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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RALPH DALE DIXON, JR.

APPELLANT

APPELLATE CASE NO. 2020-001556

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred when it denied Appellant's motion for directed verdict because the lifetime registration requirements of the Sex Offender Registry Act violated Appellant's due process rights where the act did not provide for a judicial review hearing to afford Appellant with the opportunity to be removed from the sex offender registry?

2. Whether the lower court erred when it denied trial counsel's motion to quash the indictment for failure to register where the indictment stated that it was for a "third offense" which was prejudicial information that did nothing to put Appellant on notice of the charges against him and served only to bias the grand jury into indicting Appellant because he was the type of person that would fail to register as the grand jury saw he had already been convicted of failure to register twice in the past?

STATEMENT OF THE CASE

During the June 2020 term, the Lancaster County Grand Jury indicted Appellant for failure to register on the sex offender registry, third offense, and resisting arrest. R. 265.

On November 17, 2020, Appellant's trial proceeded in his absence before the Honorable Brian M. Gibbons, and a jury. R. 1; R. 23, ll. 17 – 23. John Freeman represented Appellant. R. 1. Lisa Collins and Nadine Martin represented the state. Id.

Appellant was found guilty as indicted. R. 243, l. 21 – 244, l. 2. Judge Gibbons sealed Appellant's sentence until he could be brought before the trial court for sentencing. R. 247, ll. 17 – 21.

On November 17, 2020, Appellant's sentencing hearing proceeded before Judge Gibbons. Sentencing hearing p. 1. John Freeman represented Appellant. Id. Lisa Collins represented the state. Id. Appellant was sentenced concurrently to five years' imprisonment for failure to register, third offense, and one-year imprisonment for resisting arrest. R. 262, ll. 7 – 21.

This appeal follows.

STANDARD OF REVIEW

1. "A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "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." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 429, 753 S.E.2d at 409.

2. The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. Id. Accordingly, an appellate court is bound by the trial court's factual findings when the findings are supported by the evidence and not controlled by error of law. Id.

ARGUMENTS

1. The trial court erred when it denied Appellant's motion for directed verdict because the lifetime registration requirements of the Sex Offender Registry Act violated Appellant's due process rights where the act did not provide for a judicial review hearing to afford Appellant the opportunity to be removed from with the sex offender registry.

Relevant Facts

In 2017, Appellant was convicted of committing a lewd act, a conviction which mandated that he register on the sex offender registry. R. 54, ll. 14 – 21. Duane Rollings, the Lancaster County Sheriff's Office "sex offender registry coordinator" testified at Appellant's trial in this case. R.50, l. 23.

Rollings met with Appellant on March 23rd, 2018 and told Appellant he was required to register on the sex offender registry. R. 55, l. 12 – 56, l. 25. Rollings could not remember exactly how he explained the requirements of the sex offender registry to Appellant, but stated he gave a usual "spiel" to all registrants. R. 65, l. 19 – 66, l. 8; R. 75, l. 22 – 76, l. 9; R. 55, l. 12 – 56, l. 25. Rollings explained to Appellant that he needed to provide the address of his residence and needed to update his address on the registry every six months as well as whenever his address changed. Id. He also explained to Appellant that he needed to provide an address for his place of work. Id.

Rollings testified that he reviewed with Appellant all the sex offender registry requirements. R. 57, l. 21 – 61, l. 22. Rollings asserted that Appellant initialed a document that stated he was required to update his address within three days of moving. Id. Appellant provided to Rollings an address on Baker Street in Lancaster as his registered residence. Id.

Rollings also stated he informed Appellant that he would need to reregister on October 2nd, 2018 for his biannual registration and continue to reregister every six months for the rest of his life. Id. Rollings explained that "every little change in [Appellant's] life has to be updated." Id. Appellant initialed the paragraph stating that he understood the failure to register or provide notification of change of address would constitute a crime in South Carolina. Id. However, Rollings could not remember if Appellant stated he understood the requirements of the sex offender registry. R. 77, ll. 3 – 14.

