The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay South Carolina Bar License Fees and Assessments

---

O R D E R

The South Carolina Bar has furnished the attached list of lawyers who were administratively suspended from the practice of law on February 1, 2009, under Rule 419(b)(1), SCACR, and remain suspended as of April 1, 2009. Pursuant to Rule 419(e)(1), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 1, 2009.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated

and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
April 13, 2009

Attorneys Suspended for Nonpayment of 2009 License Fees
As of April 1, 2009

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Rowlett, TX 75088-6877

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Clermont, FL 34711-6789

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Charlotte, NC 28207-1501

John E. Carter
14125 Monticastillo Place
Charlotte, NC 28278

Renee A. Cobb
462 Mock Mill Rd.
Statesville, NC 28677

Michael J. Denning
Wright Express Corp.
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South Portland, ME 04106

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Charlotte, NC 28273

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Tharpe & Howell
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Sherman Oaks, CA 91403

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Dunn, NC 28334

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Staten Island, NY 10301

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Charleston, SC 29407

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Greenwood, SC 29646

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Louisville, KY 40223-5361

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Myrtle Beach, SC 29587-4369

Margaret Wolfe
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Camden, SC 29020-2012

Douglas R. Wright
P.O. Box 840
Tupper Lake, NY 12986

The Supreme Court of South Carolina

In the Matter of Connor M. Cogswell, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 12, 1976, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated March 24, 2009, 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 Connor M. Cogswell 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/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

April 10, 2009

The Supreme Court of South Carolina

In the Matter of Jon Farrell Hamilton, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 15, 2001, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated December 29, 2008, 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 Jon Farrell Hamilton 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/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

April 10, 2009

The Supreme Court of South Carolina

In the Matter of Leslie Hill Nordin, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 19, 1996, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated March 16, 2009, Petitioner submitted her 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 her 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 her 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 she has fully complied with the provisions of this order. The resignation of Leslie Jill Nordin shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

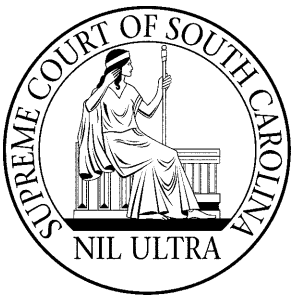
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

April 10, 2009



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 13, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles E. Houston, Jr., Respondent.

PUBLIC REPRIMAND

Opinion No. 26626
Heard March 3, 2009 – Filed April 6, 2009

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Gordon H. Garrett, of Charleston, for Respondent.

PER CURIAM: This is an attorney discipline case involving admitted misconduct in the administration of trust accounts. The Commission on Lawyer Conduct Panel (Panel) recommended that Charles E. Houston, Junior (Respondent): (1) receive a Public Reprimand; (2) be required to retain the services of a Certified Public Accountant to oversee the management of his trust account; (3) be required to attend a minimum of four hours of Continuing Legal Education (CLE) seminars; and (4) be ordered to pay the costs of the proceedings. The Office of Disciplinary Counsel (ODC) challenges the Panel's recommendation and urges a harsher sanction.

Finding no reason to deviate from the Panel's recommendation, we impose the recommended sanctions.

FACTS

Acting on an anonymous phone call, ODC conducted an investigation into Respondent's administration of his trust account. Before formal charges were filed, Respondent and ODC entered into a Stipulation and Affidavit As To Facts, in which Respondent admitted misconduct. In the Affidavit, Respondent admitted non-compliance with the South Carolina Rules of Professional Conduct (RPC) regarding recordkeeping and use of a trust account, including:

1. Unidentified Deposits – "Respondent stated that he routinely made deposits using counter deposit tickets provided by the bank; however, Respondent failed to identify the deposits with a file name, number, or case caption, and failed to maintain a copy of the deposit ticket for his records. Respondent stated that he relied on his memory to recall whose funds were in his trust account at any given time."

2. Unidentified Withdrawals – "This review also revealed numerous 'counter withdrawals' using counter checks provided by the bank. Respondent failed to identify the purpose of the withdrawals with a file name, number, or case caption."

3. Lack of Recordkeeping – "Respondent admitted that he failed to maintain a register, log, or document to reflect an accurate accounting of accumulated attorney's fees held in, or disbursed from the trust account."

The Affidavit also noted that after the investigation began, Respondent took certain corrective measures to ensure future compliance with the Rules of Conduct, including attending CLE seminars dealing with office management issues, installing new office management software, and retaining the services of a certified accountant.

Following a hearing, the Panel found that Respondent violated RPC Rules 1.15, safekeeping of property, and 8.4, violating the Rules of Professional Conduct, and Rule 417, SCACR, failure to maintain appropriate financial records.

STANDARD OF REVIEW

The findings of the Panel are entitled to great weight. In re Johnson, 380 S.C. 76, 80, 668 S.E.2d 416, 418 (S.C. 2008). However, this Court may make its own findings of fact and conclusions of law and is not bound by the Panel's recommendation. In re Larkin, 336 S.C. 366, 371, 520 S.E.2d 804, 806 (1999). This Court has the ultimate authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. In re Long, 346 S.C. 110, 112, 551 S.E.2d 586, 587 (2001).

DISCUSSION

"This Court has made it abundantly clear that an attorney is charged with a special responsibility in maintaining and preserving the integrity of trust funds." Matter of Padgett, 290 S.C. 209, 349 S.E.2d 338 (1986). Respondent's admitted failure to maintain adequate records is a serious matter. We note, however, that the misconduct is limited to recordkeeping. No clients complained, no client funds were lost, Respondent's account was never overdrawn, and ODC does not claim that Respondent misappropriated funds. Moreover, as noted by the Panel, Respondent has already taken corrective measures to ensure future compliance with the rules regarding trust accounts.

Considering all of the circumstances as well as Respondent's disciplinary history, we agree with the Panel that a public reprimand is appropriate. We therefore publicly reprimand Respondent for his misconduct and additionally require that Respondent (1) retain the services of a Certified

Public Accountant to oversee the management of his trust account; (2) attend a minimum of four hours of CLEs; and (3) pay the costs of the proceedings.[1]

PUBLIC REPRIMAND.

TOAL, C.J., WALLER, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

[1] ODC argues that Respondent violated Rule 3.1 of the Rules of Professional Conduct by arguing in his Motion to Dismiss and at the hearing that ODC engaged in racial profiling. While we agree with the Panel that Respondent's claim was meritless, we decline to find a violation of Rule 3.1.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Clinton Roberson, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26627
Heard February 5, 2009 – Filed April 6, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and David Michael Pascoe, Jr., of Orangeburg, for Petitioner.

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE PLEICONES: Respondent Clinton Roberson (Respondent) was tried in absentia and without counsel and was convicted by a jury for failing to register as a sex offender. He was sentenced to 90 days in prison. The trial court denied Respondent's motion for a new trial on grounds that Respondent waived the right to counsel by his actions. Respondent appealed the trial court's denial of his motion for a new trial, contending that he was deprived of his right to counsel, and the Court of Appeals reversed. State v. Roberson, 371 S.C. 334, 638 S.E.2d 93 (Ct. App. 2006). We granted certiorari and now reverse.

FACTS

Respondent was convicted for committing a lewd act with a minor and consequently was required by S.C. Code Ann. § 23-3-450 (1999) to register as a sex offender. Respondent was further required by § 23-3-460 to re-register annually and by § 23-3-470 to notify the sheriff if he changed addresses. He was arrested for failure to register as a sex offender in violation of § 23-3-470(B)(1) (1999).

Respondent was released on bond the day after his arrest after signing a bail form, which provided that he was released on the condition that he would appear at St. George, South Carolina courthouse on the date set for trial. As the date approached, two letters of "Notice of Appearance for Court" were mailed to Respondent's last known address, requiring him to appear at court.

Respondent did not appear for trial and a trial was conducted in his absence. A jury found Respondent guilty of failing to register as a sex offender and the judge sentenced him to 90 days imprisonment. The judge then sealed the verdict until Respondent could be brought before the court.

Over three years later, Respondent was present for sentencing at the St. George courthouse, but the court granted a motion by Respondent's counsel for a continuance in order to allow him to consult a transcript to determine whether Respondent was represented at the February trial. A motions

hearing was then held, at which time Respondent's counsel moved for a new trial, on the ground that (1) Respondent did not receive notice of the trial and so, did not make a knowing and intelligent waiver of his right to appear, and (2) Respondent was deprived of his right to counsel. The sentencing judge denied the motion for a new trial and imposed the sealed sentence.

Respondent appealed to the Court of Appeals, which reversed, finding that Respondent's failure to appear did not constitute an affirmative waiver by conduct of his right to counsel. Roberson, supra.

ISSUE

Did the Court of Appeals err in finding that Respondent's failure to appear did not constitute an affirmative waiver of his right to counsel and reversing the circuit court?

DISCUSSION

The Sixth Amendment to the Constitution requires that in all criminal prosecutions, the accused shall have the right to the assistance of counsel. U.S. Const. amend. VI. Courts have recognized three ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture. State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). The record is clear that Respondent did not waive counsel through an affirmative verbal request, therefore if Respondent relinquished his right to counsel, it must have been through waiver by conduct or forfeiture.

We held in State v. Cain, 277 S.C. 210, 284 S.E.2d 779 (1981), that a waiver of the right to counsel may be inferred from a defendant's actions. In that case, this Court noted that the appellant failed to fulfill the conditions of his appearance bond and neglected to keep in contact with the court, though he was aware of his impending trial date. Id. at 210-11, 284 S.E.2d at 779. In the instant case, evidence established that Respondent was advised at the bond hearing that he was to appear at court on the trial date, he signed a bond form stating the same, and twice a letter of "Notice of Appearance for Court"

was mailed to his last known address. Additionally, Respondent's background shows a familiarity with the court system.

We find that given Respondent's criminal history, his disregard for the instructions of the court, and his inexcusable absence from trial, a waiver by conduct of the right to counsel is inferable.

In reversing the trial court, the Court of Appeals held that to find any waiver by conduct, the requirements of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), must be met. Roberson, 317 S.C. at 337, 638 S.E.2d at 94-95. The Court of Appeals therefore reversed since "there is no evidence in the record establishing that a trial judge advised Roberson of his right to counsel and warned him of the dangers of self-representation." Id., citing Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990).

We find both Prince and Faretta inapplicable to the instant case. Both cases addressed defendants who elected self-representation, and therefore the trial court was required to (1) advise the accused of his right to counsel, and (2) adequately warn the accused of the dangers of self-representation. Prince, 301 S.C. at 423-24, 392 S.E.2d at 463; Faretta, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581-82. In the instant case, Respondent gave no indication that he wished to proceed *pro se* and instead failed to appear for trial. Consequently the Faretta requirements are irrelevant and pose no bar to waiver. See Jackson v. State, 868 N.E.2d 494, 500 (Ind. 2001) (warnings as to the perils of self-representation are irrelevant where defendant did not indicate a desire to represent himself).

We find that a waiver by conduct of the right to counsel is inferable from Respondent's actions. Therefore, the Court of Appeals erred in reversing the trial court.

REVERSED.

TOAL, C.J., WALLER, KITTREDGE, JJ., and Acting Justice E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Manuel Robinson, as duly appointed Personal Representative of the Estate of Brenda Doris Robinson, deceased, Petitioner,

v.

