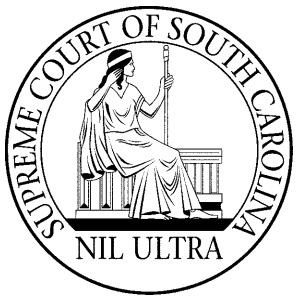

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 17, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Adrian D. Robinson, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 26817
Submitted March 17, 2010 – Filed May 17, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, 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 and Assistant Attorney General Ashley A. McMahan, all of Columbia, for Respondent.

JUSTICE BEATTY: In this post-conviction relief (PCR) case, the Court granted Adrian D. Robinson's petition for a writ of certiorari to review the PCR judge's order denying Robinson's request for relief from his sentence for trafficking in crack cocaine, third offense. In his PCR application, Robinson contended: (1) he should not have been sentenced for a third offense given he was not validly convicted of a second drug offense; and (2) his trial counsel was ineffective in failing to object to his sentence. We affirm.

FACTUAL/PROCEDURAL HISTORY

On June 7, 2000, Robinson pleaded guilty to four drug offenses. The offenses of possession with intent to distribute (PWID) crack cocaine and PWID crack cocaine within proximity of a park or school were considered first offenses. The indictments for these offenses alleged Robinson committed these acts on April 30, 1999. Robinson also pleaded guilty to possession of crack cocaine and possession of marijuana. The indictments for these offenses alleged Robinson committed these acts on February 17, 2000. The sentencing forms for the possession of marijuana charge and the possession of crack cocaine charge, which were signed by Robinson, indicate these offenses constituted second offenses. Robinson did not appeal his plea or sentences.

While on parole for the above-listed offenses, Robinson was indicted in March 2003 for trafficking in crack cocaine in an amount between ten and twenty-eight grams and PWID crack cocaine within proximity of a college or university. The indictments alleged Robinson committed these acts on December 30, 2002.

Following a trial, a jury convicted Robinson of both indicted offenses. During the sentencing hearing, the solicitor informed the trial judge of Robinson's prior record and indicated the current conviction constituted a third drug offense. The solicitor referenced Robinson's 2000 guilty plea and noted that Robinson had pleaded guilty to possession of crack cocaine as a second offense during that plea.

Robinson's trial counsel did not object to the solicitor's recitation of Robinson's prior record or the solicitor's assertion that the trafficking charge constituted a third offense. Instead, trial counsel urged the judge to sentence Robinson to the minimum term for a third offense and to order the sentences to be served concurrently.

Ultimately, the trial judge sentenced Robinson to twenty-five years' imprisonment for trafficking in crack cocaine in an amount between ten and twenty-eight grams, third offense, and to a concurrent sentence of fifteen years' imprisonment for the PWID crack cocaine in proximity of a college.

Robinson appealed his convictions and sentences to the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). After an Anders review, the Court of Appeals dismissed Robinson's appeal and granted appellate counsel's petition to be relieved. State v. Robinson, Op. No. 2005-UP-176 (S.C. Ct. App. filed March 10, 2005).

Subsequently, Robinson filed a PCR application in which he alleged multiple grounds of ineffective assistance of trial counsel and challenged the trial court's lack of subject matter jurisdiction.

At the beginning of the PCR hearing, PCR counsel informed the judge that Robinson was pursuing his application solely on the ground that trial counsel was ineffective in allowing him to be sentenced for a third drug offense rather than a second drug offense.

Robinson believed he was entitled to be sentenced as a second offender, as opposed to a third offender, given he pleaded guilty to all four of the drug offenses on the same day. Because the two "sets of charges" were entered on the same date, Robinson claimed they could not constitute a first and second drug offense. As a result, Robinson maintained his sentence for trafficking was illegally entered as a third offense rather than a second offense.

After the hearing, the PCR judge issued a written order in which he denied Robinson's application and dismissed it with prejudice.

Specifically, the PCR judge found that Robinson "could have been sentenced as a third offender regardless of the fact that the first and second convictions, used to enhance his sentence, were entered on the same date and were not part of a comprehensive plea bargain."

In reaching this conclusion, the judge noted that Robinson was sentenced under section 44-53-375(C) of the South Carolina Code,[1] which does not define what constitutes a prior narcotics conviction that would support enhancement. However, the judge found the version of section 44-53-470 of the Code, in effect at the time of Robinson's trial, stated "[a]n offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this article or under any State or Federal statute relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs." S.C. Code Ann. § 44-53-470 (2002). The judge found section 44-53-470 "plainly states that an offense will constitute a second offense if 'the offender has at any time been convicted under this article.'"

Applying section 44-53-470, the judge concluded Robinson "had a prior conviction or first offense, before the second conviction even though the two occurred at the same hearing." Additionally, the judge found Robinson had "notice and knowledge" of his charge for a second offense given: (1) he signed the sentencing sheets from the June 2000 plea that indicated he pleaded guilty to a second offense; and (2) the solicitor, during Robinson's trial, stated that Robinson was being tried for a third offense.

The judge rejected Robinson's argument that section 17-25-45(F) of the Code[2] supported his position. In so ruling, the judge found that

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[1] This section requires a judge to sentence a third or subsequent offender to "a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars." S.C. Code Ann. § 44-53-375(C)(1)(c) (2002).

[2] At the time of Robinson's trial, section 17-25-45(F) provided:

this section had to be interpreted in conjunction with section 17-25-50 of the Code,[3] which "illustrates that the Legislature intended that offenses taking place in one instance or act [of] criminality be treated as one offense." In Robinson's case, the judge found there was no temporal relation between the offenses because the first offenses occurred on April 30, 1999, and the second offenses occurred on February 17, 2000. As a result, the judge concluded that these convictions should be viewed as two separate offenses and that Robinson failed to establish that counsel was deficient.

This Court granted Robinson's petition for a writ of certiorari to review the PCR judge's order.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in

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> For the purpose of determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.

S.C. Code Ann. § 17-25-45(F) (2003).

[3] Section 17-25-50 provides:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

S.C. Code Ann. § 17-25-50 (2003).

the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

DISCUSSION

Robinson contends the PCR judge erred in denying relief where the trial judge and the jury did not have authority to convict or sentence him for a third drug offense given he had not previously been validly convicted of any second drug offense.

In support of this contention, Robinson claims his convictions from the June 2000 guilty plea constituted four, first-offense drug convictions. Because he pleaded guilty to these charges during a single

proceeding, Robinson argues each conviction was a first offense and could not have affected the other simultaneously-entered guilty pleas. Specifically, he avers the version of section 44-53-470 in effect at the time of his alleged conviction for a second offense required a valid conviction prior to establishing an offense as a second offense. Referencing legislative intent and this Court's line of cases involving recidivist sentencing,[4] Robinson maintains one offense cannot be enhanced by a prior conviction entered on the same day.

Additionally, Robinson asserts that there was no negotiated agreement with the State for him to plead guilty to any second offenses; thus, this Court's decision in Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001)[5] is inapposite. In distinguishing Rollison, Robinson claims he intended to plead guilty to first offense charges with a sentencing-cap of seven years' imprisonment for each of the four offenses. As a result, he contends his June 2000 pleas were not knowingly and voluntarily entered. Ultimately, Robinson claims his June 2000 pleas did not constitute a valid second offense and, thus, should not have served to enhance his subsequent 2003 drug conviction.

