

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE RICKEY COUEY,

APPELLANT

APPELLATE CASE NO 2017-000709

INITIAL BRIEF OF APPELLANT

RECEIVED
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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in concluding that the State established a prior conviction for Appellant's failure to register, second offense, where no testimony was presented by the State regarding prior convictions?

STATEMENT OF THE CASE

Appellant was indicted by a Spartanburg County grand jury on January 11, 2017 for failure to register, second offense. R. ___ (Indictment). Appellant proceeded to a bench trial before the Honorable R. Keith Kelly on March 14, 2017. Tr. 1. Paul Neely represented Appellant, and Barry Barnette, Sara Bozarth, and Megan Moricle appeared on behalf of the State.

After a one-day trial, Judge Kelly found Appellant guilty and sentenced him to three hundred and sixty-six days' incarceration. Tr. 68, l. 15 – Tr. 69, l. 5.

This brief follows.

ARGUMENT

The trial court erred in concluding that the State established a prior conviction for Appellant's failure to register, second offense, where no testimony was presented by the State regarding prior convictions.

Background

After spending most of his life in New Jersey, Appellant was arrested in South Carolina for failing to register, second offense. According to Debra Blanton, an employee of the Spartanburg County Sheriff's Office, Appellant failed to register in January 2015. Tr. 16, l. 24 – Tr. 17, l. 6. Appellant was arrested in September 2016. Id.

Blanton testified that offenders would register at her office: some registered biannually and others registered quarterly. Tr. 8, ll. 17 – 24. Appellant was allegedly required to register quarterly using a form provided by the State of South Carolina. Id.; R. __ (Registration Form). Blanton would read the form to Appellant. Tr. 19, ll. 18 – 24.

Blanton was aware that Appellant was leaving South Carolina to travel to New Jersey for some family court matters. Tr. 11, l. 24 – Tr. 12, l. 8. Appellant received a travel pass to go to New Jersey, and he cleared his plans with Blanton. Tr. 52, ll. 3 – 19. Blanton did not provide Appellant with any time restrictions on his travel to New Jersey, nor did she advise him to come in before he left for New Jersey. Tr. 53, l. 3 – Tr. 54, l. 5.

Blanton was the State's only witness. At the conclusion of the State's case, counsel for Appellant moved for a directed verdict. Tr. 24, l. 13 – Tr. 25, l. 14. Citing State v. Latimore, counsel argued that "a person required to register on the sex offender registry is entitled to

reasonable notice... before he can be violated for failure to register.” 390 S.C. 88, 700 S.E.2d 456 (Ct. App. 2010).

Counsel also argued a constitutional claim—that the State of South Carolina “has no personal jurisdiction to attach its laws to a resident of New Jersey.” Tr. 26, ll. 1 – 24. According to S.C. Code Ann. § 23-3-430(B), and as articulated by counsel, “a person who remains in this State for a total of thirty days during a twelve-month period is a resident of this State.” Id. Therefore, Appellant was not a resident of South Carolina under the statute and could not be convicted:

Officer Blanton testified that Mr. Couey was in New Jersey from January 2015 until August of 2016, that’s the State’s evidence, Your Honor, and if that’s the case, he’s not a resident of South Carolina and that’s based on the State’s testimony so we would move for a directed verdict on those grounds as well.

Tr. 26, ll. 1 – 24.

All three of the State’s attorneys spoke in response to this motion. Tr. 27, ll. 1 – 11. The trial court denied the motion. Tr. 28, l. 10 – Tr. 29, l. 21.

Following the denial of the directed verdict motion, Appellant testified. Tr. 30 – Tr. 55. He indicated that he lived in New Jersey nearly all of his life. Tr. 30, ll. 14 – 24. He came to South Carolina for his younger brother’s wedding. Tr. 31, ll. 14 – 21. In 2015, he returned to New Jersey to protect his parental rights. Tr. 33, l. 24 – Tr. 35, l. 1.

Appellant called Blanton on multiple occasions to advise her of his plans to return to New Jersey. Tr. 34, l. 1 – Tr. 36, l. 18. Nonetheless, she obtained a warrant for his arrest on January 30, 2015, even though the time for Appellant to register in the month of January had not expired. Tr. 35, l. 13 – Tr. 36, l. 2.

Appellant did not have to sign anything when he registered in New Jersey; he was only required to check in. Tr. 38, l. 21 – Tr. 39, l. 15. In South Carolina, Appellant was told by

Blanton to register every ninety days. Tr. 39, l. 16 – Tr. 40, l. 6. Because he could not read what was written on the registration paperwork, he relied solely on the date to know when to go back and register. Tr. 51, l. 14 – Tr. 52, l. 2.

Appellant required help from his fiancé in order to obtain an identification card at the South Carolina Department of Motor Vehicles. Tr. 50, l. 1 – Tr. 51, l. 9. Appellant was unaware that he had to provide written notice of a change in address. Tr. 36, ll. 19 – 21.

