STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2019-001156

THE STATE,

Respondent,

v.

SHERRY ASHLEY MCMAHAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

An uncounseled non-felony conviction is valid and may be used to enhance a subsequent sentence under a recidivist statute. However, an uncounseled defendant may not be sentenced to incarceration, and such a sentence is invalid. McMahan previously pled guilty to non-felony DUI and was ordered to pay a fine. She paid the fine and did not serve any time in jail. May the prior conviction be used to enhance a subsequent DUI?

STATEMENT OF THE CASE

An Abbeville County grand jury indicted Appellant Sherry Ashley McMahan for Driving under the Influence. Because McMahan had a prior DUI conviction, the State brought the case in the Abbeville County Court of General Sessions so that McMahan could be sentenced as a second offender. She proceeded to jury trial before the Honorable Donald B. Hocker on July 8-10, 2019. Before trial, McMahan moved to remand the case to magistrate's court to be tried as a DUI 1st Offense, alleging her prior DUI conviction could not be used for enhancement under South Carolina's recidivist DUI statute because she was not represented by counsel in the previous prosecution. (Court's Exhibit #4). It was undisputed that McMahan pled guilty to the prior DUI on September 20, 2011, and received a sentence of a $997 fine or 30 days in jail. McMahan elected to pay the fine, was put on a payment plan, and paid the fine in full less than one month later. (Defendant's Exhibit #4). She did not serve any jail time. The court denied her motion to remand and McMahan proceeded to trial. She was convicted and sentenced as a second-time offender to one year of incarceration and a fine, suspended on the service of 90 days' incarceration and a fine. (Tr.p.283-84). In this direct appeal, McMahan alleges the trial court erroneously sentenced her as a repeat offender because she was not represented by counsel when she pled guilty to the prior DUI.

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).

ARGUMENT

The trial court correctly determined McMahan's prior uncounseled DUI conviction could be used to enhance her sentence in this subsequent DUI prosecution.

The trial court correctly determined McMahan's prior uncounseled DUI conviction could be used to enhance her sentence in this subsequent DUI prosecution. McMahan's prior conviction is valid because the Sixth Amendment right to appointed counsel does not apply to prosecutions for non-felony offenses. Her sentence for the prior DUI was lawful because McMahan was ordered to pay a fine and was not sentenced to jail time. Even if the sentence for her prior DUI violated the Sixth Amendment, the underlying conviction is valid for all purposes, including sentencing enhancement in a subsequent prosecution. This Court should affirm her conviction and sentence.

A. McMahan's prior uncounseled conviction is valid because the Sixth Amendment right to appointed counsel does not apply in non-felony prosecutions, and her sentence for the prior DUI is valid because she was not sentenced to imprisonment.

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This includes the right to hire counsel in all cases, and the right to State-appointed counsel for indigent defendants in felony cases. Gideon v. Wainwright, 372 U.S. 335 (1963). The Sixth Amendment does not entitle indigent defendants to State-appointed counsel in non-felony cases. Nichols v. United States, 511 U.S. 738, 743 n.9 (1994) (explaining "[i]n felony cases, in contrast to misdemeanor charges, the Constitution

requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived").

However, no term of imprisonment may be imposed on an uncounseled indigent defendant who has not waived his right to counsel. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). The Sixth Amendment does not guarantee appointed counsel in all cases which carry the mere possibility of jail time. Scott v. Illinois, 440 U.S. 367 (1979); Glaze v. State, 366 S.C. 271, 275, 621 S.E.2d 655, 657 (2005) ("The proper inquiry under Scott is whether the uncounseled misdemeanor conviction actually resulted in confinement."). Rather, the Sixth Amendment only prohibits the actual imposition of a jail sentence, or a suspended sentence that may be activated and "end up in the actual deprivation of a person's liberty." Alabama v. Shelton, 535 U.S. 654, 658 (2002).

An uncounseled conviction constitutionally valid under Scott is valid for all purposes. State v. Chance, 304 S.C. 406, 407–08, 405 S.E.2d 375, 376 (1991). Such a conviction may be used to enhance punishment at a subsequent conviction. Nichols v. United States, 511 U.S. 738, 748–49 (1994). The question is whether the conviction is "valid when entered." United States v. Bryant, 136 S. Ct. 1954, 1965 (2016) ("Bryant's tribal-court convictions did not violate the Sixth Amendment when obtained, and they retain their validity when invoked in a [subsequent recidivist] prosecution. That proceeding generates no Sixth Amendment defect where none previously existed.").

