STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001073

THE STATE,

Respondent,

v.

ROBERT DALE HUGHES,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion to quash the sex registry violation indictment because the face of the indictment contained no defect, his 1994 plea was to third-degree criminal sexual conduct (which served as a valid predicate conviction requiring sex offender registration), and use of the phrase "with minor" was mere surplusage.

STATEMENT OF THE CASE

In 1994, Appellant was charged with first-degree criminal sexual conduct (CSC) with a minor and pled guilty to third-degree CSC, for which he was sentenced to ten year's imprisonment. (R. 5, lines 18–21; R. 8, lines 15–23.) When he was released from prison, he was required to register as a sex offender in accordance with a statute that was passed later in 1994. (R. 9, line 22–R. 10, line 11.) On May 12, 2015, Appellant appeared at a bench trial before Judge John C. Hayes, III, for violating the sex offender registry by failing to register. (R. 86-96; R. 40.) Judge Hayes initially denied Appellant's motion to quash the indictment and then found him guilty and sentenced him to five years' imprisonment suspended to three years'. (R. 40, lines 21–25.)

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On April 23, 2015, Appellant appeared before Judge John C. Hayes, III, on the charge of failure to register as a sex offender, third offense. (R. 4, lines 16–19.) Appellant moved to quash the indictment, arguing two grounds. First, he argued the sex offender registry did not exist at the time of his guilty plea and, thus, the punishment now imposed on him should not be allowed. (R. 5, line 22–R. 6, line 6.) Second, he argued that because the 1994 version of section 23-3-430 did not list third-degree CSC with a minor as a criminal offense, he was not required to register. (R. 6, lines 7–21.) The State responded that the Walls[1] case determined the sex offender registry did not constitute an ex post facto violation. Although the solicitor agreed with Appellant that no offense of CSC with a minor in the third degree existed at the time of his plea, he argued Appellant actually pled to CSC third degree and that the words "with minor" were merely surplusage to explain the age of the victim. (R. 7, line 6–R. 9, line 3.)

The State supported its position by submitting to the court the sex offender registry preregistration form Appellant signed when preparing to leave the Department of Corrections, which listed Appellant's conviction as "16-3-654 Criminal Sexual Conduct 3rd Degree." (R. 9, line 20–R. 10, line 11; R. 56-57.) In addition, the State gave the trial court a printout from the Department of Corrections' inmate records that showed Appellant's offense listed as "CRIMNAL SEX CNDCT 3RD D." (R. 10, lines 12–17; R.58.) The State further explained that Appellant was represented by counsel at his plea proceeding, a solicitor was present, and a plea colloquy containing a discussion of the elements of the offense and a waiver of rights would have been conducted by the plea judge. (R. 11, lines 1–12.) Therefore, the State argued it was not likely based on those

[1] 348 S.C. 26, 558 S.E.2d 524 (2002).

procedural safeguards that Appellant would have been permitted to plead to an offense that did not exist. (R. 11, lines 13–18; R. 12, line 10–R. 13, line 15.)

The trial court pointed out the indictment itself did include the words "with minor." (R. 12, lines 1-5; Exhibit #1.) At that point, the State argued the extra words were a scrivener's error or surplusage and did not render the indictment invalid. (R. 12, lines 16–18.) The solicitor cited State v. Sosbee, 371 S.C. 104, 637 S.E.2d 571 (Ct. App. 2006), which stated a scrivener's error did not necessarily invalidate a valid conviction. (R. 13, line 16–R. 14, line 17.) Additionally, the State advised the trial court that Appellant had pled guilty three times to failure to register as a sex offender. (R. 14, line 18–R. 15, line 1.) The solicitor handed the trial judge paperwork documenting those convictions. (R. 15, lines 2–25; R. 16, lines 1–7; R. 59-84.) The State explained to the trial court that Appellant had the benefit of counsel on two prior occasions when he pled guilty to failure to register and had never before contested his predicate offense. (R. 16, lines 8–18.) The State then argued that to the extent Appellant actually believed he was not convicted of an offense requiring registration, he should have filed a declaratory judgment action to have his name removed from the registry rather than moved to quash the indictment. (R. 16, line 19–R. 17, line 5.)

Next, the State discussed collateral estoppel in light of State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014), and State v. Snowdon, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006). (R. 17, line 14–R. 19, line 20.) The solicitor argued collateral estoppel prevented Appellant from having the indictment dismissed in light of the fact that he pled guilty to failure to register on three different occasions all based on the same predicate offense. (R. 19, line 21–R. 20, line 1.)

