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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY LEON ALFORD,

APPELLANT

APPELLATE CASE NO. 2014-001202

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the state to charge Appellant Alford with failure to register with the Sex Offender Registry as a third offense when the S.C. Code Section 23-3-460 and 23-3-470 (A) (B) (3) do not require that out of state convictions for failure to register be counted for enhancement purposes in South Carolina?

STATEMENT OF THE CASE

On April 24, 2014, the Horry County Grand Jury indicted Billy Leon Alford on the charge of sex offender registry violation for failing to register. On May 14-15, 2014, Alford proceeded to trial before the Honorable Edward B. Cottingham and a jury. Alford was represented by Kenneth R. Moss, and the state was represented by J. Scott Hucks and M. Travis Hyman. R. 1. The jury returned a verdict of guilty as indicted. R. 179, ll. 17 – 23. Judge Cottingham sentenced Alford to the maximum sentence of five years as a third offense for failing to register. The judge suspended the sentence to four years active service and three years probation. R. 185, ll. 4 – R. 186, ll. 11. Alford's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

In 1998, Appellant Alford pled guilty to committing a lewd act on a minor. He was sentenced to five years. See State's Exhibit 3. As a result, he was required to register as a sex offender on the Sex Offender Registry bi-annually. R. 31, ll. 5 – 23.

On August 7, 2012, Alford reported to the Horry County Sheriff's Office and registered as required. Sergeant Loraine Avant testified that he completed his portion of the Sex Offender Registration form for offender information. Sergeant Avant knew Alford as he had registered previously with the Sheriff's Office. Her job was to ensure that the Sheriff's Office complied with the statute and that sex offenders understood what to do. R. 19, ll. 11 – R. 22, ll. 16; R. 23, ll. 2 – R. 25, ll. 2.

On September 6, 2012, the Horry County Sheriff's Office received a call from an anonymous caller that Alford had moved and that he no longer lived at the address he had provided to the Sheriff's Office. Sergeant Avant went to investigate the next day, September 7, 2012 because the statute required that sex offenders notify the sheriff's office, where they last resided, in writing within three days of a change of address. When she investigated the last known residence of Alford, she discovered that no one lived there. R. 25, ll. 3 – R. 29, ll. 11.

On that same day, September 7, 2012, a police officer from Florida called the Horry County Sheriff's Office and reported that he had had contact with Alford and wanted the Sheriff's Office to know where Alford was. R. 33, ll. 3 – 24.

Deputy Renee Elvis testified that she registered Alford on August 7, 2012. She always told offenders that they had to notify the Sheriff's Office in writing of any change of

address or of any move within three days. She did not receive a written notice from Alford of his move to Florida. R. 70, ll. 1 – R. 72, ll. 5.

Deputy Paulette Rathbun did speak with Alford on September 10, 2012 which was the Monday after September 7. Alford called the Horry County Sheriff's Office on that date and told Deputy Rathbun that he had tried to call her several times but finally talked with Deputy Elvis once. He told Deputy Rathbun that he had not provided notice to the Sheriff's Office of his move and had not registered in Florida because he did not want his friends to be evicted if he gave their address. Deputy Rathbun told him to register before the end of that day because she was in the process of obtaining a warrant for him. R. 78, ll. 14 – R. 84, ll. 24. She did not receive written notice from Alford of his leaving South Carolina. R. 82, ll. 1 – 24.

Alford testified at his trial that he was convicted of lewd act because he started seeing a girl who he met when she was with his friend and the friend's girlfriend. He discovered two weeks after dating that she was young. He pled guilty under North Carolina v. Alford.¹ He has had no other sex offenses. R. 96, ll. 18 – R. 97, ll. 25. When he registered in August 2012, he knew he was about to move to Florida and he told the lady who registered him that he would be moving. She told him that he would have to put it in writing that he was moving. R. 98, ll. 16 – R. 99, ll. 3.

Alford admitted that he did not give written notice to the Horry Sheriff's Office that he was moving because he did not have an address to give. R. 133, ll. 1 – 5. He explained that the people he was living with in Horry County moved to Florida because their son was

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

very ill and they needed to help him. Alford had been homeless for four years and needed to move with them. R. 99, ll. 7 – R. 101, ll. 5.

When he got to Florida, Alford contacted the Sheriff's Office in Florida who told him he would have to register that following Monday, September 10 which Alford did. Then he had to move because the home was in a school zone so he had to register again on September 12. He told Deputy Rathbun when he called on September 10 that he would probably have to return to South Carolina. After he registered the second time in Florida on September 12, he learned that he could not stay at that address because he was a sex offender. It was a Christian Mission which did not take sex offenders. He went to St. Augustine and registered with the Sheriff's Office there. He did not have an address as he was then homeless and on the streets. R. 101, ll. 6 – R. 105, ll. 10.

In a pretrial motion, defense counsel made the motion that Alford should not be charged with failing to register as a third offense. He explained that the statute provided that if a person has a conviction in another state of one of the offenses listed in the statute, then that person would have to register in South Carolina as a sex offender. He argued that the statute did not include out of state convictions for failing to register. In Alford's case, one of the prior failures to register occurred in Virginia, and that was for Virginia law to handle-not South Carolina. R. 2, ll. 10 – R. 4, ll. 25.

The judge stated that he heard the argument but in reading the statute on its four corners, it was the intention of the Legislature for out-of-state convictions to be registered with the Sheriff's Office because the statute concerned "all matters within this Article." Therefore, he disagreed with defense counsel's argument. Counsel responded that the South

Carolina statute concerned business in South Carolina. The judge said it concerned out-of-state convictions. R. 5, ll. 1 – R. 7, ll. 9.

