

pro se response

APPELLATE Case No. 2017-001302

Roger Leon Fortune

v.

State of South Carolina

RECEIVED

FEB 05 2018

S.C. SUPREME COURT

Issue

Did Per court err in not vacating my sentence due to traffic stop Not being Justified?

statements

Seth Scott with Williamsburg County Sheriff's Department was running patrol on Highway 41 North, right at the county line rd. he observed a vehicle approach a stop sign right beside where he was. He observed neither the passenger, nor the driver wearing seat belts. Based on the failure to have their seatbelts on he made a traffic stop. App. 36, 11.1-25

On October 13, 2014, applicant pled guilty as indicted before the Honorable Clifton Newman. Judge Newman sentenced applicant without negotiations or recommendations to a 11 year sentence concurrent for Traff. Crack, Cocaine, poss. of heroin, p.w/d Marijuana and Poss. of controlled substance. App. 1- App. 3; App. 23, 11.13- App. 24, 11.21

At first we were waiting on the stop. But every time we went to court, they continued it. When we went to magistrate court, they continued it. Then we asked that it be moved to general sessions court. Then when we went to gen. sessions court they pushed it back down to magistrate again. After one more time the case got continued to Nov. 4 but I plead Oct. 13 and was sentenced Oct. 15 on the Drug charges but seatbelt charges were Not-prossed Nov. 4th. App. 90, 11.1-20

And you are talking about -- you handed me a couple of documents you were talking about being stopped for not having a seatbelt on right, that was nolle prossed? yes. App. 90, 11. 20-25 App. 91, 11. 1-5

- The Judge found that I presented no credible evidence as to why I should be able to "depart from my statements at plea hearing." App. 128.

- The Judge ruled that I waived my right to challenge the stop of vehicle and the states evidence by pleading guilty. App. 129-130

Argument

The record must show with certainty the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982)

Judges are required to give defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1973)

Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy b/t court and defendant's counsel, or both. Reddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000)

If initial stop of defendant was not justified, subsequent search + arrest of defendant were illegal fruit of the poisonous tree. US v Robinson Ca. Ga. 1976, 535 F.2d 881

The per court erred in not recognizing the fact that I had 2 court dates. I only plead guilty to drugs charges. The seatbelt charges were nolle-prosse 2 weeks later. I was not given the opportunity to go to court in the order of my incident leading to arrest

There was no way I could have known, nor that it is possible for a person to plead guilty to a charge(s) ~~and~~ and waive your rights to contest a charge stemming from same incident with different dates, (Oct. 13 / Nov 4 2014)

- I was prejudiced because I lost an opportunity to have a better result with my seatbelt trial date on the same date as drug charges or before, instead of being scheduled later.

Conclusion

Based on above my sentence should be reversed and case remanded or vacated.

App. 91, 11. 1-5
App. 90, 11. 20-25

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

THE STATE OF SOUTH CAROLINA

vs.

Roger Leon Fortune III
1317 Wheel Ct
Gresham, SC 29546-4099

Defendant

AKA

IN THE SUMMARY COURT
ORDER FOR DESTRUCTION OF ARREST RECORDS

Race _____ Sex M
DOB _____ SSN _____
SID # _____ none on booking

Charges were disposed of in the court indicated below:

Magistrate Municipal

IT APPEARS that, pursuant to S.C. Code §§ 17-22-950 and 17-1-40, the defendant is entitled to have the court summons or arrest and booking records, associated bench warrant(s), mug shot(s), and any fingerprints relating to this offense expunged and destroyed at no cost to the defendant. In accordance with S.C. Code § 17-1-40(B) and (C), law enforcement, prosecution agencies, and detention and correctional facilities shall retain these records in the manner and for the time limits proscribed by the subsections. Summary court expungements pursuant to S.C. Code §17-22-950 have been preapproved by SLED.

Warrant/Ticket/Courtesy _____
Summons / Charge(s): 61708GE/Traffic / Seatbelt violation - Non-criminal
Date of Arrest/Service 5/1/2014 Place of Arrest/Service County Of Williamsburg S.C.

I hereby declare the above charge is eligible for expungement because it is a summary level offense and the charge was (check one) dismissed, *not proessed*, or the defendant was found not guilty on: 11/4/2014

I further certify compliance with Section 17-22-950 of the South Carolina Code of Laws as follows (check one):

- The defendant was fingerprinted and this order **shall** be sent to SLED.
- The defendant was not fingerprinted and this order **shall not** be sent to SLED.

IT IS ORDERED that all arrest and booking records or court summons, associated bench warrant(s), mug shot(s) and fingerprints relating to the above-referenced charge be expunged and immediately destroyed and that no evidence of such records be retained except as permitted by S.C. Code §§17-1-40 or 17-22-950 or other recognized legal authority. In accordance with S.C. Code § 17-1-40(B) and (C), law enforcement, prosecution agencies, and detention and correctional facilities shall retain these records in the manner and for the time limits proscribed by the subsections.

Signed this 04 day of Nov 2014

William Driggers
William Clayton Driggers, Summary Court Judge

Expunged by SLED by: _____

Date: _____
(For SLED internal use only)

Arresting Officer / Prosecutor / Affiant (circle one)
(To Verify Accuracy of Disposition)

CERTIFIED COPY

Issue

The per court erred in not finding plea counsel ineffective for misadvising me regarding the penalty enhancement value of my prior convictions.

Statements

Q Did the applicant -- they have alleged today that he did not have two prior trafficking charges that could have been used to enhance his conviction to be charged ~~with~~ with third offense or pled to second offense.

