STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN KENNETH MASSEY, JR.,

APPELLANT

APPELLATE CASE NO. 2015-002563

FINAL REPLY BRIEF OF APPELLANT

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Statement of Facts

As an initial matter, several points discussed in the Statement of Facts portion of Respondent's brief require response with specific reference to the record.

In his brief, Respondent asserted that "Fairfax further stated his four-wheeler could easily be moved in the condition it was in at the time of the crime by a man simply pushing it and noted the vehicle had only been moved approximately one-hundred-fifty feet when it was discovered in the ditch." BOR at 10. This requires full context to understand how Fairfax's testimony concerning the portability of the four-wheeler was relevant. In response to questioning by the solicitor regarding the condition of the four-wheeler *after* the alleged attempted theft, Fairfax stated that when he went to start the four-wheeler to move it, "it was in first gear." R. 181, ll. 12-17. When the solicitor asked for further explanation, Fairfax stated that when he parked his ATV, he "would purposely leave it in gear to make it *harder* to move." R. 181, ll. 18-20 (emphasis added). He then added "it was still easily moved with a grown man trying to push on it," however. R. 181, ll. 21-22. At first blush, Fairfax's testimony appears somewhat contradictory. Nevertheless, the two statements may be squared by inferring that Fairfax meant that a four-wheeler left in gear, as his was, was harder to move than a four-wheeler left in a neutral gear or out of gear, but that it would be *possible* to move a four-wheeler, even if it were in gear. At any rate, Fairfax's comment about the four-wheeler being "easily moved with a grown man trying to push it" must be read in conjunction with his earlier testimony that he left the four-wheeler in gear to make it *harder* to move and the four-wheeler was *still* in gear when he looked at it *after* the alleged attempted theft.

Appellant presented evidence through his girlfriend, Joy Valverde, that he had a tumor removed from his buttocks around the time of his arrest. R. 273, ll. 7-12. Respondent conceded the presentation of this evidence, but emphasized Valverde's testimony that the surgery was not "right close" to the time of the arrest. BOR at 4 n. 6. Appellant's condition at the time of the arrest must not be minimized. Valverde explained that at time of his arrest, Appellant had a "drain" in his hip as part of his post-surgical medical care. R. 273, ll. 7-12; R. 273, ll. 18-20. Photographs were admitted showing (1) the tumor prior to surgery, (2) the area after the surgery, including the incision and where one of the staples had ripped out leading to an infection, and (3) the drain. R. 277, ll. 11-19; Defendant's #3. Valverde testified unequivocally that although she was unsure of the *exact* date of Appellant's surgery, she was certain he was still under medical treatment at the time of his arrest. R. 277, l. 23 – R. 278, l. 5. Even while Appellant remained in the county jail, he was undergoing medical treatment, including going to doctors' appointments. R. 278, ll. 6-9.

In its brief, Respondent stated Appellant "candidly apologized to the victim for his actions." BOR at 13. While Appellant did apologize to Fairfax, Appellant did not admit guilt and his apology should not be construed as an admission of guilt. R. 365, ll. 5-12. Appellant said, "I'm sorry for what I've done. You [pray] for me and I pray for you. ... I'm a bigger man today to say that I am sorry, and I have not [done] the correct things throughout my life and my record has reflected that. I'm sorry." R. 365, ll. 6-12.

Issues Presented

I. The trial judge erred in permitting Appellant to proceed *pro se* where the judge failed to ensure Appellant understood the dangers and disadvantages of self-representation and the record does not disclose that Appellant had sufficient background to intelligently waive his right to counsel or was apprised of his rights by some other source.

Both sides agree that one of the factors relevant for this Court's consideration on this issue is Appellant's prior experience with the criminal justice system. Appellant concedes he has an extensive criminal history; however, Appellant maintains his trial experience was *very* limited. In his brief, Appellant noted the record contained evidence of only one instance in which he had gone to trial. BOA at 16. This evidence was the sentence sheet for a shoplifting charge that resulted in a sentence on March 31, 2015. BOA at 16; R. 382-453. In his brief, Appellant explained that "[a]lthough the sentence sheet identified Hogge as the prosecutor, there was no indication that Appellant was represented by counsel during the proceeding." BOA at 16; R. 382-453. Respondent contended, however, the sentence sheet "demonstrate[d] that Appellant was represented by counsel at that time because it contained the South Carolina bar number of the attorney who represented him during those earlier proceedings." BOR at 18 n. 26.