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[4] See Bryant v. State, 384 S.C. 525, 534, 683 S.E.2d 280, 285 (2009) (interpreting sections 17-25-45 and 17-25-50, the recidivist statutes providing for a sentence of life without parole based on prior convictions, and discussing appellate court decisions construing these code sections).

[5] In Rollison, the defendant pleaded guilty to both first and second offense drug charges on the same day in accordance with a negotiated agreement with the State. Rollison, 346 S.C. at 508, 552 S.E.2d at 291. As part of the agreement, the defendant agreed to plead to PWID crack cocaine, first offense, and possession of crack cocaine, second offense. In exchange for the defendant's plea, the State agreed to dismiss three other charges. Id. Subsequently, the defendant filed a PCR application in which he contended his plea counsel was ineffective for permitting him to accept the plea bargain and plead to a second offense PWID at the same time he was pleading guilty to his first drug offense. Id. at 510, 552 S.E.2d at 292. This Court reversed the PCR judge's finding that plea counsel was ineffective because the plea record and the defendant's PCR testimony established that the defendant was fully aware he was pleading guilty to both first and second offenses. Id. at 511-12, 552 S.E.2d at 292-93.

The threshold question we must resolve is whether Robinson's June 2000 pleas were valid. Significantly, Robinson did not appeal his June 2000 pleas nor did he file a PCR application within the statute of limitations.[6] Consequently, we find Robinson is precluded from now attacking the validity of his pleas.

However, even if we were to find Robinson's challenges regarding the validity of his pleas were not procedurally barred, we conclude they are without merit.

Contrary to Robinson's contention, a defendant can enter a valid plea to a first and second offense during the same proceeding. Thus, it was constitutionally permissible for Robinson to enter a plea of guilty to a first and second drug offense during the same proceeding. See State v. Patterson, 272 S.C. 2, 249 S.E.2d 770 (1978) (holding, in a case where defendant pleaded guilty during the same proceeding to a first and second drug offense that occurred on the same date, trial judge properly treated the charges as first and second offenses given at the time of the imposition of the sentence for the second offense the appellant stood convicted by way of a guilty plea of a first offense); Rollison, 346 S.C. at 515, 552 S.E.2d at 294 ("A defendant can enter a valid plea to a first and second offense at the same plea hearing." (Toal, C.J., dissenting)).

Having found that Robinson's June 2000 pleas were valid, the question becomes whether the underlying convictions were sufficient to establish a second offense under section 44-53-470 and, in turn, enhance Robinson's sentence for trafficking in crack cocaine.

At the time Robinson pleaded guilty, this section provided that an offense would constitute a second or subsequent offense if the offender had "at any time been convicted under this article." As will be

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[6] See S.C. Code Ann. § 17-27-45(A) (2003) ("An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.").

discussed, we find Robinson's June 2000 plea of guilty resulted in two separate offenses for sentencing purposes after June 2000. Thus, the current trafficking conviction constituted a third offense.

Initially, we note the offenses that were the subject of the June 2000 pleas were clearly separate and did not stem from a continuous course of conduct.[7] As evidenced by the record, the indictments for PWID crack cocaine and PWID crack cocaine within proximity of a park or school alleged Robinson committed these acts on April 30, 1999. The separate indictments[8] for possession of crack cocaine and possession of marijuana alleged Robinson committed these acts on February 17, 2000. Thus, the charges stemming from Robinson's conduct on April 30, 1999 and February 17, 2000 could have been separately tried. Therefore, the fact that Robinson pleaded guilty to each of these offenses in a single proceeding did not negate their distinctiveness.

However, because the conduct for which Robinson was indicted for the offenses of possession of crack cocaine and possession of marijuana occurred during the course of a single incident on February 17, 2000, we find these offenses should count as only one for the purpose of sentencing. Similarly, the offenses committed on April 30, 1999 count as one for sentencing purposes. Therefore, Robinson had acquired two separate offenses that should have been considered for sentencing purposes in a subsequent conviction. See State v. Boyd, 288 S.C. 206, 209, 341 S.E.2d 144, 146 (Ct. App. 1986) ("We hold that where a defendant has been convicted on two or more counts for the violation of the Controlled Substance Act arising out of simultaneous

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[7] See Bryant, 384 S.C. at 534, 683 S.E.2d at 285 (interpreting sections 17-25-45 and 17-45-50 involving prior convictions that subjected defendant to a mandatory life without parole sentence and finding that the language "so closely connected in point of time that they may be considered as one offense" to mean that "the offenses are inextricably connected and share an immediate temporal proximity").

[8] We would also note the York County Grand Jury indicted Robinson on June 17, 1999, for the offenses that occurred on April 30, 1999. A year later, on June 22, 2000, the York County Grand Jury indicted Robinson for the offenses that occurred on February 17, 2000.

acts committed in the course of a single incident, the convictions will be considered as only one for the purpose of sentencing under a subsequent conviction for a violation of the Controlled Substance Act.").

Thus, applying section 44-53-470, we hold Robinson's convictions for possession of crack cocaine and possession of marijuana constituted second offenses as Robinson had also been convicted of PWID crack cocaine. See Waiters v. State, 371 S.C. 591, 593, 641 S.E.2d 434, 435 (2007) ("Under § 44-53-470, the timing of the crimes is irrelevant to the determination of a subsequent offense so long as there is a prior conviction.").

Accordingly, the trial judge properly enhanced Robinson's trafficking sentence based on his two prior drug convictions. See Butler v. State, 625 S.E.2d 458, 463 (Ga. Ct. App. 2005), aff'd, 637 S.E.2d 688 (Ga. 2006) (concluding trial judge properly enhanced defendant's conviction for selling cocaine based on three prior convictions even though two of the convictions were entered on the same date given they were separately indicted, contained in separate sentencing orders, and concerned two separate sales of cocaine that took place on different days).

Finally, Robinson argues the PCR judge erred in finding trial counsel provided effective representation. In view of our determination that Robinson was properly sentenced for a third drug offense, we find there is evidence to support the PCR judge's decision that Robinson's trial counsel was not deficient in failing to challenge the instant conviction as a third offense.

CONCLUSION

In conclusion, we find a decision to affirm the PCR judge's order is consistent with this Court's recent pronouncement concerning recidivist sentencing. See Bryant, 384 S.C. at 534, 683 S.E.2d at 285 (interpreting and applying recidivist statutes, sections 17-25-45(F) and 17-25-50, involving prior convictions resulting in a sentence of life

without parole and reiterating that a prior conviction for sentencing purposes merely requires a conviction which occurred on a separate occasion prior to the current adjudication).

Here, Robinson violated the drug laws on two separate occasions prior to his 2003 conviction for trafficking in crack cocaine. The fact that these convictions were entered during a single proceeding did not operate to "fuse" the separate convictions into a single offense.

Based on the foregoing, the PCR judge's order is

AFFIRMED.