Rollings left his job as the sex offender registry officer and Rob Marshall took over sex offender registry duties in July of 2019. R. 79, l. 15 – 80, l. 2. Marshall met with Appellant on January 17th, 2020 and Appellant provided the same Baker Street address. R. 80, l. 17 – 81, l. 13; R. 83, ll. 7 – 9. Marshall testified he went over the sex offender registry forms with Appellant as well. R. 81, l. 22 – 82, l. 24. Appellant initialed two pages that stated he needed to register and reregister within the required time frames for the rest of his life, and that it was crime to fail to update his address when it changed. R. 82, l. 20 – 83, l. 6.

Marshall stated that the sex offender registry required registrants to provide all addresses where they stay for ten days or more. R. 85, ll. 7 – 11. Marshall explained that when a registrant updated their address the registry forms would show the new address on them. R. 84, ll. 7 – 16. Marshall alleged that Appellant never reported a change of address. Id.

However, on cross-examination Marshall admitted he did not remember contacting Appellant for his biannual registration and did not "typically" read the entire sex offender registration document package to registrants. R. 87, ll. 7 – 22. He also admitted that he was the officer tasked with visiting the registered addresses of individuals on the sex offender registry but never went to Appellant's Baker Street address to verify he stayed there. R. 89, ll. 4 – 13.

Appellant's brother, Anthony William Dixon, testified at Appellant's trial as well. R. 94, l. 22; R. 95, ll. 7 – 9. Anthony lived at the Baker Street address for two and a half years. R. 95, ll. 14 – 16; R. 97, l. 24 – 98, l. 3. Anthony met with Officer Jamie Burr at his home on March 17th, 2020, and Anthony told Burr that Appellant did not live at the Baker Street address. R. 95, l. 19 – 96, l. 14; R. 130, ll. 3 – 131, l. 12. Anthony testified that he "told a lot of officers" Appellant did not live there. R. 96, l. 25 – 97, l. 6.

Anthony further told Burr that Appellant was on a trespass notice and was not allowed at the Baker Street home. Id.; R. 133, ll. 7 – 18. Anthony also testified that Appellant never lived at the Baker Street address after the trespass notice was issued. R. 102, ll. 19 – 23. However, in his testimony at trial, Anthony admitted that Appellant used the address to receive mail. R. 98, ll. 9 – 12. As a result, Appellant would regularly come to the Baker Street address to pick up his mail. R. 98, ll. 16 – 24. Notably, Anthony never told Burr that Appellant received his mail at the Baker Street address. R. 140, l. 2 – 141, l. 1.

Paulette Anderson, the tenant of the Baker Street home, testified that she requested a trespass notice to prevent Appellant from residing at the Baker Street home. R. 168, l. 2 – 169, l. 18. Anderson stated she never requested to have the trespass notice withdrawn. R. 169, l. 13 – 170, l. 1. She also testified that Appellant did not live at the Baker Street address and "was never allowed to reside [there]." R. 169, l. 8 – 10; R. 170, l. 25 – 171, l. 7.

Officer Wes Gladden served the trespass notice on Appellant on October 17th, 2018. R. 157, ll. 7 – 24. Gladden testified that on October 17th, 2018 he advised Appellant that Appellant was no longer allowed at the Baker Street address. R. 157, l. 25 – 159, l. 16. Gladden also testified that he explained the consequences of violating the trespass notice and had "no concern" that Appellant did not understand them. R. 161, l. 24 – 162, l. 12; R. 163, ll. 18 – 24.

The state rested its case. R. 206, ll. 8 – 9. After lengthy deliberations the jury returned a verdict of guilty on both charges. R. 243, l. 21 – 244, l. 2.

After the state rested its case, trial counsel Freeman moved for directed verdict and argued that the registry provisions of the South Carolina sex offender registration act were unconstitutional violations of due process under the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 15 of the South Carolina Constitution. R. 209, l. 24 – 210, l. 10. Trial counsel reasoned the lack of judicial review left registrants with no ability to be removed from the sex offender registry regardless of their likelihood to reoffend and that blanket categorization, with no opportunity for removal from the registry, was unconstitutional. Id. Moreover, registrants were required to provide personal information outside of the address requirements such as "tattoos, vehicles, phone numbers," etc. R. 253, ll. 15 – 24; S.C. Code Ann. § 23-3-530.

