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SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Beaufort County

Michael G. Nettles, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAMES HARRIS,

APPELLANT

APPELLANT CASE NO. 2012-207968

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FINAL BRIEF OF APPELLANT

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### **STATEMENT OF ISSUES ON APPEAL**

- I. The Trial Court erred in failing to grant Appellant's motion for a directed verdict on the charge of unlawful carrying of a pistol where there was no evidence showing actual or constructive possession by Appellant of the pistol and magazine found in the area where a police vehicle chase of Appellant ended.
  
- II. The Trial Court erred in using Appellant's prior out-of-state conviction for fleeing to elude police in enhancing Appellant's sentence under S.C. CODE ANN. § 56-5-750(B)(2) for failure to stop for a blue light where § 56-5-750(B)(2) does not permit the use of out-of-state convictions as predicate offenses.

### STATEMENT OF THE CASE

On September 15, 2011, Appellant James Harris was indicted by the Beaufort County Grand Jury for (1) failure to stop for a blue light in violation of S.C. CODE ANN. § 56-5-750; and (2) unlawful carrying of a pistol in violation of S.C. CODE ANN. § 16-23-20. R. 129.

Harris appeared before the Honorable Michael G. Nettles and a jury on January 24-25, 2012. R. 1. Harris was represented by Matthew Walker, and the State was represented by Assistant Solicitor James Bannon. Id.

The jury found Harris guilty on both charges. R. 105, ll. 11-20. Judge Nettles sentenced Harris to thirty months for failure to stop for a blue light and one year for unlawful carrying of a pistol with the sentences to run concurrent. R. 113, ll. 14-22.

Harris timely filed and served a Notice of Appeal on January 30, 2012.

## STATEMENT OF FACTS

On the evening of August 17, 2011, Highway Patrol Trooper Joseph Steven Warner was patrolling an area in the city limits of Bluffton, South Carolina when he encountered a red Nissan truck that appeared to be speeding. R. 11, l. 3 – 12, l. 19. Trooper Warner turned his vehicle around and caught up with the red truck. He eventually activated his blue lights. R. 13, ll. 5-23. The red truck did not stop for the blue lights and a brief chase ensued. R. 14, l. 1 – 17, l. 24.

Trooper Warner testified that the red truck eventually hit a ditch and “[t]he driver’s side door immediately opened, and as it opened - - as soon as it opened someone came out of the driver’s side seat right in the seat - - came out of the seat.” R. 17, l. 25 – 18, l. 4. Trooper Warner contended at trial that this person was Harris. R. 18, ll. 5-6. A second individual also jumped out of the driver’s side door. R. 22, ll. 15 – 21; 49, l. 23 – 50, l. 24.

Trooper Warner stopped his vehicle, got out of his vehicle, and proceeded to give chase on foot. R. 23, ll. 16-18. The person Trooper Warner was chasing ran into some bushes, and Trooper Warner was able to handcuff the person. R. 24, ll. 4-19. The person Trooper Warner handcuffed was Harris. Harris informed Trooper Warner that he was not the person driving the red truck and that he had jumped out of the driver’s side because there was a big ditch on the passenger side of the truck. R. 25, l. 21 – 26, l. 4; 48, ll. 16-23.

While out at the scene, Trooper Warner testified that he also collected a magazine that went to a forty-five caliber gun and a forty-five caliber pistol. R. 27, ll. 5 – 11. The magazine was found lying in the middle of the road by Officer Sean Phillip Jansen of the Beaufort County Sheriff’s Department, and Officer Jansen notified Trooper Warner as to the magazine. R. 52, l. 23 – 53, l. 23. Trooper Warner claimed the magazine was found in the

middle of the roadway just after where the red truck ran off the road and approximately where Harris landed in the roadway. R. 27, ll. 13-14; 29, ll. 5-9. Trooper Warner located the pistol lying on top of some leaves. R. 27, l. 24.

Trooper Warner testified that the pistol was in good condition with only some scrape marks to the outside area. R. 33, ll. 12-15. Trooper Warner also testified there was some damage to one side of the magazine as if it hit a hard surface. R. 34, ll. 5-12.

Trooper Warner did not have the pistol fingerprinted or analyzed for any DNA. R. 44, l. 14 – 45, l. 3. Trooper Warner also determined that the pistol was not a stolen pistol. R. 45, l. 15 – 46, l. 4.

Trooper Warner never testified that he saw a pistol being thrown from the truck or that he saw Harris throw anything while leaving the truck or while running. Trooper Warner further did not testify that he saw anything fall from Harris' person.

