STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHERRY ASHLEY MCMAHAN,

APPELLANT

APPELLATE CASE NO 2019-001156

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to remand Appellant's DUI charge to magistrate court where her present charge was enhanced to a second offense based on a prior uncounseled guilty plea to DUI for which Appellant was sentenced to a fine or jail time, where such jail time would have been triggered upon her failure to pay the fine?

STATEMENT OF THE CASE

Appellant was indicted by the Abbeville County grand jury for driving under the influence (DUI). R. 307-308. Appellant's trial was held before the Honorable Donald B. Hocker and a jury from July 8 – 10, 2019. R. 1. Appellant was represented by Carson Henderson. R. 1. The state was represented by Micah Black and Yates Brown. R. 1.

The jury found Appellant guilty of DUI with a blood alcohol content .16 or greater. R. 238. The judge sentenced Appellant to one-year imprisonment suspended upon the service of ninety days, which was to be served on weekends and payment of a one thousand, one hundred dollar fine. R. 243.

This appeal follows.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Inman, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). "A court is bound by the trial court's factual findings unless they are clearly erroneous." Id. (internal quotation omitted). "On review, this Court is limited to determining whether the trial court abused its discretion." State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009).

STATEMENT OF FACTS

Seth Scott, of the Abbeville County Sheriff's Office, testified that on September 28, 2018 he responded to the scene of a car accident at four o'clock p.m., where he found "[a] car backed down an embankment where it looked like it lost control." R. 133, l. 1 – 134, l. 7. Nobody was on scene with the vehicle at the time. R. 134, l. 12 – 135, l. 6. Scott ran the tag on the vehicle and responded to the address registered to the vehicle. R. 135, l. 7 – 136, l. 16. Scott, along with a second officer, knocked on the door at that address and Appellant came out of the house. R. 136, ll. 17 – 21.

Scott claimed that a strong odor of alcohol was coming from Appellant and that "[s]he was slurring her words and unsteady on her feet." R. 137, ll. 1 – 4. Scott informed Appellant that her vehicle was involved in an accident and Appellant informed Scott that she had been driving her vehicle to get something to eat when she lost control and crashed. R. 142, ll. 4 – 16. Scott claimed that Appellant admitted to drinking "an alcoholic beverage." R. 142, l. 22 – 143, l. 2. Scott admitted that he had no idea how long Appellant had been home prior to his arrival. R. 148, l. 22 – 149, l. 23.

Scott asked Appellant to come back to the scene with him and she complied. R. 143, ll. 11 – 15. Scott transported Appellant back to the scene in the rear seat of his car. R. 144, ll. 16 – 22. Once Scott got Appellant back to the scene, the investigation was turned over to Brent Lynch with the South Carolina Highway Patrol. R. 145, ll. 8 – 13.

Lynch testified that when he arrived on the scene of the car accident, Appellant was already back on the scene in the rear seat of Scott's patrol vehicle. R. 166, l. 23 – 167, l. 25. Lynch also claimed that Appellant was unsteady on her feet and slurring her speech, so he placed her under arrest for DUI. R. 168, ll. 7 – 19.

Defense counsel made a pretrial motion to remand Appellant's DUI second offense charge to magistrate court. R. 2, l. 21 – 3, l. 2. Appellant was previously accused of DUI on August 26, 2011. R. p. 249. Appellant pled guilty to this offense on September 20, 2011 without an attorney. R. p. 249. Appellant signed a waiver of counsel which read:

> I Sherry McMahan appear in my own proper person and declare that I understand the charges against me. I understand my scheduled court date is 9-20-11. I further state that I desire to waive my right to appear in court for my trial. I wish to enter a plea of GUILTY to the above listed charges. I understand that I am giving up my right to a trial by jury, *my right to hire an attorney*, my right to present evidence on my behalf. I will accept the decision of the judge in this matter. I am making this decision freely and voluntarily. I have not been threatened or forced to do this. I am not under the influence of any drugs, medication, or alcohol today.

