

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas

OCT 16 2017

G. Thomas, Cooper, Jr., Circuit Court Judge S.C. SUPREME COURT

Appellate Case No.: 2017-001350

Billy Joe Griggs #124983,..... Petitioner,

vs.

State of South Carolina, .....Respondent.

PETITION FOR WRIT OF CERTIORARI

Tommy A. Thomas  
SC Bar #5536  
Attorney for Appellant  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

Johnny James, Esq.  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
Attorney for Respondent

## INDEX

|                             |    |
|-----------------------------|----|
| TABLE OF CASES .....        | 1  |
| QUESTION PRESENTED.....     | 2  |
| STATEMENT OF THE CASE ..... | 3  |
| STATEMENT OF FACTS .....    | 3  |
| ARGUMENT .....              | 7  |
| CONCLUSION .....            | 10 |

## TABLE OF CASES

Robbins v. State 387 SC 568, 693 S.E. 2d 402 (2010)

State v. Patterson, 272 SC 2, 249 S.E. 2d 770 (1978)

### Statues:

§44-53-370

§44-53-370(a) (3)

§44-53-370(a) (4)

§44-53-470

**QUESTION PRESENTED**

**Did the Lower Court err in not granting Post-Conviction Relief as a result of the Appellant's improper enhancement?**

## **STATEMENT OF THE CASE**

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Appellant was indicted during the November 2013 term of the Chesterfield County Grand Jury for possession with intent to distribute a controlled substance 3rd (2013-GS-13-0591). Appellant proceeded to trial, and was found guilty as indicted. Franklin B. Joyner, Jr., Esquire, represented Appellant. On November 13, 2013, the Honorable Clifton Newman sentenced him to a term of imprisonment of thirteen years.

A timely notice of appeal was filed on March 13, 2014. Appellant filed this PCR application on February 2, 2015, while his direct appeal was pending before the South Carolina Court of Appeals. Appellant withdrew his appeal, and the South Carolina Court of Appeals dismissed his appeal on January 13, 2015. The remittitur was issued on February 4, 2015.

An evidentiary hearing on Appellant's PCR Application was convened on January 9, 2017 at the Marlboro County Courthouse. The Appellant was represented by Tommy A. Thomas, Esq. and Valarie Giovanoli represented the Respondent. An Order of Dismissal with Prejudice was signed by The Honorable G. Thomas Cooper on March 31, 2017. A timely Notice of Appeal was filed.

## **STATEMENT OF FACTS**

Applicant is fifty-five (55) years old. He was arrested in 2010. At that time, he worked construction and helped at his dad's store. Before this arrest, he had not had a drug offense since 1989. After his arrest, he retained Franklin B. Joyner, Jr., and got out on bond for over three (3) years prior to trial.

At Appellant's Post-Conviction Relief hearing, he raised the following issues:

1. That on an unrelated Driving Under Suspension charge he was sentenced in 2012 for DUS. The Appellant claimed that his counsel had told him that the drug charges for which he is currently serving time, would be dropped in exchange for his guilty plea to the Driving Under Suspension.
2. The Appellant believed that he was entrapped by the Confidential Informant into providing him with pain medication.
3. That Appellant believed that the Confidential Informant targeted him because the Confidential Informant had written a bad check to the Appellant's father and Appellant's father had turned this check into the Court for collection.
4. That the Appellant's charge and sentence was improperly enhanced. That the Court used §44-53-370 for enhancement, but the correct section was §44-53-370(a) (3).
5. That Counsel was ineffective for not questioning the State's witness about the color of the alleged pills that were seized.
6. That Counsel was ineffective when he stipulated to the chain of custody.

During Post Conviction Relief hearing, the Appellant testified about his prior convictions. The testimony is somewhat difficult to follow, but based on the State's questioning, the Appellant testified about the following prior record.

