STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2014-000392

THE STATE,.....RESPONDENT

v.

CHRISTOPHER JERMANE HICKS,.....APPELLANT.

BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

May this Court consider the arguments advanced by Appellant on appeal when the claims were not presented to or ruled upon by the trial court; nevertheless, the sentencing court properly considered Appellant's prior drug convictions for sentence enhancement purposes when Appellant failed to establish that two prior convictions stemmed from violations of his right to counsel or that the two other convictions should be construed as one?

STATEMENT OF THE CASE

Appellant was indicted by grand jury for Darlington County for possession with intent to distribute marijuana (2012-GS-16-1304), possession with intent to distribute cocaine (2012-GS-16-1305), possession with intent to distribute a schedule 1 controlled substance (ecstasy) (2012-GS-16-1306), and possession with intent to distribute cocaine base (2012-GS-16-1307). He was represented by Christine Wise, Esquire. On January 27, 2014, Appellant proceeded to a bench trial before the Honorable J. Michael Baxley, pursuant to which Appellant acquitted of possession with intent to distribute a schedule 1 controlled substance and convicted of all other charges. On February 24, 2014, Appellant was sentenced to an aggregate 10 years, concurrent. Appellant filed and served a notice of appeal and subsequently submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). This Court issued an order filed April 20, 2015, directing the parties to address the issue whether the trial court erred in enhancing Appellant's sentences based upon his prior convictions. Appellant thereafter submitted a Brief of Appellant as requested. This Brief of Respondent follows.

STATEMENT OF FACTS

On January 6, 2012, Appellant approached a traffic safety checkpoint conducted by the Darlington County Sheriff's Office at the corner of High Hill and Potato House Roads at approximately 6:00 p.m. (R. 79; 3-25; 110). Appellant, who was driving his cousin's rental car with a suspended license, noticed the check point, stopped his car, put it in reverse, and then pulled into a stranger's driveway. (R. 79-80; 102; 134-35). Appellant said he did not know what was going on up ahead but knew his license was suspended so got off the road and tried to call his cousin to come get him and the car. (R. 113; 115; 136; 102; 1-9). Officers at the check point noticed the vehicle make this suspicious movement and drove toward the driveway where Appellant parked. Appellant exited his vehicle and approached the house. (R. 79-81; 94; 110 – 111). Sergeant Weatherford was the first to arrive, and found Appellant walking from the side of the house near a screened porch and trash can. Appellant said he tried to alert the homeowners that he was on their property waiting for a ride. (R. 112, 15-22; 95-96; 102-103; 112-115).

Shortly after, Sergeant Gause arrived and observed Weatherford and Appellant standing between Appellant's vehicle and the residence. (R. 80; 83; 6-13). When questioned at the scene, Appellant stated that he pulled into the residence because he was driving with a suspended license. (R. 84, 4-24; 112-113; 136). Appellant also reported that he tried to call his cousin seven times to come get him, but never made contact with him. (R. 135, 11-20; 145). Appellant claims to have realized that he was on someone's property and told officers attempted to notify the homeowners of his presence and to request permission to wait there for a ride. (Id.; 101; 136; 147; 152). The door that

Appellant went to was on the side of the house, not the front door. Appellant said he heard a dog inside and that no one was home. (R. 135 – 137). During his interaction with officers, Appellant looked at the trash can. (R. 85-86; 113). Believing that Appellant's behavior was suspicious and sensing an attitude, Sergeant Weatherford escorted him back to the jail van. Officer Gause searched the scene, including the trash can near the side of the house from which Appellant emerged. (R. 84-87). Before Appellant and Officer Weatherford reach the end of the driveway, Gause radioed to advise that she found a package of drugs in the trash can. Appellant responded that they didn't find anything on him. (R. 85; 97; 104; 12-23; R. pp. 113-114). Nine individual baggies of marijuana, ten baggies of powder cocaine, two bags of crack cocaine, and nine pills were found in the trash can. (R. 104 – 105). Appellant had cash and two cell phones. (R. 104; 143).

At trial it was established that the drugs did not belong to the homeowner nor did the homeowner know or see Appellant before. (R. 67, 8-25; 68, 1-15). After Appellant testified, the judge granted a directed verdict as to the ecstasy charge and found Appellant guilty of the remaining charges and subsequently sentenced Appellant. (R. 159, 17-25; 73-76; 131-33).

