

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE COURT OF APPEALS

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Appeal from York County

MAR 21 2016

John C. Hayes, III, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT DALE HUGHES,

APPELLANT

APPELLATE CASE NO. 2015-001073

FINAL BRIEF OF APPELLANT

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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL3

STATEMENT OF THE CASE4

ARGUMENT

The trial judge erred in denying counsel’s motion to
quash the sex registry violation indictment where the state
used a third degree CSC with a minor prior emanating from
appellant’s 1994 plea proceeding as the predicate conviction
because this prior was not a crime until our legislature made
it a crime on June 18, 2012, which in turn meant that
appellant did not have a prior conviction that required him to
register as a sex offender.....5

CONCLUSION.....7

TABLE OF AUTHORITIES

Cases

<u>Edwards v. State Law Enforcement Division</u> , 395 S.C. 571, 720 S.E.2d 462 (2011).....	6
<u>United States v. Alpers</u> , 338 U.S. 680 (1949).....	6
<u>United States v. Alston</u> , 611 F.3d 219 (4 th Cir. 2010).....	6
<u>United States v. Randall</u> , 171 F.3d 195 (4 th Cir. 2009).....	6
<u>United States v. Savage</u> , 542 F.3d 959 (2d Cir 2008).....	6

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying counsel's motion to quash the sex registry violation indictment where the state used a third degree CSC with a minor prior emanating from appellant's 1994 plea proceeding as the predicate conviction because this prior was not a crime until our legislature made it a crime on June 18, 2012, which in turn meant that appellant did not have a prior conviction that required him to register as a sex offender.

STATEMENT OF THE CASE

Appellant Robert Dale Hughes was adjudicated guilty of violating the sex registry law per a bench trial held during the May 2015 term of the York County General Sessions Court before Judge John C. Hayes, III. Appellant was sentenced to imprisonment for a period of five years, suspended upon the service of three years. Phil Smith represented appellant at trial, and Assistant Solicitor Erin Joyner appeared on behalf of the state.

Appellant appealed his conviction and sentence. This brief follows.

ARGUMENT

The trial judge erred in denying counsel's motion to quash the sex registry violation indictment where the state used a third degree CSC with a minor prior emanating from appellant's 1994 plea proceeding as the predicate conviction because this prior was not a crime until our legislature made it a crime on June 18, 2012, which in turn meant that appellant did not have a prior conviction that required him to register as a sex offender.

Appellant appealed his May 12, 2015, conviction of failing to register as a sex offender. On March 3, 1994, appellant pled guilty to third degree CSC with a minor, which was not a crime that existed in South Carolina at that time. Also, note that the sex registry code enacted into law on July 1, 1994, (See S.C. Code. Ann. Section 23-3-430), did not list persons convicted of third degree CSC with a minor as being required to register, again because no such offense existed in South Carolina at that time. The offense of third degree CSC with a minor did not become a crime in South Carolina until June 18, 2012. Therefore, the state used the 1994 non-conviction as the predicate conviction to subject appellant to the sex registry law and indict him for failing to register as a sex offender . In other words, the sex registry applied not to appellant because no predicate conviction existed in his case. As a result, counsel moved to quash the violation of the sex registry indictment levied against appellant. R. 5, l. 18 – R. 7, l. 8. The state argued simply that appellant's prior CSC third with a minor should be treated as a regular and generic third degree criminal conduct sexual conviction. R. 7, l. 6 – p. 9, l. 3. The trial judge agreed with the state's position, denied the motion to quash, and found appellant guilty as charged. R. 20, l. 22 – R. 22, l. 3. This was error.

The issue of SCDC's classification of appellant's prior as a generic third degree CSC to calculate his release date or parole date as the state argued is procedural in nature and quite different

from appellant's present substantive argument regarding the classification of his non-conviction as a predicate conviction for the purpose of indicting him for a crime that carries penal punishment. There can be no creation of constructive offenses because offenses are created by Congress, or in this instance by our state legislature. United States v. Alpers, 338 U.S. 680 (1949). Moreover, although CSC third degree became a legitimate criminal offense by statute (S.C. Code Ann. 16-3-655 (C)) **and also** listed as a trigger offense under the new sex registry law on June 18, 2012; nonetheless, new laws are to be construed prospectively rather than retroactivity. See Edwards v. State Law Enforcement Division, 395 S.C. 571, 720 S.E.2d 462 (2011).

Not all prior convictions become automatic predicate convictions in every case. By analogy, compare United States v. Alston, 611 F.3d 219 (4th Cir. 2010), where the Court held that the defendant's prior 2nd degree assault conviction was improperly used as a predicate conviction to support enhanced sentencing under the ACCA¹ because the facts of this defendant's particular prior for 2nd degree assault did not involve violence. Compare also, United States v. Savage, 542 F.3d 959 (2d Cir 2008), where the Court held that because the defendant entered an Alford plea, the plea colloquy contained no factual admissions on which the government could rely to establish the predicate nature of the prior conviction. Also, see United States v. Randall, 171 F.3d 195 (4th Cir. 2009), where the Court reversed the defendant's firearm conviction because the jury instructions constructively amended the indictment to include an alternate predicate offense that was not the predicate offense charged originally in the indictment since it was the indicted predicate offense that was essential for a conviction on that firearm charge.

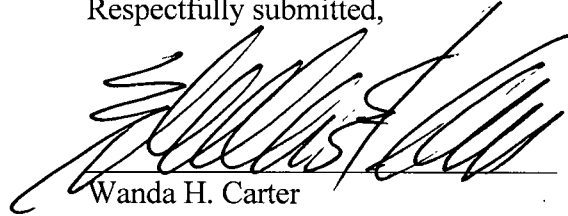
¹ The Armed Career Criminal Act under 18 U.S.C. §922 and § 924 allows for enhanced federal sentencing if the defendant has three prior convictions for a violent felony or a serious drug offense.

Here, appellant's prior predicate conviction was unusable as well since it was a non-conviction because third degree CSC with a minor was not a criminal offense during his 1994 plea proceeding. The absence a prior conviction that would be the equivalent of a predicate conviction requiring appellant to register per the sex registry law meant that the sex registry violation indictment submitted in this case should have been quashed.

CONCLUSION

Based on the argument outlined above, appellant's sex registry violation conviction and sentence should be vacated.

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

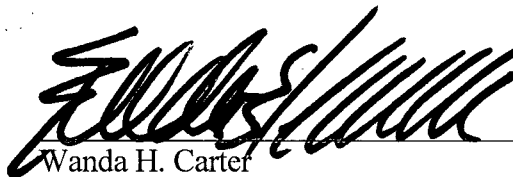
ATTORNEY FOR APPELLANT

This 21st day of March, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

March 21, 2016



Wanda H. Carter
Deputy Chief Appellate Defender

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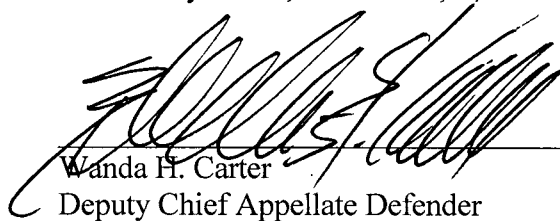
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CERTIFICATE OF SERVICE

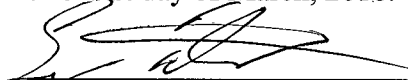
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of March, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of March, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.