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

JUSTICE PLEICONES: I agree that we should affirm the denial of petitioner's application for post-conviction relief (PCR) but write separately because I would decide the case solely on the basis that the statute of limitations bars consideration of petitioner's claim. I therefore concur in the result reached by the majority.

In June 2000, petitioner pled guilty to four drug offenses. Pursuant to a plea bargain, two of these four offenses were designated "first offenses" and two "second offenses." It is well-settled that an individual may, as part of a plea bargain, plead guilty to a crime of which he is not guilty. Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001). So long as the defendant understands the nature and elements of the charges, the consequences of his plea and the constitutional rights he is waiving by virtue of the plea, he is free to bargain for 'enhanced' convictions, that is, to have some convictions classified as second drug offenses. Id. In the same vein, he can bargain for multiple first offenses. Id.

Here, petitioner did not timely file a PCR challenge to this 2000 plea, and cannot now be heard to challenge the knowing and voluntary nature of that plea, nor the quality of assistance rendered by plea counsel as the statute of limitations applies to that conviction. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996) (one year to file application). I would decide the case on this ground, and dismiss the writ of certiorari as improvidently granted. I do not join any of the majority's discussion of the validity of that 2000 plea, the analysis of that plea's impact on petitioner's subsequent sentence, and specifically distance myself from the discussion of S.C. Code Ann. §§ 17-25-45 and -50, which I find irrelevant to the question whether petitioner was properly sentenced as a third offender following his trial and conviction.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Brian D. Coker, Respondent.

Opinion No. 26818
Submitted April 12, 2010 – Filed May 17, 2010

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed three (3) years with the condition that he complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to seeking reinstatement. See Rule 7(b), RLDE, Rule 413, SCACR.[1] He requests the suspension be made

[1] By order dated October 16, 2009, the Court amended Rule 7(b), RLDE, to provide for a maximum definite suspension of three (3)

retroactive to the date of his interim suspension, February 3, 2010. In the Matter of Coker, S.C. Sup. Ct. Order dated February 3, 2010 (Shearouse Adv. Sh. No. 6 at 35). We accept the Agreement and impose a definite suspension of three (3) years, retroactive to the date of respondent's interim suspension. In addition, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to seeking reinstatement. The facts, as set forth in the Agreement, are as follows.

FACTS

Between July 2008 and December 2009, respondent admits he misappropriated an amount which ultimately totaled $275,000.00 from his client trust account. Respondent has restored and properly disbursed the funds. Respondent self-reported his misconduct to ODC.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall hold client funds separately from lawyer's personal funds); Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

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years and to eliminate indefinite suspensions. (Previously, the maximum length of a suspension was two (2) years). The amendment applies to complaints filed on or after January 1, 2010. Respondent self-reported this matter after January 1, 2010.

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of three (3) years, retroactive to the date of respondent's interim suspension. Further, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to seeking reinstatement. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, KITTREDGE, HEARN, JJ., concur. BEATTY, J., not participating.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Victoria L. Sprouse, Respondent.

Opinion No. 26819
Submitted April 13, 2010 – Filed May 17, 2010

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Victoria L. Sprouse, of Charlotte, North Carolina, pro se.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR. The facts are set forth below.

Respondent is licensed to practice law in South Carolina. Until April 24, 2009, she was licensed to practice law in North Carolina.

On April 1, 2009, respondent was convicted on eighteen (18) counts of felony mail, wire and/or bank fraud, conspiracy, and money laundering charges in the United States District Court for the

Western District of North Carolina. On April 24, 2009, the North Carolina Bar disbarred respondent.

Pursuant to Rule 29(a), RLDE, the Office of Disciplinary Counsel (ODC) submitted a certified copy of the North Carolina Order of Disbarment to the Clerk. In accordance with Rule 29(b), RLDE, the Clerk provided ODC and respondent with thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline in this state was not warranted. ODC filed a response stating it knew of no reason why identical discipline was unwarranted. Respondent did not file a response.

After thorough review of the record, we hereby disbar respondent from the practice of law in this state. See Rule 29(d), RLDE; see also In the Matter of Sexton, 377 S.C. 402, 661 S.E.2d 60 (2008); In the Matter of Brafford, 367 S.C. 295, 625 S.E.2d 650 (2006). Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

DISBARRED.

TOAL, C.J., PLEICONES, KITTREDGE, HEARN, JJ., concur. BEATTY, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Keith Anthony Sims, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26820
Heard January 6, 2010 – Filed May 17, 2010

AFFIRMED IN RESULT

Senior Appellate Defender Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant, both 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 Donald J. Zelenka, Assistant Attorney General Melody J.

Brown, Assistant Attorney General Alphonso Simon, Jr., and Solicitor Warren B. Giese, all of Columbia, for Respondent.

JUSTICE KITTREDGE: This case concerns Rule 801(d)(2)(E), SCRE, which allows in evidence as non-hearsay an out-of-court statement made by a non-testifying "coconspirator of a party during the course and in furtherance of the conspiracy." Keith Anthony Sims was convicted and sentenced for murder. Sims appealed, challenging the admission of a statement attributed to a non-testifying declarant as inadmissible hearsay. The court of appeals affirmed, and we granted a writ of certiorari to review that decision. *State v. Sims*, 377 S.C. 598, 661 S.E.2d 122 (Ct. App. 2008). The court of appeals erred in finding the challenged evidence satisfied the "in furtherance of the conspiracy" prong of Rule 801(d)(2)(E). We affirm in result, however, because the erroneously admitted hearsay was harmless.

I.

The body of Brian Anderson was found in a Newberry County pond on December 31, 2003. The body was chained to a pipe weighted down by two cement blocks. Anderson had been shot in the right eye. Marks on Anderson's body indicated he was dragged to the pond. Nearby, law enforcement agents found work gloves and packaging.

The next day, Anderson's blood-spattered car was located in the parking lot of a Columbia apartment complex. The pattern of blood stains indicated that someone in the front passenger's seat had shot Anderson while he was in the driver's seat. Anderson was last seen alive on December 30 at a party in a Columbia hotel.

Sims and Anderson were acquaintances. They left the party together around midnight in Anderson's car. Evidence pointed to Sims as the killer, and he was arrested and charged with murder. His subsequent statements to

law enforcement contained several versions of his involvement in Anderson's death.[1]

During the investigation, law enforcement learned that Sims had enlisted the support of three individuals to help him dispose of Anderson's body, Sims's bloody clothes and the gun used to kill Anderson. Those three individuals were Natalie English (Sims's girlfriend), Derrick Ruff (Sims's friend), and Nikki Davis (Ruff's girlfriend). English, Ruff, and Davis were charged as accessories after-the-fact of murder.

Davis cooperated with law enforcement and led them to several pieces of critical evidence, including the gun that Sims used to kill Anderson. The information Davis provided also enabled law enforcement to recover several items that had belonged to Anderson; these items were found in a dumpster behind the church Sims's mother attends.

II.

At trial, Sims testified he and Anderson had lived near each other on Monticello Road in Richland County. Although they had occasional arguments, Sims stated they had been friends for several years. Sims testified that Anderson had "quite a few guns," and a few weeks before his death, Anderson had threatened Sims "over some money."