Appellant concedes that Respondent is correct that the sentence sheet for the March 31, 2015, conviction lists the bar number for an attorney, but Appellant disputes the bar number demonstrated he was represented by counsel. The listing of the bar number does *not* prove that the attorney associated with that bar number, or that any attorney, represented Appellant at the prior trial. The number was typed onto the sheet by an unknown party at an unknown time. There was no proof presented or offered to show that an attorney had represented Appellant at the prior trial. A comparison of the sentence sheet from the prior trial with the sentence sheets

for the offenses in the instant matter further illustrate the fallacy of the contention that the bar number on the prior sentence sheet *proves* Appellant was represented by counsel. The sentence sheets for the instant offenses also have the same bar number typed onto them, and the transcript before this Court irrefutably demonstrates that Respondent relieved counsel and represented himself. R. 462; R. 465. Thus, the typed bar number on the prior sentence sheet provides very little, if any, evidence to support the contention that Appellant was represented by counsel at the prior trial.

Respondent also cited to the York County Clerk of Court records for Appellant available in the Public Index online. Appellant concedes the online records show an attorney represented him, but Appellant maintains those records alone do not prove that he was represented by an attorney at the prior trial. The online records were created by an unknown person at an unknown time and their authenticity have not been tested or proven. Appellant urges this Court not to consider evidence beyond the scope of what was presented and known to the trial judge or unauthenticated evidence.

II. The trial judge erred in permitting expert testimony concerning dog-tracking where the state failed to prove the dog's reliability in accordance with *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).

In his brief, Respondent cited State v. Barger, 612 S.W.2d 485 (Tenn. Crim. App. 1980) for the proposition that although there were no reported cases of a dog tracking in reverse in 1980, the Tennessee Court found the evidence admissible in light of the foundation presented by the state. BOR at 30. Appellant is also unaware of any reported cases discussing the admissibility and reliability of dog tracking evidence when the dog tracks in reverse – from hot to cold, or from the suspect. This dearth of legal analysis demonstrates the rarity of dog handlers utilizing their dogs in this way as well as the rarity of such evidence being deemed sufficiently reliable to be admitted as evidence during trials. In addition to the reasons outlined in Appellant's brief, Hattie's lack of training and experience with reverse tracking cannot be overstated in the calculus rendering the evidence inadmissible.

Both parties agree that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) controls the outcome of this issue. In White, the Court adopted the following evidentiary framework concerning dog tracking evidence, providing that the admission of such evidence is established if

> (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.

Id. at 272, 676 S.E.2d at 687. According to the training logs and the undisputed evidence, Hattie had never "reverse tracked." This lack of experience and training alone rendered Hattie's track in this case unreliable. Hattie had not been trained to follow a scent in this way. Hattie had been trained to follow a scent from cold to hot, not hot to cold. The only training Hattie had in a

reverse track occurred on the day of Appellant's arrest – in fact, the training on a reverse track was only a few hours *after* Hattie was called to the scene of Appellant's arrest. The state could not prove reliability of Hattie's tracking because she had no prior experience with tracking of that nature and had not been trained to track in that way.

III. The trial judge erred in failing to credit Appellant with time served in pre-trial detention awaiting disposition of the charges in direct contravention of the mandatory statutory provision and controlling case law.

Both parties agree the Supreme Court's case of Allen v. State, 339 S.C. 393, 529 S.E.2d 541 (2000) guides this Court's determination of this issue. Respondent contends that "because Appellant was held in custody on unrelated charges committed while he was out on bond, which nothing in the record suggests was ever revoked, and not on the charges involved in the matter currently before the appellate court, Appellant was not serving any time on the charges involved in his appeal while he was incarcerated on the other charges, and thus, was not entitled to any credit towards his sentence for that time." BOR at 33. In support of the contention that it was necessary that Appellant's bond on the instant charges be revoked in order for him to receive credit for time served, Respondent cited a portion of the Allen decision in which the Supreme Court noted that Allen's "bond was revoked on the first set of charges" and "[h]e was, therefore, clearly in custody on **all** charges" during the relevant time period. BOR at 35 (emphasis in original). In a footnote, Respondent remarked that "if the revocation of Allen's bond on the first set of charges was irrelevant to the analysis in regard to his entitlement to credit for time served, there would have been no reason for it to be discussed in the Supreme Court's opinion in Allen's case." BOR at 35 n. 30. Thus, it is Respondent's contention that in order for Appellant to receive credit for time served, it was necessary for his bond to be revoked on the instant charges. Appellant respectfully disagrees.

