

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
Honorable Roger L. Couch, Circuit Court Judge  
Appellate Case Tracking No. 2016-001407

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The State,

Respondent,

vs.

Tony Randall Lewis,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....ii

STATEMENT OF ISSUES ON APPEAL .....1

STATEMENT OF THE CASE.....2

ARGUMENT .....3

    I.    The trial court properly sentenced Appellant for first offense failure to register on the sex offender registry after he was convicted in a bench trial.3

CONCLUSION.....7

## TABLE OF AUTHORITIES

### Cases

<u>Nichols v. United States</u> , 511 U.S. 738 (1994).....	3
<u>Scott v. Illinois</u> , 440 U.S. 367, 373–74 (1979).....	3
<u>State v. Haselden</u> , 353 S.C. 190, 577 S.E.2d 445 (2003) .....	6
<u>State v. Scriven</u> , 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000) .....	4
<u>State v. Spratt</u> , 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009) .....	3
<u>State v. Stahlnecker</u> , 386 S.C. 609, 690 S.E.2d 565 (2010) .....	6

### Statutes

S.C. Code Ann. § 22-3-540 (Supp. 2016).....	6
S.C. Code Ann. § 22-3-545 (Supp. 2016).....	6
S.C. Code Ann. § 22-3-550 (Supp. 2016).....	4, 6
S.C. Code Ann. § 23-3-470 (Supp. 2016).....	4, 5, 6

## STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly sentenced Appellant for first offense failure to register on the sex offender registry after he was convicted in a bench trial.

## **STATEMENT OF THE CASE**

The State agrees with Appellant's procedural Statement of the Case.

## ARGUMENT

### I. **The trial court properly sentenced Appellant for first offense failure to register on the sex offender registry after he was convicted in a bench trial.**

Appellant contends the trial court erred in failing to direct a verdict of acquittal on the charge Appellant failed to properly register on the sex offender registry. Appellant's contention his prior uncounseled conviction required acquittal on the current charge confuses a directed verdict with the unconstitutionality of using the prior conviction for sentence enhancement. The trial court properly found Appellant could not be sentenced under the provisions of section 23-3-470 of the South Carolina Code as a second offense. The trial court also found the provision for sentence enhancement related to the number of the offense was not an element and, therefore, a directed verdict was not appropriate. Finally, any argument the trial court needed to remand the case to magistrate court is not preserved for review on appeal and because jurisdiction was proper in the circuit court it is entirely without merit.

The United States Supreme Court has held: "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Scott v. Illinois, 440 U.S. 367, 373-74 (1979). The Court then extended the ruling holding: "The Sixth and Fourteenth Amendments to the United States Constitution prohibit a prior uncounseled conviction resulting in a sentence of imprisonment from being used to **enhance the punishment** for a subsequent conviction." State v. Spratt, 383 S.C. 212, 213, 678 S.E.2d 266, 267 (Ct. App. 2009) (citing Nichols v. United States, 511 U.S. 738 (1994)) (emphasis added).

The statute pursuant to which Appellant was indicted reads:

(A) It is the duty of the offender to contact the sheriff in order to register . . . . If an offender fails to register, . . . as required by this article, he must be punished as provided in subsection (B).

(B)(1) A person convicted for a first offense is guilty of a misdemeanor and may be fined not more than one thousand dollars, or imprisoned for not more than three hundred sixty-six days, or both. Notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, or any other provision of law, a first offense may be tried in magistrates court.

(2) A person convicted for a second offense is guilty of a misdemeanor and must be imprisoned for a mandatory period of three hundred sixty-six days, no part of which shall be suspended nor probation granted.

(3) A person convicted for a third or subsequent offense is guilty of a felony and must be imprisoned for a mandatory period of five years, three years of which shall not be suspended nor probation granted.

