The Supreme Court of South Carolina

In the Matter of Brett Andrew Nelson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 7, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina , dated February 16, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Brett Andrew Nelson shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

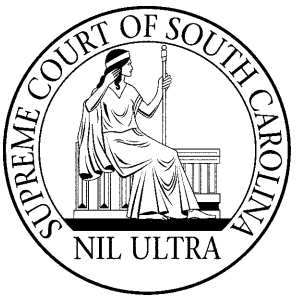
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 12, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 14, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Reginald R. Latimore, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
C. Victor Pyle Jr., Circuit Court Judge

Opinion No. 27102
Heard November 16, 2011 – Filed March 14, 2012

AFFIRMED AS MODIFIED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch Jr., all of Columbia, and Solicitor W. Walter Wilkins III, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Reginald R. Latimore (Petitioner) was convicted of violating section 23-3-470 of the South Carolina Code, S.C. Code Ann. § 23-3-470 (Supp. 2011), by failing to timely re-register as a sex offender and received a sentence of ninety days of home incarceration with GPS monitoring. The court of appeals affirmed Petitioner's sentence. *State v. Latimore,* 390 S.C. 88, 700 S.E.2d 456 (Ct. App. 2010). We granted certiorari to consider Petitioner's argument that the court of appeals erred in affirming the circuit court's denial of Petitioner's directed verdict motion, and now affirm that decision as modified.

FACTS

In 2004, Petitioner pled guilty to committing a lewd act on a child. He was released from prison in 2005, and was required to register as a sex offender by the Sex Offender Registry Act. S.C. Code Ann. §§ 23-3-400 *et seq.* (2007 & Supp. 2011). Petitioner registered in Greenville County on August 3, 2005, and signed three forms acknowledging that he had to re-register for 2006 within thirty days after the anniversary of his most recent registration, that is, before September 4, 2006. He also signed two forms acknowledging that he must notify the sheriff's office of any change in address. On one of the forms Petitioner acknowledged that he had to pay $100, either by cash or money order, at the time he re-registered.

In 2006 the General Assembly revised the sex offender registry statute to require offenders to re-register twice a year, once in their birth month and again six months later. *Id.* § 23-3-460. This amendment, which became effective July 1, 2006, altered Petitioner's annual re-registration date to require him to register both in June, when his birthday fell, and again in December. Petitioner did not re-register before September 4, 2006, when he was originally informed he must re-register, nor did he re-register in December 2006, as required by the amended statute.

Petitioner was charged under the amended act with failing to register in December 2006. At trial, the State relied on both the forms Petitioner had executed in August 2005 requiring he register "each year for life within 30 days after the anniversary date of my last registration . . ." and upon the testimony of the sex offender registry coordinator that Petitioner had no contact with the office during 2006. The coordinator acknowledged that Petitioner had changed his address from that reflected on his initial forms. The coordinator testified that the forms were filled out using the address Petitioner had given the Department of Corrections, but that when he appeared in person to complete the forms in August 2005, he gave the new address, which was then entered in the computer. Questioned about a February 1, 2006 date reflected on the change of address form found in Petitioner's record, the coordinator explained the date reflected the day that the document was printed from a website, and not the date the change of address was recorded. Finally, the coordinator testified she had no contact with Petitioner after the August 2005 registration.

After the State rested, Petitioner moved for a directed verdict on the ground he could not be convicted consonant with due process because he had not received actual notice of the change in the registration statute, which moved Petitioner's re-registration date from before September 4, 2006, to by December 31, 2006. The trial judge denied the motion. Petitioner testified that he called the sex offender registry coordinator in February 2006 to obtain approval to move into a new house, and he was under the belief that this phone call satisfied his re-registration requirement. At the close of the defense case, Petitioner renewed his directed verdict motion, which was again denied.

ISSUE

Did the court of appeals err in affirming the circuit court's denial of Petitioner's directed verdict motion?

ANALYSIS

A directed verdict motion should be denied if there is direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011) (internal citation omitted). Petitioner contends the court of appeals erred in affirming the trial court's denial of his directed verdict motion, alleging due process required the motion be granted. We disagree.

Petitioner relies upon *Lambert v. California*, 355 U.S. 225 (1957), to support his contention that due process requires a person have actual notice of changes to a law that imposes a duty on that person to register. In *Lambert*, the United States Supreme Court held due process was offended by the conviction of an individual for violating a municipal registration ordinance requiring all convicted felons to register. *Id.* at 230–31. The Court found a constitutional deprivation in Lambert's conviction because there was no evidence she had actual knowledge of the registration requirement, nor was there any evidentiary showing of the probability of such notice. *Id.* at 227.

The General Assembly's 2006 amendment to the re-registration statute had the effect of imposing an additional registration requirement on sex offender registrants of which they were not required to be actually notified. Consistent with *Lambert*, we find that due process requires a sex offender registrant to have received actual notice of the change in re-registration requirements imposed by the 2006 amendment to section 23-3-460. However, under the facts of this case, where the biannual requirement extended Petitioner's time to re-register, Petitioner is not entitled to reversal.

The record contains evidence that Petitioner had actual notice of the annual re-registration requirement. The State presented evidence that Petitioner had actual knowledge that he was required to re-register by September 4, 2006, and that the registration required a $100 payment. While there was conflicting evidence whether Petitioner was told he had satisfied

the re-registration requirement in February 2006, that evidence created a jury issue, not entitlement to a directed verdict.

The General Assembly's amendment to section 23-3-460 effectively gave Petitioner an almost four-month extension on his deadline to re-register. This extension of the re-registration period did not create a due process problem where Petitioner never sought to re-register either during the twelve-month period of which he had actual notice, or during the four-month extension. Unlike the defendant in *Lambert*, Petitioner was the architect of his own disaster. Had he attempted to fulfill his annual re-registration requirement in a timely manner, he would have been informed of the new biannual requirement.

Accordingly, we agree with the State that the court of appeals properly upheld the circuit court's denial of Petitioner's motion for a directed verdict. However, we hold that to satisfy due process a convicted sex offender must have had actual notice of the 2006 change to section 23-3-460, which imposed an additional registration requirement, to be convicted of violating section 23-3-470 of the South Carolina Code.[1]

CONCLUSION

The decision of the court of appeals affirming Petitioner's conviction is

AFFIRMED AS MODIFIED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion.

[1] To be clear, this is a narrow holding related only to notice of the 2006 amendment to section 23-3-460 and does not require that sex offender registrants receive actual notice twice yearly of their upcoming duty to re-register under that statute.

JUSTICE PLEICONES: I agree that we should affirm the Court of Appeals' opinion, but write separately as I do not believe this situation is controlled by Lambert v. California, 355 U.S. 225 (1957). Lambert invalidated a conviction for violating a municipal ordinance requiring all convicted felons residing in the city to register. The Court found Lambert's conviction violated due process, holding:

> Registration laws are common and their range is wide. [Citation omitted]. Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. At most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled. The disclosure is merely a compilation of former convictions already publicly recorded in the jurisdiction where obtained. Nevertheless, this appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder. We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.' Id., at 50. Its severity lies in the

> absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Here we are not asked to decide the fate of an individual who ran afoul of an obscure catch-all local registration rule, but rather with the question whether a change in the reregistration schedule for convicted sex offenders already on that registry requires actual knowledge. I would hold that due process does not require actual notice of the 2006 statutory change and further note that the majority appears to agree with me, upholding petitioner's conviction based upon his circumstances rather than on actual knowledge of the change in registration dates.

I concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Yelsen Land Company, Inc., Appellant,

v.

The State of South Carolina
and the State Ports Authority, Respondents.

Appeal from Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 27103
Heard February 9, 2012 – Filed March 14, 2012

AFFIRMED

Lawrence E. Richter, Jr. and Alice Richter Lehrman, both of Mount Pleasant, and Donald Bruce Clark, of Charleston, for Appellant.

Attorney General Alan Wilson and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Respondents.

JUSTICE PLEICONES: This is an action by appellant to declare that it is the owner of a 700-acre area adjacent to its Morris Island property. The

Master granted the State and the State Ports Authority (SPA) (collectively respondents) summary judgment, and appellant appeals. We affirm, finding res judicata applies to bar appellant's attempt to relitigate title to this property.

FACTS

In 1969, the State sued appellant[1] alleging the State owned "all tidelands, submerged lands, and waters" adjacent to Morris Island. Appellant answered and claimed it owned all the tidelands, submerged lands, and marshes adjacent to Morris Island. Appellant also counterclaimed for trespass on those lands by the Corps of Engineers in the form of spoilage dredged from Charleston Harbor, the digging of a ditch, and the erection of a dike. In the first appeal, the Supreme Court held that the legal questions of title to the land should be tried to a jury and that the trial judge erred in denying the State a jury trial. State v. Yelsen Land Co., 257 S.C. 401, 185 S.E.2d 847 (1972).

The jury returned a general verdict for the State, having been charged that title to tidelands, submerged lands, and all land below the high water mark on navigable streams are presumptively the State's unless the entity claiming title can show a specific grant from the sovereign that included the words "to the low water mark." It was also charged that it was to determine title to marshlands and to return damages for appellant if it found the State had trespassed on marshland owned by appellant or if it found a taking.

Following the jury verdict, appellant moved for a judgment *non obstante verdicto* and a new trial, both of which the trial judge denied in a written order. The judge appended a map with red lines drawn upon it to illustrate the land determined to belong to the State. On appeal, this Court noted that it was conceded that appellant owned the Morris Island highlands, and that what was at issue was title to the adjacent tidelands. State v. Yelsen,

[1] At that time two entities, appellant Yelsen and Dajon, claimed title to the property. Both appellant and Dajon were controlled by the same individual. Sometime later, Dajon deeded its interest to appellant. For simplicity's sake, we will refer to appellant as the plaintiff in the 1969 suit.