An examination of the controlling statute demonstrates that the revocation of bond is unnecessary. Section 24-13-40 of the South Carolina Code provides:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the

> sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In **every case** in computing the time served by a prisoner, full credit against the sentence **must be given for time served prior to trial and sentencing**, and may be given for any time spent under monitored house arrest. Provided, however, **that credit for time served prior to trial and sentencing shall not be given**: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) **when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.**

(emphasis added). The language of the statute mandates credit for time served *unless* the statutory exceptions apply. Respondent conceded "none of the exceptions delineated in Section 24-13-40 were applicable to Appellant's case" regarding the period of time in question. BOR at 36. However, Respondent argued "Appellant was not entitled to credit for time served" for the questioned time period because "there is no evidence in the record establishing Appellant's bond on the indicted charges was ever revoked at any point following his re-arrest on the subsequent charges." BOR at 36. Respondent's argument runs counter to the clear and mandatory language of the statute.

Also, Respondent's argument must fail because if the state had not revoked his bond on the instant charges, then Appellant was powerless to force the state to do so, and the state would hold the keys to the jailhouse doors, not Appellant. If the statute mandating credit for time served required revocation of bond in this situation and if Appellant's bond on the instant charges had not been revoked, which the state had no reason to seek to revoke the bond in light of the other pending charges, then the state would be permitted to manipulate the statutory scheme and deny an individual credit for time served to which all agreed he was entitled. Appellant would have no ability to ensure he received the credit to which the Legislature by

enacting the mandatory statute determined he was entitled. The state should not be permitted to manipulate the criminal justice system to such a degree.

Additionally, there *was* evidence in the record that Appellant's bond on the charges of malicious injury to property and grand larceny had been revoked, or, at a minimum, there was the perception that his bond had been revoked. On October 30, 2015, Appellant appeared before the Honorable John C. Hayes, III, regarding a motion in the case. R. 1. Hogge appeared on behalf of the state. R. 1. Phil Smith appeared on Appellant's behalf. R. 1. The solicitor explained that Appellant had been convicted of shoplifting on March 31, 2015, and that Judge Hayes had sentenced him to three years' imprisonment at that time. R. 2, ll. 4-8. Appellant "completed that three years" and returned to "the York Detention Center awaiting trial for burglary in the first degree on 2014-GS-46-781; criminal conspiracy, 780; grand larceny, 782 and another incident 2013-GS-46-3508 for grand larceny enhanced and 3509 for malicious injury to personal property enhanced." R. 2, ll. 8-13.

Appellant told Judge Hayes he had "been incarcerated since December 30th, 2013," and that one of his pending cases was "over two and a half years old" as it was indicted on October 17, 2013, and that the other case was "like two years old." R. 3, ll. 12-17. According to Appellant he had "been incarcerated here or incarcerated the whole time." R. 3, ll. 17-18. Appellant argued he had not "been issued a bond or a bond hearing." R. 3, ll. 18-19. Appellant complained that his "main issue" was "having a bond hearing." R. 4, l. 19. Appellant also explained he had been back at the local jail since August 26, 2015. R. 4, ll. 3-5. During this hearing, Smith, Appellant's counsel at the time, stated there was "another set of charges that [he] believe[d] his bond was revoked due to his other arrest." R. 8, ll. 10-24. The judge then expressed his understanding was that Appellant was "in on a revoked bond on another charge."

R. 9, ll. 6-9. Based on these exchanges, it appeared Appellant's bond had been revoked on the instant charges.

In Appellant's brief, Appellant stated the "solicitor also indicated he had offered Appellant 'a time-served sentence,' which would 'allow him the credit for the three years, the three years to run concurrent and that - - and - - to run concurrent to the three year sentence he got on the shoplifting." BOA at 33 (citing R. 369, ll. 13-21). Appellant further stated "it appeared the solicitor was arguing that Appellant was entitled to receive credit for time served on his grand larceny and malicious injury to property sentences, including the time after his arrest for shoplifting, but only if Appellant entered guilty pleas to all of the charges." BOA at 33. Respondent contended that "nothing in the record from the sentencing proceedings establishes the solicitor ever made such an offer. BOR at 33 n. 29 (citing R. 357 - R. 369). According to Respondent, "the record establishes a **circuit court judge** who later recused himself from Appellant's case indicated he was inclined to sentence Appellant to time served on the charged offenses if he was willing to plead guilty." BOR at 33 n. 29 (citing R. 366)(emphasis in original). In no way was Appellant attempting to mislead this Court regarding the plea negotiations in the case. If Appellant's reading of the transcript was in error, then it was an honest error and not an attempt to mislead. A review of the entire exchange may shed light on why the briefs appear to express opposing viewpoints.