Discussion

Trial counsel properly argued that the registration requirements of South Carolina's sexual offender registry act (SORA) was unconstitutional because it lacked a mechanism for judicial review to afford a registrant the opportunity to be removed from the lifetime registry. Accordingly, this Court should grant directed verdict on the failure to register charge; or in the alternative, order a judicial review hearing to determine whether Appellant posed a high risk of reoffending; and if he does not, remove him from the sex offender registry and vacate his conviction for failure to register.

In South Carolina, the SORA states any person, regardless of age, convicted of an enumerated crime under S.C. Code Ann. § 23-3-430(A), must register as a sex offender. The SORA's registration requirements mandate that a registrant must reregister biannually for the

rest of their life. S.C. Code Ann. §§ 23-3-450, -460. Registrants must also go to the sheriff's department to register in person and must provide all information as required by SLED, which included much more information[1] than simply an address. S.C. Code Ann. § 23-3-530; S.C. Code Ann. Regs. 73-260.

Any registrant who fails to register, fails to reregister bi-annually, or fails to provide required notification should his or her address change, is subject to criminal prosecution. S.C. Code Ann. § 23-3-470. Importantly, the SORA does not have any provision providing for judicial review to afford registrants the opportunity to be removed from the registry by demonstrating they do not post a high risk of re-offending. Instead, a person may only be removed from the registry when their conviction is reversed, overturned, or vacated and a final judgement has been rendered. S.C. Code Ann. § 23-3-430(E). "The complete absence of judicial review under South Carolina's legislative scheme is the most stringent in the country." Powell v. Keel, Op. No. 28033 (S.C. Sup. Ct. filed June 9, 2021) (Shearouse Adv. Sh. No. 19 at 9).

South Carolina's SORA was intended to apply to "convicted offenders" who "often pose a high risk for reoffending." S.C. Code Ann. § 23-3-400. The state's purported purpose for registration, namely recidivism, is not rationally related to the liberty interests implicated because the SORA groups low-level sex offenders, for which there is no indication they will reoffend, into the same category as diagnosed sexual predators. The statute makes no explanation regarding recidivism rates and does not define what constitutes a "high risk for reoffending."

South Carolina is the only remaining state to maintain a lifelong registry for all sex offenders, with no fixed-period registration classification, no tiered review, no opportunity to

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[1] Trial counsel explained the registry requires other information such as "descriptive information" which included race; sex; height; weight; blood type; social security number; full description of scars, marks, and, tattoos; etc. R. 253, ll. 15 – 24; See S.C. Code Ann. § 23-3-530; see also S.C. Code Ann. Regs. 73-260.

petition for relief of restrictions, and no judicial removal process. Other states implement either: (1) a proportionality analysis, requiring a shorter registration period for less serious offenders; or (2) the ability to petition the court for removal after specified periods of time. Some states[2] implement a mixture of these two approaches.

The SORA violates the due process provisions of the Fourteenth Amendment to the United States Constitution and Article 1, Section 15 of the South Carolina Constitution because it fails to distinguish between types of offenders and their corresponding likelihoods of recidivism. Instead, the SORA lumps together all individuals convicted of any of the offenses on the statutory list and levies the same punishment across the board, namely mandating registration on the sex offender registry indefinitely. S.C. Code Ann. §§ 23-3-430 -470. In the decades after the implementation of SORA, no evidence has been presented indicating all sex offenders reoffend at the same rate; nor has any statistical evidence been presented indicating low-level offenders, such as Appellant, reoffend at a "high" rate or even at a higher rate than other groups of offenders in general. See Powell, at 16 (citing Does #1-5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016)).