ARGUMENT

The arguments advanced by Appellant on appeal are not preserved for appellate review; nevertheless, the sentencing court properly considered Appellant's prior drug convictions for sentence enhancement purposes when Appellant failed to establish that two prior convictions stemmed from violations of his right to counsel or that the two other convictions should be construed as one?

At Appellant's sentencing proceeding on February 24, 2014, the prosecutor stated that Appellant faced potential sentences of ten (10) to twenty (20) years, each, for possession with intent to distribute cocaine and possession with intent to distribute cocaine base and five (5) to twenty (20) years for possession with intent to distribute marijuana. The prosecutor orally outlined Appellant's prior convictions from what appears to be Appellant's NCIC report. (R. 167; 172). Noting the minimum sentence of ten (10) years, the prosecutor left the sentence to the court's discretion. (R. 165-166). [1]

In response, counsel for Appellant indicated that Appellant was uncertain whether the convictions for which Appellant was being sentenced were "third offenses." (R. 172). Counsel for Appellant questioned the prosecutor's use of the NCIC report to establish Appellant's prior convictions and requested verification of the convictions. (R. 172). The prosecutor agreed to provide verification from the clerk of court but noted that she could not do so until the following day because, due to the lateness of the hour, the clerk's office was closed. (R. 173). Rather than having Appellant's family members travel to court again, the trial court announced the sentence it planned to give provided the prosecutor submitted documentation verifying the existence of the prior convictions. The prosecutor was given until the end of the week to provide the documentation. (R. 173-174). The trial court stated that if verification of the prior convictions was provided,

[1] See S.C. Code Ann. §§ 44-53-370(b)(1) (Supp. 2014); 44-53-370 (b)(2) (Supp. 2014); 44-53-375 (B)(3) (Supp. 2014).

Appellant would be sentenced to the minimum sentence of five (5) years for one conviction and the minimum sentences of ten (10) years for the remaining two convictions, concurrent. (R. 174-175). The trial court stated it would hold the sentence sheets until the end of the week to ensure verification. (R. 175).

The trial court reconvened the sentencing proceeding the following day to explain a comment made the previous day and to reiterate that Appellant faced minimum sentences and had rejected a plea offer to a lesser that would have permitted a five (5) year sentence. (R. 175-177; see also 166-167). The record also reflects that documentation of the existence of Appellant's prior convictions was provided that day and made Court's Exhibit 1. (R. 163; Supp. R. 4 – 8; Second Supp. R. 1).

The documentation presented to the trial court reflects that Appellant was convicted in the Darlington County Court of General Sessions on May 20, 1996, for possession of marijuana for which he received a 30 day sentence suspended to probation for two years. (Supp. R. 6). He was also convicted in the Darlington County Court of General Sessions on May 20, 1996, for possession of cocaine and was sentenced to two years suspended to probation for two years. (Supp. R. 5). He was represented by counsel for both convictions.[2] (Supp. R. 5-6). The record also reflects that in 1998, Appellant entered a guilty plea to possession of crack cocaine in the Darlington County Court of General Sessions and received a sentence of two years suspended to "time served." (Supp. R. 4). The sentence sheet for the 1998 conviction indicates "N/A" on the line for defense counsel's signature.[3] (Supp. R. 4). The documentation presented to the trial court further verifies Appellant's Florence County magistrate's court conviction for

[2] The Honorable James E. Lockemy was the sentencing judge for the 1996 convictions.
[3] The Honorable Edward B. Cottingham was the sentencing judge for the 1998 conviction.

possession of marijuana on January 30, 2009, for which Appellant received a fine. (Supp. R. 7-8). No defense counsel is listed on the documentation submitted for the 2009 conviction. Appellant made no objection to the documentation of his prior convictions and Appellant did not challenge the fact that he was a third time offender for sentence enhancement purposes after the documentation he requested was provided. Appellant certainly never argued to the trial court the grounds he now advances in support of trial court error and made no attempt to establish that the prior convictions could not be used for sentence enhancement. He merely challenged the existence of the prior convictions.