R. P. 249 (emphasis added). As a result of this guilty plea, Appellant was sentenced to a fine of $997, or thirty days in jail. R. p. 249. The sentencing sheet, which was signed by Appellant and the magistrate judge, stated:

> The defendant shall pay or caused to be paid the fine imposed in the amount of $997 plus three percent (3%) collection fee, total fine being $1,026.91 in 30 days . . . fine to be paid in full on . . . 10-21-11 *or a bench warrant shall be issued for the arrest of the defendant for failing to comply with payment plan* scheduled pursuant to SC Code of Laws 17-25-350.

R. p. 249 (emphasis added). S.C. Code Ann. § 17-25-350 provides:

> In any offense carrying a fine or imprisonment, the judge or magistrate hearing the case shall, upon a decision of guilty of the accused being determined and it being established that he is indigent at that time, set up a reasonable payment schedule for the payment of such fine, taking into consideration the income, dependents and necessities of life of the individual. Such payments shall be made to the magistrate or clerk of court as the case may be until such fine is paid in full. Failure to comply with the payment schedule shall constitute contempt of court; however, imprisonment for contempt may not exceed the amount of time of the original sentence, and where part of the fine has been paid the

> imprisonment cannot exceed the remaining pro rata portion of the sentence.

Defense counsel cited to Alabama v. Shelton, 535 U.S. 654 (2002), Nichols v. United States, 511 U.S. 738 (1994), Faretta v. California, 422 U.S. 806 (1975), Osbey v. State, 425 S.C. 615, 825 S.E.2d 48 (2019), Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007) all in support of his motion. R. p. 249 and 277. The judge issued a written ruling on counsel's motion to remand which stated:

> The Court respectfully denies the Defense Motion to Remand. Based on State v. Robinson, 380 S.C. 201, 669 S.E.2d 588 (2008) and State v. Talley, 371 S.C. 535, 640 S.E.2d 878 (2007), use of Defendant's prior conviction for enhancement is proper given that Defendant was not actually imprisoned as a result of that conviction.

R. p. 246.

ARGUMENT

The trial court erred in refusing to remand Appellant's DUI charge to magistrate court because her present charge was enhanced to a second offense based on a prior uncounseled guilty plea to DUI for which Appellant was sentenced to a fine or jail time, because such jail time would have been triggered upon her failure to pay the fine.

In Nichols v. United States, 511 U.S. 738, 740 (1992), the Supreme Court considered "[w]hether the Constitution prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense." In Nichols, the defendant's sentencing range for his guilty plea to a federal drug crime was increased based on his prior uncounseled state misdemeanor conviction for DUI. Nichols was sentenced only to a two hundred and fifty dollar fine for the DUI. Id. The Nichols Court ultimately held that using Nichols' prior uncounseled misdemeanor conviction in enhancing his sentencing range was proper: "[W]e hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under [Scott v. Illinois, 440 U.S. 367 (1979)] *because no prison term was imposed*, is also valid when used to enhance punishment at a subsequent conviction." Nichols, 511 U.S. at 748-749 (emphasis added).

Scott v. Illinois, 440 U.S. 367, 373-374 (1979) held that a criminal defendant was not entitled to appointed counsel where the defendant was not sentenced to "actual imprisonment." However, Alabama v. Shelton, 535 U.S. 654, 658 (2002) expanded the holding in Scott to hold "that a suspended sentence *that may end up in the actual deprivation of a person's liberty* may not be imposed unless the defendant was accorded the guiding hand of counsel in the prosecution for the crime charged." Id. (internal quotations omitted) (emphasis added).

In Shelton, the Court held that a state cannot activate a suspended sentence that was imposed on an indigent defendant where the state failed to provide the defendant with appointed counsel. Id. at 662. The Court reasoned that once a suspended sentence is activated, the defendant is "actually imprisoned" for the original offense, and thus must be afforded counsel. Id. The Shelton Court went on to hold that the imposition of a suspended sentence, even where that sentence is not activated, requires that a defendant be afforded appointed counsel.

The Shelton Court agreed with the Alabama Supreme Court that "[a] defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel." Id. at 674 (emphasis omitted). Specifically, the Supreme Court found that "Shelton is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined." Id.

In Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007), our Supreme Court considered whether prior uncounseled misdemeanors could be used to enhance a defendant's federal sentencing guidelines in the context of a PCR action. Talley was sentenced to ninety-seven months in federal prison for a federal drug offense. Id. at 539, 640 S.E.2d at 879. His sentencing range on this federal drug offense was increased based on two prior uncounseled state misdemeanor convictions – one for drug paraphernalia and the other for criminal domestic violence. Talley received a two hundred dollar fine for the drug paraphernalia. On the criminal domestic violence charge, Talley was sentenced to a nine hundred and forty dollar fine "and was sentenced to thirty days' imprisonment, immediately suspended on the condition of six months' good behavior." Id.

The Talley Court recognized that "[p]recedent prior to Shelton established that a defendant was entitled to the constitutional right to counsel when the defendant received a

sentence 'that end[s] up in the actual deprivation of a person's liberty.'" Talley, 371 S.C. at 543, 640 S.E.2d at 881 quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972). The Talley Court further recognized that Shelton had expanded this holding by requiring "counsel to be appointed when an indigent defendant received a sentence that '*may* end up in the actual deprivation of a person's liberty.'" Talley, 371 S.C. at 543, 640 S.E.2d at 881-882 quoting Shelton, 535 U.S. at 658.

Turning to the specific sentence that Talley received for his uncounseled criminal domestic violence plea, the Court stated:

> Although a magistrate has the statutory authorization to suspend sentences and impose conditional sentences, *we note the enforcement of substantive conditions as part of a suspended sentence may implicate a defendant's right to counsel as required by* Argersinger, Scott, and Shelton. In this case, the magistrate's condition of six months' good behavior was effectively probation, and accordingly, the probation was an illegal sentence. We vacate that portion of [Talley's] sentence for his [domestic violence] conviction.

Talley, 371 S.C. at 543, 640 S.E.2d at 882-883 (emphasis added). The Court went on to conclude that Talley did not have a constitutional right to counsel for his criminal domestic violence conviction:

> If a defendant receives only an immediately suspended sentence without probation, *there is absolutely no possibility the defendant will ever be incarcerated for the underlying conviction.* As such, the prison term for the underlying conviction will never be triggered, and the defendant has not received a sentence that "may 'end up in the actual deprivation of a person's liberty.'"

Id., at 545, 640 S.E.2d 878, 883 quoting Shelton, 535 U.S. at 658 (emphasis added).

In this case, Appellant was sentenced to a fine *or* imprisonment for thirty days for her uncounseled DUI conviction. Therefore, Appellant faced the real possibility of actual imprisonment for that conviction. Had Appellant failed to pay the fine imposed by the

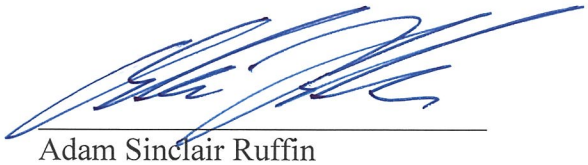
magistrate, the sentencing document clearly indicated that a bench warrant would be issued for her arrest. As the Supreme Court noted in Talley, "*the enforcement of substantive conditions as part of a suspended sentence may implicate a defendant's right to counsel as required by* Argersinger, Scott, and Shelton." Appellant's conviction for her uncounseled DUI was therefore unconstitutional. See Alabama v. Shelton, 535 U.S. 654 (2002).

Like the defendant in Shelton, Appellant was "entitled to appointed counsel at the critical stage when [her] guilt or innocence of the charged crime [was] decided and [her] vulnerability to imprisonment [was] determined." Alabama v. Shelton, 535 U.S. 654, 674 (2002). Since Appellant's prior uncounseled DUI conviction was unconstitutional in violation of Shelton, it should not have been used against her in enhancing her current DUI charge to a second offense. Unlike in Talley, where imprisonment for the uncounseled prior conviction was an impossibility, Appellant was in fact exposed to actual imprisonment which would have been triggered by her simple failure to pay the fine.

The trial judge erred in finding that the use of Appellant's prior uncounseled guilty plea to enhance her current charge to a DUI second offense was proper because Appellant was not "actually imprisoned." This was the incorrect legal standard based on Shelton and Talley and therefore, Appellant's conviction should be reversed. See Alabama v. Shelton, 535 U.S. 654 (2002); Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007).

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Abbeville County Court of General Sessions for a new trial.



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This 18th day of November, 2020.

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 "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 18, 2020

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