Bon Secours St. Francis Health System, Inc. and St. Francis Hospital, Inc., d/b/a St. Francis Women's and Family Hospital, Adrian Paul Corlette, Sr., MD, Elaine Mary Haule, MD, Donald Webster Wing, MD and Tara L. Sabatinos, PA, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 26628
Heard January 22, 2009 – Filed April 13, 2009

REVERSED

Matthew Christian and W. Harold Christian, Jr., both of Christian Moorhead & Davis, of Greenville, for Petitioner.

Ashby W. Davis, of Davis & Snyder, of Greenville, and Gregory A. Morton, of Donnan & Morton, of Greenville, for Respondents.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in Robinson v. Bon Secours St. Francis Health Sys. Inc., Op. No. 2006-UP-333 (S.C. Ct. App. filed September 20, 2006). The sole issue on certiorari is whether the Court of Appeals properly upheld the trial court's denial of Robinson's Batson[1] motion. We reverse.

FACTS

Robinson is the personal representative of the estate of his deceased wife, Brenda, who passed away while under the care of Respondents on September 19, 2000.[2] Robinson brought wrongful death and survival actions against the hospital and treating physicians. The trial commenced on March 21, 2005.

During jury selection, counsel for the defense struck four potential jurors: three black females and one white male. The jury was ultimately composed of five white males, seven white females, one black female alternate, and one white female alternate. Robinson made a Batson motion to set aside the state's strikes of the three black potential jurors.

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

[2] Brenda Robinson was a fifty-two year old epileptic who had a shunt implanted in August 2000 to drain fluid from her brain. She went to the St. Francis Hospital Emergency Room on September 11, 2000 after a seizure where she was evaluated and discharged. As a result of this evaluation, Robinson was subsequently advised she had a urinary tract infection and was proscribed antibiotics. She went home and began having seizures several days later. She returned to the hospital on September 15, 2000, and became comatose. She died four days later.

In response, defense counsel explained the rationale for his strike of Juror No. 12 stating, she was "a 53-year-old black female would more identify with the 52-year-old decedent in this case than she would any other party." Defense counsel also gave his reasons for striking the other black female jurors being that one had limited education and limited life experience due to her youth, and the other was too young and unemployed.

The trial court held the explanations given were race neutral such that Robinson had not met his burden of demonstrating purposeful discrimination; the Court of Appeals affirmed. Robinson v. Bon Secours St. Francis Health Sys. Inc., Op. No. 2006-UP-333 (S.C. Ct. App. filed September 20, 2006).

ISSUE

Did the Court of Appeals err in affirming the denial of Petitioner's Batson motion?

DISCUSSION

The Equal Protection Clause of the Fourteenth Amendment prohibits the striking of a venire person on the basis of race or gender. McCrea v. Gheraibeh, 380 S.C. 183, 669 S.E.2d 333 (2008). A Batson hearing must be held when members of a cognizable racial group or gender are struck and the opposing party requests a hearing. State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). At the hearing, the proponent of the strike must offer a facially race-neutral explanation for the strike. Once the proponent states a race-neutral reason, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007), *cert. denied*, --- U.S. ----, 128 S.Ct. 662, 169 L.Ed.2d 521 (2007); McCrea v. Gheraibeh.

An explanation for a jury strike will be deemed race-neutral **unless a discriminatory intent is inherent**. Purkett v. Elem, 514 U.S. 765, 768,

(1995); Adams, 322 S.C. at 123, 470 S.E.2d 471 (emphasis supplied). Where the stated reason is inherently discriminatory, the inquiry ends and a pretext inquiry is obviated. McCrea, 380 S.C. at ___, 669 S.E.2d at 335. On two occasions, this Court has found the stated reason for a juror strike facially discriminatory. In Payton v. Kearse, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998), we held a peremptory challenge based upon a characterization of the juror as a "redneck" was facially discriminatory, and therefore violative of Batson. Most recently, in McCrea, we found a solicitor's "uneasiness" over a potential juror's dreadlocks was insufficient to satisfy the race-neutral requirement.

Here, defense counsel stated the reason he struck the juror was that she was a "53-year-old black female" who "would more identify with the 52-year-old decedent in this case than she would any other party." The reason is, on its face, inherently discriminatory.[3] Accordingly, the trial court erred in proceeding to the next step of the inquiry, i.e., whether the stated reason was pretextual. Accord McCrea (trial court must first elicit race-neutral reason for strike before proceeding with pretext inquiry). We hold the trial court erred in denying Robinson's Batson motion. The case is reversed and remanded for a new trial.

REVERSED AND REMANDED.

TOAL, C.J., WALLER, PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

[3] We are unpersuaded by the claim that the reason for the strike was a similarity in **age**, as opposed to race. At best, the age factor provides an alternate motivation for the strike. This Court, however, has specifically rejected a dual motivation analysis in the context of a Batson claim. Payton v. Kearse, 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998) (notwithstanding validity of remaining explanations, one racially discriminatory reason vitiates strike).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Noel and Elizabeth Dillon, Appellants/Respondents,

v.

Neil Frazer, Respondent/Appellant.

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 26629
Heard January 8, 2009 – Filed April 13, 2009

AFFIRMED IN PART; REVERSED IN PART

Cynthia Barrier Patterson, of Columbia, and Donald R. Moorhead, of Greenville, for Appellant/Respondents.

C. Stuart Mauney and T. David Rheney, both of Gallivan, White & Boyd, of Greenville, for Respondent/Appellant.

JUSTICE PLEICONES: This action arose out of an automobile accident in which Noel Dillon was injured due to Neil Frazer's admitted negligence. The men were co-employees of a company located in Ontario, Canada and both were residents of Ontario. After a jury verdict for $6,000,

Dillon[1] appealed the trial court's refusal to grant a new trial absolute on damages. Frazer appealed four points, all relating to whether or not Dillon's action should have been barred by the exclusivity statute found in Ontario workers' compensation law. We certified the case pursuant to Rule 204(b), SCACR. We now affirm the trial court's ruling refusing to apply Ontario law, reverse the trial court's refusal of a new trial absolute as to damages, and remand.

FACTS

In 2002, Dillon and Frazer were employed by Massiv Die-Form (Massiv), a Canadian corporation with no facilities or place of business in South Carolina. The men were in Greenville, South Carolina working for Massiv. During their visit, Dillon and Frazer stayed at a hotel in Greenville and drove a rental car, all of which was paid for by Massiv. Both Dillon and Frazer were paid 30 minutes per day for the travel time between their hotel and the worksite. Frazer was the only employee authorized to drive the rental car.

Dillon sustained injuries in a car accident when Frazer ran a stop sign in a car in which Dillon was a passenger. Dillon was transported by ambulance to a hospital, where it was determined that he had eight fractured ribs on his right side and two on his left, a fractured sternum, a fractured clavicle, a fractured left thumb, and a punctured lung. He was admitted to the hospital where he remained for two days. Once back in Canada, Dillon received physical therapy. The remainder of his care was covered by the Canadian Health System and those costs were not sought in this action.

Due to his punctured lung, Dillon was not medically able to fly back to Canada until the Friday following his release from the hospital. He did not return to work for at least 10 weeks. Initially, Dillon returned to full-time work, but performed fewer overtime hours than prior to his injuries. Dillon testified that, prior to the accident, he worked roughly between 900 and 1,100

[1] Though Elizabeth Dillon filed Notice of Appeal, she did not pursue her appeal.

hours of overtime and double time each year. He stated that, after the accident, the number of hours he was able to work diminished.

Frazer admitted liability, so the only questions remaining for the jury were the amount of damages due Dillon and whether Dillon's wife was entitled to damages for loss of consortium. All told, Dillon's hospital care in Greenville amounted to $10,518. Dillon also claimed $320 for EMS transportation to the hospital and $1,188 in physical therapy bills. In addition to compensation for medical care, Dillon also contended that he was entitled to $509,168 in lost past and future earnings, including $101,350 in lost wages from the date of injury to the estimated trial date and $407,818 for the post-trial period, based on calculations by Dillon's expert.

During deliberations, the jury sent questions to the judge asking whether any compensation had been paid to Dillon by a third party. The jury awarded Dillon $6,000 and found for Frazer on the consortium claim by Dillon's wife. Dillon moved for a new trial *nisi additur* or in the alternative, for a new trial absolute as to damages only. The trial court granted Dillon's motion for *additur* and increased the damages by $15,000, bringing the total amount of damages to $21,000. He denied all other motions.

I.

New trial absolute

Dillon argues on appeal that the trial court erred by not granting a new trial absolute as to damages. We agree.

The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion. Toole v. Toole, 260 S.C. 235, 239, 195 S.E.2d 389, 390 (1973). "The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. The failure of the trial judge to grant a new trial absolute in this

situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." Vinson v. Hartley, 324 S.C. 389, 404-05, 477 S.E.2d 715, 723 (Ct. App. 1996). When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, prejudice, or some other improper motive. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

DISCUSSION

In Kalchthaler v. Workman, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994), the Court of Appeals held that a party, having requested and been granted an *additur*, cannot complain of the amount. However, this does not preclude a party that is granted *additur* from appealing the trial judge's refusal to grant a new trial absolute. Sullivan v. Davis, 317 S.C. 462, 467, 454 S.E.2d 907, 911 (Ct. App. 1995).

Dillon presented evidence of over $500,000 in damages as a result of the accident. While Frazer contested portions of Dillon's claim, unchallenged testimony at trial established the following damages: $10,518 in medical bills, $320.00 for EMS transportation to the hospital, $1,188 in physical therapy bills, and $18,000 in lost wages and overtime pay for the ten weeks immediately following the accident. This totals $30,026 in undisputed damages.

We find the jury verdict of $6,000 irreconcilably inconsistent with the unchallenged evidence presented at trial. The disparity between the award and the admitted damages goes beyond a merely conservative award and suggests that the jurors were motivated by improper considerations.

This suggestion is borne out by the following three questions asked by the jury during deliberations: (1) if it could see the deposition of the human resources director for Massiv; (2) whether Dillon received any compensation while he was not working during the ten weeks after the accident; and (3) whether medical bills for the accident were paid for, and if so, by whom. The

trial judge responded that those matters "are not for your concern." The jury's verdict demonstrates that the jury failed to follow the court's instruction.

In Sullivan, supra, the jury sent questions to the trial judge inquiring as to what medical expenses had been covered by insurance. Id. at 466, 454 S.E.2d at 910. The jury awarded $20,000 despite the plaintiff's medical bills totaling roughly $130,000, leading the Court of Appeals to conclude that "[t]he jurors obviously did not follow the court's instructions to disregard insurance. . . . Therefore we must set it aside and grant a new trial absolute." Id. at 466-67, 454 S.E.2d at 910-11. In the instant case, the record demonstrates that the jury ignored the trial court's instruction to disregard matters relating to third party payment of medical bills.

The jury's award of $6,000 in the face of over $30,000 in undisputed damages is grossly inadequate and demonstrates that the verdict was actuated by improper motivation. No plausible reason for the amount of the verdict has been advanced. For these reasons, the trial court erred in not granting Dillon's motion for a new trial absolute.

II.