265 S.C. 78, 79, 216 S.E.2d 876, 877 (1975). The dispositive issue on appeal was whether the trial court erred in failing to direct a verdict for appellant on the title issue.[2] The Court held "there was no evidence to sustain the claims of title of [appellant] to the tidelands in question . . . ." id. at 83, 216 S.E.2d at 879, and affirmed. We will refer to this decision as Yelsen I because the parties and the Master do so, although it is technically Yelsen II.

Yelsen I was commenced by the State in 1969 in a complaint alleging "The State of South Carolina is the owner of all the tidelands, submerged lands, and waters adjacent to Morris Island . . . ." The record in this case reflects, however, that in December 1967 the SPA had taken the tidelands of Morris Island "for use as a spoil disposal area . . . a necessary part of the dredging operation in Charleston Harbor" pursuant to S.C. Code Ann. § 54-3-170 (1992). Section 54-3-170 provides:

> The [SPA] may take, exclusively occupy, use and possess, in so far as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the riparian rights thereto pertaining. When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the [SPA]. For the purposes of this section, the meaning of the term *"use"* shall include the removal of material from and the placing of material on any such land. In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provision of this section shall continue in full force and effect as to all other

[2] Appellant also raised claims related to the statute of limitations, the admission of evidence, and the jury charge.

> lands owned by the State. The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters.

Later in December 1967, the SPA gave the federal government a "Spoil Disposal Easement" over the Morris Island tidelands it had just condemned. [3] This document identifies the SPA as "a body corporate and politic through the instrumentality of which [SPA] the State may engage in [port activities] . . . the [SPA] is specifically charged as an agency of the State to co-operate with [the federal government, et al.] . . . ." SPA's acquisition of the tidelands in 1967, well prior to the institution of the State's 1969 title suit against appellant, is an important component of appellant's arguments. We note, however, that appellant's pleading in Yelsen I includes trespass claims predicated on the spoilage being deposited on those tidelands, and that at the Yelsen I trial there was testimony that title to the land was at issue in 1967 because the Corps "needed a spoil disposal area and had requested the [SPA], as agent for the State, to acquire" it. The attorney conducting the title search for the State and the SPA in 1967 testified he spoke with both appellant's principal and his attorney in 1967 as appellant planned to buy Morris Island. There is little question but that appellant was well aware of the SPA's interest in the land as a spoilage site before the purchase.

In 1968, the Corps began depositing spoilage in the Morris Island tidelands. In 2007, appellant brought this suit against the State contending that the dredging spoils placed in the tidelands had created new highlands, and that as the adjacent highland owner, it was the owner of the newly "accreted" highlands as well. The SPA sought to intervene, but in lieu of intervention appellant was permitted to amend its complaint to add the SPA.

The amended complaint alleged three causes of action:

1) State has no interest in the new highlands because it had transferred title to the tidelands to the SPA in 1967;

[3] A second twenty-five year easement was granted in 1992.

2) Appellant's title, allegedly derived from sovereign grants, was superior to the SPA's; and

3) Appellant was the owner of the newly created highlands by virtue of accretion.

The Master granted summary judgment to respondents on all three theories, and this appeal follows.

ISSUE

Did the Master err in granting summary judgment to respondents?

ANALYSIS

Appellant concedes, as it must, that the 1975 case determined it did not have title to the tidelands. Appellant contends, however, that since SPA took title to those tidelands in 1967, neither it nor the State can assert either res judicata or collateral estoppel with regard to the 1975 decision in Yelsen I. We agree with the Master that the doctrine of res judicata applies between the State and appellant to establish that the State owns the tidelands and appellant does not. Moreover, the State and the SPA are in privity as to this title issue, and thus as between appellant and the SPA, title resides in the State and not in appellant.

Appellant's claim to the newly created highlands essentially rests on two theories: (1) that since the State no longer had title to the tidelands when it brought Yelsen I in 1969, that decision is not binding; and (2) that newly discovered documents in appellant's chain of title establish a sovereign grant to the tidelands. Appellant's theories seeking to avoid res judicata are disposed of by Caston v. Perry, 17 S.C.L. (1 Bailey) 533 (1830).

In Caston, the plaintiffs, as tenants in common, had previously prevailed against the defendant in an action to try title to a parcel of land. In

that suit, each party's claim was based on "lines" (metes and bounds). The plaintiffs then brought a second suit against the defendant for trespass. Defendant raised the issue of superior title in this second suit, alleging that before the judgment had been entered in the first case, one of the plaintiff's interest in the land had been sold at an execution sale, and that the defendant had purchased the title from the buyer at the sale. The Caston Court held the defendant's title claim was barred:

> The record of recovery in the former suit between these parties is conclusive of the defendant's rights. . . . The defendant had, at that time, the very title on which he now relies, at least his conveyance bears date long anterior; and whether the former suit depended on the extent of the lines, or the title itself, is wholly immaterial. If one, having a dozen different titles, could set them up in succession in this way, a plaintiff might be kept in Court all his life. The defendant was a stranger to the plaintiffs; they had a right to sue him, and he was bound to defend himself. If he had a title, by which he could claim to be a co-tenant with the plaintiffs, he should have produced it.

A later judge explained that Caston establishes that "a recovery by a plaintiff in trespass to try titles is conclusive between the parties as to all titles which the defendant had at the time of trial . . . ." Dorn v. Beasley, 28 S.C. Eq. (7 Rich. Eq.) 84 (S.C. App. Eq. 1854) (quote from Chancellor's decision).

Two rules can be derived from the Caston decision. First, even a plaintiff who does not have good title, but who prevails against the defendant in that first suit, has good title as against that defendant. Second, a defendant may not relitigate title based on newly discovered documents in his chain where those documents predate the first judgment. Applying those rules to this case, the State has title to the tidelands as against any claim by appellant by virtue of Yelsen I. As between these two parties, it matters not whether the State had good title as against another (i.e., the SPA), or even against appellant, as that is settled. Second, the newly discovered evidence proffered

by appellant at this trial as to his title, even if probative (which the Master found it was not) would not entitle appellant to relitigate his claim to the "new" highlands.

The Master held res judicata barred all three of appellant's claims. Res judicata's fundamental purpose is "to ensure that 'no one should be twice sued for the same cause of action.'" Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011) (internal citation omitted). Res judicata bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit. Judy, at 412, 712 S.E.2d at 167. The evidence supports the Master's conclusion that res judicata settles the title issue as between the State and appellant.

The Master also held that the SPA and the State are in privity with regard to appellant's title claim, and that both respondents are entitled to assert against appellant that title to the tidelands is res judicata in light of Yelsen I. Appellant asserts, however, that the State and the SPA cannot rely on privity here because "it only applies if [they] were basing their claims on the same set of facts" and that while the State relies on Yelsen I the SPA relies on its 1967 statutory taking. For purpose of res judicata, however, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation. E.g. Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986) ("The term 'privy' when applied to a judgment or decree means one so identified in interest with another that he represents the same legal rights."). Viewing the subject matter here as appellant's claim of title to the marshlands, and assuming that the State and the SPA are separate entities for purposes of res judicata, we agree with the Master that the State and the SPA are in privity to the extent the issue is appellant's claim of title to the Morris Island tidelands.

Appellant next contends that the SPA waived its right to rely on the Yelsen I judgment because it asserted in its motion to intervene that it owned the property pursuant to the 1967 statutory taking. The Master found no waiver, however, because the SPA's proposed answer specifically alleged res judicata and collateral estoppel. Appellant next asserts the State waived its

right to rely on res judicata because it did not contest the SPA's claim to ownership based on the 1967 condemnation but instead adopted that view. The Master found, however, that the State did not waive res judicata or collateral estoppel because it specifically pled these doctrines in opposing appellant's motion to amend its complaint after the SPA was allowed to intervene, and because the State pled a continued interest after 1967 by virtue of the Public Trust Doctrine.

Waiver is a question of fact. Laser Supply and Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009). The record is replete with evidence to support the Master's findings that neither the SPA nor the State waived res judicata. Appellant relies heavily upon Kelly v. Para-Chem Southern, Inc., 311 S.C. 223, 428 S.E.2d 703 (1993) to argue that the State waived its right to rely on its Yelsen I judgment by admitting the SPA's 1967 condemnation. This argument ignores the Master's finding that the State asserts a continuing interest in the property under the Public Trust Doctrine. That ruling is not challenged by appellant and is therefore the law of the case. E.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unchallenged ruling, whether correct or not, is law of the case).

The Master correctly held the doctrine of res judicata bars appellant's right to relitigate title to the tidelands around Morris Island and to deny the State's title to those lands. As between appellant and any other party, res judicata or collateral estoppel establishes appellant has no claim, and the State has title.