When Appellant was addressing the trial judge on sentencing, he said the state never offered him an "actual plea on this charge." R. 365, ll. 22-23. His understanding was that he had to go to trial. R. 365, ll. 23-24. According to Appellant, after he relieved his defense counsel, the trial judge suggested the parties "come up with some type of agreement." R. 364, l. 24 – R. 365, l. 2. Appellant stated the solicitor never spoke to him about "any type of agreement that day

or within the past two years." R. 366, ll. 2-4. Thereafter, the solicitor stated there had been a plea offer extended by Appellant for "seven years for everything," which the solicitor had accepted. R. 366, ll. 5-8. Then, Appellant "changed and tried to alter that offer," which the solicitor refused to entertain. R. 366, ll. 8-10. When Appellant's case was called before a different judge, who had to recuse himself, that judge, according to the solicitor, "said that he'd be inclined to sentence him to time-served if he would take that." R. 366, ll. 5-16. The solicitor claimed he then "heard back" that Appellant "would not plead to anything." R. 366, ll. 16-17.

The trial judge returned to Appellant for additional sentencing consideration, and Appellant stated he was "never informed about a time-served charge (sic)." R. 368, ll. 1-2. The solicitor then asked for an opportunity to "clear one thing up on the record." R. 368, ll. 13-14. Thereafter, the solicitor stated,

> As to his offer last time, I said that it was a time-served sentence that he could've done, I believe that the way it was actually phrased is that he could get essentially a time-served sentence and allow him the credit for the three years, the three years to run concurrent and that - - and - - to run concurrent to the three [year] sentence he got on the shoplifting. I didn't want to mislead or misstate anything.

R. 368, ll. 14-21. In the brief, Appellant was referring to this portion of the transcript in which the solicitor referred to a plea "offer" in exchange for time-served. BOA at 33 (citing R. 368, ll. 13-21). In light of the solicitor using the term "offer," Appellant construed the solicitor's statement to the trial judge on this point to refer to *an actual plea offer extended by the solicitor.* While a judge may indicate to the parties what his sentencing inclinations are in a given case, a judge may *not* extend a plea offer. If Appellant misinterpreted the transcript, it was an honest misinterpretation based on the language used – "offer" – and there was no intent to mislead this Court.

Nevertheless, the relevance of the solicitor's statements to the trial judge during sentencing regarding this matter was that the solicitor appeared to adopt an interpretation of the statute regarding credit for time served to permit Appellant to receive credit for all of the time he served during pre-trial detention, but only if Appellant entered guilty pleas to all of the charges. It was only when Appellant insisted on going to trial on the charges did the solicitor argue that he was not entitled to all of the time he served during pre-trial detention.

In his brief, Appellant stated he was "arrested on shoplifting charges on December 19, 2013." BOA at 36. This was an error, and there was no intent to mislead this Court or Respondent. The shoplifting charge arose on December 19, 2013, but Appellant was not arrested on the charge until December 30, 2013. Earlier in the brief, Appellant correctly stated Appellant was arrested on December 30, 2013, and that the charge arose on December 19, 2013. BOA at 33. After making this error, Appellant miscalculated the time served as starting on December 19, 2013, but it should have started On December 30, 2013. Thus, Appellant was entitled to credit for the time he spent in jail from December 30, 2013, until his trial on the shoplifting charge on March 31, 2015, a total of 456. When adding this number to the number of days for which the state did not dispute Appellant was entitled, he should receive credit for 555 days.

Appellant requests this Court hold that in order to receive credit for time served as mandated by the statute, it was *not* necessary for Appellant to show his bond on the instant charges had been revoked. Following such a holding, this Court should remand for sentencing hearing where Appellant would receive credit for time served. To the extent, this Court determines a showing of a bond revocation was necessary, Appellant respectfully requests a remand to permit the parties to present evidence on the matter.

CONCLUSION

Concerning Issues I and II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. Concerning Issue III, Appellant respectfully requests this Court remand the matter to the trial court for a new sentencing proceeding so that Appellant may receive credit for the time he served in pre-trial detention in accordance with the mandatory provisions of the statute and controlling case law.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of May, 2017.

CERTIFICATE OF COUNSEL

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

May 8, 2017

Susan B. Hackett

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