Application of Ontario law

Frazer argues in relation to the Ontario worker's compensation exclusivity law, that the trial court erred: (1) in refusing to apply the exclusivity law; (2) in refusing to admit evidence on the exclusivity law; (3) in refusing to charge the jury on the exclusivity law; and (4) in denying Frazer's motion for judgment notwithstanding the verdict based on application of the exclusivity law. Because each point hinges on the applicability of Ontario worker's compensation law and the exclusivity law, we address these points as one and affirm on the ground that Frazer failed to plead Ontario law and so, is barred under Rules 12(b) and 8(c). See Rule 12(b), SCRCP (every defense must be asserted in the responsive pleading); Rule 8(c), SCRCP (in a responsive pleading a party "shall set forth

affirmatively . . . any other matter constituting an avoidance or affirmative defense.").[2]

Even if Frazer's argument was preserved, we find that *lex loci delicto* properly governs this case. See Lister v. Nationsbank of Delaware, 329 S.C. 133,, 143, 494 S.E.2d 449, 454 (Ct. App. 1998) (In choice of law in South Carolina, the general rule is that the substantive law governing a tort action is the law of the state where the injury occurred.); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303, 305 (1964), overruled on other grounds (In tort cases, the law of the place where the injury was occasioned or inflicted governs in respect of the right of action.).

CONCLUSION

For the reasons stated above, we affirm the trial court's refusal to apply Ontario law and reverse the denial of Dillon's motion for a new trial absolute. Since Frazer admitted liability, we remand for a new trial on damages only.

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

[2] Frazer asserted South Carolina worker's compensation law in his pleadings, but did not include Ontario worker's compensation law. The trial court denied his motion to amend his pleadings to include Ontario law.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George I. Theisen

Lisbeth Theisen, Appellant,

v.

Joan Theisen, Richard Doris, Claude Theisen, Clifford Theisen, Eva Marie Theisen Fox and Susan Theisen Washburn, Defendants,

Of whom Joan Theisen, Richard Doris, Claude Theisen, Eva Marie Theisen Fox and Susan Theisen Washburn are Respondents,

and Clifford Theisen is Appellant.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26630
Heard March 3, 2009 – Filed April 13, 2009

AFFIRMED

Kymric Y. Mahnke and John D. Shipman, of Nelson, Mullins, Riley & Scarborough, and Robert C. Wilson, Jr., all of Greenville, for Appellants.

Frank S. Holleman, III and Lesley R. Moore, both of Wyche, Burgess, Freeman & Parham; John A. Hagins, Jr., and Stephen R. H. Lewis, both of Covington, Patrick, Hagins, Stern & Lewis, all of Greenville, for Respondents.

JUSTICE WALLER: This is a family dispute concerning the will of George Theisen, who died on November 16, 2004. Appellant, Lisbeth Theisen, filed an action in February 2006 challenging the validity of the will. The trial court granted summary judgment to Respondents, holding the action was barred by the eight month statute of limitations set forth in S.C. Code Ann. § 62-3-108(3). We affirm.

FACTS

Lisbeth Theisen and Clifford Theisen (Appellants) are children of the decedent, George Theisen. Theisen was also survived by 3 other children, Claude, Susan and Eva Marie, as well as his wife Joan, who are Respondents in this matter. Approximately two months after Theisen's death, on January 11, 2005, Joan Theisen filed a will dated June 7, 1993, and two codicils dated 1996 and 1998, requesting informal probate in Essex County, New Jersey.[1] Notice of admission of the will to probate in New Jersey was simultaneously sent to George's children. The Personal Representatives of the Estate (Joan Theisen and Richard Doris) filed certified copies of the Essex County Probate proceeding with the Greenville County Probate Court on January 27, 2005.

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[1] Theisen's will specifically directs that it be probated in New Jersey. The will and codicils were drafted by New Jersey law firms, and instruct:

> Although I am currently domiciled in the State of South Carolina, a portion of my property and estate is located in the State of New Jersey. . . . I direct my executors to offer my said Last Will and Testament for original probate in the State of New Jersey . . . . It is my express intention and unequivocal desire that the laws of the State of New Jersey shall apply.

Theisen began his business, T&S Brass and Bronze Works in New York City in 1947; he moved the headquarters to Traveler's Rest, SC, in 1978. Theisen was the majority shareholder, and the stock certificates were held in the offices of his New Jersey attorneys.

On March 3, 2005, Lisbeth Theisen, a New Jersey resident, filed a complaint in the Greenville County Probate Court requesting "Designation of Forum for Primary Probate of Estate." The Probate Court held that since no probate proceeding was pending in South Carolina, principles of comity required the New Jersey Court to determine any jurisdictional issues.

Approximately one year later, on February 3, 2006, Lisbeth filed a Petition for Formal Testacy in Greenville County Probate Court challenging the validity of her father's will and codicils, contending they were executed at a time when he lacked testamentary capacity and was subject to undue influence. The matter was removed to circuit court, and Respondents filed for summary judgment contending Lisbeth's petition was untimely and was barred by the statute of limitations. Lisbeth's brother, Clifford joined her opposition to the motion for summary judgment.[2] The trial court held two hearings in August 2006, after which an order was entered granting Respondents summary judgment. The trial court held the eight month statute of limitations of S.C. Code Ann. § 62-3-108 (3) barred Lisbeth's action. Lisbeth and Clifford's Rule 59(e) SCRCP motions were thereafter denied. This appeal follows.

ISSUES

1. Did the circuit court err in holding the action barred by the eight month statute of limitation set forth in S.C. Code Ann. § 62-3-108?

2. Does the statute of limitation begin to run upon admission of a will to probate, or upon closing of the estate?

3. Does the application of S.C. Code Ann. § 62-3-108 violate due process and equal protection?

[2] Theisen's will and codicils bequeath all of his shares in T & S to his wife, Joan, son Claude, and daughters Eva-Marie and Susan while leaving no stock to Lisbeth or Clifford. The will and codicils exclude Lisbeth and Clifford as his issue.

1. S.C. Code Ann. § 62-3-108

S.C. Code Ann. § 62-3-108 states, generally:

> No informal probate or . . . formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile . . . may be commenced more than **ten years after the decedent's death**. (emphasis supplied).

However, the statute sets forth certain exceptions, including:

> (1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, . . . proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding and if that previous proceeding was commenced within the time limits of this section;
> (2) appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person; and
> (3) a proceeding **to contest an informally probated will** and to secure appointment of the person with legal priority for appointment in the event the contest is successful **may be commenced within the later of eight months from the informal probate or one year from the decedent's death.**

Emphasis supplied.[3]

[3] The statute is taken directly from the language of the Uniform Probate Code § 3-108. However, the UPC § 3-108 (3) permits up to twelve months from the date of informal probate or three years from the date of decedent's death to contest an informally probate will.

The trial court ruled that since Theisen's will was admitted to informal probate in New Jersey on January 11, 2005, Lisbeth's action, commenced on February 3, 2006, was barred by the eight month statute of limitations in subsection (3) above. We agree.

Appellants contend the 8-month limitation is inapplicable here for two reasons: first, they contend the statute applies only to informal probates which occur **in this state;** second, they contend South Carolina law **requires** a decedent's will first be filed for informal probate in the county of the decedent's domicile. We disagree.

The plain and unambiguous language of § 62-3-108 (3) plainly applies to **any** informal probate. Anderson v. State Farm Mut. Auto. Ins. Co., 314 S.C. 140, 442 S.E.2d 179 (1994) (words of a statute should be accorded their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand statute's operation). There is simply no language in the statute which implies it excludes an informal probate conducted in another state. If the Legislature had intended the eight month limitation period to apply only to wills which were informally probated **in this state**, it could have included such language in the statute. Estate of Guide v. Spooner, 318 S.C. 335, 457 S.E.2d 623 (Ct. App. 1995) (if Legislature intended statute to apply to certain proceedings, it could have done so by including such language). We find no persuasive arguments as to why § 62-1-308 (3) should be construed to apply only to wills probated in South Carolina.[4]

Lisbeth and Clifford also contend that under S.C. Code Ann. § 62-3-201,[5] the proper venue for the first informal or formal testacy proceeding was Greenville County, the county of Theisen's domicile. We disagree.

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[4] Appellants contend most states do not have either informal probate proceedings or do not require notice for informal probate. It is uncontested however, that New Jersey does have informal probate proceedings, and that Appellants were given written notice. See N.J. Rules of Court, R. 4:80-6.

[5] S.C. Code Ann. § 62-3-201 requires venue for the first informal or formal testacy or appointment proceedings after a decedent's death be either (1) in the county where the decedent had his domicile at the time of his death; or (2) if the decedent was not domiciled in this State, in any county where property of the decedent was located at the time of his death.

Appellants cannot escape the eight month statute of limitation of § 62-3-108 (3) by raising a venue statute. The remedy to challenge venue was to raise the issue within the statutory period (which they did via the "Designation of Forum Petition");[6] however, Appellants failed to perfect an appeal from that order and instead waited until after the expiration of the eight month limitations period to file a challenge to the validity of the informal probate. Appellants cannot now complain that venue was proper only in Greenville. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). (*res judicata* bars subsequent actions by same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties).

Moreover, Theisen's will specifically directs that it be probated in New Jersey, and the Probate Court there found informal probate of the will was proper under New Jersey law, specifically N.J. St. Ann. § 3B:3-28, which provides:

> Where the will of any individual not resident in this State at his death has not been admitted to probate in the state, jurisdiction or country in which he then resided and no proceeding is there pending for the probate of the will, and he died owning real estate situate in any county of this State **or personal property, or evidence of the ownership thereof, situate therein at the time of probate, the Superior Court or the surrogate's court may admit the will to probate** and grant letters thereon. (Emphasis added).[7]

The Probate Court found Theisen owned a bank account and stock certificates which were situate in New Jersey at the time of his death. Accordingly, venue was proper under New Jersey law.

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[6] Alternatively, they could have timely filed a will contest in South Carolina within the eight month limitations period.

[7] S.C. Code Ann. § 62-3-201 (a) (2) has an analogous provision that venue is proper: "(2) if the decedent was not domiciled in this State, in any county where property of the decedent was located at the time of his death."

Lastly, Appellants cite Albert Moses, The South Carolina Probate Practice Manual, § 3-5 (4th Ed. 2001) for the proposition that the time limitations set forth in § 62-1-308 (3) do not apply to a will probated elsewhere. The Probate and Practice Manual states:

> **Time limitations on formal proceedings.** Formal proceedings to contest an informally probated will (and for appointment of a personal representative) must be commenced within the later of 8 months from the informal probate or 1 year of death. Otherwise, formal proceedings (and informal proceedings for probate and appointment must be commenced within 10 years of decedent's death. **These time limitations neither apply to a will probated elsewhere nor to the estates of persons absent, disappeared, or missing.**

(Emphasis supplied). The highlighted language appears to relate to subsections (1) and (2) of § 62-1-308. Those sections alter the normal statute of limitations for probate proceedings in cases in which the death of the decedent was in doubt, or when an individual was absent, disappeared, or missing, and their death has been recently discovered. The Probate Manual's statement that the time limitations are inapplicable to the estates of persons missing, absent, disappeared or whose death is in doubt are supported by the language of the statute itself. However, there is no language in the statute which would demonstrate that the limitations period therein was not intended to apply to wills "probated elsewhere." Accordingly, we are not persuaded by the language of the Probate Manual. We hold the trial court properly applied the statute of limitations of § 62-1-308 (3).

2. INFORMAL PROBATE

Appellants next contend that, even if the eight month limitations period of § 62-3-108 (3) is applicable, the statute does not begin to run until an informal probate is closed, rather than when the will is admitted to probate. We disagree.