1. The state asked him about a trafficking in Cocaine 10-28 grams from 1992 in which he received a three (3) year sentence. He responded that he thought that this conviction had been modified and was not a trafficking conviction. (App. p. 192, lines 1-16)
2. The Appellant was then asked about a charge on May 8, 1997, in which he received a sentence of sixty (60) days suspended to Probation, for driving under the influence 3<sup>rd</sup>

offense. The Appellant testified that he did have drinking violations and Driving under Suspension violations. (App. p. 195, lines 1-10)

3. The Appellant was then asked about an August 22, 1996 conviction for Possession of 28 grams of marijuana and 10 grams of hashish. The Appellant responded about the marijuana. He said, that is possible, I am not sure, I do not recall. (App. p. 195, lines 14-21)
4. The State then asked him about a May 2, 1999 conviction of Open Container and Disorderly Conduct. The Appellant responded that he admitted that he had some drinking charges. (App. p. 196, line 1)
5. The State inquired about his 1991, unlawful drug charge, for which he was sentenced to three (3) years suspended to eighteen (18) months. He responded yes, and said this was for possession. (App. p. 197, lines 2-6)
6. The State then inquired about a 1984 trafficking cocaine, in which he received ten (10) years. He responded, yes. (App. p. 197, lines 7-9)
7. She then asked about a 1990 Possession with Intent to Distribute Cocaine where he received a sentence of four (4) months. His response was that it was originally an Intent to Distribute, but that this charge was dropped to Simple Possession. (App. p. 197, lines 10-15)
8. Appellant was then asked about a 1992 Possession of cocaine, Applicant responded yes. (App. p. 197, lines 20-22)

In regards to his allegation of improper enhancement the Appellant was asked if he was familiarly with §44-53-470. (App. p. 196, lines 15-21) While he shows confusion over the statute, he is the one who raised the issue before the trial Court. The Appellant testified that he

told the Judge that he did not have any drug charges in over twenty (20) years and that he did not think that the State could go back over ten (10) years to enhance his sentence. (App. p. 171, lines 16-19) The Appellant further testified that he believed that the trial Judge, was not quite sure about the enhancement as well. The Court questioned Solicitor Ford about the enhancement. His trial counsel states that “you cannot go back over ten (10) years on Marijuana, but you can go back over ten (10) years on other charges.” Judge Newman was informed that the appropriate statute for enhancement was 44-53-370, (App. p. 172, lines 1-19) which was in error.

The Appellant points out at the Post Conviction Relief hearing that he believed that the proper enhancement statute is §44-53-470 section 3, which states that the Defendant must have a conviction within the previous ten (10) years. (App. p. 173, lines 21-25)

The Appellant indicates that one of the reasons that he believes that he was improperly enhanced was that he was initially eligible for parole. The Department of Probation and Parole later indicated that he was not eligible for parole as a result of his trafficking offense. (App. p. 175, lines 10-17, p. 176, lines 1-6) His parole eligibility was rescinded.

At the PCR hearing, trial counsel is asked on cross examination by the State about Section 44-53-470 (a) subsection (4). Counsel states that he believed that any prior drug conviction could be used to enhance. He is further asked in this case, could the 1984 trafficking conviction and a 1997 Possession of cocaine be used to enhance him as subsequent offenses. The response is “yes, just those two would”. (App. p. 228, lines 1-11)

Pursuant to the Court’s Order of Dismissal, the Court finds the Appellant admitted to the following convictions:

1. 1997 DUI
2. 1991 Unlawful drug
3. 1984 Trafficking cocaine
4. 1990 Simple Possession of Cocaine
5. 1992 Possession of cocaine

### ARGUMENT

Section 44-53-470 (3) provides in part for any offense involving a controlled substance other than marijuana. The offender has been convicted within the previous ten years of a first violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs.

In this case, the controlling section is Section 44-53-470 (4) which states in part, an offense involving a controlled substance other than marijuana , the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense provision.

This is how the Section read at the time that the Appellant was convicted. A subsequent amendment to this Statute effective April 21, 2016, adds a Section B. Section B states that a conviction of trafficking in marijuana or trafficking in any other controlled substance in violation of this article or of another state or federal statute, must be considered a prior offense for the purpose of any prosecution pursuant to this article. Clearly, this amendment did not apply to the Appellant at the time of his sentencing. Therefore his prior trafficking convictions should not be used to enhance.

The trial Court takes into consideration that his last offense was twenty (20) years ago but explains that under the law, it is an enhanced penalty (App. p. 142, lines 16-25) The Court notes that under his current charge he is facing a maximum of twenty (20) years and a minimum of five (5) years. (App. p. 149, lines 5-6)

In an effort to preserve a prior plea offer on the record by trial counsel the Appellant has an opportunity to voice his concern to the Court about the enhancement to a 3<sup>rd</sup> offense. (App. p. 291, lines 6-14) The Solicitor concedes that the priors have not been within the last ten (10) years, but believes that the enhancement would still apply. The Court asks for an explanation as to what can be used for enhancement purposes (App. p. 30, line 7-17) The State's position is "my understanding of the law is that we may use convictions – any conviction from General Sessions Court, Your Honor, regardless of the time period when it occurred for enhancement purposes." (App. p. 30, lines 18-21) The Appellant would argue that this is clearly wrong.

