STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2017-002257

THE STATE,

Respondent,

v.

RUSTY ANTRON JONES,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia St.
Spartanburg, SC 29306
(864) 596-2575

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court correctly sentenced Appellant for a third drug offense because Appellant previously pled guilty to two drug offenses arising from separate occurrences.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law[.]" State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011) (internal citations omitted).

STATEMENT OF THE CASE

On November 29, 2012, Appellant pled guilty to two drug charges: one count of Distribution of Cocaine Base that occurred on April 11, 2011, and one count of Possession with Intent to Distribute Cocaine Base that occurred on April 22, 2011, both in violation of S.C. Code § 44-53-375. The distribution charge was reduced from a trafficking charge as part of the plea agreement. Plea Tr. 8. The State recommended concurrent sentences and did not seek sentencing enhancement for either charge. Plea Tr. 8. In June of 2014, Appellant sold crack cocaine to an undercover informant. Tr. 48-52. In 2015, a Spartanburg County grand jury indicted Appellant for Distribution of Cocaine Base for the 2014 incident. On October 17-18, 2017, Appellant was tried by jury before the Honorable J. Mark Hayes and found guilty. Appellant did not present a defense, but his attorney argued in closing that the State failed to prove its case. After the verdict was announced, Appellant moved to be sentenced for a second offense. Tr. 186. Defense counsel admitted that Appellant pled guilty in 2012 to two violations[1] of the cocaine base distribution statute and that those charges arose from incidents that occurred eleven days apart, but argued that because Appellant pled to the charges on the same day and both were listed as a first offense on the sentencing sheets, "that constitutes one conviction and not two and that this is a second offense." Tr. 186. The trial judge ruled the prior convictions were distinct crimes for sentencing purposes and sentenced Appellant for a third offense. Tr. 188-89. Appellant timely appealed his sentence on the ground that he should have been sentenced for a second offense.

[1] Although defense counsel and the prosecutor described the 2012 convictions as both being distributions, Appellant pled guilty to one count of distribution and one count of possession with intent to distribute. Both are prohibited by the same statute and carry the same punishment. S.C. Code § 53-44-375.

ARGUMENT

The trial court correctly sentenced Appellant for a third drug offense because Appellant previously pled guilty to two drug offenses arising from separate occurrences.

Appellant was properly sentenced for a third drug offense because his two prior convictions were distinct crimes arising from separate occurrences. The fact that the State reduced one of the charges, did not seek sentencing enhancement, and allowed Appellant to plead to both crimes during a single hearing does not convert the two convictions into one. Furthermore, Appellant cannot show prejudice because his sentence falls within the sentencing range for a second offense. The trial court did not err.

The crimes to which Appellant pled guilty in 2012 were factually and legally distinct. Appellant's conviction for distribution of crack cocaine under indictment 2011-GS-42-5492 occurred on April 11, 2011 when Appellant sold more than ten grams of crack cocaine to a confidential informant. Plea Tr. 9; 13. His conviction for possession with intent to distribute crack cocaine under indictment 2011-GS-42-5491 occurred on April 22, 2011, when Appellant was found in possession of more than one gram of crack cocaine. Plea Tr. 9; 13. Where multiple convictions are obtained for violations of the Controlled Substance Act and the violations are unrelated to one another and do not arise out of a single incident, each conviction may be counted separately for sentencing purposes. State v. Boyd, 288 S.C. 206, 210, 341 S.E.2d 144, 146 (Ct. App. 1986); see also Bryant v. State, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) (three armed robberies occurring over several days, at different locations, with different victims constituted separate offenses for enhancement purposes). The fact that a defendant pleaded guilty to multiple distinct offenses in a single proceeding does not negate their distinctiveness. Robinson v. State, 387 S.C. 568, 577, 693 S.E.2d 402, 406 (2010).