Our Supreme Court recently decided Powell v. Keel, Op. No. 28033 (S.C. Sup. Ct. filed June 9, 2021) (Shearouse Adv. Sh. No. 19 at 9). The issue in Powell arose from the lower court's grant of summary judgment in favor of Powell on his claim challenging the publication and lifetime duration of the mandated registration as a sex offender under the SORA. Powell, at 10. On the issue of the registration requirements under the SORA our Supreme Court held that the,

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[2] Restoration of Rights Project, *50-State Comparison: Relief from Sex Offender Registration Obligations*, Collateral Consequences Resource Center (updated Nov. 2019), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations.

"SORA's lifetime registration requirement [was] unconstitutional absent any opportunity for judicial review to assess the risk of re-offending." Id.

On April 2, 2009, Powell pled guilty to criminal solicitation of a minor. Id.; S.C. Code Ann. § 16-15-342. As a result, Powell was required to register as a sex offender under the SORA for the rest of his life. Powell, at 11; See S.C. Code Ann. §§ 23-3-430(A), -460(A), -470. In 2011, Powell completed his sentence as well as outpatient psychiatric treatment. Powell, at 11. Powell was evaluated by Dr. Williams, a licensed professional counselor, and Dr. Thomas, a licensed psychologist, both of whom determined Powell was a low risk for recidivism. Id.

On November 21st, 2016, Powell petitioned the circuit court to grant declaratory judgement that the SORA does not permit publication[3] of the sex offender registry on the internet, and "the lifetime duration of his sex offender registration constitutes excessive punishment in violation of the Eighth Amendment of the United States Constitution and Article I, Section 15 of the South Carolina Constitution, deprives him of due process and equal protection, and warrants equitable relief in the form of his removal from the registry." Powell, at 11. After cross-motions for summary judgement, the circuit court held a hearing and granted Powell's motion on all claims. Id. The state appealed to the Court of Appeals, which transferred the case to our Supreme Court. Id.

On appeal, our Supreme Court cited State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) for the proposition that the SORA's lifetime satellite monitoring requirement implicated a protected liberty interest "to be free from permanent, unwarranted government interference." Powell, at 13 – 14. Similarly, in examining the lifetime registration requirement of the SORA,

[3] Our Supreme Court in Powell held that the SORA permits dissemination of the State's sex offender registry information on the internet. Powell, at 10; See S.C. Code Ann. § 23-3-490(E).

the Court in Powell held the lifetime registration implicated a protected liberty interest as well. Id.

Since the registration requirement of the SORA implicated a protected liberty interest, the Court determined that the SORA needed some form of judicial review to determine if the intrusion on that liberty interest furthered the state's purported interest of protecting the public wellbeing from sex offenders with a high risk of re-offending. Powell, at 16. Our Supreme Court held "Although we find the State has a legitimate interest in requiring sex offender registration and such registration is constitutional, *SORA's requirement that sex offenders must register for life without any opportunity for judicial review violates due process because it is arbitrary and cannot be deemed rationally related to the General Assembly's stated purpose* of protecting the public from those with a high risk of re-offending." Powell, at 21 (emphasis added). Accordingly, the SORA's lifetime registration requirement was unconstitutional. Id.

The import from Powell was evident, under the Dykes test, the SORA imposed an arbitrary restriction on the due process rights of registrants because it required all registrants to remain on the registry for life without any mechanism for judicial review for registrants to have the opportunity to be taken off the registry. Id. The requirement that all sex offenders remain registered on the sex offender registry did not rationally relate to the state's interest in protecting the public's wellbeing because it grouped all sex offenders together such that it forced registrants who did not pose a risk of reoffending to stay on the sex offender registry for life. Id.

In the instant case, the initial decision to have Appellant register on the sex offender registry was constitutional because the court's initial ruling requiring Appellant to register functioned as the required judicial review hearing. However, every biannual re-registration afterwards was unconstitutional because there was no judicial review of Appellant's risk of

reoffending to determine that Appellant staying on the sex offender registry was necessary to further the state's purported interest in protecting the public wellbeing. Accordingly, on March 17th, 2020 Appellant should not have been required to reregister on the sex offender registry and should not have been subsequently arrested[4] for that "violation" on March 18th, 2020.

