

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC SPRATT,

APPELLANT

APPELLATE CASE NO. 2011-193948

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

RECEIVED

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in finding that Appellant Spratt did not prove by a preponderance of the evidence that he did not waive his right to counsel in his 1998 *pro se* guilty plea to possession of crack; and therefore, this 1998 un-counseled conviction could be used to enhance his trafficking crack charge to a third offense?

STATEMENT OF THE CASE

In May 2006, the York County Grand Jury indicted Eric Antonio Spratt on the charge of trafficking in more than ten grams of crack. On June 9, 2006, Spratt was tried *in absentia* before the Honorable Derham Cole and a jury. He was found guilty and Judge Cole sealed the sentence. On May 25, 2007, Spratt appeared before the Honorable Clifton Newman for sentencing. Spratt was represented by Melisa Inzerillo, and the state was represented Erin Joyner, Assistant Solicitor. The sealed sentence issued by Judge Cole was thirty years and a \$50,000 fine. R. 4, ll. 1 – 13. Judge Newman granted Spratt's motion to reconsider the sentence, and reduced the sentence to ten years for a trafficking less than 100 grams second offense. Judge Newman ruled that Spratt had been incorrectly sentenced as a third offense. R. 4, ll. 14 – 18. The state appealed. The Court of Appeals reversed the trial court and remanded the case for a hearing for the trial court to re-evaluate Spratt's sentence after considering evidence regarding whether Spratt waived his right to counsel during his prior 1998 un-counseled guilty plea. State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009).

On June 6 -7, 2011, Spratt appeared before the Honorable Lee S. Alford for a hearing on the constitutionality of his un-counseled 1998 guilty plea regarding if he waived his right to counsel. He was represented by Melissa Inzerillo, and the state was represented by Erin Joyner, Assistant Solicitor. Judge Alford found that Spratt did not meet his burden of proof by a preponderance of the evidence that he did not waive his right to counsel in his 1998 guilty plea, and therefore, that conviction could used to enhance his trafficking conviction second degree to a third offense. He sentenced Spratt to twenty-five years. R. 68, ll. 1 – 25; R. 75, ll. 4 – 16. Spratt's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The circuit court erred in finding that Appellant Spratt did not prove by a preponderance of the evidence that he did not waive his right to counsel in his 1998 *pro se* guilty plea to possession of crack; and therefore, this 1998 un-counseled conviction could be used to enhance his trafficking crack charge to a third offense.

Eric Spratt was charged with trafficking crack cocaine as he sat in the car of a drug dealer during a drug transaction. Crack and marijuana were found on his person. ROA, Defendant's Exhibit 3, (May 25, 2007 transcript, 22 – 25). He was tried in his absence on June 9, 2006, and was found guilty. R. 4, ll. 1 – 25.

At his sentencing hearing on May 25, 2007, he learned that his sealed sentence was thirty years. His counsel made a motion for Judge Clifton Newman to reconsider the sentence. R. Defendant's Exhibit 3 (May 25, 2007 R. 85). During the sentencing reconsideration hearing, Judge Newman ruled that the respondent's prior un-counseled 1998 guilty plea conviction, which resulted in incarceration due to a subsequent violation of probation when he pled guilty to PWID crack in 1999, should not have been used to enhance his present trafficking in crack cocaine conviction to a third offense. Judge Newman then reduced the trafficking conviction to a second offense and sentenced Spratt to ten years. R. 4, ll. 1 – 25; R. 5, ll. 1 – 25; R. 6, ll. 13.

After an appeal was perfected, the Court of Appeals issued an opinion reversing the trial court and remanding the case for a hearing for the trial court to “re-evaluate Spratt's sentence after considering evidence regarding whether Spratt waived his right to counsel during his prior un-counseled guilty plea hearing.” The Court wrote that the Sixth and Fourteenth Amendments to the United States Constitution prohibited a prior un-counseled

conviction resulting in imprisonment from being used to enhance the sentence for a subsequent conviction. However, the Court wrote that a prior un-counseled conviction was not constitutionally defective or invalid if the defendant “knowingly, voluntarily, and intelligently” waived his right to counsel. The Court held that once the state proved the prior conviction, the defendant must prove by a preponderance of the evidence that the conviction was “constitutionally defective or other wise invalid.” ROA p. 152 - 154, State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009).

