STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2014-001202

THE STATE,

Respondent,

vs.

BILLY LEON ALFORD,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly treated Appellant's latest sex offender registry violation as a third offense in light of the fact Appellant had previously been convicted of one prior sex offender registry violation in South Carolina and another prior sex offender registry violation in Virginia before he was convicted of his most recent offense, and the sentence imposed by the trial judge fell within the appropriate statutory sentencing limits for Appellant's crime.

STATEMENT OF THE CASE

In December of 2013, Appellant Billy Leon Alford was served with an arrest warrant obtained after law enforcement officers with the Horry County Sheriff's Office discovered Appellant had failed to comply with the requirements of the South Carolina Sex Offender Registry Act when he left the state and moved to Florida during the preceding year. In April of 2014, the Horry County Grand Jury indicted Appellant for a sex offender registry violation. On May 14, 2014, a jury trial was commenced in the Horry County Court of General Sessions with the Honorable Edward B. Cottingham, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a five-year term of imprisonment and suspended the sentence to a four-year term of imprisonment coupled with three years of probation.

STATEMENT OF FACTS

In February of 1998, Appellant Billy Leon Alford entered a guilty plea to the charge of committing or attempting to commit lewd act upon a child after he had been arrested and indicted for one count of criminal sexual conduct with a minor. (Trial Tr. pp. 41-42; State's Ex. # 3 (Sentencing Sheet); State's Ex. # 4 (Plea Form)). Based on that guilty plea, Appellant was sentenced to a five-year term of imprisonment and ordered to register as a sex offender for the remainder of his life. (Trial Tr. p. 42; State's Ex. # 3).

Subsequently, after serving his prison sentence, Appellant began periodically registering as a sex offender and last registered on August 7, 2012, with the Horry County Sheriff's Office.[1] (Trial Tr. p. 37; p. 53; p. 76; pp. 85-86; State's Ex. # 2 (Sex Offender Packet)). At that time, Appellant was advised of the registration requirements, provided an address in Myrtle Beach, South Carolina, as his home address, and confirmed he understood everything he was required to do as a sex offender. (Trial Tr. p. 32; pp. 36-38; pp. 86-87; pp. 92-93; State's Ex. # 2). Furthermore, Appellant initialed and signed a form indicating he fully understood he was required to "[p]rovide written notification in person" to the Horry County Sheriff's Office within three days of any move to a new jurisdiction and his failure to do so would constitute a criminal offense. (Trial Tr. pp. 36-37; State's Ex. # 2).

Thereafter, on September 6, 2012, Sergeant Loraine Avant, the supervisor of the Horry County Sheriff Office's sex offender registration and tracking unit, was alerted Appellant was no longer living at the home address he had provided when he last registered. (Trial Tr. p. 38; p. 59). In response, Sergeant Avant went to that address on

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[1] Before registering as a sex offender with the Horry County Sheriff's Office in August of 2012, Appellant had previously been convicted of sex offender registry violations for failing to register on one occasion in South Carolina and on another occasion in Virginia. (Pre-Trial Tr. p. 9; Trial Tr. p. 213; p. 217).

the following day and discovered Appellant had not been living there for several weeks. (Trial Tr. pp. 38-40; p. 73; p. 100; pp. 112-113; pp. 116-117). Significantly though, Appellant had not provided any notice to the Horry County Sheriff's Office indicating he intended to change his address or move out of the state since he last registered as a sex offender. (Trial. Tr. p. 73; p. 80; p. 88; p. 100).

Subsequently, an out-of-state law enforcement officer contacted Sergeant Avant later that day and advised her Appellant was in Florida at that time. (Trial Tr. p. 44). After that information was received, Deputy Paulette Rathburn from the Horry County Sheriff's Office engaged in a telephone conversation with Appellant, and Appellant revealed during that conversation he was still in Florida and had not notified them of his move because he was afraid he and the people he was living with would be evicted if he registered as a sex offender in Florida. (Trial Tr. pp. 55-56; p. 69; p. 74; p. 77; pp. 79-80; pp. 99-100). Appellant was then located, arrested, and indicted for a third-offense sex offender registry violation, and he proceeded to trial. (Trial Tr. pp. 5-6; pp. 70-71; Indictment).

At the outset of trial, defense counsel argued to the trial judge Appellant could not appropriately be charged with a third-offense sex offender registry violation because one of Appellant's two prior sex offender registry violations had occurred in Virginia. (Pre-Trial Tr. pp. 7-9). In support of that argument, defense counsel contended: "Our [s]tate has no business defining what's required in other states." (Pre-Trial Tr. p. 9). In response, the solicitor asserted prior out-of-state convictions should be and properly could be used for sentencing enhancement purposes just as out-of-state convictions for drug offenses could be used to enhance a sentence for a South Carolina drug conviction. (Pre-Trial Tr. p. 10). The trial judge then rejected defense counsel's argument and

concluded the legislature intended for prior out-of-state convictions to be used for enhancement purposes based on the language of the relevant statutory provision. (Pre-Trial Tr. pp. 10-11).