This Court has previously recognized that the time limitation runs from the time the will is admitted to probate, and that fixing such a time is within the province of the Legislature. See Wooten v. Wooten, 235 S.C. 228, 110 S.E.2d 922 (1959). In Wooten, a will was admitted to probate on March 8, 1957, and the petitioner attempted to challenge the will on January 27, 1958. The Court held the action barred by the six month limitation period set forth in S.C. Code Ann. § 19-255 (1952) (the predecessor to § 62-3-108) such that the petitioner's attempt to challenge the will on grounds of undue influence and improper execution could not be considered. See also Jackson v. Cannon, 266 S.C. 198, 222 S.E.2d 494 (1976) (under § S.C. Code § 19-255, anyone contesting the validity of a will must commence an action to have the will proved in solemn form within six months after the will was admitted to probate). It is clear from the caselaw that the statute begins to run from the date of the will's admission to probate.

Moreover, the language of S.C. Code Ann. §§ 62-3-301 *et seq*. clearly envisions a will is "informally probated" upon admission by the court. See e.g., § 62-3-302 (upon receipt of application requesting informal probate, court shall issue a written statement of informal probate); § 62-3-303 (findings required to admit will to informal probate); § 62-3-305 (if court is not satisfied will is entitled to be informally probated, court may decline application).

Lastly, as noted by the trial court, the legal treatises are in accord that the time limitations in which to challenge a will run from the time it is admitted to probate. See 95 CJS Wills § 533 (time limitation on right to seek review of a will commences from the date of its proof, or, in other words, the date that it was admitted to probate or refers to the act of the clerk accepting the will for probate, rather than date upon which the estate is closed); 80 AmJur Wills § 808 (notice of probate of a will, or of the admission of a will to probate, may start an applicable time limitation for bringing a will contest).

Here, there is no dispute but that the will was admitted to probate by the New Jersey Court on January 11, 2005. Accordingly, Lisbeth's petition, filed in February 2006, was barred under the 8 month statute of limitations.

3. EQUAL PROTECTION/DUE PROCESS

Lastly, Appellants contend application of the 8-month limitation period violates their due process and equal protection rights.[8] We disagree.

Due process is violated when a party is denied fundamental fairness. City of Spartanburg v. Parris, 251 S.C. 187, 191, 161 S.E.2d 228, 230 (1968). Due process is flexible and calls for such procedural protections as the particular situation demands. Sloan v. S.C. Bd. Of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep't. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

The requirements of equal protection are met if: (1) a classification bears a reasonable relationship to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on a reasonable basis. The constitutional guaranty of equal protection of the law requires all members of a class to be treated alike under similar circumstances and conditions, and that any classification not be arbitrary but bear a reasonable relation to the legislative purpose sought to be effected. Sloan v. S.C. . Bd. Of Physical Therapy Exam'rs, supra, *citing* Broome v. Truluck, 270 S.C. 227, 230, 241 S.E.2d 739 (1978).

The circuit court's application of the statute of limitations simply did not deprive Appellants of due process or equal protection. They had notice of the proceedings, and they had opportunities to object to them both in South Carolina and in New Jersey. They failed to perfect their appeal from the Probate Court's Order denying their "Designation of Forum" petition; they failed to timely file a petition for formal testacy within the applicable statute of limitations in South Carolina, and they failed to object to the informal

[8] U.S. Const. amend XIV, § 1; S.C. Const. art. I, § 3 (privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws).

testacy proceedings in New Jersey. We find Appellants have suffered neither a due process nor an equal protection violation.

CONCLUSION

The trial court properly applied the 8 month statute of limitation contained in S.C. Code Ann. § 62-3-108 (3) to find Appellants' challenge to the will of their deceased father was untimely. Accordingly, the trial court's ruling is affirmed.

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dale Robert Bullis, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 26631
Submitted February 19, 2009 – Filed April 13, 2009

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this post-conviction relief (PCR) case, the PCR court found probation counsel was not ineffective in failing to inform Petitioner Dale Robert Bullis of his right to appeal the revocation of his probation and denied Petitioner relief. This Court granted a writ of certiorari to review that decision. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In November 2003, Petitioner pled guilty to grand larceny and was sentenced to ten years imprisonment, suspended upon the service of one year in prison and five years probation. On April 29, 2005, the trial court revoked Petitioner's probation and sentenced him to five years imprisonment and six months at a restitution center. Subsequently, Petitioner filed a PCR application alleging that probation counsel was ineffective for failing to inform him of his right to appeal his probation revocation.

At PCR hearing, Petitioner testified that that counsel never advised him of his right to appeal, and that following his revocation, he wrote a letter to the probation department inquiring about an appeal. Probation counsel testified that her notes did not indicate that she informed Petitioner of his right to appeal, but that it is generally her practice to inform her clients of their appellate rights. The PCR court denied relief.

We granted Petitioner's request for a writ of certiorari to review the following issue:

> Did the PCR court err in finding probation counsel was not ineffective in failing to advise Petitioner of his right to a direct appeal from his probation revocation?

STANDARD OF REVIEW

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certiorari, 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). However, this Court will reverse the PCR court's decision when it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

Petitioner argues that the PCR court erred in finding probation counsel was not ineffective for failing to inform him of his right to a direct appeal. We disagree.

A defendant has a right to counsel at trial, in a guilty plea proceeding, when seeking post-conviction relief, and during a probation revocation hearing. Whether counsel is required to inform a defendant of his right to an appeal from these proceeding depends on the type of proceeding involved. In a trial, counsel must inform a defendant who has been found guilty of a crime of the possibility of an appeal and the method for taking an appeal. *Frasier v. State*, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991). In a plea proceeding, however, there is no constitutional requirement that plea counsel inform a defendant of the right to a direct appeal absent extraordinary circumstances. *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995); *see also Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (holding that counsel has a constitutional duty to inform a defendant of his right to appeal a guilty plea if there is reason to think that a rational defendant would want to appeal or that the defendant demonstrated an interest in appealing). Finally, in a PCR proceeding, PCR counsel is required to advise an applicant of the right to appellate review of the denial of relief. *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005).

This Court has not addressed whether probation counsel is required to inform a defendant of his right to appeal the revocation of his probation. We now hold that probation counsel does not have such a duty absent extraordinary circumstances.

Probation revocation is not a deprivation of absolute liberty, but rather, results in a loss of a conditional liberty interest. *Gagnon v. Scarpelli*, 411

U.S. 778, 821-82 (1973). Thus, a probationer is only entitled to minimal due process. *Dangerfield v. State*, 376 S.C. 176, 181, 656 S.E.2d 352, 355 (2008). Not every probationer has a due process right to counsel in a revocation hearing. *Gagnon*, 411 U.S. at 790. A constitutional right to counsel in a revocation hearing may arise, however, by virtue of the Due Process Clause. *Id*. Whether a probationer has a right to counsel is decided on a case-by-case basis, taking into consideration the complexity of alleged violations and whether the probationer can meaningfully contest the alleged violations. *Id.* In South Carolina, however, all persons charged with probation violations have a right to counsel. *Barlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 621 (1986).

We hold that probation counsel is not required to inform a probationer of his right to an appeal absent extraordinary circumstances. In our view, this holding is in accord with counsel's duties at a plea hearing. *See Weathers*, 319 S.C. at 61, 459 S.E.2d at 839 (holding that, "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea."). We do not find that the constitution imposes an additional duty on counsel in a probation revocation hearing, a proceeding that is not a stage of criminal prosecution and that occurs after sentencing, which is not constitutionally mandated in a guilty plea hearing. In the instant case, because Petitioner failed to show extraordinary circumstances, we affirm the PCR court's finding that counsel was not ineffective for failing to inform Petitioner of his right to appeal.

CONCLUSION

For these reasons, we affirm the PCR court's order denying Petitioner relief.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Kevin Covert, Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26632
Heard January 21, 2009 – Filed April 13, 2009

AFFIRMED AS MODIFIED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, for Petitioner/Respondent.

Katherine Carruth Link, of West Columbia, for Respondent/Petitioner.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals decision in State v. Covert, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006)[1] and now affirm, as modified, that court's decision to grant respondent a new trial. In a split decision, Judges Short and Anderson found reversible error in the jury's possession of a statute during deliberations; in addition, Judge Short found that evidence should have been suppressed, and Judge Anderson found reversible error in the verdict form.

We hold, as did Judge Short, that an unsigned search warrant is invalid, and agree with Judge Anderson that when a verdict form is submitted to a jury in a criminal case, it must affirmatively offer a "not guilty" option. Finally, while we agree with Judges Short and Anderson that it was error to permit this jury to have a written version of the trafficking statute with it during deliberations, we would not find sufficient prejudice from that error alone to warrant reversal.

ISSUES

1) Did Judge Short err in holding that an unsigned search warrant is invalid?

2) Did Judge Anderson err in finding the verdict form here was so prejudicial as to require reversal?

3) Did permitting the jury to have a written version of the trafficking statute with it during deliberations require reversal?

[1] The facts are fully reported in that opinion, and the verdict form is reproduced in Judge Anderson's concurring opinion.

ANALYSIS

1. Warrant

The search warrant in this case is signed by the magistrate, and dated September 28, 2002; the accompanying two-page affidavit is signed by her on each page, and both these signatures are dated September 26, 2002. The return is signed and dated September 27, 2002. It is undisputed that the warrant was obtained and served on September 26, 2002.

At trial, respondent contended that the warrant was unsigned when it was served, that it was therefore invalid, and that accordingly the evidence seized pursuant to the search should be suppressed. Respondent argued that, without the magistrate's signature, the warrant was not issued within the meaning of South Carolina's search warrant statute, S.C. Code Ann. § 17-13-140 (1985). The trial judge refused to suppress the evidence even though he found the warrant had not been signed before it was served, holding that the search warrant statute was subject to a "good faith" exception, and that such an exception was applicable here.

On appeal, Judge Short held that the search warrant was not issued within the meaning of the statute because it lacked a timely signature. Judge Short also held there was a good faith exception to the statutory warrant procedures, but that it was inapplicable here. We agree that the absence of the magistrate's signature at the time the warrant was served invalidates it, but do not reach the issue whether there exists a "good faith" exception to the statutory warrant requirements since we find, as explained below, that no warrant was ever issued.

We have held, in the context of an arrest warrant, that such a warrant is not lawful where the issuing judicial officer failed to sign the warrant on the space provided on the warrant form. Davis v. Sanders, 40 S.C. 507, 19 S.E 138 (1894). Although the State would characterize such an omission as merely procedural or ministerial, we disagree. The Davis Court gave a persuasive explanation of the signature requirement, albeit in the context of an arrest warrant:

> [W]hen it is remembered that a sheriff or other officer, who undertakes to arrest a citizen under a warrant, is bound to show his warrant, if demanded, to the person proposed to be arrested, and if he refuses to do so the arrest may be lawfully resisted [internal citation omitted], we think it would be very dangerous to the peace of society for the court to hold that a paper, which shows on its face that it is an unfinished paper…would be a sufficient justification for an arrest.

The same policy considerations apply to a search warrant,[2] and thus the lack of the issuing officer's signature is not excusable as merely procedural or ministerial, but rather negates the existence of a warrant, creating instead "an unfinished paper." As the Davis Court went on to hold, the fact that the issuing officer intended to sign the warrant and had in fact signed the back was not sufficient to validate it, nor was the arrest legal despite the fact the officers who executed the arrest pursuant to the "warrant" were "entirely innocent of any intentional wrong."