Finally, the State argued the only way to construe the conviction was as a third-degree CSC. (R. 20, lines 2–4.) The solicitor noted the sentence Appellant received was the maximum penalty for that offense, Appellant signed the Notice of Sex Offender Registry form upon release from prison in 1998, which provided notice of the requirement to register as well as notice of the particular predicate offense, and Appellant had never appealed that conviction or sentence. (R. 20, lines 4–18.) The trial judge stated that a motion to quash limited him to the four corners of the indictment, and he found the indictment put Appellant on notice of the offense and that he was required to register and had failed to do so. (R. 20, line 22–R. 21, line 8.) The trial judge denied the motion to quash, relying on the fact that he saw no defect in the indictment. (R. 21, line 25–R. 22, line 1.) However, he indicated Appellant's argument could have been posed as a different type of motion. (R. 22, lines 1–3.)

On May 12, 2015, the State called Appellant's case. (R. 22, lines 8–25.) Appellant waived his right to a jury trial and elected to proceed with a bench trial. (R. 23, line 13–R. 31, line 18.) The State reminded the trial court of its previous arguments regarding why the plea should be construed as third-degree CSC rather than CSC with a minor third. (R. 33, line 14–R. 34, line 3.) After setting forth the same arguments it presented at the pretrial hearing in April, the State concluded its argument by stating that the words "with minor" were either a scrivener's error or a finding of fact by the judge and asked the trial court to find Appellant guilty. (R. 35, line 24–R. 36, line 23.) Despite the State partially basing its argument on the presumption of regularities in the court, the trial judge agreed with defense counsel and did not base his decision on any presumption; rather, he based his decision on the record itself. (R. 37, lines 1–12.) The trial judge again determined the ex post facto argument did not apply here and pointed out that

South Carolina case law had already dealt with that situation. (R. 39, line 14–R. 40, line 6.) While the trial judge noted "[t]he nature of the underlying offense is at the first blush problematic," he found it actually was not because the plea court accepted Appellant's plea "to a criminal sexual conduct." (R. 40, lines 6–9.) He stated:

> Judge Eppes or someone wrote on there with a minor. Whether that was a scribbler's [sic] error or whether [surplusage] it's still a criminal sexual conduct offense, and, the court could not accept – and I'm sure did not accept – and this sort of borders on the presumption of regularity but not exactly – a plea by anyone to a final offense. That is, there had to be a real offense underlying the charge and a real offense for what you were sentencing for, a real offense for which he served time and is required to register. So the fact that the word[s] with a minor are in there and the fact it's listed in the records is not controlling. The controlling aspect of the registration requirement is that he was required to register based on a criminal sexual conduct plea, so I find [Appellant] guilty.

(R. 40, lines 9–23.) Upon finding him guilty, the judge sentenced him to five years' imprisonment suspended to three. (R. 40, lines 24–25.)

ARGUMENT

The trial court properly denied Appellant's motion to quash the sex registry violation indictment because the face of the indictment contained no defect, his 1994 plea was to third-degree criminal sexual conduct (which served as a valid predicate conviction requiring sex offender registration), and use of the phrase "with minor" was mere surplusage.

Appellant argues the trial court erred in denying his motion to quash his sex registry violation indictment because he contends the State used third-degree CSC with a minor as the predicate offense and it was not a crime at the time. First, the State submits the judge correctly found no defect on the face of the indictment and was, therefore, bound by the four corners of the document to deny the motion. Second, the State submits that the actual plea and conviction were for third-degree CSC and that the judge only could have added the words "with minor" simply to reflect that the crime occurred with a minor. These words may be viewed as either surplusage or a scrivener's error or even as a finding of fact by the judge but, regardless, do not amount to the offense not qualifying as a predicate conviction for the purpose of the registry. The trial court properly denied the motion to quash, and this Court should affirm its decision.

"If the objection [to the sufficiency of an indictment] is timely made, the circuit court should evaluate the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense intended to be charged." State v. Tumbleston, 376 S.C. 90, 96-97, 654 S.E.2d 849, 852 (Ct. App. 2007) (citing State v. Gentry, 363 S.C. 93,102-03, 610 S.E.2d 494, 500 (2005) (citing State v. Wilkes, 353 S.C.

462, 465, 578 S.E.2d 717, 719 (2003)). Our appellate courts have determined additional language that appears in an indictment but is unnecessary to the matter may be disregarded as surplusage. State v. Watts, 321 S.C. 158, 167-68, 467 S.E.2d 272, 278 (Ct. App. 1996); State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991); State v. Toliver, 304 S.C. 298, 299, 403 S.E.2d 676, 676-77 (Ct. App. 1991); State v. Alexander, 140 S.C. 325, 138 S.E. 835 (1927).