Blanton was later recalled to the stand following the close of the defense’s case. Tr. 61 – 62. When asked about Appellant’s trip to New Jersey, she responded:

[W]hen [Appellant] came in and registered in October I believe it was, uh, a few weeks after that, uh, he came by the office [and] advised that he would, uh, probably have to go back to New Jersey on family court issues, um, that’s when he notified us and I believe it was around, um, October, November, of 2014.

Tr. 62, ll. 8 – 15.

Blanton did not recall Appellant’s call to her in January advising that he would be staying a little longer, but admitted that she does not take notes on every call that she receives. Tr. 62, l. 16 – Tr. 64, l. 10.

Virginia Ann Johnson, Appellant’s fiancé, took the stand following Appellant’s testimony. Although she was sequestered, she corroborated all of Appellant’s testimony. Tr. 6, ll. 14 – 25. She reiterated that Appellant left for New Jersey in mid-January 2015 to fight for his parental rights. Tr. 56, l. 15 – Tr. 57, l. 4. She helped him obtain an identification card by filling out his paperwork, as Appellant indicated. Tr. 59, ll. 1 – 23; Tr. 60, ll. 9 – 25; Tr. 61, ll. 7 – 15.

After the defense rested, counsel for Appellant renewed his motion for a directed verdict. Tr. 64, l. 18 – Tr. 68, l. 17. Counsel pointed out that Appellant was charged with “failure to register second offense” and “the State hasn’t provided evidence of a first offense.” Id.

Additionally, counsel pointed out that Appellant did not go far in school, has learning disabilities, and took special education classes. Id.

The trial court again denied counsel's motion. Id. In particular, the trial court found that Appellant "actually testified" that he had a prior conviction. Tr. 67, l. 19 – Tr. 68, l. 17. Counsel and the trial court discussed the testimony:

Court: [Y]our client actually testified to the, uh, uh, element that you talkin' about, I think you're tryin' to say the State never offered his prior convictions on the first offense but he testified that he was convicted, uh, of the first offense, did he not?

Counsel: Your Honor, I don't, I don't recall that - - -

Court: Well, - - -

Counsel: - - - testimony.

Court: - - - you - - - wanna look at [it]?

Counsel: Yes, sir, I would.

Tr. 66, l. 23 – Tr. 67, l. 10.

However, the court reporter indicated that she would have to pull it up on her computer, which she did not have at the time. Tr. 67, ll. 13 – 19. She offered to borrow a laptop, but the trial court ruled that Appellant testified "that he had a prior conviction." Tr. 67, l. 23 – Tr. 68, l. 17.

Argument

Although the Chapter 53 of Title 44 of the South Carolina Code of Laws covers "Poisons, Drugs, and Other Controlled Substances," it also contains the definition of a second offense: "[a]n offense is considered a second or subsequent offense if, prior to his conviction of the offense, the offender has at any time been convicted under this article." S.C. Code Ann. § 44-53-

470. The plain meaning of the statute requires a prior conviction before an enhanced sentence can be imposed.

As the South Carolina Supreme Court stated in DeWitt v. S.C. Dep't of Highways & Pub. Transp., 274 S.C. 184, 262 S.E.2d 28 (1980):

When the State is prosecuting a person for an offense that carries an enhanced penalty on a conviction of a second or subsequent offense, the State is not required to prove the legality of the prior conviction, nor does it have to show the facts surrounding that conviction. *It is only necessary for the State to prove that a previous conviction exists, that the conviction was for an offense which occurred prior to the commission of the offense for which the defendant is being tried, and the defendant was the subject of that prior conviction.*

Id. at 187, 262 S.E.2d at 29-30 (emphasis added).

The first offense (for which a defendant was convicted) must have occurred prior to the commission of the second offense. In Appellant's case, there is no evidence of his prior conviction. Outside of the conclusory statement contained in the arrest warrant, a prior conviction is never mentioned by any of the witnesses. R. __ (Arrest Warrant).

"A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state." Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." Id. at 292-93, 625 S.E.2d at 648.

Section 23-3-470 of the South Carolina Code delineates the penalties for failure to register. Subsection (B)(1) sets forth:

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 provisions of law, a first offense may be tried in magistrate's court.

Appellant was subjected to the harsher and mandatory sentence of three hundred and sixty-six days under S.C. Code Ann. § 23-3-470(B)(2) which allowed for neither suspension nor probation.

The State failed to produce any direct or circumstantial evidence from which the trial court, as finder of fact, could determine that Appellant had been convicted of a first offense. The word "prior" was used only twice in the entirety of Appellant's trial. Tr. 67, l. 1; Tr. 68, l. 3. Throughout the remainder of Blanton's and Appellant's testimony, there is no mention of a prior conviction. Therefore, Appellant could not have been convicted of a second offense and should have been entitled to a directed verdict.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse his conviction and issue an Order of acquittal.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of January, 2018.

STATE OF SOUTH CAROLINA

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Honorable R. Keith Kelly, Circuit Court Judge

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THE STATE,

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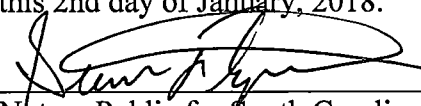
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter 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 Initial Brief of Appellant and Designation of Matter have been served on Wayne Couey, #340477, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 2nd day of January, 2018.


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.