McMahan's prior misdemeanor DUI conviction is valid. McMahan was not entitled to appointed counsel because DUI is a non-felony offense. Accordingly, her prior conviction is valid for all purposes and was appropriately used to enhance her sentence in this subsequent DUI prosecution.

Furthermore, even though it is irrelevant for purposes of this appeal, her sentence was also valid. McMahan did not receive a sentence actually resulting in imprisonment; she never served any jail time. The record shows she received a sentence of fine or jail, and chose to pay a fine. She was enrolled in a payment plan and paid the fine in full within a month. (Defendant's Exhibit #4).

Moreover, McMahan did not receive a suspended jail sentence, as was the case in Shelton. Rather, she received an "alternative sentence" of paying a fine or serving jail time. "It has long been settled in this jurisdiction that when a statute provides for punishment in the alternative, that is, by fine or imprisonment, the court has the discretion to fix it either singly or by **giving the defendant the choice of fine or imprisonment.**" State v. Petty, 245 S.C. 40, 41–42, 138 S.E.2d 643, 644 (1964) (emphasis added). McMahan was given the choice of going to jail or paying a fine. She chose to pay a fine. Accordingly, her Sixth Amendment right to counsel was never implicated.

McMahan's sentence could not have resulted imprisonment for the underlying DUI offense. Even if she had failed to pay her fine, any enforcement would have been through a new action for contempt. In such a case, the contempt action is a separate offense and any corresponding imprisonment relates to the

contempt action, not the offense for which the defendant was fined. S.C. Code Ann. § 17-25-350 (specifically providing that failure to pay fines "shall constitute contempt of court"). Accordingly, McMahan's sentence could not have resulted in jail time for the original offense. See Alabama v. Shelton, 535 U.S. 654, 672 (2002) (explaining a jail term that "**relates to the original offense** . . . crosses the line of 'actual imprisonment' established in Argersinger and Scott"); see also Williams v. Illinois, 399 U.S. 235, 243 (1970) ("It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the **familiar pattern of alternative sentence** of '$30 or 30 days.' We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine.").

Because McMahan's prior DUI conviction was a misdemeanor, she was not entitled to appointed counsel. Her sentence was lawful because she was ordered to pay a fine and served no jail time. Because her conviction was "valid when entered," she has suffered no deprivation of her Sixth Amendment right to counsel, and her prior conviction was correctly used to enhance her subsequent DUI conviction. This Court should affirm.

B. Even if McMahan's prior DUI sentence violated the Sixth Amendment, the conviction is valid.

Even if McMahan's sentence for her prior DUI conviction violated the Sixth Amendment, the underlying conviction remains valid and was correctly used to enhance her subsequent conviction. The remedy for an unlawful sentence is to

reverse the sentence, not the underlying conviction. McMahan's argument that her prior conviction is invalid is meritless.

A sentence that is unconstitutional under Argersinger is invalid. Alabama v. Shelton, 535 U.S. 654, 675 (2002). However, McMahan has cited no authority for her argument that the conviction is likewise invalid. In fact, there is no binding precedent for that assertion.

McMahan relies on Shelton and Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007), to support her argument. In Shelton, the United States Supreme Court held that a suspended jail sentence for an uncounseled misdemeanor conviction violated the Argersinger rule prohibiting imprisonment for uncounseled convictions. Alabama v. Shelton, 535 U.S. 654, 675 (2002). As noted above, this case is distinguishable because McMahan did not receive a suspended sentence in her prior conviction; she received a simple fine. But the case is unhelpful to McMahan for an additional reason: the Shelton court only invalidated Shelton's unlawful sentence, **not the underlying conviction.** Shelton, 535 U.S. 654, 675 (2002) ("Respondent's 30-day suspended **sentence**, and the accompanying 2-year term of probation, are invalidated for lack of appointed counsel even though respondent has not suffered, and may never suffer, a deprivation of liberty.") (emphasis added).

Likewise, the South Carolina Supreme Court in Talley declined to reverse a conviction due to an unlawful sentence that violated Talley's right to counsel. Like the Shelton court, the Talley court merely invalidated the sentence. Talley v. State, 371 S.C. 535, 545, 640 S.E.2d 878, 883 (2007) ("We vacate that portion of

Respondent's **sentence** for his 1996 conviction.") (emphasis added). McMahan has not cited a single case where a court invalidated a prior conviction due to an unlawful sentence.