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[1] Sims's initial statement acknowledged that Anderson had "dropped him off" after the party, but denied any involvement in Anderson's death: "I ain't got no pistol. . . . That's crazy. I didn't kill Brian." In a subsequent statement, Sims told law enforcement that he and Anderson left the party together around 1:00 a.m.; they stopped at McDonald's and a crack house before Anderson dropped off Sims. In a third statement, Sims continued to deny any involvement in Anderson's death. Sims eventually admitted to law enforcement that he shot Anderson, but contended Anderson had pulled a gun on him. At trial two years later, Sims admitted killing Anderson, who was unarmed. Sims asserted self-defense as he testified he believed Anderson was reaching for a gun.

According to Sims, around 1:00 a.m. on December 31, 2003, Anderson offered to take him home from the party. Sims contended Anderson had "a little gun in his hand" when he got into the car. Sims acknowledged that he also was carrying a gun: "I have got shot in the past. So I usually carry my gun with me." Sims testified that as they turned into his driveway:

> [Anderson] was telling me that he was going to end all his beefs before the New Year. And he was reaching underneath his seat. So I thought he was fixing to . . . grab him a gun and shoot me. So I pulled out my gun. Out of fear I shot.

Sims added: "I didn't mean to kill him. I was pulling my gun out because I thought he was fixing to kill me." Sims stated he did not realize until after he had fired that "I had just shot an unarmed man, so I was scared."

Sims said that following Anderson's shooting, he told his girlfriend, English, "something happened between me and [Anderson]." Sims stated he and English drove to Newberry because he wanted to ask his friend Ruff what he should do. English drove her car, and Sims drove Anderson's car, which contained Anderson's body. After Sims and Ruff talked, they left to dispose of Anderson's body. After dumping the body in the pond, Sims testified, "we left [the car] in Columbia."

Sims acknowledged that he gave several false statements to law enforcement in January of 2004. He admitted at trial: "I lied. I was scared." Sims said he was afraid to be truthful because "I had shot Brian [Anderson] and then I had seen he didn't have no gun." On January 22, 2004, Sims acknowledged shooting Anderson but, again, his statement was not truthful: "I told them when we had got in my driveway and Brian had pulled a gun out on me." At trial, Sims admitted, "I was lying because when I seen he had no gun I was scared."

Ruff and Davis testified at trial and acknowledged helping Sims hide Anderson's body and destroy evidence. Sims's other coconspirator, English, did not testify.

Davis testified extensively regarding the events that followed Anderson's death. According to Davis, around 3:00 a.m., English and Sims knocked on the door of the home she shared with Ruff and his mother. After Sims woke Ruff, he and Sims spoke privately. Davis claimed at this point she was not aware of the killing or that her friends were planning to help Sims dispose of Anderson's body: "She [English] wouldn't tell me what was going on. And so she asked me if I wanted to go to Charleston. And I told her, yeah . . . ." Davis stated Sims searched for bricks in Ruff's yard. After leaving Ruff's home, they stopped at a gas station for English to buy "gloves and stuff."

Next, they drove down a dirt road and parked in front of a house. Davis maintained that she still was unaware of the killing or the real purpose of the trip. Shortly after Sims and Ruff exited the car, Davis observed them "toting like this long thing I guess to a car, and a chain, you know, some bricks, just toting it to the back of the house . . . ." Davis continued:

> The next thing I knew he [Sims] sped from behind the house inside of another car. And that's when I, you know, started pushing Natalie [English]. I'm asking her what's going on? Did he steal a car or what's going on? Where did he get that from and stuff like that. **And then she told me, you know, Keith had murdered somebody.** But I didn't, you know—

Sims's counsel objected to this portion of Davis's testimony on the ground of hearsay. Without comment, the trial court overruled Sims's general hearsay objection.

Davis's testimony continued, stating they drove English's car to a park, where they met Sims, who had driven Anderson's car. According to Davis, as Sims opened the door to Anderson's car, "the guy, he just fell out." Although Davis contended she had been "unable to think," she admitted that she had helped Sims, English, and Ruff drag Anderson's body to the pond and throw him in.

Before leaving the park, Sims gave Davis a bag containing Anderson's cell phone, chain, and wallet. Sims then drove Anderson's car to Columbia,

while Ruff, English, and Davis drove English's car to Charleston. After arriving in Charleston, Davis disposed of the bag and Sims's bloody clothes. They promptly returned to Columbia and met Sims at a friend's apartment. Sims rejoined the group and they drove together to Newberry.

Sims told Davis to dispose of the gun, which he had wrapped in a shirt. Davis testified she and English drove to Columbia to attend church with Sims's mother. Sims and Ruff remained in Newberry. While English and Davis were driving to Columbia, Davis disposed of the gun. When they reached the church, Davis threw several items from Anderson's car into a dumpster behind the church.

Ruff testified and confirmed that he had participated with Sims, English, and Davis in hiding the body and disposing of the evidence.

The court charged the jury on murder, voluntary manslaughter, and self-defense. Sims was convicted of murder and sentenced. The court of appeals affirmed, to which we granted a writ of certiorari.

III.

Sims contends that the trial judge committed reversible error by allowing Davis to testify that English, a non-testifying third party, told her "Keith [Sims] had murdered somebody" because this evidence violated Rule 802, the rule against hearsay. The court of appeals analyzed the issue in terms of Rule 801(d)(2)(E), the coconspirator exception and found no error in the admission of the statement attributed to English.

An appellate court reviews challenges to the admission and exclusion of evidence for an abuse of discretion. *See State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."). We agree with Sims that the challenged testimony was inadmissible hearsay, but in view of the overwhelming evidence of guilt, we find the error harmless.

A.
Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible evidence "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Because of the generic nature of Sims's hearsay objection and the trial court's one word ruling—"overruled"—we do not have the benefit of any analysis in the trial court concerning Rule 801(d)(2)(E), SCRE. The first vetting of the evidentiary challenge occurred on appeal.

B.
Coconspirator Exception to the Rule against Hearsay

A conspiracy is "a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. The essence of a conspiracy is the agreement." *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) (internal citation omitted).

While hearsay testimony generally is not admissible, an exception is allowed when a statement is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), SCRE. When a statement meets these requirements, it is considered non-hearsay.

The court of appeals concluded the challenged statement was not hearsay because it was made by one coconspirator (English) to another member of the conspiracy (Davis), and it occurred "during the course and in furtherance of the conspiracy." The court of appeals opinion concluded:

> We rule the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating to appellant's [Sims's] own statement of guilt because the statement was calculated to induce participation in the combined and joint effort to dispose of the victim's body, the gun, and other evidence of murder. We hold the statement was **NOT** hearsay, but constituted relevant and admissible probative evidence in this murder.

Sims, 377 S.C. at 612-13, 661 S.E.2d at 130 (emphasis in original).[2]

The State urges us to accept the court of appeals view that Davis's statement was admissible under the coconspirator exception to the hearsay rule. We agree with the court of appeals that the evidence establishes the existence of a conspiracy and that English's purported statement to Davis was made during the course of the conspiracy.[3] We part company with the court of appeals only as it relates to Rule 801(d)(2)(E)'s requirement that the statement be made "in furtherance of the conspiracy."

