

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Michael G. Nettles, Circuit Court Judge

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MAR 10 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JAMES HARRIS,

APPELLANT.

APPELLANT CASE NO. 2012-207968

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES IN REPLY

- 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.

ARGUMENT IN REPLY

- 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.**

In its argument that the evidence is sufficient to sustain Appellant James Harris' conviction for unlawful carrying of a pistol, the State claims the following:

[T]he evidence set forth above, when viewed in the light most favorable to the State, established that Appellant was in actual possession of the pistol before he abandoned it during the chase. Specifically, the evidence supported that when Trooper Warner attempted to pull over the truck Appellant was driving, Appellant decided to flee since he had no driver's license and an unlawful pistol in the car; that when Appellant jumped out of the driver's seat and fell to the ground, he accidentally disengaged the magazine from the pistol; and that Appellant subsequently tossed the pistol aside from Trooper Warner.

Respondent's Brief, p. 5.

The inferences the State has drawn from the little evidence in the record pertaining to the pistol is a speculative leap from the actual evidence presented at trial. There was no testimony from Trooper Warner that he saw a pistol or any other object thrown from the red truck he was chasing. There was no testimony from Trooper Warner that he saw Harris throw anything while leaving the truck or while running. There was also no testimony from Trooper Warner that he saw anything fall from Harris' person.

The record is also devoid of any evidence that Harris decided to flee specifically because he had an unlawful pistol in the vehicle. Harris was involved in a police chase, and when the vehicle wrecked, he ran presumably knowing that law enforcement was after him at that point. R. 13, l. 15 – 18, l. 4. Harris made no statements to law enforcement on why he fled and only told law enforcement that he was not the one

driving and that he jumped out on the driver's side because of a big ditch on the other side. R. 25, l. 23 – 26, l. 4; 48, ll. 16-23; 59, l. 7 – 60, l. 18.

There is additionally no evidence in the record that the pistol and magazine found by law enforcement were ever actually in the truck from which Harris jumped. Even if it could be inferred that the pistol and magazine were in that truck, it is also important to remember that a second individual was in the truck and also jumped out of the driver's side door. R. 22, ll. 15-21; 49, l. 23 - 49, l. 24.

The facts of this case mirror the facts of State v. Pierce, 718 S.E.2d 648, 654 (N.C. Ct. App. 2011) where the North Carolina Court of Appeals held there was no evidence showing actual or constructive possession by the defendant of a firearm found on the roadside and concluded: "At most, the evidence suggests that the likely owner of the firearm was riding in [the defendant's vehicle] and that the firearm was thrown from the [vehicle] at some point, but even that conclusion is tenuous considering the lack of any evidence that the firearm was ever actually in the [vehicle]." Accordingly, the Trial Court erred in denying Harris' motion for a directed verdict on the charge of unlawful carrying of a pistol, and Harris' conviction on that charge should be reversed.

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.

In his Appellant's Brief, Harris has argued that 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 where the statute only 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." S.C. CODE ANN. § 56-5-750(B)(2). The statute is therefore clear that only a previous violation of South Carolina's statute 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 S.C. CODE ANN. § 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).

In its Respondent's Brief, the State contends Harris' argument on this point "is a red herring inasmuch as all crimes for which a person is sentenced in South Carolina must necessarily have occurred within South Carolina even if the particular statute fails to specifically set forth that requirement." Respondent's Brief, l. 7. The State is therefore trying to diminish the language of the statute which, for purposes of sentencing enhancement, limits the statute to only South Carolina offenses. The State claims that the statute does not contain any provision limiting sentencing enhancement to second or subsequent offenses to only offenses occurring in South Carolina despite the express provisions of the statute to which Harris has pointed out above.

If the Legislature had wanted out-of-state convictions to serve as sentence enhancers, it could have added language allowing for such. See Hinton v. South Carolina Dep't of Probation, Parole and Pardon Servs., 357 S.C. 327, 334-35, 592 S.E.2d 335, 339-340 (Ct. App. 2004) (observing that the Legislature did change DUI statute regarding enhanced penalties for repeat offenders to include out-of-state convictions by adding the language "any conviction . . . for the violation of any law or ordinance of this *or any other state* . . . constitutes a prior offense . . .") (emphasis added). Instead, the Legislature limited sentence enhancements to only previous violations of Subsection A of § 56-5-750 and specifically included the language that the statute only applied to those "driving on a road, street, or highway of the State" of South Carolina.

The State's policy argument that it "would be unfair to disallow sentence enhancement simply because the prior offense took place in another state" does not come into play where the Legislature has specifically limited the statute to only South Carolina offenses.

In conclusion, the Trial Court erred in using Harris' Georgia conviction for fleeing to elude police to enhance Harris' sentence for violating § 56-5-750(A).

CONCLUSION

For the reasons set forth herein and in the Appellant's Brief, 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,



Carmen V. Ganjehsani
Appellate Defender

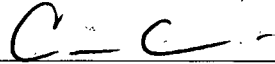
ATTORNEY FOR APPELLANT

This 10th day of March, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply 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 10th, 2014



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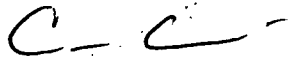
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CERTIFICATE OF SERVICE

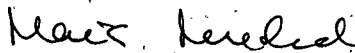
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of March, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of March, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.