Did applicant have the proper prior convictions to enhance this charge?

A Yes, he did. One moment please

Q Uh-huh

The witness, I beg the Court's indulgence. Your Honor, we just got these transcripts.

A Yes, he did. He actually had the charge of poss. of meth or cocaine base, which was a 2nd conviction, which was on January 19, 2010. He also had a trafficking ice, crack, or crack greater than 10 grams but less than 28 grams conviction on April 23, 2004.

In the transcript when we went before Judge Newman to actually review that with him because I kept explaining to him it was through the drug enhancement statute but he wouldn't take my word for it. App. 110-112

Argument

The statute that controls this substance is Sc code Anniversary § 44-53-375 (1995) This statute is divided into 4 paragraphs (sub) designated as sections A, B, C, and D respectively. Section B deals with manufacturing, distribution, purchasing or possessing with intent of ice, crack, crack cocaine, Meth & etc. Section C deals with the trafficking of these substances.

This version of the statute was before the South Carolina Supreme Court in Rainey v. State, 307 S.C. 150, 414 S.E.2d 131 (1992). Basically the court in Rainey held that where a defendant is sentenced under a specific statute and that statute specifically deals with how an offense under that statute is to be enhanced from a first, to a second, or a subsequent offense, the provisions of that statute control over more general enhancement statutes such as § 44-53-470.

In response to the Rainey decision, the legislature amended Sc. code Ann § 44-53-375(B), to incorporate into that portion of the statute the language of the general enhancement statute, making marijuana and other drugs includable in a prior record for enhancement purposes. However, the legislature did not amend subsection "(c)" of § 44-53-375 dealing with trafficking of ice, crack, or crack cocaine, etc. Therefore, that portion of the statute contains exactly the same language that it contained at the time the supreme court decided Rainey v. State supra. Research has not revealed any South Carolina Appellate court decision construing subsection "(c)" of § 44-53-375 dealing with trafficking in ice, crack, or crack cocaine.

As the court in Rainey noted, penal statutes are to be construed most strictly against the state. Rainey at 414 S.E.2d at 137. Strictly construing subsection "(c)", it is clear from the plain language of that section, that in a trafficking case, only prior convictions for trafficking may be used to enhance subsequent offenses to a second, third or subsequent offense for sentencing purposes. Under SC law, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation ~~when~~ when later statutes are enacted concerning related subjects. See State v. Corey D., 339 S.C. 107, 529 S.E.2d 20, 23 (2000). Also, Scott 334 S.E.2d 248, 513 S.E.2d 100, 103 (1999).

§ 375(c) determines enhancement of the offense according to the weight of the amount of drugs. A clear and reasonable reading of § 375(c) does not indicate that any other previous non-trafficking drug conviction would enhance the punishment under this sub-section.

Additionally, S.C. Code Ann. § 44-53-470 does not have a breakdown scheme to enhance sentence on the basis of weight. Therefore, § 470 provides a different enhancement scheme from the one enacted into law in § (c) by the general assembly. Applying § 470 would conflict with the legislative mandate of the § (c). A plain reading of these words points to a conclusion that the general assembly intended to enhance punishment as the weight of the substance increases. The legislature intended § 375(c) to have its own set of

enhancements. See *State v. Burton*, 301 S.C. 305, 391 S.E.2d 583 (1990). The State argues that § 375(C) and § 470 can be read without any conflict, while this argument is correct on its face, its application would render the language defining second and subsequent offenses in § 375(C) without any operative meaning. Statutes that are part of the same statutory scheme must be construed together where reasonable. *State v. Woody*, 345 S.C. 34, 545 S.E.2d 501 (Ct. App. 2001). It is evident that § 375(B) and (C) are part of the "same statutory scheme." As such, the two sub-sections must be construed together, if a reasonable construction exists.

Section 375(B) provides enhanced penalties for 2nd or subsequent offenses, which are defined as "a 2nd offense or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs..." This definition is indistinguishable from § 470, which defines ~~the~~ second and subsequent offenses as "if, prior to his conviction of the offense, the offender has at any time been convicted under this article or under any state or federal statute relating to narcotic drugs, marijuana, depressant, stimulant or hallucinogenic drugs."

It was ~~given~~ given in the Rainey decision that § 375(B) could not, as it was written at time, be applied in harmony with § 470 which results in reasonable

construction.

When the legislature amended section B of 44-53-375 to conform its enhancement provisions to the general drug offense enhancement statute, it was presumed to the contents of subsection (c) of the same statute. Had the legislature wished to amend subsection (c) relating to trafficking to incorporate the same general language into that section, it would have been an easy matter for the legislature to do so, for whatever reason they chose not to. So the courts is faced with the plain language of sub-section (c) which must be construed most strictly against state as a penal statute. The plain language compels the conclusion that only prior drug trafficking may be used to enhance penalties under this section (c).

In conclusion, my prior record consist of one prior trafficking, therefore I should have never even been indicted as 3rd offender, more less pleading to a second offense as a lesser included offense. Based on above information my sentence should be reversed and case be remanded.

The courts erred in not recognizing the drug enhancement value pertaining to 44-53-375 (c). The Trafficking language was not added to section 44-53-470 until a couple of years after my sentence.

Also section (2) of statute 17-25-45 explains the proper enhancement value of a serious/most serious crime. No way can a non-violent enhance a serious charge.

Receiv Fortune, 201971 BB-44

Ridgeland Correctional Institution

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The Supreme Court of South Carolina

Daniel E. Shearouse, clerk of court

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