Trial counsel here made the same argument as the defense counsel in Powell. Powell, at 11; R. 209, l. 24 – 210, l. 10. Trial counsel explained that the SORA registration requirements presented an unconstitutional violation of the registrants' due process rights because the statutory scheme did not provide judicial review to determine if forcing Appellant to reregister on the sex offender registry was proper. R. 209, l. 24 – 210, l. 10. Accordingly, the lower court erred in denying trial counsel's directed verdict motion because Appellant's conviction for failure to register, third offense, violated his due process rights as it occurred without a judicial determination that Appellant was at a high-risk of reoffending such that he needed to continue to register on the sex offender registry.

Appellant understands this case arises in an unusual procedural posture; however, Appellant should not be penalized because trial counsel clairvoyantly and correctly argued for a directed verdict due to the South Carolina SORA's unconstitutional registration requirements before the decision in Powell was published. If this Court determines that directed verdict is not the proper remedy; in the alternative, it should grant a remand for a judicial review hearing to determine if Appellant is at high risk for reoffending, and if he is not, Appellant should be taken off the registry and his conviction should be vacated.

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[4] Since Appellant's arrest was pursuant to an unconstitutional law, his arrest was unlawful such that his conviction for resisting arrest should be vacated. See State v. Francis, 152 S.C. 17, 149 S.E. 348, 354 (1929) ("[A] person has the same right to resist an unlawful arrest as to resist an unlawful assault."); see also State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570, 571 (1967).

2. The lower court erred when it denied trial counsel's motion to quash the indictment for failure to register where the indictment stated that it was for a "third offense" which was prejudicial information that did nothing to put Appellant on notice of the charges against him and served only to bias the grand jury into indicting Appellant because he was the type of person that would fail to register as the grand jury saw he had already been convicted of failure to register twice in the past.

Discussion

Prior to Appellant's trial, trial counsel moved to quash the indictment for failure to register as a sex offender, third offense. R. 2, l. 13 – 3, l. 20; R. 4, l. 18 – 5, l. 17. Trial counsel argued that the indictment prejudiced Appellant as it included the unnecessary information that it was a failure to register "third offense." R. 2, l. 13 – 3, l. 20; R. 4, l. 18 – 5, l. 17. Trial counsel explained that the inclusion of the "third offense" language in the indictment likely improperly influenced the grand jury into finding probable cause for the current failure to register charge against Appellant because he had been convicted of failure to register two prior times. R. 2, l. 13 – 3, l. 20; R. 4, l. 18 – 5, l. 17. Stated differently, the "third offense" language served only as propensity evidence that showed the grand jury Appellant was the *type* of person to fail to register on the sex offender registry and caused the grand jury to wrongfully find probable cause for the charges against him on that basis.

The state responded that to put Appellant on notice of the charges he had to defend against, they had to include the "third offense" language in the indictment. R. 3, l. 22 – 4, l. 16. The state argued that had the "third offense" language not been in the indictment, trial counsel could have argued the indictment was defective for failing to properly notify Appellant as to what he needed to defend himself against. Id.

However, contrary to the state's argument, the law in South Carolina shows that trial counsel would not have been able to argue that the indictment against Appellant should be quashed for failing to state it was a third offense. Our Courts have held the inclusion of information regarding prior convictions in an indictment is generally unnecessary to put a defendant on notice of the charge he has to defend himself against. See State v. Scriven, 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000); see also State v. Simuel, 357 S.C. 378, 593 S.E.2d 178 (Ct. App. 2004); see also U.S. v. Cotton, 535 U.S. 625 (2002) (holding that "*other than fact of prior conviction*, any fact that increases penalty for crime beyond prescribed statutory maximum must be charged in indictment, submitted to jury and proven beyond a reasonable doubt.") (emphasis added). The key distinction for determining whether it is proper to include prior convictions in an indictment is between charges that include a prior conviction as an element of the offense and charges that simply enhance sentencing based on prior convictions. Scriven, at 338, 529 S.E.2d at 73 (citing State v. Mitchell, 220 S.C. 433, 68 S.E.2d 350 (1951)). Inclusion of prior convictions in the indictment is proper for the former and improper for the latter.