Appellant argues "there is nothing in the statute that indicates two first offenses are the equivalent to a second offense." Brief of Appellant, 7. Appellant mischaracterizes a "second offense" as a distinct crime when it is actually just an increased penalty for the same underlying class of offense. See City of Sumter Police Dep't v. One (1) Blue Mazda Truck VIN No. JM2UF1132N0294812, 330 S.C. 371, 378, 498 S.E.2d 894, 897 (Ct. App. 1998) ("The legislature created only one substantive offense, DUI, and the characterization of the offense as a first, second, third, or fourth or subsequent offense is for purposes of sentence enhancement only.... The consequences of the offense are determined by the number of offenses accumulated by the offender, regardless of how those convictions are denominated."). "The right of the State to have appellant sentenced as a third offender is not contingent upon the penalties imposed for his former convictions but upon the fact that he has been previously twice convicted[.]" State v. McAbee, 220 S.C. 272, 276, 67 S.E.2d 417, 418 (1951) (holding DUI defendant was properly sentenced as third offender even though he was sentenced as a first offender in both prior DUI convictions).

Appellant's 2012 convictions for distribution and PWID cocaine base were his first convictions for each crime. Both constitute a prior "violation of a controlled substance offense provision." S.C. Code Ann. § 44-53-470. Both operate individually to enhance subsequent drug convictions. The same would be true if Appellant had been convicted for the first time of distribution of methamphetamine or heroin because "a prior offense is any drug offense," not only the specific crime for which a defendant is being sentenced. Thomas v. State, 319 S.C. 471, 473, 465 S.E.2d 350, 352 (1995); State v. Dupree, 354 S.C. 676, 692, 583 S.E.2d 437, 445 (Ct. App. 2003). Under Appellant's logic, a defendant who had been convicted twice for distribution of heroin, twice for distribution of methamphetamine, and once for distribution of cocaine could

not be sentenced as a three-time offender if he was charged again with distribution of cocaine. This is not the way sentencing enhancement works. See Id.

Appellant claims the State, by not seeking sentencing enhancement in 2012, effectively promised that one of the convictions could not be used to enhance a future drug crime. The State made no such promise and no reasonable person could interpret the plea deal as such.[2] If the State had intended to convict Appellant of only one crime, it would have allowed him to plead guilty to one indictment, not two. Instead, the State agreed not to seek sentencing enhancement on the PWID charge. This was an appropriate method of plea bargaining routinely employed by prosecutors and defense attorneys to resolve criminal cases by limiting a defendant's exposure to incarceration in exchange for a guilty plea. Appellant is in "no position to complain of the act of grace extended to him" in his 2012 plea deal. McAbee, 220 S.C. at 275, 67 S.E.2d at 418.

Finally, Appellant was sentenced within the range for a second offense. A conviction for a second offense of § 44-53-375 carries "not less than five years nor more than thirty years." A third offense carries "not less than ten years nor more than thirty years." S.C. Code §44-53-375(B). Appellant was sentenced to 25 years, a sentence at the upper end of either range. Clearly, the trial judge sentenced Appellant to 25 years because he believed the circumstances warranted it, not because he was required to by statute. A judge has discretion to impose any sentence which is within the limits prescribed by statute. State v. Bynes, 304 S.C. 62, 64, 403 S.E.2d 126, 127 (Ct. App. 1991). Therefore, Appellant suffered no prejudice. This Court should affirm.

[2] The State's only recommendation was for concurrent sentencing. Appellant told the plea judge he received no other promises in exchange for his plea. Plea Tr. 8; 12-13.

CONCLUSION

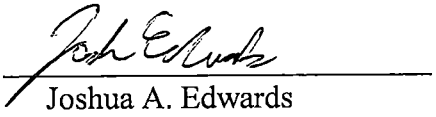
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY: 
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 29, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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THE STATE, Respondent,

v.

RUSTY ANTRON JONES, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by delivering two copies of the same, addressed to Victor R. Seeger, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 29th day of November, 2018.

Anne Mueller

Anne A. Mueller
Legal Assistant for the Respondent

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

November 29, 2018

Victor Seeger, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Rusty Antron Jones
Appellate Case No. **2017-002257**

Dear Mr. Seeger:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division