STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2012-207968

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES HARRIS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. **The trial judge properly denied Appellant's directed verdict motion on the charge of unlawful carrying of a pistol where, although the pistol was not found on Appellant's person, evidence supported that Appellant actually possessed the pistol before disposing of it during the police chase.**

II. **The trial judge properly enhanced Appellant's sentence for failure to stop for a blue light based upon a prior Georgia conviction for the same conduct.**

STATEMENT OF THE CASE

Appellant was indicted in Beaufort County in September 2011 for failure to stop for a blue light and unlawful carrying of a pistol. On January 24-25, 2012, Appellant proceeded to trial before the Honorable Michael G. Nettles and a jury. The jury found Appellant guilty as indicted, and Judge Nettles sentenced Appellant to thirty months for failure to stop for a blue light and one year, concurrent, for unlawful carrying of a pistol. A timely notice of appeal was served and filed.

ARGUMENT

I. The trial judge properly denied Appellant's directed verdict motion on the charge of unlawful carrying of a pistol where, although the pistol was not found on Appellant's person, evidence supported that Appellant actually possessed the pistol before disposing of it during the police chase.

Relevant Facts

Around 8:30 pm on August 17, 2011, Trooper Warner of the South Carolina Highway Patrol observed a red Nissan truck traveling at fifty-two miles per hour in a twenty-five mile per hour zone. (R. p. 11-12). The driver sped up after Trooper Warner attempted to pull the truck over, and, after a fairly brief chase, the truck blew out two tires. (R. p. 13-17). After making a hasty right turn onto a side road bordered by a ditch, the driver bailed out of the truck feet-first through the driver's side door, fell to the ground, then quickly got up and took off running. (See R. p. 17-21; see Video, State's Exhibit # 16). Trooper Warner immediately parked his car and ran after the driver, who was wearing an orange shirt. (R. p. 23-24). He never lost sight of the driver during the chase. (R. p. 23, lines 19-20). Having no driver, the truck rolled ahead for several yards and then a second person exited the truck through the driver's side door and took off running. (R. p. 17-22; see Video, State's Exhibit # 16). Trooper Warner did not become aware that a second person exited the vehicle until he watched the footage from his patrol car camera. (R. p. 50, lines 11-20).

Trooper Warner chased the driver on foot into a nearby wooded area where the driver tried to hide in some bushes next to a fence. (R. p. 23-24). At that point Trooper Warner was able to handcuff him, take him into custody, and read him his Miranda rights. (R. p. 24). Although the driver initially gave a false name, officers eventually learned that the person Trooper Warner chased and arrested was Appellant, James Harris.

(R. p. 18, lines 5-6; p. 59, lines 8-9). Appellant complained that his shoulder was hurting and also said he had not been driving the truck. (R. p. 24-26). Appellant stated he did not know the name of the driver. (R. p. 60, lines 6-10). A search of Appellant's person revealed a cell phone but no driver's license and no concealed carry permit. (R. p. 26, lines 5-13). After Appellant refused medical treatment, officers placed him in a county vehicle. (R. p. 26-27).

Officers then collected a magazine for a forty-five caliber gun that was found in the roadway. (R. p. 27). This magazine was found "in the middle of the roadway just after the vehicle ran off the road and approximately where [Appellant] landed in the roadway." (R. p. 29, lines 3-9). The magazine was not found in the area where the second person exited the truck since the truck had by that point rolled a good distance from where the magazine was dropped. (R. p. 51, line 20 – p. 52, line 3). The magazine had damage to th

e base area indicating it had hit a hard surface such as a roadway. (R. p. 34, lines 5-12). A forty-five caliber pistol was recovered when officers retraced the steps Appellant took when he ran from Trooper Warner. (R. p. 27). The pistol was on the ground on top of some leaves. (R. p. 27, line 25). The pistol was generally in good condition but had some scrape marks on the outside. (R. p. 33, lines 12-15). Notably, there was a little silver button on the side of the pistol which, if hit, would release the magazine. (R. p. 33, lines 18-21).

Discussion

When considering a motion for directed verdict, the trial judge must view the evidence, and all of its reasonable inferences, in the light most favorable to the State. See State v. Frazier, 375 S.C. 575, 581, 654 S.E.2d 280, 283 (2007). At the directed verdict

stage, a trial judge is not required to evaluate the evidence or determine which version is more likely; instead, a judge's sole concern is with the existence of evidence. See State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). The trial court has a duty to deny a defendant's directed verdict motion if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. See State v. Copeland, 321 S.C. 318, 326, 468 S.E.2d 620, 626 (2001). On appeal from the denial of a motion for a directed verdict, the appellate court may reverse the trial court only if there is no evidence to support the trial court's ruling. See, e.g., State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002).

Appellant asserts that the trial court should have granted his directed verdict motion as to the charge of unlawful carrying of a pistol because there was insufficient evidence that he actually or constructively possessed the pistol in question. To the contrary, the 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 his pistol; and that Appellant subsequently tossed the pistol aside as he ran from Trooper Warner.[1] Since there was sufficient evidence supporting that Appellant actually possessed an unlawful pistol, the trial judge properly denied Appellant's motion for directed verdict on this charge. (See R. p. 64-66). See State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) (under similar facts, the Supreme Court held that sufficient

[1] Note that defense counsel acknowledged at sentencing that the pistol was registered to someone in Georgia, where Appellant and his family reside. (R. p. 112, lines 3-5).

circumstantial evidence was presented to establish that the defendant actually possessed drugs he tried to abandon during a police chase); see also State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005); State v. Gore, 318 S.C. 157, 162-64, 456 S.E.2d 419, 422-23 (Ct. App. 1995). Appellant's conviction for unlawful carrying of a pistol should be affirmed.