At the close of the State's case, Harris moved for a directed verdict on the charge of unlawful carrying of a pistol where there was no evidence to connect the pistol to Harris and the pistol and magazine were merely found in proximity of an area where Harris ran near. R. 65, ll. 3-7. The Trial Court denied this motion for directed verdict. R. 66, ll. 3-4. Harris renewed his motion for directed verdict after the defense rested which the Trial Court also denied. R. 70, ll. 16-20.

After the jury began deliberating, they sent two questions to the Trial Court. The jury first asked, "We would like to know exactly where the mag[azine] was found in the road compared to where James [Harris] bailed from the truck." R.114 (Court's Ex. 1); R. 102, l. 23 – 103, l. 14. The Trial Court advised the jury this was a factual dispute they would need to resolve. R. 103, ll. 7-14.

The jury next informed the Trial Court that they would “like to hear what constitutes whether or not you are unlawfully carrying a pistol.” R. 115 (Court’s Ex. 2); R. 103, ll. 17-21. The Trial Court recharged the statute to the jury. R. 103, l. 25 – 104, l. 12.

The jury ultimately found Harris guilty of both failure to stop for a blue light and unlawful carrying of a pistol. R. 105, ll. 11-22.

## ARGUMENT

**I. The Trial Court erred in failing to grant Appellant's motion for a directed verdict on the charge of unlawful carrying of a pistol where there was no evidence showing actual or constructive possession by Appellant of the pistol and magazine found in the area where a police vehicle chase of Appellant ended.**

The Trial Court erred in failing to direct a verdict for Harris on the charge of unlawful carrying of a pistol where the evidence, taken in the light most favorable to the State, is insufficient to support the conclusion that Harris possessed the pistol. R. 65; ll. 3-7; 66, ll. 2-4; 70, ll. 16-20. S.C. CODE ANN. § 16-23-20 makes it "unlawful for anyone to carry about the person any handgun, whether concealed or not" subject to certain exceptions. Therefore, the State must prove that the defendant was unlawfully in possession of a weapon. State v. Kirby, 325 S.C. 390, 399, 481 S.E.2d 150, 154 (Ct. App. 1996).

A defendant is entitled to a directed verdict at trial when the State fails to present evidence on a material element of the offense charged. State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). The grant of a directed verdict motion for acquittal by a defendant is proper if there is a failure of competent evidence tending to prove the charge. State v. Jackson, 395 S.C. 250, 254, 717 S.E.2d 609, 611 (Ct. App. 2011).

If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the trial court should submit the case to the jury. Otherwise, "a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Buckmon, 347 S.C. 316, 321-22, 555 S.E.2d 402, 404-05 (2001); see also State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); State v. James, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004).

The State's evidence of Harris' possession of the pistol consisted of only the following: Trooper Warner did not see a pistol thrown from the red truck he was chasing; Trooper Warner did not see Harris throw anything while leaving the truck or while running; Trooper Warner also did not see anything fall from Harris' person; the magazine was found in the middle of the roadway just after where the red truck ran off the road and approximately where Harris landed in the roadway; the pistol was found lying on top of some leaves in the area where the truck stopped and where Harris was found; the pistol was determined not to be stolen; a second person was also in the truck with Harris and also jumped out of the driver's side door of the truck; the pistol was in good condition with some scrape marks on its outside area and the magazine had damage to one side as if it had hit a hard surface.

This evidence is not sufficient to support a jury verdict that Harris possessed the pistol. At most, the evidence merely suggests that the likely owner of the pistol was riding in the truck being chased by Trooper Warner. There was a second person, however, in the truck with Harris, and the pistol could have belonged to that second person. Furthermore, there is no evidence even showing that the pistol was ever thrown from the truck, that Harris ever threw anything while leaving the truck or while running, or that anything ever fell from Harris' person.

There is simply no evidence showing actual possession of the pistol by Harris, nor is there any evidence of Harris' control of the pistol sufficient to show constructive possession. See State v. Jackson, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) ("To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [weapon].") (internal citations omitted). Harris did not have dominion and control over the outside area where the pistol and magazine were found.

Accordingly, the Trial Court erred in denying Harris' motion for a directed verdict on the charge of unlawful carrying of a pistol. Harris' conviction on that charge should be reversed. See State v. Pierce, 718 S.E.2d 648, 654 (N.C. Ct. App. 2011) (holding that there was no evidence showing actual or constructive possession by the defendant of a firearm found on the roadside of the route of a police vehicle chase in which the defendant was involved and concluding that the trial court should have granted the defendant's motion to dismiss the charge of possession of the firearm found).