Here Appellant attempted to challenge the sufficiency of his current indictment by attacking the language written on the indictment and sentencing sheet from his 1994 conviction. Besides the fact that any challenge to the 1994 conviction is untimely, the attack is also misplaced. See Tumbleston, 376 S.C. at 96-97, 654 S.E.2d at 852; S.C. Code Ann. § 17-19-90 (2003) ("A challenge to the sufficiency of an indictment must be made before the jury is sworn."). The current indictment is clearly sufficient because "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and . . . apprises the defendant of the elements of the offense intended to be charged." Tumbleston, 376 S.C. at 96, 654 S.E.2d at 852. Whatever the case, consideration of the 1994 indictment also does not yield Appellant's desired result.

Appellant's argument rests on the addition of the words "with minor" that appear written as part of the plea on the 1994 indictment for first-degree CSC with a minor and on the sentencing sheet, which he maintains indicates the actual plea and conviction were for "third-degree CSC with a minor," an offense that did not exist at that time. In 1994 the statute covering criminal sexual conduct with minors, section 16-3-655, listed each offense as follows: "(1) A person is guilty of criminal sexual conduct in the first degree if

the actor engages in sexual battery with the victim who is less than eleven years of age. (2) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655 (2003). As Appellant pointed out, no third-degree level existed in the statute. However, it is interesting to note that the language in the statute does not even include the words "with a minor" or "with minor." This fact weakens Appellant's argument that these words make the difference between a conviction and a "non-conviction."

Appellant argues "[t]here can be no creation of constructive offenses because offenses are created by . . . our state legislature." He cites United States v. Alpers, 338 U.S. 680 (1949), for this proposition. He then argues, "CSC third degree became a legitimate criminal offense by statute . . . on June 18, 2002; . . . new laws are to be construed prospectively rather than retroactiv[ely]."[2] However, the issue here is not one of prospective versus retroactive application of a statute. The State is not arguing that Appellant pled to third-degree CSC with a minor in 1994 and that because it became a specific statutory offense in 2012 it should retroactively apply and, thus, serve as the predicate offense for Appellant's failure to register charge. Quite the opposite is true; the State is arguing that Appellant pled to third-degree CSC, which was a valid offense in 1994 and served as the predicate offense for Appellant's current failure to register charge. Accordingly, whether "new laws are to be construed prospectively rather than retroactiv[ely]" is of no moment here.

[2] Presumably Appellant intended to write "CSC third degree **with a minor**" here rather than "CSC third degree."

Likewise, Appellant's reliance on United States v. Alston, United States v. Savage, and United States v. Randall is inapposite. Alston and Savage both involved Alford pleas where the Courts found that "the distinguishing feature of an Alford plea is that the defendant does not confirm the factual basis for the plea" and, thus, determined they could not rely on specific facts that could support the predicate convictions. Nothing in the record here indicates Appellant's plea was an Alford plea, so those cases are not applicable. And Randall focused on the proof necessary for one offense versus another to support a firearm conviction.

As the trial court pointed out here, the "controlling aspect of the registration requirement is that [Appellant] was required to register based on a criminal sexual conduct plea." Appellant pled, served his sentence, registered as a sex offender upon release, and had multiple convictions for violating the registry. The trial judge correctly denied his motion to quash and found him guilty, once again, of failure to register.

Additionally, the State submits collateral estoppel is an alternative sustaining ground on which this Court could affirm Appellant's conviction. As the solicitor argued at trial, collateral estoppel prevented Appellant from having the indictment dismissed in light of the fact that he pled guilty to failure to register on three different occasions all based on the same predicate offense. (R. 19, line 21–R. 20, line 1.) See State v. Snowdon, 371 S.C. 331, 334, 638 S.E.2d 91, 93 (Ct. App. 2006) (finding collateral estoppel can be used in criminal proceedings and that it "prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action"). Because Appellant pled guilty to failure to register as a sex offender three previous times, all based on the same predicate offense, the issue of whether it qualified as a valid offense requiring registry was necessarily determined in those prior

plea proceedings. Thus, the doctrine of collateral estoppel prevents him from now raising that issue.

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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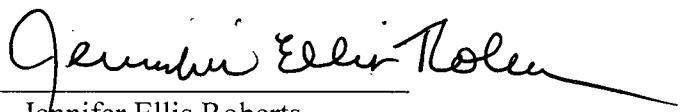
BY: 
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March 10, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent 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 certify that all parties required by Rule to be served have been served. This 10th day of March, 2016.

Angela Bennett

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