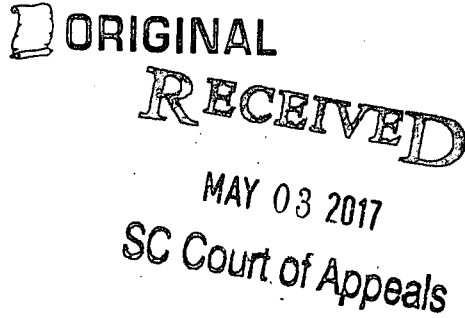


STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

 ORIGINAL
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TONY RANDALL LEWIS,

APPELLANT

APPELLATE CASE NO. 2016-001407

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) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT

The trial court erred in denying Appellant Lewis’ directed verdict motion for acquittal of the charge of failure to register as a sex offender second offense pursuant to S.C. Code Section 23-3-0460 when the court had found that Lewis had not waived his right to counsel in the uncounseled magistrate’s court first offense, which therefore made the first offense unconstitutional and which should not have been considered in the second offense.5

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

Allen v. State, 339 S.C. 393, 529 S.E.2d 541 (2000) 8

Nichols v. U.S., 511 U.S. 738 (1994) 6, 9

Scott v. Illinois, 440 U.S. 367, (1979) 6, 8

State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004)..... 9

State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. Filed June 30, 2010)..... 4

State v. Cain, Op. No. 27694 (2016) 9

State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004)..... 9

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)..... 9

Rules

Rule 29, SCRCrimP 3, 7

Statutes

S.C. Code § 23-3-0460..... 1, 2, 5

Constitutional Provisions

U.S. Const.Amend.VI. 8

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Lewis' directed verdict motion for acquittal of the charge of failure to register as a sex offender second offense pursuant to S.C. Code Section 23-3-0460 when the court had found that Lewis had not waived his right to counsel in the uncounseled magistrate's court first offense, which therefore made the first offense unconstitutional and which should not have been considered in the second offense?

STATEMENT OF THE CASE

In 2001, Appellant Tony Lewis was convicted of committing a lewd act on a child under sixteen and was imprisoned. R. 65, ll. 12 – 19. On January 16, 2014, he registered with the Spartanburg County Sheriff's Office for the first time as a sex offender pursuant to S.C. Code Section 23-3-0460. R. 16, ll. 4 – 25. He was required to register twice a year and should have registered again in July 2014, but failed to register then. R. 16, ll. 2 – 25; R. 13, ll. 1- 25; R. 99. He was convicted in a trial held in his absence in magistrate's court on September 22, 2014, before the Honorable David James Turner. The sentence was thirty days imprisonment or a fine. R. 104.

On May 15, 2015, Lewis was arrested when officers went to his home to serve a warrant. R. 62, ll. 12 – R. 63, ll. 5. Three pills of phentermine were found inside the home which Lewis claimed were his. R. 62, ll. 25 – R. 63, ll. 5.

On June 25, 2015, the Spartanburg County Grand Jury indicted Appellant Lewis on the charges of violation of the sex offender registry second offense, and possession of phentermine. R. 79-80; R. 84-85. On March 16, 2016, Appellant Lewis proceeded to trial before the Honorable Roger L. Couch. Defense counsel requested a bench trial for Lewis which the trial judge granted. R. 6, ll. 1 – 22. Lewis was represented by Howard Anderson, and the state was represented by Allison Mabbs. R. 1.

Defense counsel argued that the prior conviction for failure to register could not be used to enhance the current charge of failure to register to a second offense because the first offense was tried in Lewis' absence without an attorney to represent him. Counsel argued that the first offense was unconstitutional. R. 43, ll. 16 – R. 49, ll. 20. The trial judge took the issue under advisement and said he would issue an order later. R. 50, ll. 2 – 25.

On March 28, 2016, Judge Couch issued an order holding that “because Mr. Lewis did not validly waive his right to counsel in the trial before the magistrate’s court, any resulting conviction that imposed any sentence of incarceration – as that one did - may not be used against Mr. Lewis to aggravate the punishment of any subsequent offense, such as this one.” R. 107-109.

On March 31, 2016, Lewis appeared before Judge Roger Couch for sentencing on the sex offender registry violation and to plead to the drug charge. R. 55, ll. 1-25. The judge told Lewis that he had found him guilty of failure to register as a sex offender first offense “as opposed to the second offense they were attempting to charge him with.” R. 56, ll. 6 – 16. The court found that Lewis had 271 days of time served on the drug charge and one day of time served on the sex offender registry violation charge. R. 64, ll. 1 – 16. The judge sentenced Lewis to time served on the drug offense and to six months on the failure to register as a sex offender charge. R. 65, ll. 6 – R. 66, ll. 10.

On June 10, 2016, Lewis appeared again before Judge Couch for a hearing on the Rule 29, SCRCrimP, motion filed by defense counsel. Defense counsel explained that the judge had found Lewis guilty of failure to register as a sex offender first offense because the judge believed that Lewis had not waived his right to counsel for the first conviction for failure to register. R. 70, ll. 1 – 16.