Subsequently, during trial, the solicitor presented evidence and testimony establishing Appellant committed a sex offender registry violation by moving from South Carolina without providing written notice regarding the move to the Horry County Sheriff's Office. (Trial Tr. p. 37; p. 73; p. 80; p. 88; p. 100; pp. 111-112; pp. 116-117). Then, at the conclusion of the State's case, Appellant testified in his own defense and readily acknowledged he moved to Florida in August of 2012 without providing written notice of the move to the Horry County Sheriff's Office despite the fact he knew he had an affirmative obligation to do so. (Trial Tr. pp. 155-156; pp. 159-160; p. 164). Appellant further candidly stated he despised the statutes outlining the sex offender registration requirements. (Trial Tr. p. 145).

Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (Trial Tr. p. 211). Following the verdict, the solicitor reiterated Appellant's latest sex offender registry violation constituted a third offense in light of the fact he had previously been convicted of two prior sex offender registry violations, and defense counsel reaffirmed his argument one of the convictions should not be considered during sentencing because it occurred in Virginia.[2] (Trial Tr. p. 213; p. 217). The trial judge then sentenced Appellant to a five-year term of imprisonment and suspended the sentence to a four-year term of imprisonment coupled with three years of probation. (Trial Tr. p. 217).

[2] During trial, defense counsel renewed his argument regarding the use of Appellant's prior out-of-state conviction for a sex offender registry violation at both the conclusion of the State's case and the conclusion of the defense's case. (Trial Tr. pp. 118-119; p. 169).

ARGUMENT

The trial judge properly treated Appellant's latest sex offender registry violation as a third offense in light of the fact Appellant had previously been convicted of one prior sex offender registry violation in South Carolina and another prior sex offender registry violation in Virginia before he was convicted of his most recent offense, and the sentence imposed by the trial judge fell within the appropriate statutory sentencing limits for Appellant's crime.

Appellant contends the trial judge erred in allowing the solicitor to charge him with a third-offense sex offender registry violation. In support of that contention, Appellant maintains his most-recent sex offender registry violation should not have been treated as a third offense in light of the fact one of his two prior convictions occurred in a state other than South Carolina. Contrary to Appellant's contentions, the trial judge properly treated Appellant's latest sex offender registry violation as a third offense because it was the third occasion on which Appellant, a convicted sex offender, had been convicted of failing to comply with the requirements for registering as a sex offender. Because Appellant had previously been convicted of two prior sex offender registry violations before he committed and was convicted of his latest sex offender registry violation, Appellant's latest crime constituted a third offense, and the trial judge correctly sentenced Appellant to a term of imprisonment falling within the statutory sentencing limits established for a third-offense sex offender registry violation. Accordingly, Appellant's conviction and sentence should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An

abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ANALYSIS

During the sentencing phase of a criminal trial, a trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). Significantly, a trial judge imposing a sentence for a criminal offense "**must** be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (emphasis added). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limits prescribed by statute." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

In the case sub judice, Appellant, a convicted sex offender, was charged with and convicted of a violation of South Carolina Code Section 23-3-470, the statutory provision criminalizing failures to comply with the requirements for sex offender registration, based on his failure to provide any notification of his change of address when he abruptly left South Carolina and moved to Florida. Pursuant to that statutory provision, "[a] person convicted for a third or subsequent offense is guilty of a felony and must be imprisoned for a mandatory period of five years, three years of which shall not be suspended nor probation granted." S.C. Code Ann. § 23-3-470(B)(3). In Appellant's case, prior to being convicted of his latest sex offender registry violation, Appellant had

previously been convicted of two prior sex offender registry violations for failing to register as a sex offender – once in South Carolina and once in Virginia. As a result, Appellant's latest sex offender registry violation was the third occasion on which he violated the requirements he had been ordered to comply with in regard to registering as a sex offender and, thus, constituted a third offense. See State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) (indicating a statute's words must be given their plain and ordinary meaning without resorting to subtle or forced construction in order to limit or expand the statute's operation); see also BLACK'S LAW DICTIONARY 1186 (9th ed. 2009) (defining "offense" as "[a] violation of the law; a crime, often a minor one"). Accordingly, the trial judge committed no error in sentencing Appellant for a third-offense sex offender registry violation, and, since Appellant's sentence fell within the appropriate sentencing limits for such an offense, there is no proper basis for that sentence to be disturbed on appeal. See State v. Johnson, 159 S.C. 165, 170, 156 S.E. 353, 354 (1930) ("This Court has no jurisdiction on appeal to correct a sentence alleged to be excessive, when it is within the limits prescribed by law. The length of the prison sentence rests in the sound discretion of the trial Court unless partiality, prejudice, oppression, or corrupt motive is shown.").