Concerning the "in furtherance of" prong, our law provides that "a statement by a co-conspirator must advance the conspiracy to be admissible

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[2] The holding of the court of appeals warrants a correction and a clarification. First, the court of appeals erred in referring to English's statement to Davis as Sims's "own statement of guilt." We view this as a scrivener's error, for the coconspirator analysis in the court of appeals opinion correctly attributes the statement to English. We further clarify that Davis's status as a coconspirator was not relevant to the analysis of the admissibility of English's statement. A statement made by a coconspirator to (or overheard by) a third party who is not a member of the conspiracy may be admissible, provided the statement was made during the course and in furtherance of the conspiracy. *See State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998); *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994).

[3] During oral argument, Sims's counsel acknowledged that Sims "enlisted" English, Ruff and Davis to dispose of Anderson's body and other evidence.

under Rule 801(d)(2)(E)." *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000) (internal citation omitted). "While mere conversation or narrative declarations are not admissible under this rule, statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities are admissible." *Id.* at 372, 536 S.E.2d at 869 (quoting *United States v. Arias-Villanueva*, 998 F.2d 1491, 1502 (9th Cir. 1993)).

In *State v. Anders*, a witness testified that she overheard a coconspirator of Anders say that Anders "was going to pay him big for blowing up the building." 331 S.C. 474, 476, 503 S.E.2d 443, 444 (1998). We held that "even if made **during** the conspiracy, the statement in no way **advanced** the conspiracy." *Id.* at 476-77, 503 S.E.2d at 444 (emphasis in original). In *Anders*, we noted that our jurisprudence in this area mirrored that in other jurisdictions. *See United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990) ("Mere chitchat, casual admissions of culpability, and other noise and static in the information stream are not admissible."); *United States v. Posner*, 764 F.2d 1535, 1538 (11th Cir. 1985) (stating a letter that "spilled the beans" regarding a tax scheme "could hardly be considered to have advanced any object of the conspiracy"). Caselaw subsequent to *Anders* remains in accord. *See United States v. Pratt*, 239 F.3d 640, 643 (4th Cir. 2001) ("Idle conversation that touches on, but does not further, the purposes of the conspiracy does not constitute a statement in furtherance of a conspiracy under Rule 801(d)(2)(E).").

While English's challenged statement was made during the conspiracy, it was not made in furtherance of the conspiracy. The statement neither advanced the conspiracy nor was intended to further induce Davis's participation in the conspiracy. English's statement that Sims had "murdered somebody" was simply part of her narrative, best described as "spilling the beans." *See Posner*, 764 F.2d at 1538. We thus conclude the statement was not admissible under Rule 801(d)(2)(E).

C.
Harmless Error

While we agree with Sims that the statement is inadmissible hearsay, we find the error harmless in view of the overwhelming evidence of guilt. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (citing *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)). "[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" *Id.* at 212, 631 S.E.2d at 267 (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)).

Sims was able to fully develop a theory of self-defense by stating repeatedly: "I thought he was reaching for his gun to shoot and kill me. So out of fear I pulled my gun out and shot"; "I didn't mean to kill him. . . . I guess just out of – out of fear I shot"; and "I had shot Brian and then I had seen he didn't have no gun."

Moreover, English's statement that Sims "had murdered somebody" is properly viewed as a colloquial expression that Sims had killed Anderson, without regard to the legal niceties distinguishing murder from other forms of homicide.

The trial court charged the jury on the law of murder, voluntary manslaughter, and self-defense. During deliberations, the jury asked the court to provide a "concise definition" of only murder and manslaughter. Without objection, the court provided the jury with the written instructions, after which the jury returned a guilty verdict for murder. A careful review of the record convinces us that the murder conviction was the product of overwhelming evidence of guilt and the jury's thoughtful consideration of the law. We reject any suggestion that the jury, during the course of this four-day trial, merely assented to the "murder" reference in Davis's lengthy testimony.

IV.

In sum, because the challenged testimony was not "in furtherance of" the conspiracy, we hold the testimony was not admissible under the coconspirator exception of Rule 801(d)(2)(E). We hold, however, that the error was harmless. We affirm the court of appeals in result.

AFFIRMED IN RESULT.

PLEICONES and BEATTY, JJ., concur. TOAL, C.J., concurring in a separate opinion in which HEARN, J., concurs.

CHIEF JUSTICE TOAL: I concur in the majority's result, but respectfully disagree with its reasoning. I would hold that the trial judge did not err in allowing Davis to testify that English told her "Keith [Sims] had murdered somebody." In my view, the court of appeals correctly analyzed this issue, finding that English's statement was admissible under SCRE 801(d)(2)(e), the co-conspirator exception to the rule against hearsay. Therefore, I would affirm the court of appeals in every respect and not reach a harmless error analysis.

HEARN, J., concurs.

The Supreme Court of South Carolina

RE: Amendment to Rule 601 of the South Carolina Appellate Court Rules

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O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 601(a) of the South Carolina Appellate Court Rules is amended to read as shown in the attachment to this order. This amendment shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 14, 2010

(a) Order of Priority as Between Tribunals. In the event an attorney of record is called to appear simultaneously in actions pending in two or more tribunals of this State, the following list shall establish the priority of his obligations to those tribunals:

(1) The Supreme Court.

(2) The Court of Appeals.

(3) The Commission on Judicial Conduct, the Commission on Lawyer Conduct, and the Committee on Character and Fitness.

(4) The Circuit Court - General Sessions.

(5) The Family Court - merits hearings involving child abuse, child neglect and termination of parental rights upon approval of the Chief Judge for Administrative Purposes for the Family Court and notice to the Chief Judge for Administrative Purposes for the Circuit Court five days prior to the term of the Circuit Court.

(6) The Circuit Court - Common Pleas, Jury Term.

(7) The Family Court – all cases not referenced in (5) above.

(8) The Circuit Court - Common Pleas, Non-Jury Term.

(9) The Administrative Law Court.

(10) Alternative Dispute Resolution Conferences conducted pursuant to the SC Court-Annexed ADR Rules.

(11) The Probate Court.

(12) Magistrates and Municipal Courts.

(13) Other Administrative Bodies or Officials.

When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Syllester D. Taylor, Appellant.

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 4687
Submitted June 1, 2009 – Filed May 13, 2010

REVERSED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Deputy Attorney General Christina J.