We agree with the Master that res judicata bars appellant's suit, and therefore the appealed order is

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Osiel Gomez Narciso, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Beaufort County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 27104
Heard January 25, 2012 – Filed March 14, 2012

AFFIRMED IN PART, REMANDED IN PART

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Matthew J. Friedman, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Oseil Gomez Narciso (Petitioner) appeals his conviction for trafficking cocaine, and asserts that the circuit court erred in denying his motion to suppress drug evidence seized by police during a routine traffic stop. Following his conviction, Petitioner signed a Consent Order Granting Belated Direct Appeal (Consent Order) and waived his right to raise any other post-conviction relief (PCR) allegations. Petitioner requests this Court remand his case to determine whether that waiver was entered into knowingly and voluntarily. We affirm the circuit court's order denying Petitioner's motion to suppress, and remand the case for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

FACTUAL/PROCEDURAL BACKGROUND

On August 3, 2005, the Beaufort County Sherriff's Office (BCSO) conducted a drug investigation focusing on Petitioner. Police believed that Petitioner may have been involved in the sale and distribution of cocaine in the Hilton Head/Bluffton area of Beaufort County. A sheriff's deputy received information that Petitioner might be operating a vehicle in the area with expired license plates and possibly no driver's license. The deputy conducted a traffic stop of Petitioner after confirming that his license plates were indeed expired and suspended. A "back-up officer," arrived on scene shortly thereafter. Police placed Petitioner under arrest for operating the vehicle without a driver's license and removed him from the vehicle. Police then conducted a "K-9" search of the vehicle. The narcotics-detection dog used in the search alerted on drug residue on the vehicle, and police conducted a search of the cargo compartment. Police seized powdered cocaine from the vehicle, and charged Petitioner with knowingly and intentionally possessing a quantity of powder cocaine with a weight in excess of one hundred grams.

The Beaufort County Grand Jury indicted Petitioner for trafficking cocaine in excess of one hundred grams, and Petitioner proceeded to trial. The jury found Petitioner guilty as indicted. The circuit court sentenced Petitioner to twenty-five years imprisonment. Petitioner did not appeal his conviction or sentence, but subsequently filed a PCR application.

Petitioner claimed in his PCR application that his trial attorney failed to file a timely notice of appeal even after assuring Petitioner that he "had multiple grounds for appeal," and that he "would almost certainly be successful in overturning the convictions at the appellate level." According to the Consent Order, Petitioner's trial counsel admitted that he failed to file an appeal even though Petitioner requested one be filed. Thus, the State consented to granting Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)[1]. In the same Consent Order, Petitioner "waived his right to raise any other PCR allegations."

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[1] In *White v. State*, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974), the defendant was convicted of burglary and sentenced to twenty years imprisonment. The defendant did not appeal his conviction or sentence, but subsequently filed a petition for PCR and a circuit court denied that relief in a full evidentiary hearing. *Id*. The defendant argued on appeal that the PCR judge should have ordered a new trial because the defendant did not knowingly and intelligently waive the right to appeal from his conviction and sentence. *Id*. at 117, 208 S.E.2d at 39. The defendant's trial counsel testified at the PCR hearing that he did not advise the defendant of his right to appeal because he was certain the defendant knew of his rights due to his prior criminal record. *Id*. The PCR judge found that the defendant did not knowingly and intelligently waive his right to appeal, and directed defendant's new counsel to secure a belated appeal to this Court from his conviction and sentence. *Id*. at 118, 208 S.E.2d at 39. This Court found that with regard to this belated appeal, no notice of appeal had been filed, and thus the Court had no jurisdiction over such an appeal. *Id*. at 119, 208 S.E.2d at 39. However, the Court reviewed the record in connection with the properly presented PCR appeal and ruled that "there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal,

In a petition for writ of certiorari to this Court, Petitioner asserted that the PCR judge properly found that he did not waive his right to a direct appeal, and requested this Court remand his case to determine whether his waiver of any other PCR allegations was entered into knowingly or voluntarily. This Court granted the petition for writ of certiorari as to whether Petitioner knowingly and voluntarily waived his right to direct appeal, dispensed with further briefing on that question, and elected to proceed with further review of the direct appeal issue—the validity of the stop and search. Additionally, this Court granted review of whether Petitioner's waiver of any other PCR allegations was entered into knowingly and voluntarily.

ISSUES PRESENTED

I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.

II. Whether Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

STANDARD OF REVIEW

On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010) (citation omitted). However, this Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. *Id.*

On certiorari in a PCR action, the Court applies the "any evidence" standard. Accordingly, this Court will affirm if any evidence of probative

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even if notice of intention to appeal had been timely served . . . ." *White*, 263 S.C. at 119, 208 S.E.2d at 40.

value in the record exists to support the findings of the PCR court. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citation omitted).

LAW/ANALYSIS

I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.

Petitioner argues that the facts presented by police to the circuit court did not rise to the level of "reasonable suspicion," and that he was "unreasonably seized." Thus, according to Petitioner, his Fourth Amendment rights were violated, and this Court should reverse his conviction. We agree with Petitioner that the search incident to arrest in this case violated his Fourth Amendment rights. However, for reasons explained below, the exclusion remedy is unavailable to Petitioner, and thus his conviction will stand.

In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court initially explained the constitutionally permissible scope of a search incident to arrest. In that case, police ordered the driver of a speeding vehicle to pull over to the side of the road and stop. *Id.* at 455. The policeman asked to see the driver's license and automobile registration and simultaneously smelled burnt marijuana. *Id.* at 455–56. The officer directed the occupants out of the car and conducted a pat down of the four men. *Id.* at 456. The officer then conducted a search of the passenger compartment of the car, including a black leather jacket belonging to Belton. *Id.* He unzipped one of the pockets of the jacket and discovered cocaine. *Id.*

Belton argued that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. *Belton*, 453 U.S. at 456–57. The Court stressed the need to provide a "workable rule," and held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, "he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 459–60. The Court reasoned that the police should also be allowed to examine the contents of

any containers found within the passenger compartment, "for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id*. at 460–61 (citations omitted).

In the instant case, the police stopped Petitioner as part of an ongoing drug investigation, but primarily because the license tags on his automobile were expired. The police officer asked Petitioner for his driver's license, and verified that Petitioner did not possess a valid driver's license. Thus, he arrested Petitioner, and police searched Petitioner's vehicle incident to that arrest.

Petitioner challenged the search at trial. The circuit court judge initially expressed concern at the vehicle search following a mere traffic stop, but denied Petitioner's motion to suppress:

> It concerns me that the law enforcement in this case would risk this investigation by making a search under these circumstances without obtaining a search warrant. It would have been a very easy thing to do. There was just no reason that it needed to be done the way that they did it . . . . But after looking especially at the case of *New York v. Belton*, 433 U.S. 454, is [sic] the only thing that tips the scales in the State's favor in this case; and that is that a search may be made incident to an arrest of the passenger compartment of the vehicle, including containers located in the passenger compartment where the search incident to arrest even if the detainee has been arrested and removed from the vehicle.

Petitioner's trial took place in 2007, two years prior to the United States Supreme Court's holding in *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, the United States Supreme Court limited the expansive searches allowed by *Belton*. The Court noted that *Belton* had been widely understood to "allow a vehicle search incident to arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id*. at 1718. The Court found this reading incompatible with its

previous decisions regarding the basic scope of searches incident to lawful custodial arrests. *Id*. at 1719 (citation omitted). Therefore the Court held that police may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Id*. (citing *Thornton v. United States*, 541 U.S. 615, 624–25 (2004)).

Newly announced rules of constitutional criminal procedure must apply retroactively to all cases, "pending on direct review or not yet final, with no exception for cases in which a new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Petitioner's conviction has not yet become final on direct review. Thus, *Gant* applies retroactively to this case, and Petitioner may invoke its rule of substantive Fourth Amendment law as a basis for seeking relief. However, our analysis of the instant case is further controlled by the United States Supreme Court's decision in *Davis v. United States*, 131 S.Ct. 2419 (2011).

In *Davis*, the defendant was charged and convicted of unlawful possession of a firearm based on discovery of a revolver in a stopped automobile in which he was the only passenger. *Id.* at 2425–26. During the pendency of Davis's appeal, the United States Supreme Court decided *Gant*. The Eleventh Circuit applied *Gant*'s new rule and held that the vehicle search incident to arrest violated Davis's Fourth Amendment rights. *Id.* at 2426 (citation omitted). However, the court concluded that penalizing the arresting officer for following binding appellate court precedent would do nothing to deter Fourth Amendment violations. *Id.* (citing *United States v. Davis*, 598 F.3d 1259, 1265–66 (2010)).

The United States Supreme Court agreed, and reasoned that the acknowledged absence of police culpability doomed Davis's claim. *Id.* at 2428. "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningful deterrence' and culpable enough to be 'worth the price paid by the justice system.'" *Id.* (citing *Herring v. United States*, 555 U.S. 135, 144 (2009)). Excluding evidence in cases

where the "constable" has scrupulously adhered to governing law deters no police conduct and imposes substantial social costs. *Davis*, 131 S.Ct. at 2434. Thus, the Court held that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. *Id.*

In the instant case, the search incident to arrest violated Petitioner's Fourth Amendment rights pursuant to *Gant*. However, excluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. *See id.* at 2426–28. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142 (1974).

This Court will only reverse the circuit court's decision on a motion to suppress when there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010). The circuit court in this case applied the established law to a search executed pursuant to binding precedent. Thus, *Davis v. United States*, and our own standard of review, commands that the circuit court's decision be affirmed.[2]

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[2] Respondent argues that due to *Gant*, the "search-incident-to-arrest logic is no longer appropriate grounds for denying the suppression motion," and urged this Court to find the search was justified under the automobile exception. However, the decision in *Davis* being dispositive, this Court need not reach the automobile exception, or any other grounds, for upholding the search. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1998) (holding that appellate courts need not discuss remaining issues when determination of a prior issue is dispositive).

II. Whether the Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

Petitioner signed a consent order granting belated direct appeal and waived his right to raise any other PCR allegations. He now asks this court to remand his case for a determination as to whether he knowingly and voluntarily waived his right to raise additional PCR claims.