S.C. Code Ann. § 23-3-470 (Supp. 2016). Subsection A of the statute sets for the elements of the crime. It requires 1) a duty to contact the sheriff to register and 2) a failure on the part of the individual to register. These are the only elements of the crime established by the legislature. Subsection B merely provides the penalties and includes sentence enhancement for a second and subsequent offense. The indication of a defendant's violation being a second or subsequent offense is not required in the indictment and is not required to be proven at trial until the sentencing phase when it would be used for enhancement purposes. See e.g., State v. Scriven, 339 S.C. 333, 338, 529 S.E.2d 71, 73 (Ct. App. 2000) ("Scriven was charged and convicted of violating S.C. Code Ann. § 44-53-370. This section makes it illegal to distribute marijuana and cocaine. Although it contains provisions for **sentence enhancement** upon conviction for a second or greater offense, these provisions are **not elements** of the offense." (Emphasis added)).

Accordingly, the trial court properly denied Appellant's motion to direct a verdict of acquittal based on the fact it found Appellant's prior conviction for failing to register was an uncounseled conviction. Instead the trial court properly refused to consider the offense for purposes of sentence enhancement. Appellant's counsel, while previously moving for an acquittal, acknowledged the cases indicate that the prior conviction simply cannot be used for enhancement. The following colloquy occurred:

Q. Well, Mr. Anderson, I think you were saying, in quoting those cases or using them for the proposition that if he's uncounseled, . . . that that can not be used - - that conviction can not be used for enhancement. That's what you say that case says.

A. Yes, judge, because he was sentenced to jail time. So he got - - it was a fine or 30 days. He already served part of the 30 days cause he's been arrested.

.....  
A. So those cases say that if you are sentenced to imprisonment, an uncounseled conviction can not be used to an - - for an enhancement.

(3/16T.48; R.48). As a result, the trial court correctly found "the existence of a prior conviction for failure to register is not an element of the indicted offense," but "merely a fact that alters the potential punishment." (March 28 Order p.2; R.108). The trial court properly denied the motion for an acquittal and determined it was appropriate to "sentence him in accordance with the penalties associated with a first failure to register"—sentencing Appellant to six months, which is clearly within the sentencing range for a first offense failure to register. (March 28 Order p.2-3; R.108-09); see also S.C. Code Ann. § 23-3-470(B)(1).

Appellant also seems to make the argument that the circuit court should have referred the case to the magistrate court once he determined the current offense would be considered a first offense for sentencing purposes. The argument is not preserved for review on appeal because Appellant never asked the circuit court to send the proceedings to the magistrate court. See State

v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.”); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Further, the issue is entirely without merit. According to section 23-3-470(B)(1): “Notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, or any other provision of law, a first offense **may** be tried in magistrates court.” S.C. Code Ann. § 23-3-470(B)(1) (Supp. 2016) (emphasis added). The statute makes it clear the circuit court has jurisdiction over a trial for a first offense, or the magistrate **may** hear the trial if it is brought in magistrate court. In the instant case, the charge was brought in circuit court, where it was entirely proper.<sup>1</sup>

Accordingly, the trial court properly denied Appellant’s motion for a directed verdict of acquittal. The trial court properly retained jurisdiction over the case, and properly sentenced Appellant within the range provided for by section 23-3-470(B)(1). As a result, Appellant’s conviction and sentence should be affirmed.

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<sup>1</sup> It should be noted the language of section 23-3-470(B)(1) is important because it has to specifically exclude the first offense failure to register from the sections establishing jurisdiction of the magistrate court in order to even allow the offense to be heard by a magistrate. Section 22-3-540 gives magistrates exclusive jurisdiction over all criminal cases where the punishment does not exceed a \$100 fine or thirty days imprisonment. Section 22-3-545 states cases involving crimes punishable by no more than \$5,000, one year imprisonment, or both may be transferred from general sessions to magistrate’s court. The punishment for a first offense failure to register can be up to 366 days, or greater than one year. As a result, the offense could not be heard in magistrate court at all without the specific provision of the statute allowing it to be heard by a magistrate.

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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April 24, 2017

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent 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."

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