**II. The Trial Court erred in using Appellant's prior out-of-state conviction for fleeing to elude police in enhancing Appellant's sentence under S.C. CODE ANN. § 56-5-750(B)(2) for failure to stop for a blue light where § 56-5-750(B)(2) does not permit the use of out-of-state convictions as predicate offenses.**

During sentencing for Harris' conviction for failure to stop for a blue light in violation of S.C. CODE ANN. § 56-5-750, the Trial Court enhanced Harris' sentence based upon a conviction in the State of Georgia for fleeing to elude police in violation of GA. CODE ANN. § 40-6-395. R.116. (Court's Ex. 4); R. 106, l. 22 – 110, l. 14; 113, ll. 18-22.

South Carolina Code Section 56-5-750 provides:

(A) In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver; while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

(B) A person who violates the provisions of subsection (A):

(1) for a first offense where no great bodily injury or death resulted from the violation, is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars or imprisoned for not less than ninety days nor more than three years. The Department of Motor Vehicles must suspend the person's driver's license for at least thirty days; or

(2) for a second or subsequent offense where no great bodily injury or death resulted from the violation, is guilty of a felony and, upon conviction, must be imprisoned for not more than five years. The person's driver's license must be suspended by the department for a period of one year from the date of the conviction.

Id.

If Harris had been convicted of a first offense, Harris would have only been guilty of a misdemeanor. Instead, the Trial Court used Harris' out-of-state conviction for fleeing to elude

police to enhance Harris' sentence and therefore, Harris was found guilty of a felony under § 56-5-750(B)(2).

South Carolina's statute for failure to stop for a blue light does not permit the use of out-of-state convictions as predicate offenses. See § 56-5-750(B). The statute permits the enhancement of a sentence for a person "who violates the provisions of subsection (A)" of South Carolina's failure to stop for a blue light statute "for a second or subsequent offense." § 56-5-750(B)(2). The statute is clear that only a previous violation of South Carolina's statute for failure to stop for a blue light can serve as a sentence enhancement. Code section 56-5-750(B)(2) thus limits prior convictions to those involving a prior violation of that particular statute and does not permit out-of-state convictions for similar statutes to serve as a sentence enhancement.

In addition, a person only violates § 56-5-750(A) by failing to stop when signaled by a law enforcement vehicle "while driving on a road, street, or highway of the State [of South Carolina] . . ." This statute obviously refers to roadways in South Carolina and therefore, a person can only violate § 56-5-750(A) by driving on a roadway in South Carolina, not in another state. As such, a person can only have a second offense of violating § 56-5-750(A) if the person has had a first offense of violating this code section while driving on a South Carolina roadway. § 56-5-750(B)(2); see State v. Cardin, 156 A.2d 118, 118-19 (N.H. 1959) (holding prior conviction of similar offense in Massachusetts could not be considered in determining whether a second offense of operating a motor vehicle while under the influence of intoxicating liquor had been committed where under New Hampshire's statute, reference is only to a public way within New Hampshire).

The facts of this case are distinguishable from State v. Zulfer, 345 S.C. 258, 262, 547 S.E.2d 885, 887 (Ct. App. 2001) where this Court held that the first degree burglary statute unambiguously permitted the use of out-of-state convictions as predicate offenses where the plain language of the burglary statute provided for the enhancement of the offense of burglary based on a “prior record of two or more convictions for burglary or housebreaking or a combination of both.” This Court determined that “[n]owhere does the language of the statute limit a prior record of convictions for burglary or housebreaking to only those that occurred within South Carolina. In not so limiting a prior record of convictions, the plain language of our burglary statute permits an enhancement of the offense based on a prior record of out-of-state convictions for burglary or housebreaking or a combination of both.” Id.

In contrast to Zulfer, the failure to stop for a blue light statute does limit a prior record of convictions to only violations of that particular statute and thus only those violations that occurred in South Carolina. See § 56-5-750(B)(2). Accordingly, the Trial Court erred in using Harris’ Georgia conviction for fleeing to elude police to enhance Harris’ sentence for violating § 56-5-750(A). Harris should be resentenced as a first offender under § 56-5-750(B)(1) and found guilty of a misdemeanor instead of a felony. This would allow Harris to eventually take advantage of the provisions of § 56-5-750(F) which permit a person convicted of a first offense to apply to the court for an order expunging the records of the arrest and conviction.

CONCLUSION

For the reasons set forth herein, Appellant James Harris respectfully requests this Court to reverse his conviction for unlawful carrying of a pistol. Harris also requests this Court to remand his conviction for failure to stop for a blue light for resentencing as a first offender pursuant to S.C. CODE ANN. § 56-5-750(B)(1).

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of March, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 10, 2014



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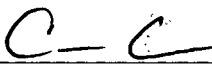
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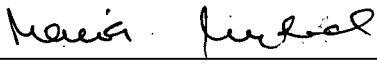
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10<sup>th</sup> day of March, 2014.

  
Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 10<sup>th</sup> day of March, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2013.