

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

R. Lawton McIntosh, Circuit Court Judge

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DEC 18 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RUSSELL ALAN TUPPER,

APPELLANT

APPELLATE CASE NO. 2015-000717

ANDERS BRIEF OF APPELLANT

JOHN H. STROM
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court committed reversible error by failing to redact language in Appellant's indictment for DUI, 4th or subsequent, stating that Appellant had "three prior convictions within a period of ten years," when Appellant stipulated to the jurisdiction of the court pursuant to S.C. Code Ann. § 56-5-2980?

STATEMENT OF THE CASE

On April 7, 2014, the Oconee County Grand Jury indicted Appellant Russell Alan Tupper for: driving under the influence of alcohol (DUI), 4th or subsequent; driving with a suspended license (DUS), 3rd or subsequent offense; and as a habitual traffic offender. R. * (Indictments). Prior to trial, Appellant's indictment for DUS, 3rd was amended to a DUS, 2nd, by agreement of the parties so as to reflect that Appellant had only one prior DUS conviction. R. p. 86, ll. 1 - p. 88, ll. 25.

On March 23-24, 2015, Appellant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. R. p. 1 - p. 243. Russell Warren and W. Wilson Burr represented Appellant. Assistant Solicitor Bethany A. Blundy represented the State. The jury found Appellant guilty as charged. R. 225, ll. 2-24.

The trial court revoked in full Appellant's five year suspended sentence for a prior DUI. R. 232, ll. 4-25. The court then sentenced Appellant to two concurrent terms of five years imprisonment for DUI, 4th, and for the habitual traffic offender violation. R. 241, ll. 6-19. These sentences were ordered to be served consecutive to the completion of Appellant's probation revocation sentence. *Id.* Appellant was also sentenced to six months of probation for the DUS, 2nd. *Id.*

ARGUMENT

The trial court committed reversible error by failing to redact language in Appellant's indictment for DUI, 4th or subsequent, stating that Appellant had "three prior convictions within a period of ten years," when Appellant stipulated to the jurisdiction of the court pursuant to S.C. Code Ann. § 56-5-2980.

Relevant Facts

Oconee County 911 center received a call at 8:30 a.m. stating that a vehicle had driven off of Armstrong road located outside of Westminster and that multiple people were standing around the accident scene, but that there were no apparent injuries. R. p. 175, ll. 7-25. South Carolina Highway Patrolman Michael Taylor was dispatched to accident scene.

Oconee County 911 operators received a second call about the accident at 9:14 a.m. from William Gravley also advising them of the accident. R. p. 135, ll. 1 - p. 137, ll. 22. Gravley, a school district maintenance employee, was traveling between schools when he saw Appellant standing on the side of the road. Nearby a vehicle was resting in the adjoining woods about forty feet from the apex of a sharp curve in the road. R. p. 135, ll. 8 - p. 136, ll. 23; R. p. 143, ll. 1-9.

Gravley would claim at trial that Appellant had told him "he had ran out of the road [and] missed the curve." R. p. 136, ll. 5-14. Appellant also allegedly asked Gravley to take him to his mother's house. *Id.* Gravley declined and, instead, called 911. *Id.* Gravley would also claim at trial that Appellant had a quiet, slow demeanor and talked very slowly. R. p. 136, ll. 20 - p. 137, ll. 8.

Patrolman Michael Taylor arrived at the scene of the accident only a few minutes after Gravley, as he was dispatched after the first 911 call. R. p. 175, ll 7 - 176, ll. 4. When Taylor arrived, Appellant was sitting in Gravley's truck. R. p. 176, ll. 2-22. Other than Gravley and Appellant there was nobody else at the accident scene. *Id.*

Taylor, who was familiar with Appellant's driving record, claimed he immediately noticed a strong odor of alcohol on Appellant and took him into custody. R. p. 149, ll. 3-21. At trial, Taylor maintained that Appellant eventually admitted that he had been drinking heavily. *Id.* Taylor did not ask Appellant to perform any field sobriety tests, alleging that "I felt like he was too intoxicated to be even attempting these tests." R. p. 159, ll. 3-23.

Taylor also averred that because the accident was located near a sharp curve in the road it would have been too dangerous to administer the tests. *Id.* Taylor would testify at trial that Appellant was "passing out" in the back of his patrol car after being arrested. R. p. 161, ll. 3-20. Nevertheless, he did not believe Appellant needed to be inspected by EMS. *Id.* Appellant purportedly refused a breathalyzer test. R. p. 161, ll. 19 - p. 165, ll. 24.

Pre-Trial Stipulation Regarding Evidence of Prior DUIs

Prior to trial, the State and the defense agreed to stipulate that Appellant had been convicted of the necessary predicate offenses in order to be charged as a habitual traffic offender. R. p. 115, ll. 11-23. At first, the State sought to introduce evidence of Appellant's prior DUIs to prove that Appellant qualified as a habitual traffic offender. R. p. 90, ll. 13 - p. 104, ll. 16; *see also* S.C. Code Ann. § 56-1-1100.

Defense counsel objected to any reference to prior DUIs, noting that Appellant had stipulated to the trial court's jurisdiction, thus preventing the State from submitting evidence of the prior DUIs. *Id.* Counsel specifically referenced § 56-5-2980, which holds that "if the defendant stipulates that the charge constitutes a second or subsequent offense, ***the indictment shall not contain allegations of prior offenses and evidence of such prior offenses must not be introduced.***" (*emphasis added*).