In order to determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995)). Numerous jurisdictions have upheld waivers of post-conviction relief, provided they were knowing and voluntary. *Id.* at 143, 665 S.E.2d at 607. A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001).

In *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court addressed whether a PCR court erred in enforcing a written plea agreement wherein the petitioner waived his right to direct appeal, PCR, and habeas corpus relief. The petitioner argued that his waiver was not knowing and intelligent because there was no discussion at the plea proceeding about the extent of his understanding of the waiver. *Id.* at 141, 665 S.E.2d at 607.

The Court took into account that although petitioner had only a ninth grade education, the text of the written plea agreement was straightforward. *Id.* at 143–44, 665 S.E.2d at 608. In addition, the plea colloquy showed that the PCR court specifically asked petitioner about the waiver both in the language of the plea agreement, and in "plain language." *Id.* Two attorneys accompanied petitioner to the plea hearing and both signed the written plea

agreement along with petitioner. *Id.* Thus, this Court held that the PCR court correctly enforced the waiver and dismissed petitioner's PCR application. *Id.*

In this case, according to the Consent Order, Petitioner appeared before the PCR court on August 26, 2008. The Consent Order states that Petitioner waived his right to raise any other PCR allegations, but was "granted a belated direct appeal pursuant to White v. State." The record before this Court of the colloquy between the parties consists of the following:

The court: What's the—what we got this morning?

Mr. Friedman: Your Honor, the first one is Osiel Gomez Narcisco [sic].

The court: All right.

Mr. Friedman: May we approach on this one?

The court: Yeah

(Bench conference)

Mr. Friedman: Thank you, Your Honor.

The court: Okay. Appreciate it. Thank you.

The Consent Order signed by Petitioner is straightforward. However, Petitioner used an English-speaking interpreter throughout his original trial, and apparently has, at best, a limited command of the English language. The colloquy provided to this Court does not show that the PCR court specifically asked Petitioner about the waiver, either in the language of the Consent Order, or in "plain language."

The State argues that Petitioner's case is distinguishable from *Spoone* because in that case the issue was "whether the right to appellate review and post-conviction review may be waived by a written plea agreement . . . ," and

that "[Petitioner] proceeded to trial and was convicted." This is a distinction without a difference. The key issue in *Spoone* and in Petitioner's case is the circumstances surrounding the waiver of the right to appeal PCR allegations. Aside from the consent agreement, the record in this case does not support the conclusion that Petitioner entered into the agreement knowingly and voluntarily. Additionally, the colloquy between the court and the defendant in this case does not clearly establish that Petitioner knowingly and voluntarily waived his right to raise any other PCR allegations. This Court will affirm the PCR court's findings if any evidence of probative value exists in the record. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011). However, finding that no such evidence exists in the instant case, we must remand for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

CONCLUSION

We affirm the circuit court's denial of Petitioner's motion to suppress. However, the record does not adequately demonstrate whether Petitioner's waiver was in accordance with this Court's waiver jurisprudence. Thus, we remand the case for a determination on that issue.

AFFIRMED IN PART, REMANDED IN PART.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marcus Hyman, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27105
Heard October 18, 2011 – Filed March 14, 2012

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General David Spencer, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Marcus Hyman (Petitioner) appeals the denial of his request for post-conviction relief (PCR) on the ground that his counsel was ineffective. We affirm.

FACTS/PROCEDURAL BACKGROUND

In June 2007, a grand jury indicted Petitioner for the offenses of distribution of cocaine, third offense, and distribution of cocaine within the proximity of a school or park. In September 2007, Petitioner pleaded guilty to these charges, and after a colloquy with the plea judge, he relinquished various constitutional rights, including his right to a jury trial. The plea judge sentenced Petitioner to the mandatory minimum sentence of fifteen years imprisonment for the distribution charge and ten years for the proximity charge, to run concurrently. No direct appeal was taken. However, Petitioner subsequently filed an application for PCR.

Central to Petitioner's ineffective assistance of counsel claim on appeal is a videotape recording of the drug transaction, forming the basis of his charges, that Petitioner never saw prior to pleading guilty. At the evidentiary hearing, Petitioner testified that, after his arrest, he requested to view all of the evidence in the State's possession. Defense counsel testified that she became aware of the videotape early in her representation of Petitioner when she read Petitioner's arrest warrant. Shortly thereafter, defense counsel informed Petitioner of the existence of the videotape and its alleged content.

Defense counsel subsequently undertook negotiations with the solicitor to work out a plea agreement on Petitioner's behalf.[1] These negotiations ultimately resulted in the solicitor agreeing to reduce the distribution charge

[1] At the plea hearing, defense counsel stated on the record that she repeatedly met with Petitioner to discuss the progress of these negotiations, and at one point she even wrote out the various options available to him.

to a second offense, in exchange for Petitioner's agreement to serve five years in prison. This offer was conditioned on Petitioner's agreement not to view the videotape due to the involvement of a confidential informant, whose identity the State sought to conceal but would have been revealed to Petitioner if Petitioner watched the videotape.[2] At the evidentiary hearing, defense counsel testified that plea offers conditioned on the nondisclosure of certain evidence in the State's possession were "basically protocol for all drug cases," so as not to "burn[] . . . [the] confidential informant" unless necessary, or compromise the informant's safety.[3] The solicitor's offer was set to expire on September 18, 2007, at whatever time the plea judge retired for the afternoon.

At the evidentiary hearing, Petitioner testified he repeatedly told defense counsel that he wanted to watch the videotape, and stated that his personal review of the videotape was critical to whether he planned to accept the offer because he wanted to discern whether the videotape depicted his involvement in the drug transaction. To the contrary, defense counsel testified that her notes from conversations with Petitioner during this time reveal that she spoke to Petitioner on August 9, 2007, and again on September 7, 2007, and during both conversations, Petitioner stated he wanted *her* to watch the videotape. Consequently, defense counsel testified, she watched the videotape on September 14, 2007, and testified the videotape

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[2] At the evidentiary hearing, Petitioner testified that, as he understood the offer, if he chose to plead guilty in exchange for five years imprisonment, he would not be allowed to view the videotape, but if he chose to plead guilty in exchange for ten years imprisonment, the solicitor would allow him to view the videotape. Defense counsel did not recall this characterization of the deal. However, she testified that, at some point during the negotiations, the solicitor offered to make no recommendation on the proximity charge and dismiss the distribution charge if Petitioner agreed to a ten to fifteen year sentence.

[3] Petitioner testified that he never received an explanation for why he could not watch the videotape.

"clearly" depicted Petitioner engaged in a drug transaction.[4] Defense counsel relayed these impressions to Petitioner while the five-year offer was still on the table. During this conversation, after defense counsel described the perpetrator as wearing a hat, Petitioner informed her that "it couldn't possibly be him" in the videotape because he never wore hats. Therefore, defense counsel asked the narcotics officer for still photographs from the videotape, which she showed to Petitioner prior to the expiration of the offer. Petitioner testified he recognized himself as the subject of these photographs, but testified that the images did not show him engaged in a drug transaction.[5] Petitioner still refused to accept the solicitor's offer.

As promised, the offer expired when the plea judge retired on September 18, 2007. The next day, September 19, 2007, the parties picked a jury in Petitioner's trial, with opening statements to follow on September 20, 2007. After jury selection but before his trial began in full, Petitioner pleaded "straight up" to the charges.[6] At the evidentiary hearing, defense counsel testified Petitioner never saw the videotape because he decided not to proceed to trial.[7]

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[4] At the plea hearing, the solicitor told the court that the informant was outfitted with audio and video equipment, and that the videotape depicted Petitioner engaged in the sale and transfer of drugs to the informant in exchange for twenty dollars, which the informant paid in one dollar bills so that the transaction would appear clearly on the videotape.

[5] At the plea hearing, defense counsel and Petitioner agreed that the still photographs were made from the videotape, and the plea judge stated on the record that the photographs "obviously" depicted Petitioner.

[6] By the time of Petitioner's plea, the identity of the informant had been disclosed to the defense.

[7] Petitioner explained he decided to plead guilty because he felt "coerced," stating "I didn't want to go through without seeing the evidence . . . . [I]f I would have seen the evidence, I wouldn't even took [sic] it to [sic] that far."

The PCR judge denied Petitioner's application and dismissed it with prejudice. In determining that counsel was not ineffective, the PCR judge noted that defense counsel watched the videotape, Petitioner had the opportunity to see still photographs made from the videotape, and plea counsel met with Petitioner to discuss the charges against him, the punishment he faced, and the negotiations. Furthermore, the PCR judge found defense counsel more credible than Petitioner. The PCR judge stated he was concerned over the seemingly widespread policy of withholding evidence from criminal defendants to allegedly protect the identity of confidential informants, which he described as effectively "impair[ing] a defendant's ability to make an intelligent choice regarding his jury trial rights." However, because counsel watched the videotape, the State provided still photographs to Petitioner, and the evidence was not exculpatory, the PCR judge found that Petitioner could not demonstrate that he was prejudiced by not watching the videotape himself.

ISSUE

Does probative evidence in the record support the PCR court's finding that counsel was not ineffective, even though Petitioner was not provided the opportunity to watch the videotape prior to his guilty plea?

STANDARD OF REVIEW

In PCR proceedings, the applicant bears the burden of proving the allegations contained in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citation omitted). On appeal, the PCR court's ruling should be upheld if it is supported by "any evidence" of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (quoting *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)). However, reversal is appropriate where the PCR court's decision is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007) (citation omitted). "This Court gives great deference to the [PCR] court's findings of fact and conclusions of law." *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citation omitted).