The Davis requirement that a warrant must be signed by the issuing judicial officer in order to be complete is a common law decision predicated on public policy considerations. The signature is the assurance that a judicial officer has found that law enforcement has made the requisite probable cause showing, and serves as notice to the citizen upon whom the warrant is served that it is a validly issued warrant. Without the signature, it is merely an "unfinished paper." Davis, *supra*; see also DuBose v. DuBose, 90 S.C. 87, 72 S.E. 645 (1911) ("But it has been decided [in Davis] that, when an officer is performing the ministerial duty of issuing a paper on compliance with certain conditions prescribed by law, his signature at the foot of the paper he intended to sign is necessary to its validity").

We consider also whether the unsigned warrant can be upheld in the face of § 17-13-140, the general search warrant statute. The statute contains

[2] See S.C. Code Ann. § 17-13-150 (2003) (copy of warrant and affidavit shall be furnished to person served)

requirements different from those mandated by the Fourth Amendment, and is in some ways "more strict" than the federal constitution. State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). While we have recognized a "good faith" exception to the statute's requirements where the officers make a good faith attempt to comply with the statute's affidavit procedures, McKnight, *supra*, explaining State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975), we have left open the question whether a good faith exception would be applied where "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid." McKnight, *supra*. Here, we do not reach the question whether there exists a good faith exception to the statute where a defective warrant is issued, since under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17-13-140. See also Davis, *supra* (officers good faith irrelevant where warrant is not signed).

The circuit court erred in refusing to suppress the evidence seized pursuant to the unsigned "warrant." Respondent is therefore entitled to a new trial.

2. Verdict Form

In this case, the jury was given a verdict form which tracked the provisions of the trafficking statute, but did not specifically allow the jury to return a "not guilty" verdict. We agree with Judge Anderson that this was error and hold that henceforth, any verdict form given to a jury for use in a criminal case must specifically include as an option "not guilty." We therefore overrule State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct. App. 2001) to the extent it holds that a jury charge can negate prejudice from the lack of a "not guilty" choice on a verdict form.

3. Trafficking Statute

Judge Short and Judge Anderson found reversible error in the trial court's submission to the jury of the trafficking statute, while Judge Goolsby found no error. Since this case was tried and the appeal decided by the Court of Appeals, we have held that it is within the trial judge's discretion to "submit its instructions on the law to the jury in writing." State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007). We caution the bench again, as we did

in Turner, that this practice should be used sparingly, and only where it will aid the jury and where it will not prejudice the defendant. It is never appropriate, however, to give only part of the charge to the jury as was done in this case.

CONCLUSION

The Court of Appeals decision reversing respondent's convictions and sentences is

AFFIRMED AS MODIFIED.

WALLER, BEATTY, JJ., and Acting Justice James E. Moore, concur. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: Although I concur in the decision to affirm the court of appeals' decision reversing Covert's conviction, I write separately because I would reach this decision on different grounds.

As a primary matter, I do not find that *Davis v. Sanders*, 40 S.C. 507, 19 S.E. 138 (1894) controls this case. *Davis* was decided over one hundred years ago, prior to the passage of § 17-13-140. Moreover, the *Davis* Court, in the absence of any statutory authority, relied on prior case law in declaring that a warrant must be signed.[3] *See State v. Vaughn*, 16 S.C.L. (Harp.) 313 (1824) (holding that a warrant that was signed but not sealed was nevertheless a valid warrant). Moreover, I find it significant that the parties in *Davis* conceded that a warrant had to be signed, thereby leaving only the issue of whether the magistrate's notation on the warrant constituted a signature for the Court's determination. Accordingly, I believe that *Davis* is somewhat irrelevant to the facts of this case and that we must solely look to § 17-13-140 to determine the validity of this warrant.

Section 17-13-140 does not specifically require the magistrate to sign the warrant, but rather, merely requires that a magistrate "issue" the warrant. Nonetheless, a magistrate's signature indicates that she has made the necessary probable cause finding required before issuing the warrant. Even assuming that an unsigned warrant is defective, I do not believe that this alone necessarily renders the warrant void *ab initio*.

This Court has held that the good faith exception to the exclusionary rule applies in cases where officers make a good faith attempt to comply with the statute's affidavit requirements. *See State v. McKnight*, 291 S.C. 110, 112-13, 352 S.E.2d 471, 472 (1987) (refusing to apply the good faith exception where the officers failed to attempt to comply in good faith to the affidavit requirements); *State v. Sachs*, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975) (allowing evidence to be admitted pursuant to the good faith exception where officers attempted in good faith to comply with the statutory

[3] Specifically, the *Davis* Court found that the lower court properly charged the jury that "a warrant need not be under seal, yet it must be in writing, and signed by the officer issuing." *Id*. at 509, 19 S.E. at 139.

requirements). In my view, the policy reasons for applying the good faith exception to the exclusionary rule in other cases are applicable in this case. *See State v. Harvin*, 345 S.C. 190, 194, 547 S.E.2d 497, 500 (2001) (recognizing that the main purpose of the exclusionary rule is the deterrence of police misconduct). Covert does not allege that the officers knew the warrant was unsigned or deliberately obtained the warrant without a signature, and the record contains no evidence that he was prejudiced by the statutory violation. Therefore, I would hold that the officers attempted in good faith to comply with § 17-13-140's requirements and the exclusionary rule should not render the evidence inadmissible.

In my view, the fatal flaw in the State's case is its failure to present any evidence at trial that the magistrate made a probable cause finding. As the majority observes, the signature on the warrant indicates that a judicial officer found that law enforcement made the requisite probable cause showing, a finding clearly required before a warrant may be issued. The State bore the burden of proving the validity of the warrant and, in my view, while the absence of a magistrate's signature may be a factor in determining whether the warrant was issued upon probable cause, it is not dispositive of the determination. However, by failing to call the magistrate to testify that she issued the warrant upon finding probable cause, the State failed to present any evidence to show the warrant was valid and therefore did not carry its burden. *See Sachs*, 264 S.C. at 555, 216 S.E.2d at 508 (recognizing that "all that is necessary to justify the issuance of a warrant is probable cause"); *see also* U.S. Const. amend. IV and S.C. Const. art. I (mandating that a warrant must be supported by probable cause).

For these reasons, I would hold that the good faith exception is applicable under these circumstances, but that the State failed to carry its burden of proving the magistrate issued the warrant upon finding probable cause. Accordingly, I concur with the majority's decision to affirm as modified the court of appeals' opinion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ernest Battle, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Charleston County
Thomas L. Hughston, Circuit Court Judge
William P. Keesley, Post Conviction Judge

Opinion No. 26633
Submitted December 4, 2008 – Filed April 13, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Matthew J. Friedman, all of Columbia, for Petitioner.

Assistant Appellate Defender Kathrine Hudgins, South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this post-conviction relief (PCR) case, we granted a writ of certiorari to review the PCR court's order granting Respondent Ernest Battle relief. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Respondent was indicted for trafficking cocaine, possession with intent to distribute within proximity of a school, and conspiracy to violate narcotic laws. At trial, the State presented evidence that a confidential informant contacted LaShawn Floyd and arranged to purchase drugs. After the informant and Floyd exchanged money, Floyd walked behind a nearby building and shortly reappeared with cocaine. Officers arrested Floyd as she was completing the transaction with the informant. Officers also arrested Respondent and James Nelson as they appeared from behind the building. Floyd and Nelson[1] testified that the cocaine was Respondent's.

The trial judge first charged the jury on reasonable doubt:

> A reasonable doubt may arise from the evidence that's been presented in this case or from the lack of evidence in the case. You alone, you are the sole judges of the facts of this case. You alone must make the decision as to whether or not the State has proven him guilty of the charge beyond a reasonable doubt.
>
> Now, as I told you at the outset, [Respondent] has said, "I'm not guilty of either one of those charges," and that places the burden of proving him guilty on the State. A person who is charged is never required to prove himself

[1] Floyd, Nelson, and Respondent are all cousins.

or herself innocent. The burden of proof is on the State throughout the trial to convince you the jury of his guilt beyond a reasonable doubt.

A person who is charged is presumed innocent from the moment of his arrest, throughout any arraignment, throughout the trial itself, until you the jury have reached a conclusion in the jury room that the State has proven him guilty by the evidence presented here in court beyond a reasonable doubt. If the State doesn't do that, then he's entitled to a verdict of not guilty. Now, what do we mean when we say that the State must prove someone guilty beyond a reasonable doubt? What do those words mean? The term "reasonable doubt" may be understood by giving it its plain and ordinary meaning. A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. If, after considering all the evidence in this case, you hesitate to convict [Respondent] on the basis of that evidence, then he's entitled to a verdict of not guilty.

A reasonable doubt may arise from the evidence that's been presented in this case or from the lack of evidence in the case. You alone, you are the sole judges of the facts of this case. You alone must make the decision as to whether or not the State has proven him guilty of the charge beyond a reasonable doubt

. . .

[T]he burden of proof is on the State to convince you of his guilt beyond a reasonable doubt. There's no burden on him to explain or to do anything. The burden of proof is on the State to produce the evidence here in court to convince you of his guilt beyond a reasonable doubt.

The trial court then instructed the jury on circumstantial evidence:

> There is another type of evidence that we refer to as indirect or circumstantial evidence. That is evidence which may prove a particular fact to be proved, not by evidence based upon the physical senses of testifying witness but rather on the basis of the proof of other facts which infer the proof of a particular fact as a necessary consequence.
>
> The commission of a crime may be proved by circumstantial or indirect evidence as by direct evidence of an eyewitness. Circumstantial evidence is permissible provided it meets the legal test. To the extent that the State relies on circumstantial evidence, it must prove all the circumstances relied on beyond a reasonable doubt. These circumstances must in every way perfectly be consistent with one another; and they must point conclusively, that is, to a moral certainty, to the guilt of the accused to the exclusion of every other reasonable hypothesis or explanation.[2] In other words, the circumstances must be

[2] This portion of the charge reflects the traditional circumstantial evidence charge as articulated in *State v. Edwards*, which provides that when the State relies upon circumstantial evidence to prove its case, the jury may not convict the defendant unless:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989) (citing *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924, 926 (1955)). At the time this case was tried, although the *Edwards* circumstantial evidence charge was acceptable, the Court recommended a different circumstantial evidence charge. *See State v.*

> absolutely inconsistent with any other reasonable hypothesis or explanation than the guilt of the accused.

Shortly after the jury began deliberating, the foreman sent a note requesting a transcript of the jury charges. The trial court refused, but told the jury it would recharge portions of the instructions. The foreman then asked, "There was a portion about reasonable person. Could there be another scenario possible: Would a reasonable person consider that something else happened instead of what's claimed by the prosecution?" The trial court responded:

> Okay. I'm not sure if what you're asking about was what I discussed or mentioned when I was talking about two types of evidence, the two ways that we classify evidence . . . As I said, there are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as testimony of a witness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts; that's what we're talking about when I talk about circumstantial evidence.
>
> . . .
>
> You can have proof of circumstances that lead to that conclusion beyond a reasonable doubt, as I've defined that for you.
>
> So that's what I'm talking about when I'm talking about circumstantial evidence. But the circumstances proved by the State must be complete. They must lead to that conclusion beyond a reasonable doubt.

Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). However, in 2004, a majority of the Court held that the *Grippon* charge was the sole and exclusive charge to be given in circumstantial evidence cases. *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (Toal, C.J., dissenting).

> And in the evaluation of circumstantial evidence, you must search for, consider, any other reasonable hypothesis or explanation than that which the State advances and the claim made by the State. You have to examine every other reasonable hypothesis or explanation other than the guilt of the accused when considering circumstantial evidence.
>
> That's the essence, I think, of my instructions to you on circumstantial evidence. It's not necessary to prove every fact that the State has to prove in order to be entitled to a verdict of guilty by direct evidence. They can prove it by circumstantial evidence, but it must be a complete chain; that is, all the circumstances that the State relies on, other than direct testimony, all the circumstances that the State relies on to establish an element, some part that's necessary to prove the defendant guilty, some part of the crime that he is accused of committing, they must establish all those circumstances, as I said beyond a reasonable doubt.
>
> And in consideration of that, it's your duty to examine any other reasonable hypothesis or explanation than the guilt of the accused. And if there is another reasonable explanation for the circumstance, then you cannot rely on that circumstance in finding the defendant guilty.

Trial counsel did not object to any portion of the charges. The jury returned a guilty verdict, and the court of appeals affirmed. *State v. Battle*, Op. No. 2003-UP-348 (S.C. Ct. App. filed May 20, 2003).

Respondent filed an application for PCR and alleged that trial counsel was ineffective for failing to object to the portion of the jury charges on reasonable doubt and circumstantial evidence. Although the PCR court found that the first portion of the reasonable doubt charge was constitutional, it found that other portions of the charges were improper. Specifically, the PCR court expressed concern over the trial court's use of the "moral

certainty" language and the portion of the charge requiring the jury to "search for" or "seek" a reasonable explanation other than Respondent's guilt. Accordingly, the PCR court ruled that, viewed in its totality, the charge diluted the State's burden to prove Respondent guilty beyond a reasonable doubt.

We granted the State's request for a writ of certiorari to review the PCR court's order granting relief to review the following issue:

> Did the PCR court err in finding trial counsel ineffective for failing to object to the jury charges?

STANDARD OF REVIEW

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certiorari, 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).

LAW/ANALYSIS

The State argues that the PCR court erred in finding trial counsel ineffective for failing to object to the jury charges. We agree.

In order to prove counsel was ineffective, a PCR applicant must show that counsel's performance was deficient and that he suffered resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution. *Todd v. State*, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003).

Trial courts should avoid using "seek" language in instructing the jury because such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof. *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998). Additionally, "moral certainty" language, although not *per se* reversible error, is disfavored. *See State v. Johnson*, 306 S.C. 119, 131, 410 S.E.2d 547, 554 (1991) (recognizing that courts have affirmed convictions where the trial court did not use "moral certainty" language in conjunction with "substantial" or "grave" doubt in defining reasonable doubt).

In our view, there is not a reasonable likelihood that the jury applied the trial court's instruction in a way that violated the Constitution. The trial court repeatedly emphasized that the State retained the burden to prove Respondent's guilt beyond a reasonable doubt in its initial instruction. The trial court mentioned "moral certainty" in explaining circumstantial evidence, but he also stated that the circumstances must point "conclusively" to the defendant's guilt, and that guilt must be shown to the exclusion of every other reasonable hypothesis. *See Todd*, 355 S.C. at 403, 585 S.E.2d at 309 (upholding a similar charge and recognizing that the "'moral certainty' language cannot be sequestered from its surroundings"). While we recognize that the trial court employed the "search for" language in a supplemental instruction,[3] the court used "search for" only one time and emphasized that the State retained the burden to prove Respondent's guilt beyond a reasonable doubt. Therefore, we find that this language did not shift the burden to Respondent to put forth a reasonable hypothesis which would exculpate him. Finally, we believe that any portion of the charge reflecting an *Edwards* instruction favored Respondent. Accordingly, we hold that when read as a whole, in its entirety, the jury instructions did not violate Respondent's due process rights.

[3] *See Lowry v. State*, 376 S.C. 499, 507, 657 S.E.2d 760, 754 (2008) (finding the fact that the improper charge occurred in a supplemental instruction relevant to the analysis due to the prominence of the charge).

CONCLUSION

For these reasons, we reverse the PCR court's order granting Respondent relief.

WALLER, PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joseph L. Smalls, Jr., Respondent.

Opinion No. 26634
Heard March 17, 2009 – Filed April 13, 2009

DISBARRED

Attorney General Henry D. McMaster and Assistant Deputy Attorney General Robert E. Bogan both of Columbia, for Office of Disciplinary Counsel.

I. S. Leevy Johnson of Johnson, Toal & Battiste, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, Joseph L. Smalls, Jr., stipulated to misconduct primarily involving his trust accounts. The Commission on Lawyer Conduct panel recommended retroactive disbarment, restitution, and assessment of costs. We find retroactive disbarment, restitution, and costs warranted.

I.

Smalls ran the Smalls Law Firm, in Columbia, which consisted of a general practice with a high volume of real estate closings. Smalls solely possessed check signing authority and maintained control over the firm's bank accounts related to this case.

Smalls stipulated this case arose out of a complaint to Office of Disciplinary Counsel (ODC) because a check for $72,379.67 issued by Smalls for a real estate closing was not honored in 2002. The complaint launched a full ODC investigation into Smalls' multiple law firm bank accounts. As a result of its investigation, ODC petitioned for interim suspension, which this Court granted on May 16, 2002.

Additionally, Smalls conceded he failed to identify client file names or numbers as required by Rule 417, SCACR on "scores" of deposits between 2000 and 2002 into his trust accounts. Smalls further admitted he routinely transferred funds between law firm accounts to "cure" account shortages. This misconduct resulted in multiple insufficient funds penalties and fees. One of Smalls' trust accounts was assessed penalties for approximately seventy-five insufficient funds checks from 2000 to 2002. Another trust account was assessed approximately 11 insufficient funds fees during the same time period.

A bank, where Smalls maintained a trust account and a general operating account, force-closed the accounts in 2002. Upon force-closure, the trust account had a balance of negative $413.57, and the bank returned approximately thirty-five checks in the last seven business days totaling approximately $75,000 due to insufficient funds. The general operating account had a balance of negative $44.69.

The Lawyers' Fund for Client Protection received claims totaling $235,528.82, and the Fund paid out a total of $114,239.04 to forty-seven people. The Fund received $33,541.71 from the appointed Trustee resulting in a net deficit of $80,697.33.

In addition to the above misconduct, Smalls represented a client in a workers' compensation case, which settled for $7,000 in November 2001. The funds were not disbursed to the client prior to Smalls' interim suspension on May 16, 2002. Next, a chiropractor treated one of Smalls' clients. The client assigned part of her settlement to the chiropractor, and the client settled in April 2002. The chiropractor was not paid. Lastly, a court reporter submitted an invoice for a deposition

transcript on or about March 14, 2002 for $342.20. Smalls stipulated this invoice was not paid as he was out of the office due to illness and then suspended.

Upon review of the stipulation of facts and hearing testimony, the panel recommended retroactive disbarment, payment of costs, and restitution. Smalls challenged the panel's report and recommendation.

II.

The panel found clear and convincing evidence of violations of Rules 1.15, 8.4(a), 8.4(b), 8.4(d), and 8.4(e), RPC, Rule 407, SCACR. The panel further found a violation of Rule 417, SCACR. The panel recommended disbarring Smalls retroactively, assessing costs against Smalls, and requiring Smalls to make full restitution to the Lawyers' Fund and to victims. We agree and find retroactive disbarment, imposition of costs, and restitution warranted.

Rule 1.15 requires the safekeeping of a client's property. The evidence indicated Smalls failed to maintain the records of his trust accounts and failed to maintain the integrity of his trust accounts. Accordingly, we agree that Rule 1.15 was violated. Next, we hold subsections (a), (b), (d), and (e) of Rule 8.4 were violated through Smalls mishandling of clients' funds. Lastly, we hold the financial recordkeeping requirements of Rule 417 were ignored.

We acknowledge it is unclear whether Smalls used the unaccounted for money for his personal benefit. What is clear, however, is that Smalls drastically failed to keep clients' property safe and mishandled money, moving funds from one account to another to cover shortages. Accordingly, we find that disbarment is an appropriate sanction under these circumstances. Based on precedent and Smalls' interim suspension since May 16, 2002, we find imposing a sanction of retroactive disbarment adequately protects the public. *See In the Matter of Yarborough*, 380 S.C. 104, 106, 668 S.E.2d 802, 803 (2008) (disbarring retroactively given the duration of Yarborough's indefinite suspension, Yarborough's disciplinary history, and the

Court's finding the purpose of disciplinary proceedings, which is to protect the public and the integrity of the legal system, was satisfied by retroactive disbarment); *In the Matter of Evans*, 376 S.C. 483, 484-85, 657 S.E.2d 752, 752-53 (2008) (accepting agreement to disbar retroactively due to Evans' failure to manage staff and reconcile her records); *In the Matter of Kennedy*, 367 S.C. 355, 361, 626 S.E.2d 341, 345 (2006) (disbarring Kennedy retroactively for failing to follow recordkeeping and money handling requirements, periodically using trust money to pay Kennedy's expenses, and additional misconduct such as mail fraud).

Under Rule 7(b), RLDE, Rule 413, SCACR we further require Smalls to contact ODC within fifteen days of the filing of this opinion regarding setting up a restitution plan for the Lawyers' Fund and other victims, to agree on a payment plan with ODC within sixty days of the filing of this opinion, to complete restitution prior to petition for reinstatement, to make payment of the costs associated with the disciplinary proceedings within ninety days of the filing of this opinion, and to take the Legal Ethics and Practice Program administered by ODC prior to any petition for reinstatement. Failure to comply with the restitution plan may result in the imposition of civil or criminal contempt by this Court.

III.

For the foregoing reasons, we retroactively disbar Smalls to the date of his interim suspension. Within fifteen days of the date of this opinion, Smalls shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

WALLER, ACTING CHIEF JUSTICE, PLEICONES, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In re: Amendment to Rule 402(d)(1), SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402(d)(1), SCACR, is amended. The following language shall be added to the end of Rule 402(d)(1), SCACR:

> Petitions seeking permission to file a late application are strongly discouraged, and only petitions documenting extraordinary circumstances justifying the late filing will be granted. If a petition for late filing is submitted, the petition must comply with the provisions of Rule 224, SCACR, must contain facts showing that extraordinary circumstances exist, and must be accompanied by a fully completed bar application, along with all required original attachments. Under no circumstances will petitions be accepted for filing after March 15 for the July Bar Examination or November 15 for the February Bar Examination. Unless otherwise directed by the Court, the filing fee for a late application will be $1,500, plus an additional $500 fee if the applicant has been admitted to practice law for more than one (1) year in another state or the District of Columbia at the time the application is filed. The filing fee is non-refundable and may not be credited to a later examination.

This amendment shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

April 10, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James E. Sanders, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4527
Heard September 16, 2008 – Filed April 7, 2009

AFFIRMED IN PART, REVERSED IN PART

Melissa Jane Reed Kimbrough, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Kevin Scott Brackett, of York, for Respondent.