Catoe, all of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

SHORT, J.: Syllester D. Taylor appeals his conviction and thirty-year sentence for possession with intent to distribute (PWID) cocaine base, arguing the trial court erred in admitting the drug evidence because the officers lacked reasonable suspicion to stop him or probable cause to search his tennis ball. We agree. Therefore, we reverse Taylor's conviction and vacate his sentence.[1]

FACTS

On July 25, 2006, between 10:30 and 11:00 p.m., Florence County Sheriff's Deputy Toby Bellamy received an anonymous tip indicating "a black male on a bicycle . . . [was] possibly selling dope" on the "dirt portion of Ervin Street." The tip did not include a clothing description. Bellamy drove his patrol car down Gilyard Street, which intersects Ervin Street, and observed a black male, later identified as Taylor, riding a bicycle on the dirt road. Bellamy testified he decided to approach the area on foot to "see exactly what was basically going on." Bellamy and Lieutenant Darren Yarborough walked toward the intersection of Ervin and Gilyard Streets. As they turned onto Ervin Street from Gilyard Street, Bellamy again observed Taylor on a bicycle, this time "huddled close together" with another black male. As the officers approached, Bellamy did not witness anything pass between the two men. However, Bellamy testified when Taylor and his companion noticed the officers nearing, Taylor mounted his bicycle and rode toward Bellamy, while the other individual walked in the opposite direction toward the wooded area. Taylor pedaled past Bellamy on his bicycle, glanced at him, and Bellamy ordered him to stop. When Taylor ignored Bellamy's second command to stop and get on the ground, Bellamy conducted an arm-bar takedown. As a result, Taylor was forced off his bicycle and onto the ground. Once apprehended, Bellamy searched Taylor and discovered a tennis ball containing crack cocaine.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Taylor was arrested and charged with PWID cocaine base. At trial, Taylor sought to exclude the drug evidence, arguing the stop, search, and arrest were unlawful. During an in camera hearing, Bellamy testified to receiving an anonymous tip of possible drug activity in an area known for previous drug related incidents; observing Taylor on a bicycle where the tipster indicated; approaching Taylor on foot; and witnessing Taylor engrossed in a close conversation with another individual.[2] Additionally, Bellamy indicated Taylor's close proximity to the other man led him to suspect illegal drug activity; he stated: "in [his] line of work and with recent experiences . . . any time two males [were] that close huddled up [they were] trying to hide something . . . [and] 90 percent of the time[,] . . . some sort of illegal activity [was] going on." He stated Taylor pedaled his bicycle as if he would not stop when riding away from his companion and toward the officers. Accordingly, Bellamy ordered Taylor to put his hands up and get on the ground to ensure the officers' safety and because Bellamy believed that he had probable cause drug activity might be taking place.

Taylor argued the drug evidence should be suppressed based on Florida v. J.L., 529 U.S. 266 (2000), and State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000). Specifically, he maintained this incident arose as the result of an unreliable anonymous tip. Additionally, he alleged he was within his rights to decline to stop after Bellamy's command. Taylor also asserted the officers failed to observe him engaged in any illegal activity. He contended the anonymous tip and being in close proximity to somebody while in a high-crime area did not rise to reasonable suspicion.

The State averred the following circumstances constituted reasonable suspicion to stop Taylor: (1) the anonymous tip; (2) the area being known for drug related incidents; (3) Taylor's close conversation with another individual was denotative of criminal activity; (4) Taylor's companion's departure

[2] Bellamy articulated Taylor was "standing with his bicycle straddled between his legs kind of in a huddle with the other subject [who] was standing beside him very close." While Bellamy was "unable to tell due to the lighting . . . if anything was passed off" between the men, he nevertheless decided to approach Taylor in light of the illegal activities in the area.

toward the woods when the officers approached; and (5) Taylor's getting on his bicycle and pedaling toward the officer "like [he was] not going to stop." Furthermore, the State insisted these facts were distinguishable from J.L. and Green because Taylor's close conversation suggested criminal activity, he departed the scene only when he noticed the officers, and he ignored the officers' commands to stop.

The trial court admitted the drug evidence, finding the stop was based on more than the anonymous tip.[3] The trial judge referred to the officers' observations, the high-crime nature of the area, and Taylor's close proximity to his companion. While conceding Taylor's reasonable suspicion argument was persuasive, the court nevertheless believed the tipster's anonymity affected the credibility and the weight of the evidence, not its existence.[4]

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[3] The trial court acknowledged Taylor correctly interpreted J.L. and Green, but explained J.L. and Green "stand for the premise that . . . reasonable suspicion based solely on an anonymous tip lacks sufficient [indicia of] reliability." The court believed "if the testimony was that they had an anonymous tip, they went to the area, they found a person fitting that description on a bicycle[, t]hey walked up to him and they frisked him," then J.L. and Green would preclude the admission of the drug evidence. Nevertheless, the trial court differentiated the facts at hand from J.L. and Green, finding it was "not just solely [an] anonymous tip."

[4] Taylor also claimed the officers lacked probable cause to continue searching him after finding the tennis ball; therefore, the drug evidence should be suppressed as fruit of an unlawful search and seizure. Bellamy testified in camera that after feeling a large item in Taylor's pocket, he searched his pocket to identify whether the object was a weapon. Bellamy pushed the object out of Taylor's pocket, and the tennis ball rolled on the ground. Bellamy picked the tennis ball up, squeezed it, noticed a slit, and observed what he believed to be a bag of crack cocaine inside the tennis ball. Consequently, the trial court also denied Taylor's suppression motion with regard to this argument, finding Bellamy had "the right to satisfy himself that [the] hard object was not a weapon."

Accordingly, Bellamy and Yarborough testified at trial regarding the circumstances surrounding Taylor's arrest. At the close of the State's case, Taylor renewed his prior objections and the trial court reiterated its previous denial of Taylor's motion to suppress. The jury convicted Taylor of PWID cocaine base, and the trial court sentenced him to thirty years' imprisonment.[5] This appeal followed.

STANDARD OF REVIEW

"[T]he appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error." State v. Green, 341 S.C. 214, 219 n.3, 532 S.E.2d 896, 898 n.3 (Ct. App. 2000); accord State v. Sanders, Op. No. 4527 (S.C. Ct. App. filed April 7, 2009) (Shearouse Adv. Sh. No. 16 at 80); State v. Willard, 374 S.C. 129, 133, 647 S.E.2d 252, 255 (Ct. App. 2007).

LAW/ANALYSIS

Taylor argues the trial court erred in admitting the drug evidence because the officers lacked reasonable suspicion to stop him. We agree.

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999); see also U.S. v. Sokolow, 490 U.S. 1, 7 (1989); Terry v. Ohio, 392 U.S. 1, 30 (1968). "Reasonable suspicion is a lesser standard than probable cause and allows an officer to effectuate a stop when there is some objective manifestation of criminal activity involving the person stopped." State v. Padgett, 354 S.C. 268, 273, 580 S.E.2d 159, 162 (Ct. App. 2003) (citations omitted); Blassingame, 338 S.C. at 248, 525 S.E.2d at 539 ("The term 'reasonable suspicion' requires a particularized and objective basis that

[5] Taylor was tried in his absence, and his sentence was initially sealed.

would lead one to suspect another of criminal activity.") (citing U.S. v. Cortez, 449 U.S. 411, 417-18 (1981)). When evaluating an investigatory stop's validity, a court must consider the totality of circumstances. Sokolow, 490 U.S. at 8. Likewise, the court "must require the agent to articulate the factors leading to that conclusion." Id. at 10.