Appellant argues for the first time on appeal that the trial court erred in using the prior convictions to enhance the sentence given in this case because the convictions were either "uncounseled misdemeanors" or were disposed of on the same day. Respondent submits the arguments are without merit. First, the arguments advanced on appeal were never presented to or ruled upon by the trial judge at the time of sentencing and, therefore, may not be considered for the first time on appeal. Second, the prosecutor established the existence of two convictions obtained with assistance of counsel and two uncounseled convictions that resulted in sentences of "time served" or a fine rather than the possibility of jail time. All of the prior convictions occurred before the commission of the crime for which Appellant was being tried and Appellant was the subject of the prior convictions. The prior convictions Appellant now challenges were properly considered for sentence enhancement purposes.

Respondent first submits that this Court must decline to consider the arguments Appellant presents on appeal. The record reflects that Appellant failed to object to the use of the prior convictions for sentence enhancement purposes. Appellant merely asked that

the prosecutor verify the existence of the prior convictions from documentation other than the NCIC report. After the documentation was provided, Appellant did not object to the documentation, oppose the existence of the prior convictions, or challenge the use of the prior convictions for sentence enhancement purposes. The trial court was not given the opportunity to rule on these issues Appellant raises for the first time on appeal. See State v. Byars, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011)(holding, for an objection to be preserved for appellate review, the objection must be made with sufficient specificity to inform the trial court of the point being urged by the party objecting); State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) (stating that in order to preserve an issue for appellate review, the issue must be contemporaneously raised to and ruled upon by the trial court). Appellant certainly never advanced the specific grounds he presents to this Court on appeal – that two of the convictions were uncounseled and two were obtained on the same day. Because Appellant did not first present the arguments he now advances on appeal to the sentencing court and because the sentencing court was not given an opportunity to rule on the issues, the claims are not available for appellate consideration. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (holding that to preserve an issue for appellate review, there must be a contemporaneous objection that is ruled on by the trial court); State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) (holding that an argument advanced on appeal but not raised to or ruled upon by the trial court is not preserved for appellate review); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001)(holding that an objection must be presented to the trial court with sufficient specificity to bring attention to the exact error claimed); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding that the losing party must

first try to convince the trial court that it has ruled incorrectly and, if that effort fails, convince the appellate court; however, the issue must have been presented to the trial court and the trial court must rule on it before the matter will be considered on appeal).

Assuming *arguendo* the issue is preserved and turning, first, to what may be the uncounseled convictions, Respondent acknowledges that the determination of whether the prior uncounseled convictions may be used for sentence enhancement purposes depends upon whether Appellant's right to counsel was violated when the convictions were obtained. The determination whether the right to counsel was violated involves the question of whether the right to counsel attached and, if so, whether Appellant established that he did not waive the right.

The Sixth and Fourteenth Amendments to the United States Constitution prohibit a prior conviction for a misdemeanor resulting in a sentence of imprisonment or for a felony obtained in violation of the right to counsel to be used to enhance the punishment of a subsequent conviction. State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009); State v. Robinson, 380 S.C. 201, 669 S.E.2d 588 (2008); State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 337 (1998), citing Nichols v. U.S., 511 U.S. 738 (1994) and State v. Chance, 304 S.C. 406, 405 S.E.2d 375 (1991). The constitutional right to counsel attaches when a defendant receives a misdemeanor sentence that may end up in the actual deprivation of a person's liberty. Talley v.State, 371 S.C. 535, 640 S.E.2d 878 (2007), citing Alabama v. Shelton, 535 U.S. 654, 658(2002); see also Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). "[O]nly those proceedings 'resulting in immediate actual imprisonment' trigger the right to state-appointed

counsel," id. at 663, and not the threat of imprisonment. Scott v. Illinois, 440 U.S. at 367; see also State v. Wickenhauser, 309 S.C. 377, 423 S.E.2d 344 (1992).

Therefore, a "defendant's prior uncounseled misdemeanor conviction may only be used to enhance his sentence for a subsequent conviction if the defendant was not actually imprisoned as a result of the prior conviction." Robinson v. State, 380 S.C. 201, 205, 669 S.E.2d 588, 590 (2008), citing Nichols v. United States, 511 U.S. 738 (1994) and Glaze v. State, 366 S.C. 271, 621 S.E.2d 655 (2005). It is Appellant's "burden to prove by a preponderance of the evidence that the prior conviction is constitutionally defective or invalid when objecting to the use of the prior conviction to enhance punishment of a subsequent conviction." State v. Sosbee, 371 S.C. 104, 111, 637 S.E.2d 571, 574 (2006).