LAW/ANALYSIS

Petitioner contends that because he was not provided the opportunity to view the videotape recording of the drug transaction forming the basis of his convictions, he did not enter his guilty plea freely, voluntarily, and knowingly, and as a result, his counsel was ineffective. We disagree.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 668). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The *Strickland* test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In the guilty plea context, the inquiry with respect to the counsel's alleged deficiency turns on whether the plea was voluntarily, knowingly, and intelligently entered. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). Furthermore, "[t]he second, or 'prejudice,' requirement . . . focuses

on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. 52 at 59. Therefore,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden, 393 S.C. at 572, 713 S.E.2d at 615 (citation omitted). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citations omitted).

When a criminal defendant rejects a plea bargain, we will examine separately whether trial counsel was ineffective with respect to both the defendant's rejection of the offer and his ultimate decision to plead guilty. *Kolle v. State*, 386 S.C. 578, 590, 690 S.E.2d 73, 79 (2010). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citation omitted). Therefore, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000) (citation omitted).

I. Specific Contentions as to the Deficiency in Counsel's Performance

A. Waiver

When attempting to determine the voluntary and intelligent nature of a plea, the plea colloquy ordinarily serves as confirmation that a criminal

defendant is waiving the right to raise certain constitutional claims by pleading guilty. *See Rivers v. Strickland*, 264 S.C. 121, 213 S.E.2d 97, 98 (1975) ("The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea. An accused also waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions.") (citation omitted). However, "[g]iven the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)) (alterations in original). Specifically, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) (emphasis removed) (citing *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980)).

At the evidentiary hearing, the PCR judge found defense counsel to be more credible than Petitioner. *See Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994) (appellate court deference to PCR judge's credibility findings is so great that it required the Court to uphold PCR judge's determination even where testimony at PCR hearing was unequivocally contradicted by the trial record). Through this lens, then, we find that Petitioner had a full understanding and awareness of both the circumstances surrounding the plea negotiations and the implications of rejecting the State's offer. Moreover, the record reveals that Petitioner was aware of the consequences of pleading guilty, rather than proceeding to trial, and voluntarily and intelligently relinquished his constitutional rights to a jury trial and all other attendant trial rights during the plea proceeding. However, insofar as Petitioner argues that the nondisclosure of the videotape renders his waiver involuntary, we address those concerns below.

B. Alleged Brady *Violation*

To the extent Petitioner argues, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), that a criminal defendant may never enter a plea voluntarily without the State first disclosing all of the evidence in its possession, we disagree and hold that no *Brady* violation occurred in this case.

"The *Brady* disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." *Porter v. State*, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (citation omitted). *Brady* evidence is either favorable exculpatory evidence or favorable impeachment evidence. *Porter*, 368 S.C. at 384, 629 S.E.2d at 356 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." *Id.* (citing *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220). A "reasonable probability" is demonstrated when the suppression "undermines confidence in the outcome of the trial." *Id.* (quoting *Bagley*, 473 U.S. at 678). The State must disclose *Brady* evidence even when a criminal defendant does not specifically request the evidence. *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

In *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999), we held that an applicant "may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged *Brady* violation." (citation omitted); *see, e.g.*, *State v. Hill*, 368 S.C. 649, 657, 630 S.E.2d 274, 279 (2006) (recognizing the Court's extension of the *Brady* disclosure rule to guilty plea and sentencing procedures). Consequently, we utilized the following framework to evaluate the success of a PCR applicant's claim: (1) whether the evidence in question was favorable to the applicant; (2) whether the prosecution knew of or had the evidence in its possession; (3) whether the prosecution suppressed the evidence; and (4) whether the evidence was material to Petitioner's guilt or punishment. *Gibson*, 334 S.C. at 524, 514 S.E.2d at 324 (citations omitted). We held that these factors applied in the guilty plea context to both exculpatory evidence and evidence to be used for

impeachment purposes. *Id.* (citations omitted). Finally, we held "[a] *Brady* violation is material when there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." *Id.* at 525, 514 S.E.2d at 325 (citations omitted).

Petitioner cannot satisfy any of the factors delineated in *Gibson* to establish a *Brady* violation with respect to the videotape. Tantamount to any *Brady* claim is the withholding of evidence. Under the present facts, it is undisputed that the solicitor disclosed the videotape to defense counsel. Therefore, in order to find that this action amounts to impermissible suppression under *Brady*, we must first assume that the Constitution requires disclosure of *Brady* evidence to a criminal defendant *personally*. We are unwilling to make that sweeping assumption, and find that disclosure to defense counsel was satisfactory under the present circumstances. Further, because we deem the manner of disclosure appropriate, Petitioner cannot satisfy the materiality prong of *Brady*. *See Porter v. State*, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) ("Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different *had the evidence been disclosed to the defense*." (emphasis added) (citing *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220)). Finally, Petitioner has not proven that the videotape was favorable to him. By all accounts, including defense counsel's testimony, the videotape depicted Petitioner engaged in a drug transaction with a confidential informant. Because the evidence at issue is *inculpatory*, *Brady* is inapplicable.

Therefore, no violation of *Brady* occurred under these facts.

C. Rule 5, SCRCrP

In addition, Petitioner argues that, because he was not permitted to watch the videotape personally in violation of Rule 5 of the South Carolina Rules of Criminal Procedure, counsel was ineffective. We disagree.

Rule 5 permits inspection of evidence in the State's possession "which [is] material to the preparation of his defense or [is] intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant" upon request by the defendant. Rule 5(a)(1)(C), SCRCrP.

Compliance with Rule 5 is a fact-based inquiry. Under the present facts, the State not only disclosed the existence of the videotape, but also made the evidence available for inspection by defense counsel. The State even took the extra step of generating still photographs to assuage Petitioner's concerns about the contents of the videotape. Plea negotiations were ongoing until the day before jury selection, and there is no indication that the State would have withheld the videotape if a full trial on the merits followed. In fact, the identity of the informant had been disclosed to the defense by the time Petitioner pleaded guilty, removing any remaining impediment to Petitioner's access to the videotape in time for his trial. We note that, in cases involving a confidential informant, a criminal defendant's interest in access to certain evidence must be weighed against the State's interest in protecting the identity and safety of the informant. *See State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 614–15 (2003) ("Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances." (internal citations omitted)). Here, the State struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations. Therefore, under these circumstances, the manner and extent of disclosure to defense counsel was satisfactory under Rule 5 of the South Carolina Rules of Criminal Procedure.

Accordingly, it cannot be said that defense counsel acted unreasonably in failing to seek to compel disclosure of the videotape to defendant personally under the facts of this case.

II. Prejudice

Likewise, Petitioner fails to prove how he was prejudiced by his counsel's alleged deficient performance. At the PCR hearing, Petitioner stated that if he had seen the videotape, he would not have "took it . . . that far." In other words, if he had seen the videotape, he would have chosen to plead guilty earlier.

To show prejudice, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)). In *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), the United States Supreme Court explained:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

(citation omitted).

The PCR judge found that Petitioner was not prejudiced because the evidence was not exculpatory. Probative evidence in the record supports the PCR judge's findings. Petitioner was fully aware of the inculpatory nature of the videotape throughout the negotiations and the guilty plea proceedings. Consequently, Petitioner has failed to prove how the outcome would have been different had he chosen not to plead guilty until after he watched the videotape himself. Accordingly, counsel was effective.

CONCLUSION

For the reasons stated above, we affirm the PCR court's dismissal of Petitioner's application.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In the Matter of C. Kevin Miller, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has filed a return objecting to the issuance of an order placing him on interim suspension and appointing an attorney to protect his clients' interests.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Jason Michael Imhoff, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Imhoff shall take action

as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Imhoff may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Jason Michael Imhoff, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Jason Michael Imhoff, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Imhoff's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

March 7, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Highlands Property Owners Association, Inc., Appellant,

v.

Shumaker Land, LLC, Respondent.

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Opinion No. 4952
Heard December 5, 2011 – Filed March 14, 2012

REVERSED AND REMANDED

D. Ryan McCabe and Stephanie C. Trotter, both of Columbia, for Appellant.

Robert C. Ashley, of Columbia, for Respondent.

WILLIAMS, J.: On appeal from the Master-in-Equity (Master), Highlands Property Owners Association, Inc. (the Association) challenges the Master's determination that Respondent Shumaker Land, LLC's (Shumaker LLC) seven lots within the Highlands development were not subject to assessments levied by the Association pursuant to the restrictive covenant governing the development. The Association argues the Master erred in failing to establish a lien against Shumaker LLC's lots and in failing to foreclose upon the lien because Shumaker LLC was subject to this restrictive covenant at all relevant times. We reverse and remand.

FACTS/PROCEDURAL HISTORY

The Association instituted this action against Shumaker LLC to collect unpaid annual assessments for 2007 on seven lots owned by Shumaker LLC within the Highlands development. Shumaker LLC counterclaimed, seeking a judicial declaration that Shumaker LLC is the successor "Declarant" as defined by the Covenants, Conditions, and Restrictions of the Highlands (Covenants) and, as a result, the seven lots are not subject to assessments by the Association. There is no dispute as to the basic facts of this case, but instead as to the interpretation of the Covenants.