Therefore, we examine an extensive litany of cases and factors leading to reasonable suspicion in order to properly determine the appropriate application of reasonable suspicion in the instant matter.

A. Factors Leading to Reasonable Suspicion

When determining whether the circumstances are sufficiently suspicious to warrant further investigation, officers are not required to ignore the relevant characteristics of a location. Illinois v. Wardlow, 528 U.S. 119, 124 (2000). However, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." Id. at 124; U.S. v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) (stating a defendant's presence in a high crime area does not by itself constitute reasonable suspicion, but an officer may consider an area's propensity toward criminal activity); accord U.S. v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997) (articulating an individual's presence in a high-crime area, without more, will not sustain a finding of reasonable suspicion; however, the disposition of an area toward criminal activity may be considered with additional particularized factors to support a finding of reasonable suspicion).[6]

In addition to location, "[t]he lateness of the hour is another fact that may raise the level of suspicion." Lender, 985 F.2d at 154 (finding the

[6] Cf. Ornelas v. U.S., 517 U.S. 690, 700 (1996) (stating a "police officer may draw inferences based on his own experience in deciding whether probable cause exists" and an "appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable"); State v. Davis, 354 S.C. 348, 357, 580 S.E.2d 778, 783 (Ct. App. 2003) ("[T]he law is well settled that the officer's knowledge of general trends in criminal behavior is a relevant consideration in determining probable cause.").

officers' observations of the defendant in a known drug area at approximately 1 a.m. a factor contributing to reasonable suspicion).

Furthermore, an individual's innocent and lawful actions may, in certain situations, combine to suggest criminal activity. Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (citing Terry v. Ohio, 392 U.S. 1 (1968), as an example of "conduct justifying the stop [being] ambiguous and susceptible of an innocent explanation").[7] Specifically, "Terry recognized that the officers could detain the individuals to resolve the ambiguity" of their actions. Wardlow, 528 U.S. at 125.

For example, in U.S. v. Sokolow, the United States Supreme Court found the following circumstances established reasonable suspicion to stop Sokolow:

> (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

[7] In Terry, "[t]he officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring." Wardlow, 528 U.S. at 125. While this conduct was itself lawful, "it also suggested that the individuals were casing the store for a planned robbery." Id.

490 U.S. 1, 3 (1989). The Court held "[a]ny one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."[8] Id. at 9.

Nervous, evasive behavior is also considered a pertinent factor when determining reasonable suspicion. Wardlow, 528 U.S. at 124. Similarly, evasion can contribute to reasonable suspicion. U.S. v. Lender, 985 F.2d 151, 154 (4th Cir. 1993).

In Lender, officers advanced to a street corner in a neighborhood known for drug activity and observed a group of four or five men, including Lender, "huddled on a corner." Id. at 153. The officers saw Lender with his hand outstretched and palm up and the other men looking down at his palm's contents. Id. As the officers neared, the group of men dispersed and Lender "walked away from the officers with his back to them." Id. The court determined the officers had reasonable suspicion to stop Lender because among other things, his evasive conduct failed to dispel their earlier suspicions of drug activity. Id. at 154. The court stated: "Evasive conduct, although stopping short of headlong flight, may inform an officer's appraisal of a streetcorner encounter." Id.

Likewise, headlong flight, "the consummate act of evasion," is suggestive of wrongdoing. Wardlow, 528 U.S. at 124. However, flight is not necessarily indicative of criminal activity because innocent reasons to depart from police exist. Id. at 124-25. Therefore, when an officer approaches an individual without reasonable suspicion or probable cause, the individual can lawfully ignore the officer. Id. at 125 ("[A]ny 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for

[8] The Court rejected the argument that the analysis was altered by the agents' belief that Sokolow's behavior mimicked a drug courier profile. Sokolow, 490 U.S. at 10. Instead, the Court insisted courts determining the existence of reasonable suspicion "must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent." Id.

a detention or seizure.' But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." (citations omitted)).[9]

Another factor to consider when determining whether reasonable suspicion has been aroused is the existence of a tip and the quality thereof. Third party tips "completely lacking in indicia of reliability . . . either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." Adams v. Williams, 407 U.S. 143, 147 (1972). Therefore, when "a tip has a relatively low degree of reliability, more information [is] required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." Alabama v. White, 496 U.S. 325, 330 (1990).

In Adams, 407 U.S. at 146, the United State Supreme Court found the officer was justified in responding to a known informant's tip alleging illegal activity[10] because the officer personally knew the informant, the informant provided tips in the past, and the informant "came forward personally to give information that was immediately verifiable at the scene." Additionally, the Court referenced the location,[11] the time of day, and the suspect's behavior[12] as additional justification for the officer's actions. Id. at 147-48.

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[9] Accord Jones v. Commonwealth, 670 S.E.2d 31, 35 (Va. App. 2008) (finding a defendant's refusal to heed officers' requests to stop failed to serve as justification for his seizure because "citizens who are not under arrest or otherwise detained have every right to refuse or ignore requests from law enforcement officers").

[10] At approximately 2:15 a.m., the informant alleged "an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist." Adams, 407 U.S. at 144-45.

[11] The suspect was located in an area known for criminal activity. Id. at 147.

On the other hand, "reasonable suspicion based solely on a call made from an unknown location by an unknown caller lack[s] sufficient indicia of reliability to make an investigatory stop." State v. Green, 341 S.C. 214, 217, 532 S.E.2d 896, 897 (Ct. App. 2000); Florida v. J.L., 529 U.S. 266, 269 (2000) ("Anonymous tips . . . are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's 'not easily predicted' movements." (quoting White, 496 U.S. at 332) (emphasis added)); Id. at 270 ("Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if [the] allegations turn out to be [fabrications], 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'") (citations omitted). Therefore, in order for an anonymous tip to justify an investigatory stop, its reliability must be verified. White, 496 U.S. at 330.

Furthermore, anonymous tips providing readily observable information do not supply sufficient indicia of reliability to establish reasonable suspicion to justify an investigatory stop. Green, 341 S.C. at 218, 532 S.E.2d at 897. In Green, the "officer was notified that a 'black male [named] Alonzo Green was leaving the area of Bayside Manor' . . . [with] a large sum of money and narcotics." 341 S.C. at 216, 532 S.E.2d at 896. The anonymous tipster identified the vehicle Green would be driving as a gray four-door Maxima and said Green recently departed Bayside Manor. Id. The officer stopped Green, whom he knew by sight, based solely on the anonymous tip. Id. As he approached Green's vehicle, he noticed Green "fumbling under the front seat." Id. The officer asked Green to exit the vehicle, frisked him for weapons, and discovered narcotics and a large sum of money. Id. At trial, Green moved to suppress all evidence found incident to the stop, arguing the

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[12] When the officer reached the vehicle to investigate the tip, he tapped on the window and asked the occupant, Robert Williams, to open the door. Id. at 145. "When Williams rolled down the window instead, [the officer] reached into the car and removed a fully loaded revolver from Williams'[s] waistband. The gun had not been visible . . . from outside the car, but it was in precisely the place" the informant indicated. Id.

stop and search violated the Fourth Amendment, to no avail. Id. at 216, 532 S.E.2d at 897. On appellate review, this court determined the evidence was erroneously admitted whereas the "only information available to the officer was the statement of an unknown, unaccountable informant who neither explained how he knew about the money and narcotics, nor supplied any basis for the officer to believe he had inside information about Green." Id. at 218, 532 S.E.2d at 898. Our court stated because the tipster remained anonymous, he did not risk his credibility and could lie with impunity; hence, because we could not "judge the credibility of the caller, . . . the risk of fabrication [became] unacceptable." Id.