At the remand sentencing hearing before Judge Lee Alford, the state explained that the purpose of the hearing was resentencing after determining if Spratt waived his right to counsel during the 1998 guilty plea before Judge John Hayes. The state explained that the two prior convictions used to enhance the trafficking to a third offense were the 1998 guilty plea to possession of crack, and a 1999 guilty plea to PWID crack. However, Spratt did not challenge the 1999 pleas as he was represented by counsel then. R. 4, ll. 24 – 25; R. 5, ll. 1 – 25; R. 6, ll. 1 – 3.

Defense counsel made a motion to the court for Spratt’s sentence to remain at ten years as Spratt was challenging that the 1998 conviction was not effective and could not be used to enhance the sentence. Counsel also argued that the case be heard before Judge Newman. R. 6, ll. 5 – 23. Judge Alford ruled that the appellate court sent the case back to the trial court for any judge to hear as the court did not designate any specific judge. R. 10, ll. 20 – 25; R. 11, ll. 1 – 5.

Counsel continued to argue that Spratt received a five year sentence suspended to probation at the 1998 guilty plea. That probation was revoked for six months when he pled

guilty in 1999. Therefore, Spratt was sentenced to incarceration for an un-counseled plea. R. 12, ll. 8 – 25; R. 13, ll. 1 – 25; R. 14, ll. 1 – 7.

Counsel then informed the court that there was no transcript available from the 1998 plea as Court Administration told her they kept the tapes only five years pursuant to Rule 607, SCACR. Counsel also explained that there was nothing on the sentencing sheet to indicate if any warnings were given to Spratt or if he waived his right to counsel. Spratt's testimony was the only recollection of the events from the 1998 plea. R. 14, ll. 4 – 25; R. 15, ll. 1 – 5.

Spratt testified that he was seventeen at the time of the 1998 guilty plea before Judge John Hayes, and it was his first time in General Sessions Court. R. 18, ll. 8 – 12. He remembered standing before Judge Hayes, and remembered he did not have an attorney. R. 16, ll. 1 – 25; R. 17, ll. 1 -24. He told the court:

My right hand to God, I never waived my rights to
counsel.....I never waived my right for counsel.

R. 17, ll. 15 – 16; R. 17, ll. 24.

Spratt testified that he did not recall Judge Hayes explaining to him he had the right to an attorney because he would have accepted it if he had been told. He would never turn down help from counsel. R. 17, ll. 25; R. 18, ll. 1 – 7.

Spratt said he did not know he could have someone argue things he did not know of and maybe get better than he could get. R. 18, ll. 16 – 25; R. 19, ll. 1. A lady came to the holding cell just before his 1998 guilty plea who he thought was the solicitor. R. 19, ll. 2 – 14. This lady told him she was recommending probation to Judge Hayes for Spratt. And he received probation. R. 26, ll. 18 – 25; R. 27, ll. 1 – 6.

On cross examination, he told that he had been in Family Court for criminal charges as a juvenile. R. 19, ll. 16 – 25. He was represented by an attorney, but his mother always handled that. He did not have to do anything. R. 20, ll. 1 – 25; R. 21, ll. 1 – 25. The last time he was in Family Court was in July 1998, just a few months before he was arrested for the 1998 possession of crack. R. 22, ll. 1 – 25.

E.B. Springs, solicitor in the Sixteenth Circuit, testified for the state. R. 50, ll. 1 – 11. Since 1998, he had handled guilty pleas before Judge Hayes, and had observed him conduct many pleas including *pro se* pleas. R. 50, ll. 12 – 25; R. 51, ll. 1 – 3. He said Judge Hayes had a routine that he followed in conducting *pro se* pleas. He would go through the rights colloquy, as well as Faretta warnings regarding the dangers of self-representation. He discussed the right to a jury trial, and the companion rights. R. 51, ll. 4 – 22. He did not remember if he were present for Spratt's plea in 1998. On cross examination, he said he did not remember being at Spratt's plea. R. 51, ll. 23 – 25; R. 52, ll. 6 – 18.