THOMAS, J.: Sanders was convicted of the murder of Child Cope,[1] two counts of first degree criminal sexual conduct, and conspiracy to commit criminal sexual conduct. He was sentenced to life imprisonment, plus thirty years. Sanders appeals. We affirm the convictions for murder and two counts of criminal sexual conduct in the first degree, and reverse only as to the charge of conspiracy.

FACTS/PROCEDURAL HISTORY

On January 12, 2002, police responded to a burglary at a house on White Street in Rock Hill. After taking fingerprints, the officer was called to a house down the street where a man of a similar description was attacking Victim 4.[2] On January 12, 2002, at about midnight, Victim 4 was in her room watching a movie when she heard a knock at her door. When Victim 4 opened the door, Sanders pushed the door in and shoved her into the bathroom. The fight continued in the kitchen where Sanders kicked and pushed Victim 4. Sanders also held Victim 4 in a choke hold and tried to get on top of her several times. While Victim 4 was on the floor, Sanders ran into her room and grabbed her purse. As he was trying to leave, Victim 4 grabbed a pan from the stove and hit Sanders with it. He dropped the purse and Victim 4 grabbed her mace. She tried to spray him, but missed. She then saw a small screwdriver on the floor and swung it at him, hitting him at least once in the shoulder.

Victim 4 had a blood stain on her shirt, which the police took as evidence. When officers searched for the suspect, they spotted Sanders crouched between two buildings around the corner from Victim 4's house. Sanders' clothes and hair matched the description both victims had given and

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[1] See State v. Cope, Op. No. 4526 (S.C. Ct. App. filed April 2, 2009) (Shearouse Adv. Sh. No. 15 at 72, 72-74) (providing background facts of Child Cope's murder).

[2] See id. at 76-79 (providing background facts concerning Sanders' victims).

he was bleeding. Police were able to match Sanders' prints with the fingerprints taken at the White Street house. Sanders submitted to a blood test on January 14, 2002.

In September 2002, SLED ran a test of bodily fluids found in the case of State v. Cope and found Sanders' DNA matched semen and saliva found on the body of Child. Sanders eventually was indicted on the charge of murdering Child.

On June 18, 2004, Sanders filed a motion to suppress the DNA evidence extracted from him in January 2002 because it was unlawfully obtained. Conceding the blood drawn in January 2002 was invalidly obtained, the State moved on August 3, 2004, to have more blood drawn from Sanders.[3] Sanders argued the second blood draw was fruit of the poisonous tree of the first draw. Judge Alford determined all the Snyder[4] factors were present: (1) probable cause existed to believe Sanders committed the crime of first degree burglary; (2) there was a clear indication that relevant material evidence would be found; (3) the method used to secure Sanders' blood sample was safe and reliable; and (4) the crime of first degree burglary is serious and the evidence to be collected from Sanders would be important to the investigation. On August 4, 2004, Judge Alford ordered Sanders to submit to a second blood test. Sanders' blood was drawn again on August 5, 2004. The trial court in this case denied Sanders' motion to suppress the DNA evidence based on Judge Alford's analysis under Snyder.

The jury convicted Sanders. This appeal follows.

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[3] The State conceded the Snyder factors were not considered in the warrant for the January 2002 blood test.

[4] In re: Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992).

LAW/ANALYSIS

I. DNA Sample

Sanders argues the trial court erred in admitting the DNA evidence because the first blood draw was invalid and the evidence from the subsequent blood draw, after the August 2004 hearing in the Victim 4 case, should therefore have been suppressed. We disagree.

In State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000), our supreme court articulated the standard of review to apply to a trial court's determination that a search did not violate the Fourth Amendment. The Brockman court rejected the de novo standard set forth in Ornelas v. United States, 517 U.S. 690 (1996), for reviewing determinations of reasonable suspicion and probable cause in the context of warrantless searches and seizures and reviewed the "trial court's ruling like any other factual finding." Brockman, 339 S.C. at 66, 528 S.E.2d at 666. Therefore, this court may reverse a trial court's ruling only upon a showing of clear error and must affirm if there is any evidence to support the ruling. See State v. Williams, 351 S.C. 591, 597, 571 S.E.2d 703, 706 (Ct. App. 2002).

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. Amend. IV. A court order that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment. Schmerber v. California, 384 U.S. 757, 767-70 (1966). "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Id. at 768. "In other words, the questions we must decide . . . are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." Id.

In In re Snyder, our supreme court set forth the considerations for a warrant or order compelling a bodily intrusion. 308 S.C. 192, 195, 417

S.E.2d 572, 574 (1992). The elements to determine whether probable cause exists to permit the acquisition of such evidence are: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure the evidence is safe and reliable. Id. The court also approved consideration of the seriousness of the crime and the importance of the evidence to the investigation. Id. The trial court, in issuing such an order, must "balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures." Id.

We find no error in the trial court's review of probable cause under the Snyder factors in the Victim 4 case. Victim 4's shirt contained blood from the attack, Sanders was found nearby, his appearance matched Victim 4's description, and Sanders was injured when found.

Sanders also argues the trial court erred in permitting the DNA obtained in the Victim 4 case to be used in this case. We disagree.

A blood sample validly obtained in connection with one crime may be used in a subsequent unrelated case. See State v. McCord, 349 S.C. 477, 484, 562 S.E.2d 689, 693 (Ct. App. 2002) (finding no improper search or seizure where defendant's blood, voluntarily submitted in an unrelated case, is used in a subsequent case); see also Washington v. State, 653 So.2d 362, 364 (Fla. 1994) ("[O]nce the samples were validly obtained, albeit in an unrelated case, the police were not restrained from using the samples as evidence in the murder case."); Bickley v. State, 489 S.E.2d 167, 169 (Ga. Ct. App. 1997) (holding the DNA evidence should not be "suppressed on the basis that additional testing of defendant's blood . . . required an independent warrant"); Patterson v. State, 744 N.E.2d 945, 947 (Ind. Ct. App. 2001) ("[U]nder the facts of this case, society is not prepared to recognize as reasonable an individual's expectation of privacy in a blood sample lawfully obtained by police."); Wilson v. State, 752 A.2d 1250, 1272 (Md. Ct. App. 2000) (holding Fourth Amendment claims are no longer applicable once a person's blood sample has been lawfully obtained).

We find no error in using the results from the validly obtained blood evidence in the Victim 4 case as evidence in this case.

II. Conspiracy

Sanders argues the trial court erred in failing to direct a verdict on the conspiracy charges based on the lack of evidence supporting an agreement between Sanders and Cope. We agree.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight." Id. In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated:

> [T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (emphasis in original) (internal citations omitted).

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). "Often proof of conspiracy is necessarily by circumstantial evidence alone." State v. Miller, 223 S.C. 128, 133, 74 S.E.2d 582, 585 (1953). Nevertheless, "the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy." State v. Crocker, 366 S.C. 394, 406, 621 S.E.2d 890, 897 (Ct. App. 2005). Moreover, in viewing the sufficiency of the evidence to support a charge of conspiracy, an appellate court "must exercise caution to ensure the proof is not obtained 'by piling inference upon inference.' " State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 81 (1993) (quoting Direct Sales Co. v. U.S., 319 U.S. 703, 711(1943)).

"The gravamen of the offense of conspiracy is the agreement or combination." Gunn, 313 S.C. at 134, 437 S.E.2d at 80; see also State v. Condrey, 349 S.C. 184, 193, 562 S.E.2d 320, 324 (Ct. App. 2002) (stating the crime of conspiracy "consists of the agreement or mutual understanding"). "Often proof of conspiracy is necessarily by circumstantial evidence alone." Miller, 223 S.C. at 133, 74 S.E.2d at 585. Recognition of this reality, however, does not compromise the standard that a trial court must use in deciding a directed verdict motion when the evidence against an accused is entirely circumstantial, namely, that the case must be submitted to the jury only "if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or form which his guilt may be fairly and logically deduced." State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004).

We agree with Sanders that the absence of actual proof of an agreement and of some connection between him and Cope warranted a directed verdict on the conspiracy charge. Here, there was no direct evidence of an association between Cope and Sanders. The State's evidence that there was a conspiracy was entirely circumstantial, consisting of: (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the

same two-hour time frame as the injuries that Cope confessed to inflicting; (2) Sister's testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry; and (3) the fact that the house was full of debris and passage inside, particularly at night, would have been difficult. These factors, whether considered individually or collectively, raise at most a suspicion that Cope and Sanders intended to act together for their shared mutual benefit. Any inference that they made an agreement to accomplish a shared, single criminal objective would be speculative at best. Therefore, because the State failed to prove the element of agreement for the crime of conspiracy, the trial court should have granted a directed verdict as to that charge.

CONCLUSION

We affirm the trial court's evidentiary rulings and the denial of Sanders' motion for severance. As a result, the sentences of life imprisonment for murder, plus thirty years for criminal sexual conduct, are also affirmed. We further hold, however, the trial court erred in declining to direct a verdict of acquittal for Sanders on the issue of conspiracy, and we reverse only as to that charge.

AFFIRMED IN PART, REVERSED IN PART.

PIEPER, J., concurs. SHORT, J., concurs and dissents in a separate opinion.

SHORT, J. (dissenting in part): I concur in part and respectfully dissent in part.

I concur with the majority that the trial court did not err in admitting the DNA evidence. I respectfully dissent, however, regarding the trial court’s failure to direct a verdict on the conspiracy charge and would affirm the trial court on this issue.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight." Id. In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated:

> [T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (emphasis in original) (internal citations omitted).

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). "A formal or express agreement need not be established." State v. Crawford, 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct. App. 2005). To prove conspiracy, it is not necessary to prove an overt act. State v. Crocker, 366 S.C. 394, 405, 621 S.E.2d 890, 896 (Ct. App. 2005). "It is axiomatic that a conspiracy may be proved by direct or

circumstantial evidence or by circumstantial evidence alone." State v. Horne, 324 S.C. 372, 381, 478 S.E.2d 289, 294 (Ct. App. 1996).

"Often proof of conspiracy is necessarily by circumstantial evidence alone." State v. Miller, 223 S.C. 128, 133, 74 S.E.2d 582, 585 (1953). "[I]n establishing the existence of a conspiracy or an individual's participation therein, it is permissible for the jury to consider circumstantial evidence because, by its very nature, a conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available." 15A C.J.S. Conspiracy § 176 (2002). Although mere presence at the scene of a crime may be insufficient to support a conspiracy conviction, presence at the scene of the crime is relevant to prove conspiracy. Id. at §§ 176 &187.

The State's theory was Cope served up Child to Sanders for their mutual perverse pleasures. Forensic evidence indicated the bite mark on Child where Sanders's DNA was found was inflicted within the same time period as the injuries Cope confessed to inflicting on Child. Additionally, no evidence existed of forced entry into the house by any of the windows or doors. Sister testified she locked the back door that evening and Child locked the front door with a chain lock. Viewing the evidence in the light most favorable to the State, a connection and an overt act could be inferred from the circumstantial evidence that Cope allowed Sanders entry into the home wherein Sanders committed unlawful sexual acts upon Child. I find the temporal connection of the timing of the injuries and the lack of evidence of forced entry are circumstantial evidence that both Cope and Sanders were inside the house at the same time. A circumstantial connection was also made between Cope and Sanders by Cope's confessions and the DNA evidence implicating Sanders. Considering the totality of the evidence, I conclude substantial circumstantial evidence, rising above mere speculative inferences, exists to support the trial court's submission of the conspiracy charge to the jury. Accordingly, I would affirm the trial court's denial of Sanders's motion for a directed verdict on conspiracy.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James T. Judy, Respondent,

v.