In State v. Scriven, 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000) Scriven was on trial for violating S.C. Code Ann. § 44-53-370 which "makes it illegal to distribute marijuana and cocaine." Id. at 338, 529 S.E.2d at 73. Prior to his trial, Scriven was convicted of five drug-related offenses. Scriven, at 336 – 37, 529 S.E.2d at 72 – 73. Accordingly, when Scriven was found guilty he was convicted for "distribution of marijuana, third offense." Id. at 337, 529 S.E.2d at 73. Scriven argued on appeal, inter alia, that the indictment, which did not include language referring to Scriven's prior convictions for the degree of the offense, failed to put him on notice of the charges he had to defend against. Scriven, at 337, 68 S.E.2d at 73.

The Court of Appeals held that indictment was not defective as it was sufficient to fully inform Scriven of the offenses with which he was charged despite the indictment not including information about his prior convictions. Scriven, at 339, 529 S.E.2d at 74. The Court specifically noted that, "Although [the statute] contains provisions for sentence enhancement upon conviction for a second or greater offense, *these provisions are not elements of the offense.*" Id. (emphasis added). The Court in Scriven also noted that the "trial court *properly considered* [Scriven's] prior convictions *at the time of sentencing.*" Id. (emphasis added)

Accordingly, the propriety of including language referring to a second or subsequent offense in the indictment turns on whether the existence of a prior conviction was an element of the charged crime such that it was necessary to include to fully inform the accused of the charges against him. If a prior conviction is not an element of the crime it should not be included in the indictment and should only be considered during sentencing. Id.

In the present case, the statute for failure to register on the sex offender registry, under which Appellant was convicted, does not have a prior conviction as an element of the crime. See S.C. Code Ann. § 23-3-470. This is unlike many other statutes in the South Carolina Code that enumerate distinct offenses based on the level or gradation of the crime such as burglary, criminal sexual conduct, and harassment which all have prior convictions as an element for proving the higher degrees of offenses. See S.C. Code Ann. §§ 16-11-311 -313 (proof of prior burglary convictions can be used to prove first- and second-degree burglary); see also §§ S.C. Code Ann. 16-3-655(A)(B) (proof of prior criminal sexual conduct convictions can be used to prove first- and second-degree criminal sexual conduct); see also §§ S.C. Code Ann. 16-3-1710 - 1720(C) (proof of a prior conviction for harassment within the preceding ten years can be used to prove first- and second-degree harassment).

In South Carolina, defendants are entitled to impartial grand jurors. State v. Richardson, 149 S.C. 121, 146 S.E. 676 (1928). Undoubtedly, the inclusion of a second or subsequent offense in the indictment prejudices the accused because it shows the grand jury that the accused has committed the same crime in the past and improperly influences the grand jury into believing he was the *type* of person to commit the present crime. Thus, it is improper to include a second or subsequent offense in the indictment when it is unnecessary to fully inform the accused of the charges against them.

As in Scriven, the charge against Appellant in the present case does not have a prior conviction as an element of the offense. Scriven, at 338, 529 S.E.2d at 73 – 74; S.C. Code Ann. § 23-3-470(A). Thus, the wrongful inclusion of the "third offense" language was unnecessary to put Appellant on notice of the charge he had to defend himself against and served only as propensity evidence which improperly influenced the grand jury into indicting Appellant because he was the *type* of person that would fail to register. R. 2, l. 13 – 3, l. 20; R. 4, l. 18 – 5, l. 17.

As trial counsel argued, the only way to cure the prejudice in this case was to quash the improper indictment and to reindict Appellant under a proper indictment that did not state it was a "third offense." R. 2, l. 13 – 3, l. 20; R. 4, l. 18 – 5, l. 17. Accordingly, Appellant's conviction for failure to register should be vacated because the grand jury could not be impartial after improperly learning the prejudicial information that Appellant had been convicted of failing to register on the sex offender registry two times prior to the present charges.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate his conviction for failure to register on the sex offender registry; or in the alternative, provide a judicial review hearing to determine if Appellant should be removed from the sex offender registry; and if he should be removed, vacate his conviction for failure to register on the sex offender registry.

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of December, 2021.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,

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