The original developer, Highlands Development Limited Partnership (HDLP), under the direction of J. Allen Shumaker (Shumaker) in his capacity as president of the partnership as well as one of two principal limited partners in HDLP, executed the Covenants as the Declarant and developer of the residential community. The Covenants authorized the Association to collect from each property owner an annual assessment. Article IV, Section 7 of the Covenants provides, in pertinent part:

> The annual assessments provided for herein shall commence as to each lot on the first day of the month following the conveyance of the lot by Declarant to any person or entity other than a sale of all of Declarant's interest in all of the properties.

Also at issue is the interpretation of the term Declarant used in the Covenants. Article I, Section 7 of the Covenants states, in pertinent part:

> "Declarant" shall mean and refer to HIGHLANDS DEVELOPMENT LIMITED PARTNERSHIP, or any other person or entity who succeeds to the title of Declarant to any portion of the Properties by sale or assignment of all of the interests of the Declarant in the Properties, <u>if the instrument of sale or assignment expressly so provides</u> . . . .

(emphasis added). In December 2003, the homeowners of the Highlands development assumed control of the Association. As HDLP began dissolving its partnership several years later, HDLP conveyed the seven lots in question to Shumaker individually. Noticeably, the deed did not assign or transfer any rights under the Declaration to Shumaker as required by the Covenants. That same day, on July 28, 2006, Shumaker conveyed the seven lots to his limited liability company, Shumaker LLC. This deed also failed to assign or transfer any rights under the Declaration to Shumaker LLC as required by the Covenants.

Following the conveyance of the seven lots, the Association levied assessments against Shumaker LLC pursuant to the Covenants. Although a portion of the 2006 annual assessments were paid on the lots, Shumaker LLC failed to pay the assessments due on the property for 2007, and the Association filed a notice of lien on each of the seven lots. Fourteen months later, on August 25, 2008, HDLP executed an Assignment of Declarant's Rights (Assignment) conveying "all rights of Declarant in The Highlands" to Shumaker LLC.

A hearing was conducted on March 9, 2009, and the Master initially issued an order of foreclosure and sale and awarded the Association $13,190.15 (the June Order). Shumaker LLC timely filed a Rule 59(e), SCRCP, motion seeking to alter or amend the June Order. The Master subsequently issued a second order (the August Order) finding in favor of

Shumaker LLC and denying the Association's request for foreclosure. After the Master conducted a second hearing regarding the contradicting orders, the Master granted Shumaker LLC's motion, vacating the June Order and ratifying the August Order. This appeal follows.

STANDARD OF REVIEW

"In an appeal from an action in equity, tried by a judge alone, this court may find facts in accordance with its own view of the preponderance of the evidence." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008).

LAW/ANALYSIS

I. Definition of "Declarant"

The Association contends the Master erred in determining Shumaker LLC qualified as a Declarant under Article I, Section 7 of the Covenants. We agree.

"The law in this state regarding the construction and interpretation of contracts is well settled." Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect. Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Id. (citing Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

The Master found the distribution of the remaining seven lots to Shumaker LLC to be all the remaining assets belonging to HDLP. The distribution was made in conjunction with the dissolution of the limited

partnership and was part of the transfer or assignment of all of HDLP's interest in the Highlands development to Shumaker LLC. Accordingly, the Master found Shumaker LLC, as successor in interest to HDLP, acted as the Declarant under the Covenants so that the seven lots were not subject to the assessments.

We find the Covenants, when read in their entirety, support a finding that Shumaker LLC is not the Declarant. As noted previously, Article I, Section 7 of the Covenants defines Declarant as the "HIGHLANDS DEVELOPMENT LIMITED PARTNERSHIP, or any other person or entity who succeeds to the title of Declarant . . . by sale or assignment of all of the interests of the Declarant in the Properties, if the instrument of sale or assignment expressly so provides." (emphasis added). HDLP, as the original Declarant under the Covenants, conveyed the property to Shumaker on July 28, 2006. The deed to Shumaker does not reference any rights held by HDLP as Declarant, nor does the deed purport to transfer any of those rights to Shumaker. Because the deed does not expressly convey the Declarant's rights to Shumaker upon taking title to the seven lots, Shumaker does not qualify as a Declarant under Article I, Section 7 of the Covenants. Accordingly, because Shumaker was not a Declarant, Shumaker LLC cannot qualify as the Declarant by virtue of succeeding title to Shumaker.

II. Annual Assessments[1]

The Association next argues because Shumaker was not the Declarant, his subsequent conveyance to Shumaker LLC is not exempt from the annual assessments levied against Shumaker LLC for the seven lots. We agree.

In his August Order, the Master found HDLP's transfer of the seven lots to Shumaker and Shumaker's subsequent transfer to Shumaker LLC represented "a sale of all of Declarant's interest in all of the properties" as contemplated by Article IV, Section 7 of the Covenants. Shumaker LLC argues that the Master properly found Article IV, Section 7 of the Covenants was satisfied, preventing the commencement of an annual assessment.

[1] We combine the Association's second and third arguments.

However, the Master failed to read the provisions of the Covenants together. "It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." Brady v. Brady, 222 S.C. 242, 246, 72 S.E.2d 193, 195 (1952). Read together, Article I, Section 7 and Article IV, Section 7 of the Covenants state the original Declarant intended that it would retain all powers and rights under the Declaration unless it expressly conveyed those rights and powers to some other entity in writing. The deed conveying the seven lots from HDLP to Shumaker did not expressly convey the Declarant's rights to Shumaker upon taking title. As a result, Shumaker was never the Declarant for the Highlands. Therefore, the conveyance from Shumaker to Shumaker LLC could not constitute "a sale of all of Declarant's interests in the properties" as contemplated by Article IV, Section 7 of the Covenants. The subjective intentions of Shumaker in transferring the properties and dissolving the limited partnership simply are not relevant. See Forest Land Co. v. Black, 216 S.C. 255, 262, 57 S.E.2d 420, 424 (1950) ("The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties as shown by the agreement, governs.") (emphasis added).

Shumaker LLC further argues HDLP's Assignment to Shumaker LLC evinces the limited partnership's intent to transfer all rights of the Declarant to Shumaker LLC, exempting Shumaker LLC from the assessments levied by the Association. We find Shumaker LLC's argument is without merit. As an initial matter, we note the Assignment attempting to memorialize the transfer of rights and authority occurred fourteen months after the Association filed a notice of lien on each of the seven lots. Moreover, at the time it executed the Assignment to Shumaker LLC, HDLP no longer retained any rights, title, or interest in the seven lots as the limited partnership already transferred its interest in the property to Shumaker on July 28, 2006. As a result, HDLP's subsequent attempt to execute the August 25, 2008 Assignment is invalid. See Von Elbrecht v. Jacobs, 286 S.C. 240, 243, 332 S.E.2d 568, 570 (Ct. App. 1985) ("[A] grantor of real property generally can transfer no greater interest than he himself has in the property."). Therefore, Shumaker LLC is

not the Declarant as defined by the Covenants. Accordingly, annual assessments for the seven lots properly commenced upon the sale from Shumaker to Shumaker LLC.

In view of our determination that the Master erred in finding Shumaker LLC exempt from the annual assessments levied by the Association, we need not reach the Association's remaining argument regarding a balancing of the equities. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Accordingly, we reverse and remand the case to the Master with instructions to commence foreclosure proceedings against the seven lots to satisfy the unpaid assessments.

REVERSED AND REMANDED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CarMax Auto Superstores
West Coast, Inc., Appellant,

v.

South Carolina Department
of Revenue, Respondent.

Appeal From Administrative Law Court
Judge Carolyn C. Matthews

Opinion No. 4953
Heard January 26, 2012 – Filed March 14, 2012

REVERSED AND REMANDED

John C. von Lehe, Jr., and Bryson M. Geer, both of Charleston, for Appellant.

Milton G. Kimpson and Harry A. Hancock, both of Columbia, for Respondent.

Alexandra E. Sampson, of Washington, D.C., and Burnet R. Maybank, III, of Columbia, for Amicus Curiae Council on State Taxation.

Robert L. Widener and Erick P. Doerring, both of Columbia, for Amicus Curiae South Carolina State Chamber of Commerce.

LOCKEMY, J.: This appeal arises out of CarMax Auto Superstores West Coast, Inc.'s (CarMax West) protest of an assessment of corporate income taxes by the South Carolina Department of Revenue (the Department). CarMax West alleges the Administrative Law Court (ALC) erred in: (1) failing to place the burden of proof on the Department to establish by clear and convincing evidence that the standard statutory apportionment method used by CarMax West does not reflect the extent of CarMax West's business in South Carolina and that the Department's alternative accounting method is reasonable; (2) failing to consider and find that CarMax West operates a unitary business; (3) concluding that the activities of CarMax West in South Carolina are not fairly represented by the standard statutory apportionment method; (4) allowing the Department to apply separate accounting to a unitary business; (5) failing to apply the "place of activity" test set forth in Lockwood Greene Engineers v. South Carolina Tax Commission, 293 S.C. 447, 361 S.E.2d 346 (Ct. App. 1987) and concluding that CarMax West's financing receipts should be sourced to South Carolina; and (6) concluding that the Department did not violate CarMax West's constitutional rights by applying separate accounting to a unitary business and by sourcing financing receipts to South Carolina. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

1. Formation and Corporate Structure of CarMax, Inc.

CarMax, Inc. (CarMax) was formed in 1993 and is the nation's largest retailer of used cars and light trucks. From 2002-2004, CarMax operated as a holding company with two wholly owned subsidiaries: (1) CarMax West, which sold used vehicles in the western United States and owned substantially all of CarMax's intellectual property; and (2) CarMax Auto Superstores, Inc. (CarMax East), which sold used vehicles in the eastern and mid-western United States, including South Carolina, and handled financing

and corporate overhead/management. Prior to 2004, CarMax East paid CarMax West a royalty for its use of the intellectual property. In 2004, CarMax's corporate structure was reorganized. CarMax Business Services, LLC (CBS) was created to: (1) house CarMax's financing operations (CarMax Auto Finance (CAF)); (2) provide certain shared services to the companies in the group; and (3) own the intellectual property. CBS was created as a multi-member limited liability company between CarMax West and CarMax East, with CarMax West owning a 93.5% interest in CBS and CarMax East owning a 6.5% interest in CBS. CBS charges CarMax West and CarMax East a per vehicle management services fee, which includes an intellectual property royalty component. The income from the management fee, in addition to the financing income generated through CAF, is distributed to CarMax West (93.5%) and CarMax East (6.5%).