II. The trial judge properly enhanced Appellant's sentence for failure to stop for a blue light based upon a prior Georgia conviction for the same conduct.

Appellant contends that the trial court erred by enhancing his sentence for failure to stop for a blue light based upon a prior Georgia conviction for fleeing or attempting to elude a police. South Carolina's failure to stop for a blue light statute provides, in pertinent part, as follows:

> (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.

S.C. CODE § 56-5-750.

Appellant asserts that the statute is "clear" that only a previous violation of South Carolina's statute for failing to stop for a blue light can serve to enhance a sentence under S.C. CODE § 56-5-750(B). Appellant points out that subsection (A) of the statute specifically states that section (A) is violated only if a person is "driving on a road, street, or highway of the State." However, Appellant's 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. Consequently, the fact that subsection (A) is drafted in this manner has no bearing upon whether or not a sentence enhancement for an out-of-state conviction is appropriate.

It is the State's position that since the failure to stop for a blue light statute does not contain a provision limiting sentence enhancement to second or subsequent offenses occurring in South Carolina, the statute contemplates that out-of-state convictions may be used for enhancement. See State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (in considering statutory construction, "'[t]he Court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'") (citation omitted); cf. State v. Zulfer, 345 S.C. 258, 262, 547 S.E.2d 885, 887 (Ct. App. 2001) (holding that the first-degree burglary statute clearly allows for the use of out-of-state convictions to enhance the crime where the plain language of the statute does not limit the prior convictions permitted to be used to in-state convictions). Indeed, allowing the use of out-of-state convictions to enhance the sentence for failure to stop for a blue light is entirely logical because the whole idea is to punish a defendant to a greater extent for the current offense due to his repetitive similar illegal actions. See State v. Washington, 338 S.C. 392, 397, 526 S.E.2d 709, 711 (2000)

("However, Defendant's current sentence does not punish him a second time for his previous transgression. Instead, the State is punishing Defendant to a greater extent for the current offense due to his repetitive illegal actions."). It would be unfair to disallow sentence enhancement simply because the prior offense took place in another state because the result would be that defendants who commit numerous prior similar offenses in bordering states would receive minimal sentences in South Carolina despite their continuing disregard for the law, while defendants who commit prior similar crimes within the state would receive higher sentences.[2] See People v. Poppe, 394 Ill. 216, 220-21, 68 N.E.2d 254, 256 (1946) ("The purpose of the Habitual Criminal Act is to punish people who have committed prior felonies more seriously than those who are guilty of a first offense. If plaintiff in error's contention were correct, it would result in penalizing more heavily those who have previously been convicted of offenses in this State and not penalizing as severely persons who have committed the same crimes in other States, regardless of how many times they may have been convicted in other jurisdictions."); State v. Wood, 2 Utah 2d 34, 39, 268 P.2d 998, 1001-02 (1954) ("Appellant contends further that the intent of the legislature in enacting the present habitual criminal statute, U.C.A.1953, 76–1–18, was to make it applicable only in those instances where the previous felonies charged were committed in and punishable in the state of Utah. This construction would make the imposition of the enhanced punishment available against one who had committed two previous felonies within the state but not as against one who had committed any number of felonies in other states. Clearly the intent of the statute is otherwise, for its obvious purpose is to protect society against any person whose tendency towards criminality is indicated by previous offenses.").

[2] It would be particularly unfair in a case such as this where Appellant has numerous prior convictions indicating his total lack of respect for the criminal justice system. (See R. p. 111, lines 7-19; p. 116).

Here, Appellant's prior Georgia conviction was for "fleeing or attempting to elude a police officer" under GA. CODE ANN. § 40-6-395. Subsection (a) of that statute states as follows:

> It shall be unlawful for any driver of a vehicle willfully to fail or refuse to bring his or her vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle or police officer when given a visual or an audible signal to bring the vehicle to a stop. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such signal shall be in uniform prominently displaying his or her badge of office, and his or her vehicle shall be appropriately marked showing it to be an official police vehicle.

GA. CODE ANN. § 40-6-395(a). Compare South Carolina's statute for "failure to stop motor vehicle when signaled by law-enforcement vehicle":

> 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.

S.C. CODE § 56-5-750(A).

Plainly, the Georgia statute and the South Carolina statute proscribe the same conduct – fleeing in one's vehicle to avoid a police officer attempting to make a traffic stop. It was therefore proper for the trial judge to enhance Appellant's South Carolina sentence based upon his prior Georgia conviction. (See R. p. 106, line 22 – p. 110, line 13; p. 116). Cf. State v. Phillips, 400 S.C. 460, 462, 734 S.E.2d 650, 651 (2012) ("When a prior conviction is for an offense not found in § 17–25–45, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement." (citing State v.

Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003) & State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000)). Appellant's sentence for failure to stop for a blue light should be affirmed.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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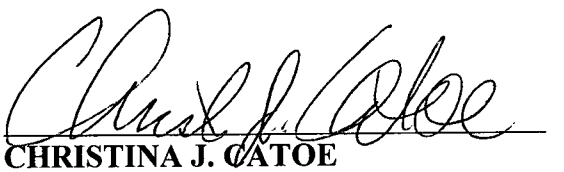

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March 21, 2014

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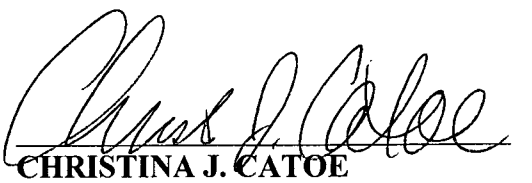
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.



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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Carmen V. Ganjehsani**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **21st** day of **March, 2014.**

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SWORN to before me this 21st day of March, 2014.

Notary Public for South Carolina.
My Commission Expires: 5/11/2014