON APPEAL

The trial judge erred at sentencing by considering pending shoplifting charges because this information was immaterial to punishment on appellant's instant shoplifting conviction received in the instant case.

STATEMENT OF THE CASE

Appellant Boris Phillips was convicted per jury trial of shoplifting (greater than third) during the February 2013 term of the Horry County General Sessions Court before Judge Larry B. Hyman. Appellant was sentenced to imprisonment for a period of seven years. Melinda Knowles represented appellant at trial.

Appellant appealed. This brief follows.

ARGUMENT

The trial judge erred at sentencing by considering pending shoplifting charges because this information was immaterial to punishment on appellant's instant shoplifting conviction received in the present case.

At trial, Myrtle Beach Police Officer Mark McIntyre testified that on August 5, 2010, he was informed by Sears managers that a male had entered a Sears store in Myrtle Beach[1], placed a Craftsman hand tool set and other tools into a shopping cart and then pushed the cart past the point of sale, and out of the store without paying for the tools. App. 35, l.7-p. 37, l.3. Sears loss prevention managers Arthur Costa, Jason Plumley, and William McKenzie all testified at trial regarding this theft and stated that the event in question was captured on videotape. App. 61, l. 21-p. 63, l. 15; App. 71, l. 9-p. 73, l.10. William McKenzie testified that he recognized the perpetrator in the videotape in question as appellant because he knew appellant from his employment at a local auto parts store. App. 73, l. 22-p. 76, l. 17.

At sentencing, the solicitor recited appellant's prior record to the trial judge as follows:

> Solicitor: Your Honor, starting in 1996 I have convictions for DUS; 2000 CDV; 2001 petite larceny, bribing an officer; 2004, petite larceny; 2004, shoplifting; 2005, petite larceny and shoplifting; 2006, forgery 1000 to 5000; 2007, grand larceny 1000 to 5000; 2008, shoplifting, two other shopliftings, a shoplifting third or subsequent; simple assault and battery; 2009, shoplifting and shoplifting third or subsequent; 2011 breach of trust less than 2000.
>
> The Court: how many property offenses do you have there?
>
> Solicitor: Your Honor, I show 13 property offenses for enhancement purposes.

App. 106, l. 20-p. 107, l. 6.

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[1] The Sears store in question was located at Coastal Grand Mall in Myrtle Beach.

Then, the solicitor gave the trial judge the following information:

> Solicitor: Your Honor, just one more matter further for the state, at this time he also has two other pending shoplifting third or subsequent charges in our office.
>
> The Court: What were the dates on those?
>
> Solicitor: Well---
>
> The Court: So he has two pending?
>
> Solicitor: That's right. One was from the other day. He went into the Sears and another is from Wal-Mart in August as well.
>
> The Court: The same Sears?
>
> Solicitor: Same Sears.

App. 112, lines 16-p. 113, l. 1.

Clearly, the trial judge certainly needed to know appellant's prior record, but the last piece of information regarding appellant's two pending shoplifting charges at the same Sears store to be decided in the future constituted information that was unsolicited, prejudicial, irrelevant and unconnected to the subject of sentencing appellant on the instant shoplifting conviction because said information was not material to punishment in appellant's instant case. These pending shoplifting charges might have been dismissed or appellant might have been exonerated or acquitted on them. Also, since the pending charges were for shoplifting offenses, which were from the same store and identical to the charge of shoplifting for which appellant had been convicted in the instant case, then the prejudice of bringing more shoplifting charges to the trial judge's attention was clearly overwhelmingly and irrevocably damaging. Moreover, appellant had six other prior shoplifting convictions on his record (and a total of thirteen property offenses in all), which had already been presented to the trial judge at the sentencing phase of the trial. Note that the trial judge was

seemingly moved and probably troubled by appellant's shoplifting priors and the total number of property offenses on his record because he asked the solicitor specifically for the total number of appellant's property offenses. Undoubtedly, the disclosure of appellant's pending shoplifting charges to the trial judge had a negative impact on appellant's character in that appellant appeared as though he possessed a propensity to steal and steal habitually.

A sentencing judge should know all material facts, including any information material to punishment and the defendant's prior record. State v. Franklin, 276 S.C. 240, 226 S.E. 2d 896 (1976). Certainly, petitioner's prior record constituted proper information to be considered by the trial judge at sentencing, but the consideration of future charges that had not been adjudicated and were identical to the charges for which he was being sentenced was improper. In Franklin, the Court held that a sentencing judge must not act on surmise or suspicions. Therefore, considering appellant's pending shoplifting charges for which there has been no disposition in the instant case meant that the trial judge was acting improperly under surmise or suspicion.

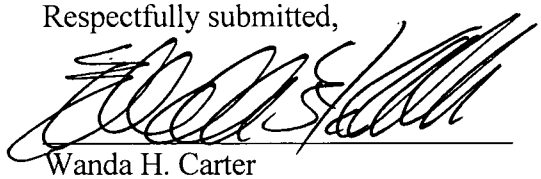
Compare the case of Robinson v. State, 380 S.C. 201, 699 S.E.2d 588 (2008), where the Court reversed due to the trial judge's use of the defendant's uncounseled magistrate court's drug conviction of possession of marijuana to enhance his subsequent trafficking in crack cocaine sentence. Similarly, see United States v. Tucker, 404 U.S. 443 (1972), where the Court reversed a sentencing judge's sentence because the sentence was based upon misinformation of constitutional magnitude because the trial judge considered the defendant's prior unconstitutional convictions in determining his sentence. Compare the remand in State v. Rich, 269 S.C. 701; 239 S.E. 2d 731 (1977), where the trial judge misapprehended petitioner's list of offenses by considering a charge that was discharged (assault and battery with intent to ravish) in order to enhance that defendant's assault and battery with intent to ravish conviction, and by considering another charge (indecent exposure) where no disposition had been entered. This was prejudicial because the trial judge in

Rich referenced the defendant as a "habitual sex offender." Note that both Courts in Rich and Franklin cited to the holding in Townsend v. Burke, 334 U.S. 736 (1948), where the United States Supreme Court held that due process at sentencing is violated if a trial judge sentences the defendant "on the basis of assumptions concerning his criminal record which were materially untrue." In the case at bar, the judge erred at sentencing by considering appellant's pending shoplifting charges because this information was immaterial to punishment on appellant's instant shoplifting conviction received in the present case and in turn violated the Fourteenth Amendment Due Process Clause.

CONCLUSION

Based on the foregoing argument, appellant requests that his case be remanded for a new sentencing hearing.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2013.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Entire Trial Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

October 31, 2013

Wanda H. Carter
Deputy Chief Appellate Defender

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Appellate Case No. 2013-000338

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Boris Philips, # 337355, at Campbell Work Center, 4530 Broad River Road, Columbia, SC 29210 this 31st day of October, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2013.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.