In arguing to the contrary, Appellant contends his latest sex offender registry violation should not be considered to be a third offense due to the fact one of his prior sex offender registry violations had been committed in Virginia instead of South Carolina. In support of that argument, Appellant maintains his earlier out-of-state sex offender registry violation cannot be considered for sentencing enhancement purposes despite the fact he indisputably committed that violation because Section 23-3-470 did not directly state consideration of an out-of-state conviction was appropriate for sentencing

enhancement purposes. Importantly though, the legislature did **not** include any language limiting or prohibiting a sentencing judge from considering an out-of-state conviction in Section 23-3-470. See State v. Donahue, 400 S.C. 604, 607, 735 S.E.2d 547, 549 (Ct. App. 2012) ("[N]othing in the language of [the third-degree burglary statute] limits a circuit court to considering only South Carolina offenses. Therefore, a circuit court **must** consider an out-of-state burglary conviction in determining the sentencing range for third-degree burglary." (emphasis added)). Instead, the legislature specifically chose to mandate an enhanced punishment for an offender who was simply convicted of "a third or subsequent offense," which evidenced a plain and clear intention on the part of the legislature to permit a sentencing judge to consider both prior in-state **offenses** and prior out-of-state **offenses** when sentencing an offender convicted of a successive sex offender registry violation.[3] S.C. Code Ann. § 23-3-470(B)(3); see Donahue, 400 S.C. at 608, 735 S.E.2d at 549 ("We find 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." (emphasis added)); see also State v. Zulfer, 345 S.C. 258, 262, 547 S.E.2d 885, 887 (Ct. App. 2001) ("Nowhere 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 the burglary statute permits an enhancement of the offense based on a prior record of out-of-

[3] Notably, all fifty states and the federal government have enacted legislation requiring individuals convicted of sex offenses to register as sex offenders, and that legislation is designed to protect the public from sex offenders who may reoffend while aiding law enforcement agencies in solving sex crimes. See Reynolds v. United States, __ U.S. __, 132 S. Ct. 975, 978 (2012) (recognizing all fifty states along with the federal government have statutes requiring sex offenders to register as sex offenders with the relevant jurisdictions and to provide up-to-date information for inclusion in state and federal sex offender registries); see also State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (holding the legislature enacted the statutory provisions in regard to the sex offender registry "to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes" after noting efforts to protect communities, conduct investigations, and apprehend sex offenders are hampered by a lack of information about convicted sex offenders).

state convictions for burglary[.]"), cert. dismissed as improvidently granted, 353 S.C. 537, 579 S.E.2d 317 (2003); cf. State v. Wood, 2 Utah 2d 34, 39, 268 P.2d 998, 1001-1002 (Utah 1954) ("Appellant contends further that the intent of the legislature in enacting the present habitual criminal statute . . . 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."). Thus, it was entirely proper for the trial judge to consider Appellant's prior in-state and out-of-state convictions for sex offender registry violations when sentencing him for his latest offense, and the trial judge's consideration of Appellant's prior convictions was fully consistent with the underlying purpose and rationale behind the legislature's decision to include a statutory provision providing for enhancement punishments for offenders who have repeatedly committed sex offender registry violations. See Zulfer, 345 S.C. at 263-264, 547 S.E.2d at 887-888 ("[I]t is clear that the legislative policy behind the enactment of this section is to provide 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.' To shift the focus to the fact that a defendant's prior offenses may have occurred in different jurisdictions would thwart the objective of requiring heightened accountability from repeat offenders for their subsequent crimes." (footnotes omitted)); see also Graham v. West Virginia, 224 U.S. 616, 623 (1912) ("The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second

time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."). Accordingly, as the trial judge committed no error in sentencing Appellant for his latest crime, Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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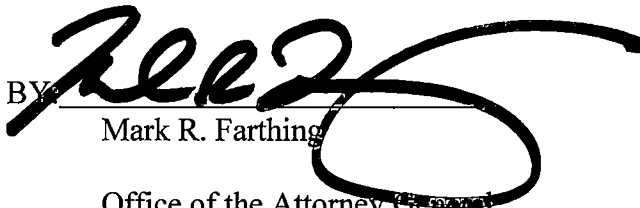

BY: ______________________
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November 30, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2014-001202

THE STATE,

Respondent,

vs.

BILLY LEON ALFORD,

Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 30th day of November, 2015.

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November 30, 2015

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RE: State v. Billy Leon Alford – Appellate Case No. 2014-001202

Dear Ms. DuRant:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: (Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services