The federal appellate courts have uniformly rejected McMahan's argument. In United States v. Jackson, 493 F.3d 1179 (10th Cir. 2007), then-Judge Gorsuch authored the Tenth Circuit Court of Appeals' opinion rejecting the same argument McMahan makes in this case: that an unlawful suspended sentence renders a prior uncounseled conviction invalid for enhancement purposes. The court referenced its prior decision in United States v. Reilley, 948 F.2d 648 (10th Cir.1991), where it held that "the appropriate remedy in such cases is to **strike down the suspended sentence of imprisonment but affirm the conviction** and the 'remainder of the sentence'—namely, the fine." Jackson, 493 F.3d at 1183 (emphasis added). The court explained:

> We took this course on the implicit basis that the remedy ought to fit the right. As defined at least so far by Argersinger and Scott, and recently reaffirmed by Shelton, the Sixth Amendment right at issue protects individuals against being sentenced to a deprivation of liberty without the benefit of counsel; accordingly, we held, the proper remedy was to vacate that portion of the sentence offensive to the Sixth Amendment without doing harm to the defendant's conviction or the remaining, constitutionally inoffensive, portions of his sentence. To go further, to hold the conviction and fine portion of a sentence infirm, would be to relieve the defendant from any consequence of his or her actions despite guidance from Scott and Nichols and now Shelton that uncounseled misdemeanor convictions and non-prison sentences may be given respect and effect consistent with the Sixth Amendment's remedial purposes.

Jackson, 493 F.3d at 1183. The court stated its opinion was consistent with "the uniform teaching of our sister circuits which have recognized, even in the presence

of a prison sentence violating the Sixth Amendment, the persistent vitality of a misdemeanor conviction as well as any non-imprisonment sentencing terms." Jackson, 493 F.3d at 1186. See also United States v. Ortega, 94 F.3d 764, 769 (2d Cir. 1996); United States v. Acuna-Reyna, 677 F.3d 1282, 1285 (11th Cir. 2012).

The Jackson rule is consistent with South Carolina precedent. "In the case of an illegal sentence, the well settled practice in this jurisdiction is to **affirm the conviction but set aside the sentence** and remand the case to the trial court for the purpose of resentencing the defendant." State v. Petty, 245 S.C. 40, 42, 138 S.E.2d 643, 645 (1964); State v. Goins, 122 S.C. 192, 115 S.E. 232, 233 (1922) ("As the error, however, merely pertains to the sentence imposed upon the defendant, by his honor, the presiding judge, **it does not entitle him to a new trial**, but merely to a new sentence in conformity to the requirements of the statute."). The rule makes perfect sense for the reason stated by Judge Gorsuch in Jackson—the remedy should fit the right. There is no good reason to invalidate a perfectly lawful conviction merely because the court erred in sentencing.

One final consideration weighs against McMahan's argument. South Carolina's DUI statute provides enhanced punished "for a second offense." S.C. Code Ann. § 56-5-2930 (A)(2). "The statute is concerned with prior convictions and not the sentences under those convictions." State v. McAbee, 220 S.C. 272, 276, 67 S.E.2d 417, 418 (1951). Thus, unlike the statutory schemes controlling recidivist sentencing enhancement for some federal crimes, enhancement in South Carolina DUI cases is unaffected by the sentence imposed for the prior conviction. See

United States v. Acuna-Reyna, 677 F.3d 1282, 1285 (11th Cir. 2012) (explaining "even if Shelton barred the district court from considering the stand-alone sentence of probation to calculate Acuna–Reyna's criminal history score, the district court was entitled to consider the conviction itself and corresponding monetary fine to be valid").

McMahan has suffered no Sixth Amendment violation. But even if she had been unlawfully sentenced in her prior DUI conviction, the conviction itself is valid for all purposes, including sentencing enhancement in this subsequent DUI prosecution. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

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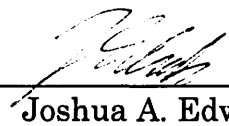
BY: 
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September 29, 2020

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Appellate Case No. 2019-001156

THE STATE, Respondent,

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SHERRY ASHLEY MCMAHAN, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Adam S. Ruffin, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This 29th day of September, 2020.

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Date:	Tuesday, September 29, 2020 10:30:00 AM
Attachments:	McMahan Sherry - Cover letter for IBOR-DOM (02390349xD2C78).PDF McMahan Sherry - Initial Brief of Respondent and Designation of Matter (02390353xD2C78).PDF

Dear Mr. Ruffin,

Attached to this email is the State's Initial Brief of Respondent and Designation of Matter and a cover letter in the above matter.

The initial brief will be filed with the Court later today through One Drive.

As a courtesy, please acknowledge receipt of this email and its attachments by return email.

Thank you.

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