STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 2014-UP-362 (S.C. Ct. App. filed October 15, 2014)
Appellate Case No. 2014-002639

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES HARRIS,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Petitioner's sentence for failure to stop for a blue light was properly enhanced based upon a prior Georgia conviction for the same conduct where the operative language of our statute - referring to "a second or subsequent offense" - does not limit sentence enhancement to South Carolina offenses.

STATEMENT OF THE CASE

Petitioner 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, Petitioner proceeded to trial before the Honorable Michael G. Nettles and a jury. The jury found Petitioner guilty as indicted, and Judge Nettles sentenced Petitioner 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.

On October 15, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions. See State v. Harris, Op. No. 2014-UP-362 (S.C. Ct. App. filed 10/15/2014). Petitioner's request for rehearing was denied on November 21, 2014. Petitioner timely submitted a Petition for Writ of Certiorari to the Court of Appeals, and this Return follows.

ARGUMENT

Petitioner's sentence for failure to stop for a blue light was properly enhanced based upon a prior Georgia conviction for the same conduct where the operative language of our statute - referring to "a second or subsequent offense" - does not limit sentence enhancement to South Carolina offenses.

Petitioner contends that the trial court erred by enhancing his sentence for failure to stop for a blue light based upon his prior Georgia conviction for fleeing or attempting to elude police. This argument is without merit. 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
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> (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 (emphasis added).

In State v. Donahue, 400 S.C. 604, 735 S.E.2d 547 (Ct. App. 2012), *cert. denied* June 12, 2014, the Court of Appeals addressed a sentence enhancement issue in the context of a conviction for burglary in the third degree. The third-degree burglary statute provided that "[b]urglary in the third degree is a felony punishable by imprisonment for not more

than five years for a first offense **and for not more than ten years for a conviction of a second offense** according to the discretion of the Court." S.C. Code § 16-11-313(B) (emphasis added). The Court of Appeals held that since nothing in the language of the statute limited a circuit court to considering only South Carolina offenses, "a circuit court must consider an out-of-state burglary conviction in determining the sentencing range for third-degree burglary." Donahue, 400 S.C. at 607, 735 S.E.2d at 549. The Court of Appeals rejected Donahue's argument that use of the word "offense" rather than "conviction" in the statute meant that the legislature intended to limit sentence enhancement to in-state offenses, holding that "the use of the word offense in subsection 16-11-313(B) does not indicate the intent to limit the circuit court to the use of South Carolina crimes for enhancement." Id. at 608, 735 S.E.2d at 549. The court also pointed out that if the legislature had intended to limit the scope of the enhancement to in-state offenses, it could have easily done so. Id. (citing State v. Zulfer, 345 S.C. 258, 262-63, 547 S.E.2d 885, 887 (Ct. App. 2001), which held that our 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).

In Petitioner's case, the operative language of the sentencing statute - "a second or subsequent offense" - does not limit sentence enhancement to second or subsequent offenses occurring in South Carolina. Therefore, as in Donahue, the statute contemplates that out-of-state convictions may be used for enhancement.[2] See State v. White, 338 S.C.

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[2] Petitioner 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). Petitioner 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." Petitioner'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

56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Had the legislature intended that prior out-of-state convictions not be used for sentence enhancement, it would have clearly said so in the statute. See Zulfer, 345 S.C. at 262-63, 547 S.E.2d at 887; Donahue, 400 S.C. at 608, 735 S.E.2d at 549.

Allowing the use of out-of-state convictions to enhance a sentence for failure to stop for a blue light is entirely reasonable because the whole objective of sentence enhancement is to punish a defendant to a greater extent for the current offense due to his repeated 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 illogical 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.[3] 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

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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. Obviously, a defendant subject to sentence enhancement under subsection (B)(2) must have committed the acts for which he is being sentenced in South Carolina and must have violated the provisions of subsection (A). However, the operative language *pertaining to sentence enhancement* is the "second or subsequent offense" language in subsection (B)(2), which by its plain language is not limited to in-state offenses.

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

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.").

Construing the statute in the manner Petitioner suggests would lead to the absurd result that a defendant having numerous out-of-state convictions for fleeing from police officers could come into South Carolina and violate our failure to stop for a blue light statute, yet suffer no sentence enhancement despite the fact that he has a consistent pattern of failing to stop for police officers. Meanwhile, a person from South Carolina who had just one prior in-state conviction would have his sentence enhanced from a misdemeanor to a five-year felony. Our legislature clearly did not intend such and absurd result. See City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (stating that courts will reject a meaning "when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative

intention;" in such a case, the court will "construe the statute so as to escape the absurdity" and carry the legislative intention into effect).

Here, Petitioner'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 Petitioner'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)). Petitioner's enhanced sentence for failure to stop for a blue light should be affirmed.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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January 12, 2015

STATE OF SOUTH CAROLINA
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Appeal from Beaufort County
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THE STATE OF SOUTH CAROLINA,

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the State's **Return to Petition for Writ of Certiorari** in the above-referenced matter has been served upon **Laura Ruth Baer,** South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **12th** day of **January, 2015.**

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ALAN WILSON
ATTORNEY GENERAL

January 12, 2015

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: State of South Carolina v. James Harris
Appellate Case No. 2014-002639

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the State's **Return to Petition for Writ of Certiorari** in the above-referenced matter, along with **Proof of Service** of the same.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

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Assistant Attorney General
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cc: Laura Ruth Baer, Esquire
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