2. Income Tax Returns, Audit, and Department Determination

CarMax West filed South Carolina corporate income tax returns for the years 2002-2007 utilizing the standard apportionment formula for multi-state taxpayers outlined in section 12-6-2250 of the South Carolina Code (2000). This formula calculates a taxpayer's taxable income in South Carolina by computing a ratio of the taxpayer's total property, payroll, and sales. The Department audited CarMax West for the tax years 2002-2007 and issued an audit report on June 19, 2008, adjusting the apportionment formula used by CarMax West and issuing a proposed assessment totaling $829,490. On October 20, 2008, CarMax West submitted a Notice of Protest. On March 11, 2009, the Department issued a Final Agency Determination upholding the proposed assessment. The Department found neither the standard formula nor the gross receipts formula fairly represented the extent of CarMax West's business in South Carolina. The Department applied an alternative method to calculate CarMax West's taxable income in South Carolina. The alternative apportionment formula divided CarMax West's income from royalties and financing receipts from within South Carolina by its royalties and financing receipts from everywhere CarMax West does business to determine its ratio of apportionable income taxable in South Carolina. The Department's method did not include the retail income earned by CarMax West in other states. After the audit and the Department's Determination, CarMax West filed amended tax returns in September 2009, utilizing the gross receipts

formula. To calculate taxable income using gross receipts, a fraction is created with the numerator being the taxpayer's South Carolina receipts and the denominator being the taxpayer's total receipts in all states. This fraction is multiplied by the taxpayer's apportionable net income to determine the taxable income. Here, CarMax West included income from South Carolina royalties but excluded financing revenue in the numerator.

3. ALC Determination

CarMax West filed this matter for a contested case hearing before the ALC. Following a hearing on February 18 and 19, 2010, the ALC issued its final order on April 22, 2010. The ALC upheld the Department's alternate method for calculating CarMax West's tax liability, and determined the alternate method was reasonable and did not violate the Commerce Clause. According to the ALC, "the significance of considering [CarMax West's] South Carolina source income apart from its retail operations is inherent in the language of § 12-6-2320 regarding 'the extent of the taxpayer's business activity in this State.'" The ALC noted that "[w]here a taxpayer engages in a trade or business in another state but receives income from a separate line of business in this State, it is only reasonable that careful consideration be given to how that taxpayer's business is represented in this State for tax purposes." The ALC also determined CarMax West was not negligent in reporting its tax liability and dismissed the penalties imposed by the Department. The ALC denied CarMax West's motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

Appeals from the ALC are governed by the Administrative Procedures Act (APA). S.C. Code Ann. §§ 1-23-310 to -400 (2005 & Supp. 2011). Pursuant to the APA, this court may reverse or modify the ALC's decision if the appellant's substantial rights have been prejudiced because the administrative decisions are:

> (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in

> view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2011). "As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence." MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008).

LAW/ANALYSIS

CarMax West argues the ALC erred in failing to place the burden of proof on the Department to establish by clear and convincing evidence that the standard statutory apportionment method used by CarMax West did not reflect the extent of CarMax West's business in South Carolina and that the Department's alternative accounting method is reasonable.

The ALC held:

> [t]he standard of proof is a preponderance of the evidence. Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17 (1998). Additionally, the burden of proof is generally upon the party asserting the affirmative in an adjudicatory administrative proceeding. 2 Am. Jur. 2d Administrative Law § 354 (2004). The taxpayer in this matter requested a contested case hearing to challenge the Department's proposed assessment; thus, the taxpayer bears the burden of proof.

CarMax West argues that although this is the appropriate standard in tax assessment cases generally, an exception to the rule applies when a party wishes to deviate from the standard method of apportionment. In such a case, CarMax West contends, the burden shifts to the party attempting to deviate to show by clear and convincing evidence why the standard method should not be used and the alternative method is reasonable. CarMax West cites several

decisions from other jurisdictions applying similar shifts in the burden of proof. See Limited Stores, Inc. v. Franchise Tax Bd., 152 Cal. App. 4th 1491, 1498, 62 Cal. Rptr.3d 191, 196 (Cal. App. 1 Dist. 2007) (holding the party asserting alternative apportionment bears the burden of showing by clear and convincing evidence that alternative apportionment is appropriate); Union Pacific Corp. v. Idaho State Tax Comm'n, 139 Idaho 572, 575, 83 P.3d 116, 119 (Idaho 2004) (holding "[t]he party asserting alternative apportionment bears the burden of showing that alternative apportionment is appropriate"); St. Johnsbury Trucking Co. v. State, 118 N.H. 209, 212, 385 A.2d 215, 217 (N.H. 1978) (holding "an alternative formula is the exception, and the party who wants to use an alternative formula accordingly has the burden of showing that the alternative is appropriate"); Donald M. Drake Co. v. Dep't of Revenue, 263 Or. 26, 32, 500 P.2d 1041, 1044 (Or. 1972) (holding "the use of any method other than apportionment should be exceptional" and the party seeking to use an alternative method bears the burden of proof); Kmart Properties, Inc. v. N.M. Taxation & Revenue Dep't, 139 N.M. 177, 191, 131 P.3d 27, 41 (N.M. App. 2001) (holding the Department of Revenue had the burden of proof "to justify any modification of the [Uniform Division of Income for Tax Purposes Act] formula"), rev'd on other grounds, 139 N.M. 172, 131 P.3d 22 (N.M. 2005). CarMax West also contends the Department failed to cite any authority to the contrary and agreed at trial that the Department bore the burden.

The Department maintains: (1) no such standard of proof is found in the plain language of section 12-6-2320(A); (2) the cases cited by CarMax West are non-binding; and (3) our supreme court has not adopted the clear and convincing standard. The Department contends there is a shifting burden of proof. First, the Department argues it bears the burden of proving CarMax West's chosen method of apportionment is not reasonable. Thereafter, once the Department meets its burden, CarMax West bears the burden of proving by clear and convincing evidence that under the Department's alternate method the income attributed to South Carolina is "out of all appropriate proportions to the business transacted" in South Carolina or has led to a "grossly distorted result."

We find the ALC erred in finding CarMax West had the burden of proving the Department's alternate accounting method was not reasonable.

There are two burdens of proof which must be met in this case. First, we note both the Department and CarMax West agree the Department bears the burden of proving the gross receipts formula does not fairly represent CarMax West's business activity in South Carolina. Second, the Department bears the burden of proving its alternative accounting method is reasonable and more fairly represents CarMax West's business activity in South Carolina.

In Media General Communications, Inc. v. South Carolina Department of Revenue, 388 S.C. 138, 146, 694 S.E.2d 525, 529 (2010), it was undisputed that the gross receipts apportionment statute "did not fairly represent [the multi-state] Taxpayers' income." It was also undisputed that the alternative method proposed by the Taxpayer "did fairly measure the Taxpayers' business activity in South Carolina." Media General, 388 S.C. at 146, 694 S.E.2d at 529. Our supreme court upheld the Taxpayers' alternative method, because "the Department has not established that another method would be more appropriate." Id. at 152, 694 S.E.2d at 532. Thus, based on Media General, the Department, as the proponent of an alternative apportionment method, must establish that its alternative method is not only appropriate, but more appropriate than any competing methods.

Furthermore, although the statutes do not provide a standard of proof, we find they evidence intent by the General Assembly to require proponents of alternate apportionment methods to prove their method fairly represents the extent of the taxpayer's business activity in South Carolina. It is only logical that a party seeking to override the legislatively determined apportionment method bears the burden of proving that method is not appropriate and an alternative method more accurately reflects the taxpayer's business activity within the state. Additionally, we disagree with CarMax West's assertion that the standard of proof is clear and convincing evidence. CarMax West has failed to cite any South Carolina authority supporting its position and the statutes do not indicate a legislative intent to apply the clear and convincing standard. Accordingly, we reverse the ALC's determination that CarMax West had the burden of proof, and remand for a reconsideration of all issues applying the preponderance of the evidence burden of proof.

CONCLUSION

We find the ALC erred in determining CarMax West had the burden of proving the Department's alternate accounting method was not reasonable, and therefore, we reverse the ALC and remand for a reconsideration of all issues.

REVERSED AND REMANDED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

North Point Development Group, LLC, Appellant,

v.

South Carolina Department of Transportation, Respondent.

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 4954
Heard January 12, 2012 – Filed March 14, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John R. Chase, of Florence, and Sarah P. Spruill, of Columbia, for Appellant.

Beacham O. Brooker, Jr., of Columbia, for Respondent.