Counsel told the court that the Rule 29 motion was concerned about the sentencing credit. Counsel argued that the judge had given Lewis credit for 276 days on the drug charge and only one day credit on the failure to register charge. However, based on the case of State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. Filed June 30, 2010), counsel argued that Lewis should receive credit for all of the time served, even on multiple charges, if the charges were all

adjudicated the same day. Therefore, he should receive credit for the time served prior to sentencing on both charges. Counsel explained that the sheriff believed that Lewis actually served only 172 days from July until trial. Counsel asked the judge to amend the sentence to give Lewis credit for the time he served from July through sentencing which was 172 days according to the sheriff on both charges. R. 71, ll. 11 – R. 72, ll. 12; R. 75, ll. 22 – R. 76, ll. 2. The judge said that he would read the cases and make a decision. R. 76, ll. 23 – R. 77, ll. 10.

On June 28, 2016, the trial judge issued an order wherein he modified the sentence for the failure to register as a sex offender to reflect that Lewis should receive 172 days of presentence credit rather than the one day originally indicated in the “judgment.” R. 105-106.

This appeal follows.

ARGUMENT

The trial court erred in denying Appellant Lewis' directed verdict motion for acquittal of the charge of failure to register as a sex offender second offense pursuant to S.C. Code Section 23-3-0460 when the court had found that Lewis had not waived his right to counsel in the uncounseled magistrate's court first offense, which therefore made the first offense unconstitutional and which should not have been considered in the second offense.

Appellant Tony Lewis was convicted in 2001 of committing a lewd act on a child under sixteen. R. 87; R. 65, ll. 12-19. In 2014, he was living with his parents and his brother, Bobby Ranson. R. 24, ll. 25 – R. 25, ll. 3. Lewis was required to register twice a year as a sex offender at the sheriff's office in Spartanburg. R. 99-100; R. 16, ll. 2 -25; R. 13, ll. 1-25.

His mother testified at his trial that she and her husband usually took Lewis to the sheriff's office to register. Once when they took him, they were told to be there before five o'clock and then it was changed to twelve o'clock. When they arrived at twelve, the lady in charge was not there. R. 25, ll. 25 - R. 26, ll. 21. After his father's heart attack, his brother took him to register. R. 25, ll. 12 – 24. The brother, Bobby Ranson, said that he lived with his parents and Lewis. He would take Lewis to register but the last time that Lewis went, Lewis told him that the woman was not there for him to register. R. 32, ll. 1 – 25.

Deborah Blanton, the Sex Offender Registry coordinator for the Spartanburg County Sheriff's office, reported that Lewis registered on January 16, 2014 and had not reported since. He was due to register in July 2014. R. 11, ll. 12 – 20; R. 16, ll. 3 – 25.

On September 22, 2014, a trial was held in Lewis' absence in magistrate's court. He was convicted of failing to register on the sex offender registry, and was sentenced to thirty days of a fine. R. 99-100; R. 104.

On May 15, 2015, Lewis was arrested and charged with failure to register as a sex offender second offense. R. 62, ll. 12 – R. 63, ll. 5. He proceeded to trial on March 16, 2016 in a bench trial. The sentencing sheet from Lewis' original conviction for lewd act on a child was marked as Court's Exhibit 1 when it was presented. Lewis' first conviction in magistrate's court for failing to register as a sex offender was presented and marked as Court's Exhibit 2. R. 8, ll. 13 – R. 9, ll. 13.

Defense counsel asked the judge if he could argue his directed verdict motion with his closing argument, and the judge agreed. R. 43, ll. 4 – 10. Defense counsel argued that because Lewis was tried in his absence on the first offense, that he had not waived his right to counsel. He was sentenced to a fine or thirty days in jail. Lewis had already served some time in jail. Counsel then cited Scott v. Illinois, 440 U.S. 367, (1979) and Nichols v. U.S., 511 U.S. 738 (1994) which held that "an uncounseled criminal conviction may not serve as the basis for an enhancement of a subsequent offense." Counsel argued that Lewis could not be lawfully convicted of a second offense because the first conviction was unconstitutional and could not be used to enhance his current charge to a second offense. Counsel argued that his current charge would then be a first offense. R. 43, ll. 12 – R. 44, ll. 19.

Defense counsel then then stated:

Well, no, actually because he's only been indicted---I think he has to be acquitted here because he was tried in absentia without counsel previously.

R. 44, ll. 20 -22.

Counsel claimed that the same reasons should apply to an acquittal as applied to not being able to enhance this charge to a second offense---that the first offense was unconstitutional because it was based on an uncounseled conviction. R. 44, ll. 23 – R. 45, ll. 3. Counsel asked

the trial judge to acquit Lewis of this second offense for failing to register as a sex offender either on constitutional grounds or on statutory grounds. R. 46, ll. 3 – 6.

The judge clarified with defense counsel that counsel was saying that the cases counsel cited were for the “proposition that if he’s uncounseled” and not represented by counsel, that that conviction cannot be used for enhancement. Defense counsel responded: “Yes, Judge,...because he was sentenced to jail time a fine or 30 days. He already served part of the 30 days because he’d been arrested.” R. 48, ll. 3 – 12.