At the close of the defense evidence, the judge asked who had the burden of proof in a sentence enhancement issue. Defense counsel said that the state had the burden to present prior convictions that might enhance the sentence. Then the burden shifted to the defendant to show by a preponderance of the evidence that one or more of these convictions was defective. R. 43, ll. 1 – 25; R. 44, ll. 13.

After the evidence was presented, defense counsel argued that Spratt had met his burden of proof by a preponderance of the evidence that he did not receive the rights normally given in a *pro se* plea, and did not give up his right to an attorney. Spratt was the only person in the court who was present at the guilty plea. Mr. Springs could comment on

Judge Hayes' pattern of conducting pleas, but he still did not know about Spratt's plea. Defense counsel asked that the 1998 conviction not be considered, and asked the court to find that the trafficking was a second offense. R. 54, ll. 1 – 25; R. 55, ll. 1 – 25; R. 56, ll. 1 – 22.

The state argued that Spratt had not met his burden of proof because he conveniently had no memory of some things. The state argued that he did know about attorneys as he had one in Family Court. The state argued that Spratt was not credible. R. 56, ll. 23 – 25; R. 57, ll. 1 – 25; R. 58, ll. 1 – 25; R. 59, ll. 1 – 25; R. 60, ll. 1 – 6.

The judge ruled that Spratt had not met his burden of proof by a preponderance of the evidence. R. 63, ll. 3 – 8; R. 68, ll. 20 – 23. The judge cited the basis of his ruling was the testimony from Mr. Springs of the regular practice of Judge Hayes to give the rights during a plea. R. 63, ll. 9 – 25. The judge said in his own experience of reviewing Judge Hayes' PCR records, he had never seen Judge Hayes not advise defendants of their rights. R. 64, ll. 1 – 25; R. 65, ll. 1 – 15.

The judge found that Spratt's testimony was not credible, and he had not proved he was not advised of his right to an attorney, and he chose to plead guilty on a *pro se* basis. The judge ruled that the trafficking was third offense, and sentenced Spratt to twenty-five years. R. 65, ll. 16 – 24; R. 68, ll. 10 – 24; R. 74, ll. 22 – 25; R. 75, ll. 1 – 16.

The Sixth and Fourteenth amendments prohibit a prior un-counseled conviction that results in a sentence of imprisonment to be used to enhance punishment of a subsequent conviction. Nichols v. United States, 511 U.S. 738 (1994); State v. Chance, 304 S.C. 406, 405 S.E.2d 375 (1991); State v. Payne, 332 S.C. 266, 504 S.E.2d 335 (1998); State v. Sosbee, 371 S.C. 1021, 637 S.E.2d 571 (2001); State v. Spratt, *supra*.

If an un-counseled prior does not result in a prison term, then it can be used to enhance. Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007). In Alabama v. Shelton, 535 U.S. 654 (2002), the United States Supreme Court held that there can be no activation of a suspended sentence upon the violation of probation if no attorney was present during the offense for which he could be imprisoned.

Spratt's prior 1998 conviction was un-counseled and resulted in probation, but that due to a subsequent violation of probation, he was incarcerated, and that as a result said prior should not have been used as a sentence enhancer.

Spratt established by a preponderance of the evidence that the prior un-counseled conviction should not have been used to enhance his trafficking conviction per the mandate in State v. Payne, 332 S.C. 266, 504 S.E.2d 335 (1998). The fact that there was no real possibility of submitting any evidence on this issue other than Spratt's memory that no counsel was present to represent him on the 1998 conviction and that he believed there was no waiver of his right to counsel at that time met the preponderance of the evidence standard.

There is credence to the fact that Spratt sought and received counsel's assistance in a subsequent drug case in 1999.