However, an accused has the constitutional right to waive counsel and to proceed *pro se* as long as the waiver is knowing, voluntary, and intelligent. Farretta v. California, 422 U.S. 806 (1975). A person may be imprisoned for an offense when not represented by counsel if he or she knowingly and intelligently waived of the right to counsel. Glaze v. State, 366 S.C. 271, 621 S.E.2d 655 (2005), citing Argersinger v. Hamlin, 407 U.S. 25 (1972). The decision made by the accused to waive the right to counsel must be honored as long as the waiver is knowing, voluntary, and intelligent. Farretta v. California, 422 U.S. at 806; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). A conviction obtained in the absence of counsel but after a knowing, voluntary and intelligent waiver of the right to counsel is not constitutionally infirm and an accused who validly waives the right to counsel may not later claim the conviction was obtained in violation of the right to counsel. See Alabama v. Shelton, 535 U.S. at 654 (stating that

absent a knowing and voluntary waiver, a person may not be imprisoned unless represented by counsel); Argersinger v. Hamlin, 407 U.S. at 25 (stating that absent a knowing and voluntary waiver, no person may be imprisoned for any offense, whether felony or misdemeanor, unless represented by counsel); Scott v. Illinois, 440 U.S. at 367 (stating, absent a valid waiver, an indigent defendant convicted without counsel cannot be sentenced to a term of imprisonment); State v. Spratt, 383 S.C. at 213, 678 S.E.2d at 267 ("A prior uncounseled conviction is not constitutionally defective or invalid when the defendant knowingly, voluntarily, and intelligently waived his right to counsel. Further, courts in other jurisdictions have held the trial court may consider prior uncounseled convictions as a basis for sentence enhancement when the defendant validly waived his right to counsel.").

A presumption of regularity attaches to final judgments, even on the question of right to counsel. State v. Payne, at 266, 504 S.E.2d at 335; see also Harris v. Commonwealth, 497 S.E.2d 165 (Va.App. 1998); State v. Jordan, 621 S.E.2d 229 (N.C.App. 2005). The defendant bears the burden of proof when the defendant collaterally attacks a prior conviction the State seeks to use under a sentence enhancement statute. State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009); State v. Sosbee, at 104, 637 S.E.2d at 571; State v. Payne, at 266, 504 S.E.2d at 335; see Parker v. State Highway Dep't, 224 S.C. 263, 78 S.E.2d 382 (1953); State v. McAbee, 220 S.C. 272, 67 S.E.2d 417 (1951); Parke v. Raley, 506 U.S. 20 (1992); Harris v. Commonwealth, 497 S.E.2d 165 (Va.App. 1998). "When the State is prosecuting a person for an offense that carries an enhanced penalty for a conviction of a second or subsequent offense, the State is not required to prove the legality of the prior conviction,

nor does it have to show the facts surrounding the conviction. It is only necessary for the State to prove that a previous conviction exists, that the conviction was for an offense which occurred prior to the commission of the offense for which the defendant is being tried, and that the defendant was the subject of that prior conviction." Id. at 338, 504 S.E.2d at 372, citing DeWitt v. S.C. Dep't of Highways and Pub. Transp., 274 S.C. 184, 262 S.E.2d 28 (1980).

The record before this Court reflects that the State properly met its burden to establish the existence of at least two predicate convictions for the sentence enhancement in this case. The State established the existence of Appellant's convicted for possession of crack cocaine by what appears to be an uncounseled guilty plea in 1998; however, Appellant was sentenced to "time-served" and a fine. (Supp. R. 4). The term "time-served" specifically connotes the period of time Appellant served in pre-trial custody prior to conviction and not further prison or jail time subsequent to the conviction. See State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004); see also Nicholson v. State, 761 So.2d 925, 930-31 (Miss. Ct. App. 2000). Similar to Glaze v. State, the "time-served" sentence in this case could not result in actual imprisonment at a later date like a term of imprisonment suspended to active probation or a public service requirement the defendant may fail to honor. Glaze v. State, 366 S.C. 271, 274-75, 621 S.E.2d 655, 657. The pre-trial imprisonment was a result the arrest and not the conviction. Comeaux v. State, 988 So.2d 101, 103 (Fla. Dist. Ct. App. 2008). With the 1998 drug conviction, Appellant served no jail time following the entry of the judgment of conviction. He was not subjected to the possibility of incarceration; therefore, Appellant's right to counsel did not attach and the conviction was properly considered for sentence enhancement