On March 28, 2016, Judge Couch issued an order finding that the uncounseled conviction in magistrate’s court which resulted in the thirty day incarceration, could not be used to enhance the second offense. The order also provided that the prior conviction for failure to register was not an element of the second offense. The judge denied the request for an acquittal of the second offense. R. 107-109.

On March 31, 2016, Lewis appeared again before the same trial judge for sentencing on the failure to register charge and to plead guilty to possession of the drug phentermine. The judge said to Lewis at the beginning:

We’d already talked about or had a hearing on one of the charges, and I made a finding in that case, and I believe I have found that you were guilty of failure to register first offense as opposed to the second offense they were attempting to charge you with.

R. 55, ll. 1 – R. 56, ll. 16.

The judge sentenced Lewis to six months with credit for one day on the failure to register charge. He was sentenced to time served on the drug charge of 276 days. R. 64, ll. 1 – R. 66, ll.

10.

On June 10, 2016, a hearing was held to consider defense counsel's motion pursuant to Rule 29, SCRCrimP based on the sentencing credits. R. 70, ll. 1-7. Defense counsel gave a brief history of the case for the judge. Counsel stated:

As you recall, we had a bench trial in this case back in March for failure to register as a sex offender. He was indicted as a failure to register second, and because the court found that he had not validly waived his right to counsel for his first conviction, you decided to sentence him as a first offense rather than acquitting him as I argued and I certainly respect that.

R. 70, ll. 10 – 16.

Defense counsel argued that the 276 days should apply to the failure to register charge and the drug charge if they were adjudicated the same day based on the case law. The judge decided to look at the law and make a decision. R. 75, ll. 16 – R. 77, ll. 10.

On June 28, 2016, the judge issued an order modifying the sentence for the failure to register giving Lewis credit for 172 days of presentence time citing the case of Allen v. State, 339 S.C. 393, 529 S.E.2d 541 (2000). R. 105-106. The sheriff had informed the court that the days served were actually 172 instead of 276. R. 71, ll. 16 – R. 72, ll. 10.

Discussion

The Sixth Amendment provides that in “all criminal prosecutions, the accused shall enjoy the right.....to have the assistance of counsel for his defense.” U.S. Const.Amend.VI.

In Scott v. Illinois, 440 U.S. 367 (1979), the United States Supreme Court held that “the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense.”

In Nichols v. United States, 511 U.S. 738 (1994), the United States Supreme court held that consistent with the Sixth and Fourteenth Amendments, a sentencing court may consider a

defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense so long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment.

On appeal of a denial of a directed verdict of acquittal, the Supreme Court must look at the evidence in the light most favorable to the state. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Arnold, *supra*. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In State v. Cain, Op. No. 27694 (2016) (has not been released for publication as of this writing), the Supreme Court reversed Cain's conviction for trafficking in methamphetamine because the trial court erred in denying Cain's motion for a directed verdict. Cain argued that the state did not produce sufficient evidence as to the amount of drugs required for trafficking. The Supreme Court agreed with Cain and reversed.

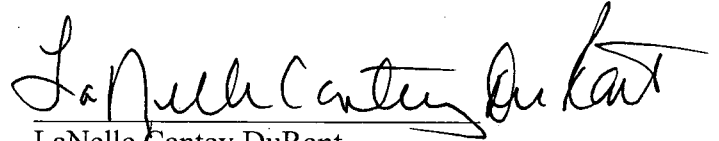
In Lewis' case, the state did not present sufficient evidence of a failure to register second offense. Since the first offense was determined to be an uncounseled conviction in Lewis' absence, and the trial judge found that Lewis had not waived his right to counsel in the first offense, the trial judge erred in not granting a directed verdict to Lewis on the second offense charge. Although the judge sentenced Lewis as a first offense, he still would have two convictions for failure to register as a sex offender. Therefore, it was prejudicial to Lewis for the judge not to grant a directed verdict on the second charge when the first conviction was unconstitutional.

In the alternative, the judge should have remanded the second offense to magistrate's court for adjudication since the judge found it was a first offense. There was a strong probability that Lewis' sentence would have been thirty days or a fine as was the sentence on the first offense.

If it were unconstitutional to use the uncounseled first offense for enhancement purposes, then it would be unconstitutional to consider it as an element of the second offense in the adjudication of a second offense.

CONCLUSION

Based on the above, Appellant Lewis' conviction and sentence for failure to register as a sex offender should be vacated, and the case remanded for the entry of a directed verdict.

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant
Appellate Defender

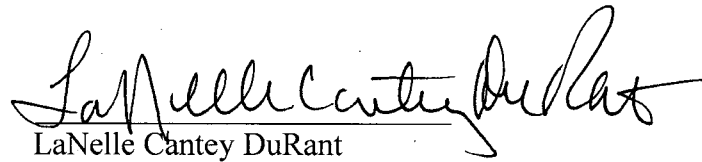
ATTORNEY FOR APPELLANT

This 3rd day of May, 2017.

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 April 15, 2014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 3, 2017


LaNelle Cantey DuRant
Appellate Defender

S.C. Commission on Indigent
Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211

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