The trial court concluded that the State could not introduce evidence of the prior DUIs in order to prove Appellant's habitual traffic offender status. *Id.* Instead, the defense and the State agreed that Appellant is a habitual traffic offender, that his license was suspended at the time of the accident, and "the main issue that's going to be decided at trial today is whether or not he was driving" and impaired. R. p. 115, ll. 11-23

Trial

Gravley and Taylor were the only two witnesses at trial. Taylor testified that because of a malfunction with his patrol car's camera there was no video of Appellant being read his *Miranda* rights or of his conduct during the investigation. R. p. 152, ll. 5 - 157, ll. 9. Taylor also testified that he inspected the wrecked vehicle and believed that the driver's side seat was in a position that would accommodate a driver of roughly the same height as Appellant. R. p. 151, ll. 3-17.

Taylor stated that the car was registered to Appellant's mother. R. p. 148, ll. 11-25. On cross-examination, Taylor conceded that the initial 911 call indicated that multiple people were at the accident site, but that once he reached the area, only Appellant and Gravley were present. R. p. 173, ll. 4 - p. 176, ll. 22. Further, Taylor admitted that he did not personally observe Appellant driving the car and Appellant never told him that he was driving the car. R. p. 168, ll. 9 - p. 169, ll. 21.

Verdict and Sentencing

The State rested after Taylor's testimony. Appellant did not present any evidence and the defense's motion for a directed verdict was denied. R. p. 183, ll. 16 - p. 188, ll. 23. Following closing arguments, the trial court charged the jury. R. p. 206, ll. 4 - p. 224, ll. 11. The jury was then provided with the indictments and exhibits and began their deliberations. *Id.*

Crucially, the indictment for DUI, 4th or subsequent offense, included the following language: "Russell Alan Tupper did . . . drive a vehicle while under the influence of alcohol and/or other drug or a combination of drugs and/or substances which cause impairment; *having three prior convictions within a ten year period.*" R. p. (Indictment) (*emphasis added*). After forty-five minutes of deliberations, the jury found Appellant guilty of all charges. R. p. 224, ll. 19 - p. 225, ll. 24.

Discussion

South Carolina Code Laws Ann. § 56-5-2930 prohibits driving a vehicle while under the influence of intoxicating substances. Circuit courts only acquire jurisdiction after a first offense, and an indictment must allege a prior offense to properly allege jurisdiction. *See Tyler v. State*, 247 S.C. 34, 145 S.E.2d 434 (1965); *see also State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991) (the State is required to allege jurisdiction in the indictment).

However, under S.C. Code Ann. § 56-5-2980, a defendant charged with a DUI is entitled to stipulate that the charge is a second or subsequent offense in order to prevent any allegations of the prior offenses from being introduced to the jury either in testimony or by the indictment. Accordingly, the trial court committed reversible error by allowing the DUI, 4th or subsequent offense, indictment to be presented to the jury without having the reference to "three prior convictions" redacted.

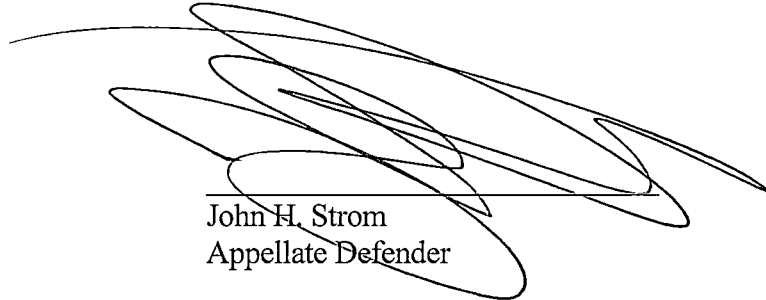
When the State and defense counsel agreed to stipulate to jurisdiction, and the judge accepted, the DUI indictment needed to be redacted. As it was not redacted, the prohibited language concerning Appellant's prior DUIs became nothing more than improper, unduly prejudicial evidence of prior bad acts.

The only issues in Appellant's case were whether or not Appellant was driving and whether or not Appellate was impaired. R. p. 115, ll. 4-23. The entire jury trial was tainted by evidence of Appellant's prior offenses; evidence which should have been excluded pursuant § 56-5-2980, Rule 403, SCRE, and improper under Rule 404(b), SCRE. Cf: *State v. Anderson*, 318 S.C. 395, 458 S.E.2d 56 (1995) (under prior statute the failure to sever charges of DUI and DUS from charge as a habitual traffic offender was not abuse of discretion as the State's refusal to stipulate to trial court's jurisdiction over DUI and DUS charges resulted in the prior convictions underlying habitual offender charges being admitted to prove jurisdiction). Thus, the conviction, and contingent probation revocation, improperly stands in violation of appellant's constitutional rights. U.S. Constitution Amend. 5, 6 and 14, S.C. Constitution Art. I., Sec. 11, 13 and 14.

CONCLUSION

Based on the foregoing argument, Appellant Russell Alan Tupper respectfully requests his conviction and concurrent probation revocation be vacated.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of December, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

December 18, 2015



(Insert Appellate Defender Name)
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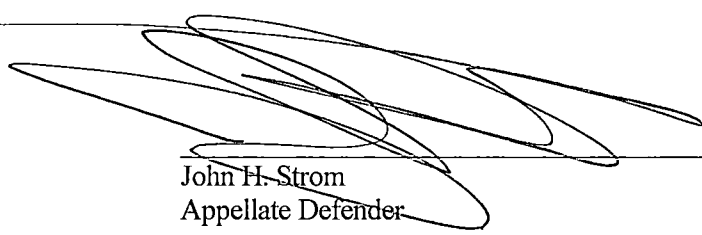
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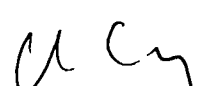
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant have been served on Russell Alan Tupper, #297400 at Perry Correctional Institution, this 18th day of December, 2015.


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of December, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025