Ronnie F. Judy, Appellant.

Appeal From Dorchester County
Roger M. Young, Circuit Court Judge

Opinion No. 4528
Heard March 5, 2009 – Filed April 8, 2009

AFFIRMED IN PART AND REVERSED IN PART

Glenn Walters, Sr., and R. Bentz Kirby, both of Orangeburg, for Appellant.

Capers G. Barr, III, of Charleston, for Respondent.

CURETON, A.J.: Ronnie F. Judy (Ronnie) appeals from the jury's verdict against him, arguing the circuit court erred in declining to dismiss the

suit against him on the basis of laches, collateral estoppel, or res judicata, and in declining to permit him to amend his answer to include a defense of waiver. We affirm in part and reverse in part.

FACTS

In 1983, Vesta Rumph (Mrs. Rumph) died, leaving three parcels of real property to be distributed equally between brothers Ronnie and James T. Judy (James).[1] The three parcels included a 10.9-acre tract (10.9-acre Tract), a 9.29-acre tract on which stood the family homestead (Homestead Tract), and a 134.71-acre tract which included an eleven-acre manmade pond (Pond Tract). The property was not formally distributed between the men for many years. Pursuant to an oral agreement between the men, Ronnie took possession of the Homestead Tract and lived in the Rumph homestead, and James took possession of the other two tracts. From July 1983 until October 15, 2001, Ronnie served as personal representative of Mrs. Rumph's estate (Estate). In 1999, Ronnie deeded his half-interest in the tracts to J. Todd Judy.

On February 8, 2001, James filed suit in probate court seeking partition of the Estate's property. On February 12, 2001, Ronnie executed a Deed of Distribution in his capacity as personal representative of the Estate granting ownership of the three tracts to himself and James as the heirs. However, because Ronnie disclaimed any interest in the property based on his 1999 transfer of his interest, he was dismissed from the suit in his personal capacity.[2]

In August 2001, on behalf of the Estate, Ronnie executed and recorded a deed purporting to convey full ownership of all three tracts to J. Todd Judy and Ryan C. Judy. Subsequently, James petitioned to have Ronnie removed as personal representative of the Estate. Ronnie was served with notice this

[1] Mrs. Rumph was not related to Ronnie or James. She and her husband were friends of the Judys' father. When Mrs. Rumph became elderly, Ronnie and James cared for her, and she devised her property to them.

[2] The property was not partitioned as a result of that suit.

petition would be heard on October 9, 2001. The day before this hearing, Ronnie executed an agreement on behalf of the Estate leasing twenty-five acres of the Pond Tract to a third party for fishing purposes for a period of ten years. On October 15, 2001, the probate court removed Ronnie as personal representative of the Estate and appointed James in his place.

In November 2001, J. Todd Judy and Ryan C. Judy recorded a deed purporting to convey title to the Homestead Tract to Wanda Judy. Later, James petitioned on behalf of the Estate to recover the property Ronnie had conveyed, including the Homestead Tract. The probate court found Ronnie's August 2001 deed was invalid, the subsequent conveyance to Wanda Judy was void, and the Estate owned all three tracts. Later, the probate court found the Estate validly conveyed ownership of the three tracts equally to Ronnie and James through the February 12, 2001, deed of distribution, and therefore, both men's signatures were required for a valid sale of the property.

In May 2003, someone operating a backhoe damaged the earthen dam supporting the eleven-acre manmade pond on the Pond Tract, and the pond drained completely. In November 2003, James again petitioned the probate court to partition the property and also to void the October 2001 fishing lease. On January 7, 2004, the probate court granted the relief sought, awarding ownership of the Pond Tract to James and the 10.9-acre and Homestead Tracts to Ronnie. In December 2005, James sold the Pond Tract for $1.28 million.

In November 2005, James filed a circuit court suit sounding in tort against Ronnie for the loss of the pond. Ronnie represented himself until near the eve of trial, when he finally retained counsel. Just before trial, Ronnie moved to dismiss for lack of subject matter jurisdiction, arguing James's suit was barred by laches, collateral estoppel, and res judicata, and moved to amend his answer to add the defense of waiver. The circuit court denied the motion to dismiss as to collateral estoppel and res judicata. The case proceeded to trial. Following presentation of the evidence, the circuit court permitted amendment of the answer to include laches but immediately found no evidence existed to support that defense. The circuit court also permitted amendment of the answer to include waiver. However, after

argument, the circuit court declined to charge the jury on waiver. The jury returned a verdict in James's favor. The circuit court denied Ronnie's post-trial motions for judgment notwithstanding the verdict and for a new trial. This appeal followed.

STANDARD OF REVIEW

An action in tort for damages is an action at law. Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005). In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law. Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006).

LAW/ANALYSIS

Ronnie argues the circuit court erred in refusing to dismiss James's suit for waste on the bases of collateral estoppel, laches, and res judicata. We disagree as to collateral estoppel and laches. However, we agree as to res judicata.

I. Collateral Estoppel and Laches

Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was "actually litigated and determined by a valid and final judgment" in a prior suit. Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same. Id. It applies only if "the precluded party has had a full and fair opportunity to litigate the issue in the first action." Id.

"Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421,

434 S.E.2d 279, 280 (1993). In determining whether laches bars a claim, the court has broad discretion and should consider the circumstances of the case, "including whether the delay has worked injury, prejudice, or disadvantage to the other party." Id., 434 S.E.2d at 281.

The circuit court did not abuse its discretion in refusing to dismiss James's suit for waste on the basis of collateral estoppel or laches. Collateral estoppel is inapplicable because the probate court did not adjudicate the issue of fault for destruction of the dam. See Zurcher, 379 S.C. at 135, 666 S.E.2d at 226. In addition, the circuit court's refusal to dismiss the waste suit on the basis of laches was within its broad discretion. James clearly knew during the pendency of the partition suit that the destruction of the dam and pond diminished the value of the Pond Tract. No evidence indicates in the nearly three years between the probate court's decision and the filing of the circuit court suit Ronnie detrimentally changed his position in reliance on James's decision not to pursue a claim for this loss in value. Ronnie testified he intended to appeal the probate court's order but lost his right to do so because his attorney delayed in filing a notice of appeal. The record does not reflect Ronnie would have demanded a determination of lost value had he known James would pursue this claim in a separate suit. To the contrary, Ronnie testified that, had the probate court determined he was responsible for the diminution in the Pond Tract's value, he "would have had to go to the bank and borrow money and walk off from the place." Adjudication of this claim by a different court in an entirely separate suit certainly is not judicially economical when the probate court could have disposed of it in the context of the partition suit. However, a tax on the judiciary does not equate to a detrimental change in position by a party. Accordingly, neither collateral estoppel nor laches bars James's suit for waste.

II. Res Judicata

When claims arising out of a particular transaction or occurrence are adjudicated, res judicata bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit. Plott v. Justin Ent., 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007). Res judicata requires proof of three elements: 1) a final,

valid judgment was entered on the merits of the first suit; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Id.

> [T]he rule precluding relitigation of issues which might have been raised in the prior action applies only where the two actions involve the same cause of action; but all questions which were actually litigated in the prior action and determined by the judgment are conclusive in any subsequent action between the parties, or their privies, regardless of whether the subsequent action involves the same or a different cause of action.

Lowe v. Clayton, 264 S.C. 75, 82, 212 S.E.2d 582, 585-86 (1975).

Whether res judicata precludes a claim because the first and subsequent suits involve the same cause of action is not merely a matter of aligning identical causes of action or theories of liability; rather, the subject matter of the two suits must be the same. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999). "The test utilized by this court for comparing two causes of action is to determine whether the primary right and duty and the delict or wrong are the same in both actions." Plum Creek Dev. Co. v. City of Conway, 328 S.C. 347, 350, 491 S.E.2d 692, 694 (Ct. App. 1997), aff'd as modified, 334 S.C. 30, 512 S.E.2d 106 (1999); see also Nunnery v. Brantley Constr. Co., Inc., 289 S.C. 205, 210, 345 S.E.2d 740, 743 (Ct. App. 1986).

> South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: 1) when there is identity of the subject matter in both cases; 2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; 3) when there is the same evidence in both cases; and recently

> 4) when the claims arise out of the same transaction or occurrence.

334 S.C. at 35 n.3, 512 S.E.2d at 109 n.3 (citing James F. Flanagan, South Carolina Civil Procedure 649-650 (2d ed. 1996)). Seeking a different remedy in the second suit for the same wrong does not alter the identical nature of the subjects of the two actions. 334 S.C. at 35, 512 S.E.2d at 109. "[F]or purposes of res judicata, 'cause of action' is not the form of action in which a claim is asserted but, rather the 'cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'" Id. at 36, 512 S.E.2d at 109-110 (quoting 50 C.J.S. Judgment § 749 (1997)).

The circuit court erred in declining to dismiss James's suit for waste on the basis of res judicata because Ronnie satisfied all three required elements. The probate court's final, valid order adjudicating the partition suit satisfies the first element. Plott, 374 S.C. at 511, 649 S.E.2d at 95. Ronnie's and James's participation in the partition suit satisfies the second element, identity of the parties to both suits.[3] Id. The third element, identity of the subject matter of both suits, is also satisfied. Id.; see also Plum Creek, 334 S.C. at 35, 512 S.E.2d at 109. Certainly, the remedies sought in the partition and waste suits differed considerably, even in the nature of the relief sought. The probate court heard a petition for equitable relief, partition of jointly owned land. By contrast, the circuit court heard a tort suit for waste, a legal action. However, identity of the subject matter of the two suits rests not in their forms of action or the relief sought, but rather, in the combination of the facts and law that give rise to a claim for relief. Plum Creek, 334 S.C. at 36, 512 S.E.2d at 109-110. Partition of ownership stripped Ronnie of his rights and duties related to the Pond Tract after the pond was lost. The waste suit settled the issue of fault for the loss of the pond. James's interest in the Pond

[3] While the plaintiff in the partition suit was the Estate, with James as its personal representative, both men participated in the partition suit in their individual capacities and had the opportunity to cross-claim against each other. We do not address the differences between their roles in the partition and waste suits because neither party argued this point.

Tract suffered when the earthen dam on that parcel of land failed under Ronnie's care. Both suits arose from this fact. Consequently, the circuit court erred in finding res judicata did not preclude the waste suit.

Ronnie also argues the circuit court erred in refusing to permit him to amend his answer to allege the defense of waiver. We do not reach this issue because our ruling on the applicability of res judicata disposes of this appeal. 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

As to the issue of whether the circuit court erred in denying Ronnie's motion to dismiss, we find neither collateral estoppel nor laches bars this action. Consequently, we affirm the circuit court's refusal to dismiss on those bases. However, we find res judicata applies. Therefore, we reverse the circuit court's refusal to dismiss on the basis of res judicata. Because our reversal on the basis of res judicata disposes of this appeal, we do not reach the issue of whether the circuit court erred in declining to permit Ronnie to amend his answer to allege the defense of waiver. Accordingly, the decision of the circuit court is

AFFIRMED IN PART AND REVERSED IN PART.

PIEPER and LOCKEMY, JJ., concur.