In an analysis of the case at hand, the first question is, can any drug conviction, other than marijuana, be used to enhance future convictions, regardless of how old they are? Appellant would contend that pursuant to Section 44-53-470, the answer to that question is no.

The court asks what is the enhancement Statute and is told it is §44-53-370 (a) (App. p. 31, lines 20-25). Upon further inquiry by the Appellant, the court points out that the Laws says "at any time" in response to questions at the timing of prior conviction (App. p. 32, lines 9-16). Trial Counsel states that "for the record, I've explained that there is a ten year time limit in accordance with the statute based on marijuana." (App. p. 32, lines 24-25, p. 33, line 1) But, unfortunately on controlled substance, any substance other than marijuana there is no time limit. (App. p. 33, lines 3-5)

The Appellate would argue that you have to read §44-53-470 A (3) and A (4), together. The two Subsections are joined with the word “and”. In reading these two Subsections together, the phrase “been convicted within the previous ten (10) years of a controlled substance... other than marijuana” is introduced into Subsection 4.

The Appellant would argue that in determining enhancement, the Court must first look at the age of any prior conviction. The issue in this case is not marijuana but controlled substances. Appellant’s last drug conviction was in 1989 over ten years from the current conviction.

In the case of Robbins v. State 387 SC 568, 693 S.E. 2d 402 (2010) the Court finds proper enhancement. But there is no discussion of the ten (10) years in Subsection A(3). The Court finds, in part, there is no temporal relationship between the offenses and that a Defendant can enter a plea of guilty to a first and second offense during the same proceeding State v. Patterson, 272 SC 2, 249 S.E. 2d 770 (1978) The Court finds Robinson’s June 2000 plea resulted in two separate offenses for sentencing purposes.

The Appellate argues that the Robinson case is distinguishable from the case at hand. One, his convictions are all over ten years.

A logical reading of §44-53-470 would be as follows:

1. In reading Subsections A (3) and A (4) together would require a conviction to be less than 10 years to enhance a controlled substance conviction.

2. That the legislative Amendment effective April 21, 2016, added Section (B), which adds the language:

(B) In addition to the above provisions, a conviction of trafficking in marijuana or trafficking in any other controlled substance in violation of this article or of another state or federal statute relating to trafficking in controlled substances must be considered a prior offense for purposes of any prosecution pursuant to this article.

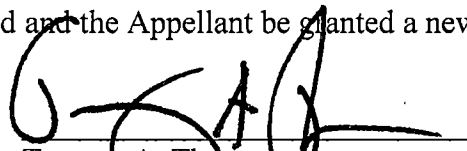
3. That you can only infer from this amendment that trafficking of marijuana or controlled substances that were older than ten (10) years could not be used to enhance prior to 2016.

4. The Appellant has trafficking charges that were used improperly in this case to enhance.

5. That it is only follows that the legislative intended as demonstrated above that the Appellant's drug charges which were over twenty (20) years old, could not have been used to enhance.

### CONCLUSION

That the Lower Court's decision be reversed and the Appellant be granted a new trial.



Tommy A. Thomas  
Attorney for Petitioner  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

October 16, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas  
Post-Conviction Relief

G. Thomas Cooper, Jr., Circuit Court Judge

---

Appellate Case No.: 2017-001350

---

Billy Joe Griggs #124983,..... Appellant,

vs.

State of South Carolina, .....Respondent.

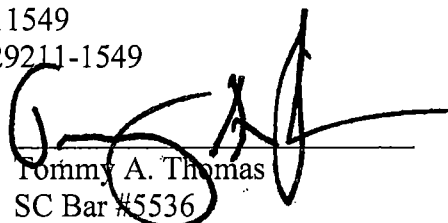
---

CERTIFICATE OF SERVICE

---

I, Tommy A. Thomas, Attorney for the Appellant, hereby certify that I hand delivered a copy of the Petition for Writ of Certiorari and Appendix, to the Attorney General's Office, at:

Johnny Ellis James, Jr., Esq.  
Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211-1549



Tommy A. Thomas  
SC Bar #5536  
Attorney for Petitioner  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

October 16, 2017