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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

J. Michael Baxley, Circuit Court Judge

ORIGINAL

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JERMANE HICKS,

APPELLANT

APPELLATE CASE NO. 2014-000392

BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in using appellant's prior convictions to issue enhanced sentences in the case.

STATEMENT OF THE CASE

Appellant Christopher Jermane Hicks was found guilty of possession of marijuana with intent to distribute, possession of cocaine with intent to distribute, and possession of crack cocaine with intent to distribute per a bench trial held before Judge J. Michael Baxley during the January 2014 term of the Darlington County General Sessions Court. Appellant was sentenced to imprisonment for an aggregate period of ten years. Christine Wise represented appellant at trial and Assistant Solicitor Wendall Burch appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

ARGUMENT

The trial judge erred in using appellant's prior convictions to issue enhanced sentences in the case.

The state's case consisted of the testimony of two police officers, the homeowner on whose property the drugs were found, and two drug analysts.

Police Officer Jacqueline Gause testified that she and Officer Weatherford were guarding a check point road block at the intersection of High Hill Road and Potatoe House Road in Darlington County on the night of January 6, 2012, when they saw a vehicle approach and then turn into a residential driveway before reaching the check point. Officer Gause stated that Officer Weatherford immediately pulled into the same residential driveway and made contact with appellant, who was the driver of the vehicle that turned into the residential driveway, and arrested him for driving without a license. Tr. 77, 1.16-p. 83, 1.23. Also, Officer Gause stated that since there are usually other acts connected to a driving violation, she then began to look around in the vicinity where Officer Weatherford was looking near the house and moved over to the area where the trash can was located, particularly after she saw appellant look over towards the area where the trash can stood. Officer Gause stated that she went to the trash can, and that when she opened the top lid, she saw plastic baggies of marijuana and a bag of crack cocaine. Tr. 84, 1.25-p. 90, 1.14.

Officer Weatherford testified that when he pulled into the residential driveway in question, he saw appellant, who had already parked there, exit and start walking toward the house by the patio of the house; and as a result, he (Officer Weatherford) started to look around the house to see if something had been "thrown down," but did not find anything. Tr. 110, 1.8-p. 114, 1.3.

Officer Weatherford stated that minutes later, Officer Gause informed him that she had found a "package." (in the trash can). Tr. 114, 1 lines 3-5.

Narcotics analysts Lawrence Zivkovich and John Speckt identified the drugs found at the scene as marijuana and cocaine (crack). Tr. 71, l. 1 – p. 76, l. 16; Tr. 119, l. 1 – p. 123, l. 15.

The residential driveway appellant turned into and the place where the events of this case transpired occurred on the property of homeowner Shannon Windham. At trial, Windham testified that she had previously reported to police suspicious activities of individuals who appeared on her property near the creek by her home. Tr. 63, -1.17-p. 68, l.16.

Appellant testified at trial and explained that he was driving to a Dollar General Store on that night when he saw lights flashing at the check point, but did not know for sure that it was a check point so he turned around and found himself on someone else's property. Appellant explained that he knocked on the door of the home where he found himself, but no one answered the door, and that he never paid attention to or noticed the trash can by the home. Soon thereafter, one officer found dope in the trash can and arrested him in connection with it. App. p. 133, l. 17 – p. 145, l. 4.

Petitioner was sentenced as a third-time drug offender on all three of the instant drug convictions in the case. However, at the sentencing phase, the issue of petitioner's prior record, which bore on enhanced sentencing, follows:

Trial Counsel: And I also did want to add that he asked that I indicate to the Court that he is not sure if these are third or more subsequent offenses. I did review the NCIC report [and]...prior to incarcerations well him out at the detention center, and he does not believe that these are third offenses.

The Court: And on what basis do you have to dispute the NCIC sheet that was published for the Court?

Trial Counsel: From my understanding and I might be wrong, I don't believe that's indicative proof of a conviction. I believe you actually have to have actual warrants. I might be wrong and I apologize if I am.

The Court: So you're asking for a certification of the convictions?

Trial Counsel: For my client's request I am, Your Honor.

The Court: ...because we have family members here who are gathered and it's not fair to them to require them to come back yet again, what I will do is I will advise you what the sentence will be if that state produces – and I believe the State will produce – a certification of these prior convictions. What we can do is we can just simply – if you want to have them sent by mail I'll be here all this week. I'm just gonna go head and advise that if you do provide that proof and I'll give you to till the end of this week to do so, then what the sentence would be. Just one moment please.

The Court: And if you submit a proof that these indeed are the correct charges, then it would be the Court's intention to sentence Mr. Hicks on five, for five years for the one charge it carries a minimum of five. All concurrent to the other two, which carry a minimum of 10; thus, I will sentence him to 10 years in prison. And that will be his concurrent sentence for all charges. That is the minimum for which he can be sentenced according to state law. And I will await that before the end of the week and issue the sentencing sheet at that time. And again, we'll credit Mr. Hicks for the time that he is, has been in jail awaiting this proceeding today.

(Court's Exhibit Number 1, warrants and indictments..marked and made a part of the record.).
Tr.172, l. 4 – p. 175, l. 14.