purposes. See Glaze v. State, at 274-75, 621 S.E.2d at 655 (stating that an indigent defendant convicted of a misdemeanor is not unconstitutionally denied the right to counsel if he is sentenced to time served after neither waiving the right to counsel nor being provided counsel by the state), citing Nichols v. United States, 511 U.S. 738, 748-49 (1994)); see also State v. Sosbee, at 111, 637 S.E.2d at 574 ("[A]n uncounseled conviction that does not result in actual imprisonment may be used to enhance a subsequent conviction); Scott v. Illinois, 440 U.S. at 367 (holding that the Constitution only requires an indigent criminal defendant be appointed counsel when sentenced to a term of imprisonment).

The record before this Court also reflects that Appellant was convicted of possession of marijuana in magistrate's court in January 2009 and was sentenced to payment of a fine of $573.00. (Supp. R. 7-8). Appellant's argument regarding this prior conviction has even less merit. This prior drug conviction was properly considered for sentence enhancement purposes regardless of whether Appellant appeared without counsel or was represented by counsel. Appellant was not subjected to the possibility of incarceration for this prior conviction; therefore, Appellant's right to counsel did not attach and the conviction was properly considered for sentence enhancement purposes. Id.

Moreover, once the State established the existence of the prior 1998 and 2009 convictions, it was Appellant's burden to show that he did not knowingly and voluntarily waive the right to counsel in order to prevent use of the uncounseled convictions for sentence enhancement. Appellant made absolutely no argument or effort to challenge use

of the prior drug convictions for enhancement purposes on the ground the convictions were obtained in violation of the right to counsel.

Turning to the other conviction, the record establishes that Appellant was convicted in 1996 of possession of cocaine and possession of marijuana and that he was represented by counsel when both convictions were obtained. (Supp. R. 5-6). Appellant speculates for the first time on appeal that because both charges were disposed of on the same day, the charges arose out of the same transaction or occurred within close sequence in time. Relying on State v. Boyd, 288 S.C. 206, 341 S.E.2d 144 (Ct. App. 1986) and S.C. Code Ann. § 17-25-50 (2014), he contends the two convictions must be treated as one for sentence enhancement purposes. However, once the State established the existence of the two 1996 convictions, it was Appellant's burden to present the challenge he now makes on appeal and to make the necessary factual showing to the trial court to support the claim. This Court should not invalidate Appellant's sentence on appeal based upon pure speculation. Appellant was represented by counsel for both convictions and the two convictions were properly considered for sentence enhancement purposes. Nevertheless, whether the two 1996 drug convictions are treated as one or two is of little consequence to this Court's consideration of Appellant's sentence. When taken in conjunction with Appellant's 1998 and/or 2009 convictions, it is clear that Appellant was properly treated as a third time offender even if the 1996 convictions are considered as one.

The presumption of regularity attached to these final judgments of conviction and, pursuant to established precedent, the burden to show the convictions were

constitutionally defective or otherwise invalid for sentence enhancement purposes fell to Appellant – a burden Appellant failed to meet.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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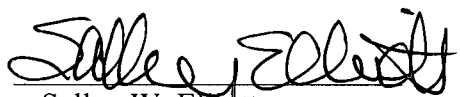
BY: 
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Columbia, South Carolina
August 12, 2015

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Brief of Respondent*, dated August 12, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
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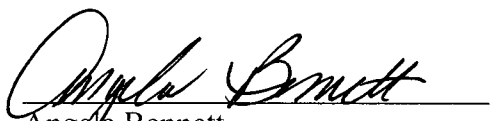
I further certified that all parties required by Rule to be served have been served. This 12th, day of August, 2015.



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