

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Cherokee County

J. Mark Hayes, II, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RICKY TATE,

APPELLANT

---

ANDERS BRIEF OF APPELLANT

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DAYNE C. PHILLIPS  
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

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SC Court of Appeals

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in finding Appellant's underlying convictions were sufficient to constitute as a valid second offense under S.C. Code Ann. § 44-53-470 (2011), thereby allowing the improper enhancement of Appellant's sentence for trafficking crack cocaine under S.C. Code Ann. § 44-53-375(C)(1)(c) (2011)?

### STATEMENT OF THE CASE

On March 31, 2011, Appellant Ricky Tate was indicted by the Cherokee County Grand Jury for trafficking between twenty-eight and one-hundred grams of crack cocaine. R. 151 – 152. Prior to trial, the indictment was amended to trafficking between ten and twenty-eight grams of cocaine. R. 23, l. 18 – 24, l. 18.

On July 19, 2011, Appellant proceeded to trial before the Honorable J. Mark Hayes, II, and a jury. R. 1. Appellant was represented by William S. Bean, IV, and the State was represented by Assistant Solicitor George Kendall. R. 1.

On July 20, 2011, the jury found Appellant guilty as charged. R. 138, ll. 7-18. Judge Hayes subsequently sentenced Appellant to twenty-five years imprisonment pursuant to S.C. Code Ann. § 44-53-375(C)(1)(c) (2011).

## STATEMENT OF FACTS

### **Relevant Facts**

During sentencing, the State noted that Appellant had previously pled guilty to three counts of distribution of crack cocaine on June 19, 1998, and that two of Appellant's charges occurred on different days (December 11 and 16, 1997).<sup>1</sup> R. 140, ll. 16-25. The State then maintained that Appellant's current trafficking cocaine conviction should constitute as a third drug conviction and requested to enter the indictments and sentencing sheets of Appellant's prior convictions into evidence.<sup>2</sup> R. 141, l. 17 – 143, l. 3; 154 – 159. The State further asserted that S.C. Code § 17-25-50 (2011) provides the test for “determining the number of offenses for the purpose of imposition of sentence[:] the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offense.” R. 142, ll. 1-14.

In response, defense counsel argued, “[T]he State has the burden of showing that the incidents pled to do not constitute a similar crime or one set of facts for purposes of invoking that statute to enhance the level of [the] charge in sentencing . . . [, and] what the State has handed up to the Court relating to the offenses would not be sufficient in our opinion to get them beyond the question of whether or not those pleas to those particular

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<sup>1</sup> S.C. Code Ann. § 44-53-470 (2011) (providing “[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 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[.]”).

<sup>2</sup> S.C. Code Ann. § 44-53-375(C)(1)(c) (2011) (requiring a judge to sentence a third or subsequent offender to “a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars[.]”).

offenses were not somehow related . . . .” R. 143, ll. 18-25.

Notably, although the trial court found “that there is sufficient information presented to the Court . . . [to] treat this *as a third or a second offense*[,]” the trial court treated Appellant’s conviction as a third offense. R. 148, ll. 11-13 (emphasis added). The trial court ultimately held, “I do believe that based on the information that the State has given me that I can consider these prior offenses as part of the sentence” and sentenced Appellant to twenty-five years imprisonment. R. 148, ll. 20-23; 153.

## ARGUMENT

**The trial court erred in finding Appellant's underlying convictions were sufficient to constitute as a valid second offense under S.C. Code Ann. § 44-53-470 (2011), thereby allowing the improper enhancement of Appellant's sentence for trafficking crack cocaine under S.C. Code Ann. § 44-53-375(C)(1)(c) (2011).**

There are two relevant statutes in this case: (1) S.C. Code Ann. § 44-53-470 (2011); and (2) S.C. Code Ann. § 44-53-375(C)(1)(c) (2011). First, Section 44-53-470 of the South Carolina Code provides that “[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 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[.]” Second, Section 44-53-375(C)(1)(c) of the South Carolina Code requires that a trial judge sentence a third or subsequent offender under the prior statute to “a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars[.]”

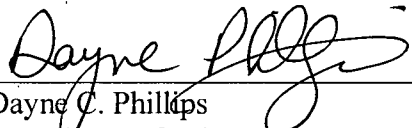
Here, the information presented by State is insufficient to prove that Appellant's trafficking cocaine conviction should constitute as a third drug conviction because, although the May 21, 1998 indictments indicate that Appellant was charged with distribution of crack cocaine on two separate dates (December 11 and 16, 2007), the indictments do not specify whether Appellant's charges were from a single investigation and arrest (i.e., were not separate and distinct). *Cf.* S.C. Code Ann. § 44-53-470 (2011). The June 19, 1998 sentencing sheets also fail to illustrate how Appellant would have been on notice that his distribution of crack convictions, which he later pled guilty to on the same day, would be considered as separate subsequent convictions. R. 157 – 159.

Therefore, the trial court erred in finding Appellant's underlying convictions were sufficient to constitute as a valid second offense under S.C. Code Ann. § 44-53-470 (2011), thereby allowing the improper enhancement of Appellant's sentence for trafficking crack cocaine under S.C. Code Ann. § 44-53-375(C)(1)(c) (2011).

**CONCLUSION**

For the foregoing reasons, Appellant Ricky Tate's convictions should be reversed and remanded to the Cherokee County Court of General Sessions for re-sentencing.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2012.

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IN THE COURT OF APPEALS

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Appeal from Cherokee County

J. Mark Hayes, II, Circuit Court Judge

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THE STATE,

RESPONDENT,

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PETITION TO BE RELIEVED AS COUNSEL

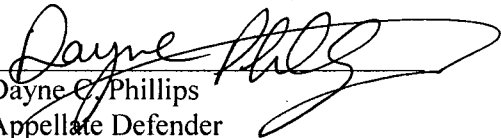
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Counsel for Ricky Tate states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Mark Hayes, II, which was held on July 20, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Ricky Tate.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2012.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

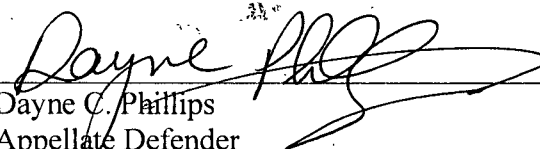
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) 1 – 150.
- (3) Sentencing Sheet
- (4) Court's Exhibit #2 (Indictments on previous convictions).

I certify that this designation contains no matter which is irrelevant to this appeal.

September 12th, 2012

  
Dayne C. Phillips  
Appellate Defender

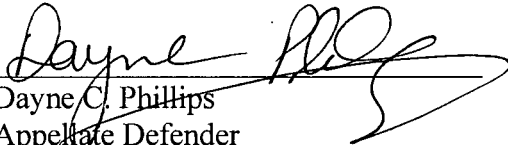
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

September 12, 2012

  
Dayne C. Phillips  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
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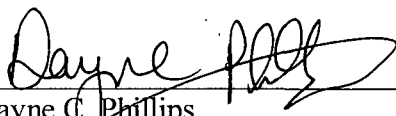
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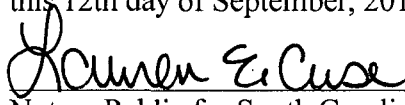
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter 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; and a copy of the Anders Brief of Appellant and Record on Appeal have been served on Ricky Tate, #251069 at Kirkland Correctional Institution, this 12th day of September, 2012.

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 12th day of September, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: August 23, 2014.