Thereafter, court's exhibit # 1 was reproduced in the Supplemental Record on Appeal filed in the case. This information established that petitioner's sentences should not have been enhanced as a third-time drug offender. For example, petitioner's prior record submitted in the court's exhibit in the case consisted of a 1998 prior possession of crack cocaine conviction under 44 -53-375(A)¹ which should not have been considered an enhancer because that 1998 conviction was an uncounseled misdemeanor prior conviction.

¹ Possession of crack cocaine is a misdemeanor under S.C. Code Ann § 44 -53-375(A).

See Supp ROA p. 4. Clearly, the sentencing sheet for the 1998 possession of crack conviction reflected that appellant had no attorney (N/A appeared on line that read “attorney for defendant”) when he pled guilty as charged and the sentencing sheet further reflected “time served” as the sentence handed down in the case.

The rule of law is that if an unconcealed misdemeanor conviction resulted in the service of prison time, then said prior cannot be used as a sentence enhancer. Nichols v. United States, 511 U.S. 738 (1994); See Robinson v. State, 380 S.C. 201, 669 S.E.2d 588 (2008); Glaze v. State, 366 S.C. 271, 621 S.E.2d 655 (2005). Without a waiver, an indigent defendant convicted of a misdemeanor sans counsel cannot be sentenced to a term of imprisonment or have that prior used to enhance a subsequent conviction and sentence. Scott v. Illinois, 440 U.S. 367 (1979). Nichols supra. See also, Robinson, where the Court held that counsel erred in allowing a prior unconcealed marijuana possession conviction to be used as an enhancer when the defendant subsequently served jail time on that conviction after failing to complete his public service sentence. By contrast, compare Glaze, where the defendant’s prior unconcealed marijuana possession conviction was allowed to be used as a sentencing enhancer because he spent ten days in jail (time served) awaiting trial since he could not post bail per the rationale that his time served sentence was due to no funding to exit prison, which he was free to do, and that this was not the equivalent of a judicially imposed time of confinement for the purpose of enhancement as the Court seemed to view as a distinguishing factor in that case. The Glaze Court expounded on this issue as follows:

In *Argersinger v. Hamlin*, the United States Supreme Court held “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” 407 U.S. 25, 37, 92 S.Ct. 2006, 2012, 32 L.Ed.2d 530, 538 (1972). In *Scott v. Illinois*, the Court

clarified that when imprisonment is an authorized punishment, but is not actually imposed on an unrepresented defendant convicted of a misdemeanor, there is no abrogation of the right to counsel. 440 U.S. at 373-74, 99 S.Ct. at 1162, 59 L.Ed.2d at 389. In other words, actual imprisonment is the event that triggers the right to counsel. *Id.* Moreover, in *Nichols v. United States*, the Court held "that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S. at 748-49, 114 S.Ct. at 1928, 128 L.Ed.2d at 755.

However, in the case at bar, the record is devoid of the circumstances surrounding petitioner's "time served" disposition, and therefore can only be interpreted literally as confinement within the meaning of prison time. Hence, petitioner's case is distinguished from the Glaze case since petitioner's time served appeared to have been actual time served sans a bail issue.

Note further that this same scenario existed in connection with petitioner's 2009 disposition on a possession of marijuana charge, which could not have been used as an enhancer either, because it too was an uncounseled misdemeanor prior conviction. See Supp. App. p. 7-8.

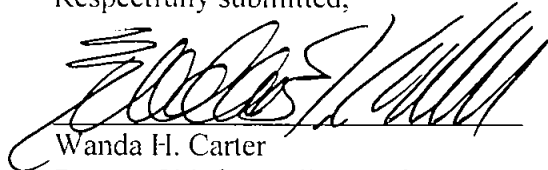
Finally, petitioner's prior possession of cocaine and his prior possession of marijuana convictions found at Supp. ROA. 5 – 6 indicate that apparently both were disposed of simultaneously on the same day, i.e., May 20, 1996, and the inference is that the two charges arose out of the same transaction or occurred within very close sequence in time. It appears that both of those prior possession convictions to which petitioner pled on the same day should be combined and treated as one. Compare State v. Boyd, 288 S.C. 206, 341 S.E.2d 144 (Ct. App.1986), where the Court held that per the Controlled Substance Act, a defendant's two prior convictions should have been treated as one for the purpose of

sentencing where the offenses being committed simultaneously in the cause of a single event. Compare S.C. Code Ann § 17-25-50 (1976). See also the habitual offenders statute where multiple offenses combine treated as one offense under S.C. Code Ann § 56-1-1020 (1976).

CONCLUSION

Based on the foregoing argument, counsel requests that the case be remanded to the lower court for a new sentencing proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of May, 2015.

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IN THE COURT OF APPEALS

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Appeal from Darlington County

J. Michael Baxley, Circuit Court Judge

THE STATE,

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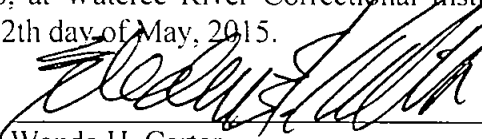
v.

CHRISTOPHER JERMANE HICKS,

APPELLANT


CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher Jermane Hicks, #246896, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 12th day of May, 2015.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of May, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.