After the state presented its case and rested, defense counsel renewed his motion that Alford not be charged with a third offense. Counsel argued that the only evidence that he's been convicted in this case is that he was convicted once in South Carolina for a Sex Offender Registry violation. The judge stated that counsel had made that motion which was denied, and the record was protected. Counsel then moved for a directed verdict. R. 94, ll. 13 – R. 95, ll. 13.

At the close of all of the testimony, defense counsel renewed his motion that this should not be a third offense for failure to register. The judge again denied the motion. R. 137, ll. 6- R.140, ll. 6.

At sentencing, after the solicitor read Alford's prior convictions, the judge asked about the prior violations of the Sex Offender Registry. The solicitor said:

Your Honor, he had a 2004 and a 2009.

There was no mention of a Virginia conviction for failure to register. R. 180, ll. 20 – R. 181, ll. 19.

At sentencing, the judge said that Alford had a long and notorious prior history, but he was most concerned with the fact that Alford failed to register on two prior occasions. This was his third time. R. 185, ll. 4 – 9.

Defense counsel argued again that one of those two priors was in Virginia, and the Virginia requirements were different. Counsel argued that there was no evidence in the report on what was violated. The judge said he understood, and then sentenced Alford as a

third offense. He sentenced Alford to five years suspended to four years and three years probation. R. 185, ll. 10 – 23.

ARGUMENT

The trial court erred in allowing the state to charge Appellant Alford with failure to register with the Sex Offender Registry as a third offense when the S.C. Code Section 23-3-460 and 23-3-470 (A) (B) (3) do not require that out of state convictions for failure to register be counted for enhancement purposes in South Carolina.

South Carolina Code Section 23-3-430 provides:

(A) Any person, regardless of age, residing in the State of South Carolina who **in this State** [emphasis added] has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below.....shall be required to register pursuant to the provisions of this article.

Following in Section 23-3-430 (C) are listed numerous offenses. Failure to register as a sex offender is not listed.

Section 23-3-460 (A) provides that a person required to register pursuant to this article is required to register biannually for life. Section 23-3-460 (F) provides that if a person required to register moves outside of South Carolina, the person must provide written notice within three business days of the change of address to a new state to the county sheriff with whom the person last registered.

Section 23-3-470 (A) provides that it is the duty of the offender to contact the sheriff in order to register or provide notice of any changes in employment or school. This Section also provides that if an offender fails to register or provide notice of employment or school changes, as required by this article, he must be punished as provided in subsection (B).

Subsection (B) (1) provides that a person guilty of the first offense is guilty of a misdemeanor and may be fined not more than one thousand dollars and imprisoned for not more than three hundred and sixty-six days. Subsection (B) (2) provides that a person guilty

of a second offense is guilty of a misdemeanor and must be imprisoned for a mandatory period of three hundred sixty-six day no part of which may be suspended nor probation granted. Subsection (B) (3) provides that a person guilty of a third or subsequent offense is guilty of a felony and must be imprisoned for a mandatory period of five years, three of which shall not be suspended nor probation granted.

No where does the statute provide that a failure to register in another state is appropriate for enhancement for sentencing purposes. The legislature did not include this provision which they could have done if they felt it was necessary.

In South Carolina Code Section 16-11-311 which is the statute for burglary, first degree, the legislature included a provision for enhancing a burglary second degree to first degree. In Section 16-11-311 (A) (2), the Legislature provided that a burglary committed by a person with a prior record of two or more convictions for burglary shall be guilty of burglary first degree.

The only documentation presented to the court of a failure to register in Virginia was one sentence in the case summary at the Horry County Sheriff's Office. No documentation of the conviction was included nor reference to a warrant or indictment from Virginia. See Court's Exhibit 2. The trial judge did not allow this case summary to go to the jury nor be admitted as evidence. The judge had it marked as a Court's Exhibit for the record. He did the same with the note Deputy Rathbun wrote on September 10, 2012 after she talked to Alford. This was marked as Court's exhibit 1. R. 138, ll. 19 – R. 139, ll. 5.

The state also presented as State's Exhibit 2 the Sex Offender Registration Form which contained the significant information about Alford and his case. The date on the form was August 7, 2012. On this form was the qualifying offense from 1998 and his first sex

offender registry violation which was in South Carolina in 2004. The corresponding statute for the violation was listed as 23-3-470 (A) (B) (1) indicating this was a first offense. No other violations of the sex offender registry were listed.

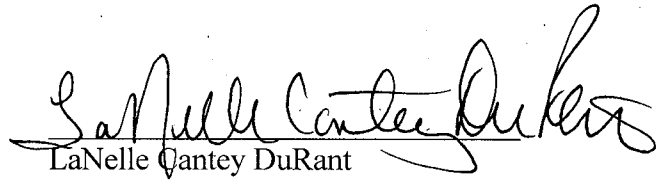
The indictment, 2014-GS-26-01587, did not have any mention of this being a third offense. There was no testimony before the jury of a third offense from Virginia.

Section 23-3-430 specifically provides that a person who has been convicted in **this state**, meaning South Carolina, of a sexual offense as listed in the statute shall be required to register. Therefore, the reasonable conclusion would be that violations of the Sex Offender Registry in other states would not count for enhancement in sentencing.

CONCLUSION

Based on the above, Alford's sentence and conviction should be reversed, and his case remanded for resentencing as a second offense.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

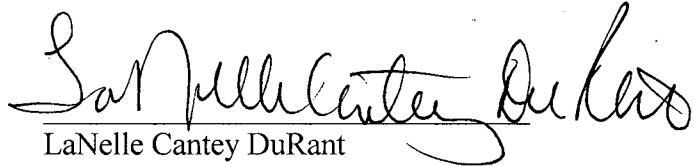
ATTORNEY FOR APPELLANT

This 21st day of January, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 21, 2016

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant".

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