The Court of Appeals relied on their own decision in State v. Payne, *supra*, that the defendant had the burden of proof by a preponderance of the evidence. However, Spratt's case is distinguished because the Court held that Payne "produced no evidence, testimonial or otherwise, to prove his assertion that the prior conviction was acquired in violation of the constitutional dictates of Faretta v. California, 422 U.S. 806 (1975)." Payne relied on his

arguments to the trial court. Spratt presented testimonial evidence through his own testimony that he was not told he had a right to an attorney at his 1998 plea.

In State v. Payne, *supra*, the Court of Appeals relied on a United States Supreme Court case, Parke v. Raley, 506 U.S. 20 (1992) which held that the Due Process Clause permits a state to place the burden of proof upon a defendant who collaterally attacks the validity of a prior conviction where the government seeks to use it under a sentence enhancement statute. The Supreme Court discussed the Kentucky law “which imposed a shifting burden of proof for collateral attacks of prior convictions. The Kentucky statute provided that the commonwealth had the initial burden to establish the prior conviction. The burden then shifted to the defendant to show that his rights were violated at the prior conviction. Then the burden shifted back to the commonwealth to affirmatively prove the conviction was entered in a way which protected the defendant’s rights.”

The Court of Appeals in State v. Payne, *supra*, did not go far enough in following the Parke decision. The Court did not address the third step where the burden of proof shifted back to the state to prove the prior conviction did not violate the defendant’s rights. The Court of Appeals wrote that South Carolina does not have a statute addressing the burden of proof for collateral attacks of prior convictions. Therefore, the Court relied on the presumption of regularity that attaches to final judgment as provided in the case law.

Due process requires that the third step be followed for the state to prove that the prior conviction did violate Spratt’s rights. His sentence was being changed from ten years to twenty five years. The burden of proof is on the state to prove a person is guilty of a crime. Therefore, the burden should be on the state to prove the trafficking charge

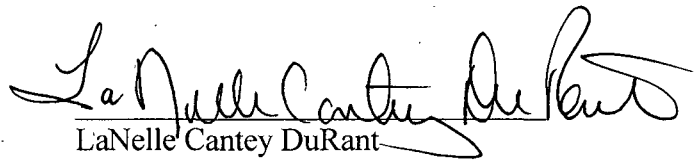
was a third offense instead of a second which was the real issue. The state presented no evidence to challenge Spratt's assertions as untrue. The state could have called the solicitor who conducted the guilty plea. Defense counsel told the court merely that that solicitor had moved. There was no indication that the solicitor could not have been reached or a statement from him presented. R. 60, ll. 20-25.

Furthermore, the trial judge relied on his own experience with Judge Hayes which was not evidence. The state's only witness had no personal knowledge of the case. R. 51, ll. 23-25; R. 52, ll. 6 – 18. The trial judge incorrectly held that the trafficking conviction was a third offense.

CONCLUSION

Based on the above, the order of the trial court should be reversed, and the case Remanded for the sentence of ten years to be restored for the trafficking crack conviction as a second offense.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

LaNelle Cantey DuRant
Appellate Defender

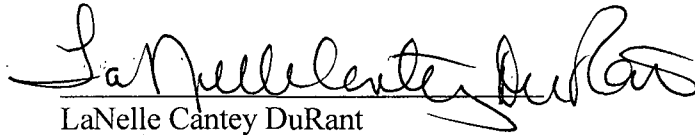
ATTORNEY FOR APPELLANT

This 4th day of October, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 4, 2012

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written in a cursive style.

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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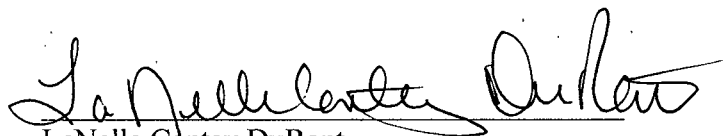
V.

ERIC SPRATT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of October, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of October, 2012.



Notary Public for South Carolina (L.S.)

My Commission Expires: July 24, 2022.