

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ROBERT DALE HUGHES,

APPELLANT

APPELLATE CASE NO. 2015-001073

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2017-UP-029

PETITION FOR REHEARING

RECEIVED

JAN 26 2017

SC Court of Appeals

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing in the above titled appeal because this Court's holding that the state's indictment satisfied the proper notice and sufficiency requirements suggested that it inadvertently overlooked the substantive argument on appeal, which was that appellant's indictment should have been quashed as a **matter of law** since the charge of failing to register as a sex offender was not a crime that existed in this case as no predicate prior conviction existed to support said offense charged in the case. In support of this petition, counsel would submit the points that follow.

1.) 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.

2.) On appeal, appellant raised the following issue before this Court:

The trial judge erred in denying counsel's motion to quash [the 2015] 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.

3.) This Court affirmed on appeal based on the following case law.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007) ("The trial [judge]'s factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) ("The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the [trial judge] to know what judgment to pronounce if the defendant is convicted."); State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952) ("The true test of the sufficiency of an indictment is . . . whether it contains the necessary elements of the offense intended to be charged[] and sufficiently apprise[s] the defendant of what he must be prepared to meet.").

4.) However, this Court might have misinterpreted appellant's claim as attacking the notice or sufficiency requirements of his indictment when to the contrary, the argument was that the indictment should have been quashed as a **matter of law** because it contained no crime charged within. In other words, appellant's prior predicate conviction from 1994 was unusable as it was a non-conviction in that degree CSC with a minor was not a criminal offense during that 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 as a **matter of law**.

5.) On March 3, 1994, appellant pled guilty to third degree CSC with a minor. 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 plea as the predicate conviction to subject appellant to the sex registry law and indict him for failing to register as a sex offender in 2015. In other words, the sex registry applied not to appellant because no predicate conviction existed in his case. As a result, counsel moved in effect as a **matter of law** 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 on May 12, 2015. . R. 20, l. 22 – R. 22, l. 3. This was error and appellant appealed.

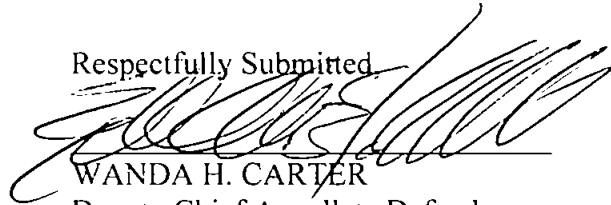
6.) The issue of SCDC’s classification of appellant’s prior as a generic third degree CSC to calculate his release date or parole date as the state argued is procedural in nature and quite different from appellant’s present substantive argument regarding the classification of his non-conviction as a 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).

7.) 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.

WHEREFORE, based on the foregoing points, appellant would request a rehearing on the issue of whether the indictment in question should have been quashed as a **matter of law** for charging a crime that did not exist and could not be cured via findings that the proper “notice” and “sufficiency” requirements were satisfied.

Respectfully Submitted

WANDA H. CARTER
Deputy Chief Appellate Defender

This 26th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Robert Dale Hughes, at 609 Trailmaster Drive, Rock Hill, SC 29730, this 26th day of January, 2017.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day of
January, 2017.


(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.