LOCKEMY, J.: North Point Development Group, LLC (North Point) appeals the circuit court's finding that it lacked jurisdiction to review the South Carolina Department of Transportation's (the Department) decision to deny North Point's application for an encroachment permit. North Point contends neither the chain of title, nor the Florence County tax assessor's

records, indicate the property at issue was located at a controlled-access intersection. North Point also argues the Department's denial of its permit application was arbitrary, capricious, and characterized by an abuse of discretion. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

North Point owns a parcel of land (the Property) at the intersection of U.S. Highway 378 and S.C. Highway S-21-57 in Florence County. On November 10, 2009, North Point applied to the Department for an encroachment permit to construct a driveway from the Property onto U.S. 378. The Department determined the area of the proposed driveway was a controlled-access facility and denied North Point's request for a permit.[1] Thereafter, North Point petitioned the circuit court for judicial review of the Department's decision. North Point sought a reversal of the Department's decision on the grounds that the denial of the permit application was a taking of a property right and violated several constitutional protections, or, in the alternative, reimbursement from the Department for its loss of direct access to U.S. 378. North Point also argued the Department's denial was arbitrary, capricious, and characterized by an abuse of discretion.

In response, the Department argued it did not have the authority to issue an encroachment permit for a controlled-access facility and the circuit court did not have jurisdiction to review the matter. According to the Department, the judicial review authorized by section 57-5-1120 of the South Carolina Code (2006) applies only to denials of applications for private driveway entrances onto non-controlled-access highways.[2] The Department

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[1] The Department is authorized to acquire rights of access to establish controlled-access facilities by section 57-5-1070 of the South Carolina Code (2006). Once a controlled-access facility has been established, no person may have rights of ingress and egress across the controlled-access lines, "except at such designated places at which access may be permitted, upon such terms and conditions as may be specified from time to time by the Department." S.C. Code Ann. § 57-5-1040 (2006).

[2] Pursuant to section 57-5-1120, "any abutting property owner or lessee may file an application within thirty days from a decision of the department in the

maintained it purchased access rights to the Property from North Point's predecessor-in-title, Jeanne Swintz, in 1997.

On December 18, 2009, a hearing was held before the circuit court. At the hearing, North Point argued the Swintz deed was deficient and did not effectively transfer access rights to the Department. North Point maintained the Swintz deed refers to highway plans dated April 23, 1996, whereas the plans presented by the Department bear the dates of April 29 and 30, 1997. The Department explained the April 29 and 30, 1997, plans are the "as-built" plans filed after the completion of the project showing the controlled-access line created after Swintz granted the rights of access to the Department. According to the Department, pre-construction plans are changed into as-built plans as projects progress and rights of access are negotiated.

In a January 12, 2010 order, the circuit court dismissed North Point's complaint for lack of jurisdiction to review encroachment permits onto controlled-access highways. The court held the judicial review authorized by section 57-5-1120 applied only to encroachment permit applications for non-controlled-access highways. The court determined the Department legally acquired access rights to the Property from Swintz under the terms of section 57-5-1070. The court also found the Department validly established the intersection was a controlled-access facility. The court noted no revisions to the notation of the new control of access line were indicated after the earliest date appearing on the plans, April 23, 1996.

On February 2, 2010, North Point filed a motion for reconsideration. North Point argued the court erred in finding the plans at issue were "so filed under [section] 57-5-570" of the South Carolina Code (2006). North Point maintained that because the Department's highway plans are stored at the Department's District Office in Florence and not at the office of the Florence County Tax Assessor as required by section 57-5-570, it was deprived of its

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administration of Sections 57-5-1080 to 57-5-1110 for a hearing in the matter before a circuit judge . . . ." S.C. Code Ann. § 57-5-1120 (2006). Section 57-5-1080 provides for a permit system for side-road entrances or private driveways onto highways not designated as controlled-access facilities. S.C. Code Ann. § 57-7-1080 (2006).

right to have such information available at the location required by law. North Point also argued the Swintz deed was unclear regarding the grant of access rights to the Department, and the circuit court had jurisdiction to review the Department's decision pursuant to Article I, Section 22 of the South Carolina Constitution.

The circuit court denied North Point's motion for reconsideration. The court determined the language of the Swintz deed was sufficient to put purchasers on notice that access rights had been "alienated and impose upon those persons a duty of further inquiry into the status of that title irrespective of the technical issue of strict compliance with the statute regarding local storage of highway plans." This appeal followed.

LAW/ANALYSIS

I. Chain of Title

North Point argues the circuit court erred in finding the chain of title was sufficient to establish a grant of access rights from Swintz to the Department. We disagree.

According to the Swintz deed, Swintz conveyed to the Department "0.570 acre of land, damages, and all improvements thereon, if any, including rights of access as may be needed for controlled access facilities." The Swintz deed specifically references the Department's highway plan dated April 23, 1996. North Point argues the Swintz deed fails to specify the precise location of the controlled-access line, the scope of any controlled access, or the access rights of the remainder of the Property. North Point contends the presence of a controlled-access line is uncertain because the April 23, 1996 plan referenced in the deed was not produced. The Department argues that although the Swintz deed does not contain the precise location of the controlled-access line, the plans referenced therein contain the location of the line.

We find the Swintz deed was sufficient to establish a grant of controlled access rights. The record contains two title pages and two highway plan sheets from the Department's file which pertain to the area at

issue. The plan sheets, dated April 29 and 30, 1997, indicate a controlled-access line extends the full length of the Property along U.S. 378. According to the Department, these plans are "as-built" plans which incorporate all revisions made during the course of the project beginning with the right-of-way plans. The title pages contain the dates any revisions to the plans were made and the names of the engineers approving the revisions. The second title sheet in the record indicates the final seal and approval for right-of-way purposes by the road design engineer was made on April 23, 1996. Pursuant to the first title sheet, no right-of-way revisions were made after April 23, 1996. Accordingly, we find the highway plans referenced in the deed show Swintz conveyed access rights to the Department. See Fuller-Ahrens P'ship v. S.C. Dept. of Highways & Public Transp., 311 S.C. 177, 181, 427 S.E.2d 920, 922 (Ct. App. 1993) (holding where a deed incorporates highway plans by reference, those plans and the notations thereon must be read with the deed).

North Point also argues the Department's denial of its encroachment permit constitutes a taking of a private property right without just compensation. We disagree. Pursuant to the Swintz deed, Swintz conveyed access rights to the Property to the Department in 1997. Therefore, because Swintz conveyed the access rights before North Point purchased the Property, North Point does not have a property right to protect.

II. Plan Maintenance

North Point argues the circuit court erred in finding the Department properly maintained the official highway plans for the intersection at issue. We disagree.

Pursuant to section 57-5-570,

> [t]he [D]epartment shall maintain in the office of the tax assessor for each of the several counties a copy of all highway plans on which are indicated the widths of the rights-of-way for each road in the related district or county and an alphabetical list of property owners on each road for which rights-of-way have

> been acquired. These records must be for the convenience of persons making inquiry as to the right of the State in and to the right-of-way for roads constructed by the [D]epartment in any county.

S.C. Code Ann. § 57-5-570 (2006). The circuit court found the Swintz deed was sufficient to provide notice to potential purchasers that access rights to the Property had been conveyed and impose on those persons a duty "of further inquiry into the status of that title irrespective of the technical issue of strict compliance with the statute regarding local storage of highway plans." The circuit court determined the maintenance of the highway plans at the Department's Florence office instead of the Florence County Tax Assessor's office did not deprive North Point of any constitutional right. The court noted its finding was supported by the "language of S.C. Code § 57-5-570 which requires a copy of all highway plans be *maintained by* the Department in the offices of the individual tax assessors." The court found the originals, or the "primary source of relevant information, is the [Department] itself."

North Point contends that because the Department's highway plans are not stored at the Florence County Tax Assessor's office as required by section 57-5-570, it was deprived of its right to have such information available at the location required by law. The Department argues highway plans are easily obtainable from any Department office and the plan library is available for download by professional land surveyors. We find the language of the Swintz deed was sufficient to put potential purchasers on notice that access rights to the Property had been conveyed to the Department and that such conveyance was noted on the highway plans. Although a copy of the plans was not located in the tax assessor's office, the originals were located in Florence County and were available for review.

III. Jurisdiction

North Point argues the circuit court erred in finding it lacked jurisdiction to review the Department's refusal to consider North Point's permit application. We agree.

Pursuant to section 57-5-1040, once a controlled-access facility has been established, no person may have rights of ingress and egress across the controlled-access lines, "except at such designated places at which access may be permitted, upon such terms and conditions as may be specified from time to time by the Department." S.C. Code Ann. § 57-5-1040 (2006). North Point maintains the Department abused its discretion under section 57-5-1040 by summarily rejecting its encroachment permit application. We find the circuit court has jurisdiction to determine whether the Department's refusal to consider North Point's permit request is an abandonment of the discretion provided by the statute. See Cole v. Manning, 240 S.C. 260, 267-68, 125 S.E.2d 621, 625 (1962) (holding that while the courts may not substitute judicial discretion for administrative discretion, capricious or arbitrary exercise of administrative discretion is subject to judicial review). Accordingly, we reverse the circuit court's finding that it lacked jurisdiction to review the Department's denial of North Point's permit application and remand to the circuit court for reconsideration. Should the circuit court determine the Department abused its discretion in failing to consider North Point's permit application, it should remand to the Department for reconsideration.

CONCLUSION

We affirm the circuit court's findings that: (1) the chain of title was sufficient to establish a grant of access rights from Swintz to the Department; and (2) the maintenance of the highway plans at the Department's Florence office did not deprive North Point of any statutory right. We reverse the circuit court's finding that it lacked jurisdiction to review the Department's denial of its permit application, and remand to the circuit court to determine whether the Department abused its discretion in declining to consider North Point's permit application.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and PIEPER, JJ., concur.