An anonymous tip can provide the basis for an investigatory stop if the officer conducting the stop verifies the tip's reliability by observing the suspect engaged in criminal activity. White, 496 U.S. at 331. In White, an officer received an anonymous tip indicating Vanessa White would be leaving a particular apartment at a specific time; driving a brown Plymouth station wagon with a broken right taillight; and going to a certain motel carrying cocaine in a brown case. The officer stopped White after witnessing her leave the specified apartment; drive the brown Plymouth station wagon at approximately the time the tipster indicated; and travel in the direction of the named motel. Id. at 327. Recognizing anonymous tips alone rarely demonstrate "the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable,'" Id. at 329 (quoting Illinois v. Gates, 462 U.S. 213, 237 (1983)), the United States Supreme Court concluded reasonable suspicion existed under the totality of the circumstances because "the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of [White's] car." Id. at 331-32.

Nevertheless, White was a close case because "[k]nowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden

contraband." J.L., 529 U.S. at 271. Therefore, "[t]he reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." Id.

In order to rely upon an anonymous tip to effectuate a stop, the tip must demonstrate knowledge of concealed criminal activity. See Florida v. J.L., 529 U.S. 266, 272 (2000). For example, in J.L., officers were dispatched to a bus stop after an anonymous caller[13] claimed a young black male wearing a plaid shirt at the bus stop was carrying a gun. When the officers arrived, they identified an individual matching the description, searched him, and uncovered a weapon. Id. "Apart from the tip, the officers had no reason to suspect any . . . illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements." Id. Thus, the officers' suspicion arose solely from the anonymous tip, not any perceptions of their own. Id. at 270.

Emphasizing an anonymous tip's need to demonstrate knowledge of concealed criminal activity, the court elucidated:

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Id. at 272. The court held "an anonymous tip lacking indicia of reliability of the kind contemplated in Adams v. Williams, 407 U.S. 143 (1972), and

[13] No information about the informant or audio recording of the call existed. J.L., 529 U.S. at 268.

Alabama v. White, 496 U.S. 325 (1990), does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm."[14] Id.

An additional factor to consider when determining whether reasonable suspicion exists is the officer's experience and intuition. See Illinois v. Wardlow, 528 U.S. 119, 125 (2000) ("[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."). Nevertheless, "a wealth of experience will [not] overcome a complete absence of articulable facts." U.S. v. McCoy, 513 F.3d 405, 415 (4th Cir. 2008) (noting Terry v. Ohio, 392 U.S. 1 (1968), "clearly requires that an officer . . . 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion'" in order to briefly detain or frisk an individual (quoting Terry, 392 U.S. at 21)). Furthermore, an officer's impression that an individual is engaged in criminal activity, without confirmation, does not amount to reasonable suspicion. U.S. v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997).

In Sprinkle, two officers in a high-crime neighborhood observed Victor Poindexter sitting in a parked vehicle. Id. at 615. Officer Daniel Riccio knew Poindexter was recently released from prison after serving time for narcotics violations, but "had no reports of any criminal activity by Poindexter since his release." Id. at 615-16. Riccio noticed Sprinkle, whom he did not know, get into the passenger seat of Poindexter's vehicle. Id. at 616. As Riccio walked by the driver's side of Poindexter's vehicle to his patrol car, he "noticed Sprinkle 'huddling and talking to [] Poindexter' . . . [toward] 'the console of the vehicle' with their hands 'close[] together.'" Id. When Poindexter saw Riccio, he put his head down, covering the left side of his face with his hand as if to conceal his identity. Id. Because it was a fairly

[14] The court rejected a firearm exception to the standard Terry analysis: "If police officers may properly conduct Terry frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain . . . that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in Adams and White, the Fourth Amendment is not so easily satisfied." J.L. at 273.

bright day with plenty of sunlight, Riccio "did not see anything in either man's hands." Id. Furthermore, neither officer viewed "any drugs, money, guns, or drug paraphernalia in the car . . . [and] Poindexter and Sprinkle did not make any movement that indicated an attempt to conceal any object inside the car." Id. The officers continued to their patrol cars, and Poindexter started his vehicle, pulling it into the street, and drove away in a normal, unsuspicious fashion. Id. After Poindexter drove approximately 150 feet, an unrelated traffic stop blocked his route. Id. Seizing the opportunity, the officers parked behind Poindexter's stopped vehicle, engaged their blue lights, exited the patrol car, and approached. Id. Riccio informed Sprinkle he was going to pat him down for weapons. Id. As Riccio began the pat-down, Sprinkle pushed away and began to run. Id. Sprinkle brandished a handgun during the foot chase and was ultimately detained and charged with possessing a handgun. Id.

At trial, Sprinkle moved to suppress the handgun's admission, declaring it was the fruit of an unlawful stop. Id. The trial court granted the motion and dismissed his indictment. Id. The government appealed, professing five factors combined to establish reasonable suspicion: (1) the officer's knowledge of Poindexter's criminal record and narcotics history; (2) the neighborhood being known for narcotics activity; (3) the two men huddled together in the vehicle "with their hands close together"; (4) Poindexter's attempt to hide his identity from Riccio; and (5) Poindexter's departure "as soon as the officers walked by the car." Id. at 617.

On appeal, the Fourth Circuit Court of Appeals ruled the known prior criminal history of an individual was insufficient to create reasonable suspicion, but the knowledge could be combined with more concrete factors to constitute reasonable suspicion of current criminal activity. Id. Additionally, the court recognized the high-crime nature of the neighborhood could not provide independent or freestanding grounds for reasonable suspicion, and noted Riccio viewed Poindexter and Sprinkle at 5:30 p.m. on a sunny day. Id. The court mentioned the government maintained the particular acts of suspicious behavior initiated with the two men huddling toward the center console of the vehicle with their hands close together, and

the acts gave Riccio "'the impression that they were in the midst of a narcotics transaction.'" Id. at 617. However, the court held "it would take more for this impression to qualify as a reasonable suspicion." Id. The court concluded hiding one's face "is an act that may be appraised with others in deciding whether suspicion reaches the threshold of reasonableness." Id. at 618. Similarly, the court determined Poindexter's departure was not evasive because he "drove off right after his passenger got in the car, and the officers admitted that he drove in a normal, unhurried manner." Id. Ultimately, the court ascertained the officers lacked reasonable suspicion to stop Sprinkle.[15] Id. at 618-19. While acknowledging Riccio's curiosity was understandably aroused upon seeing Poindexter in a neighborhood with high narcotics activity, the court avowed the officers needed additional particularized evidence to indicate criminal activity. Id. at 618. Nevertheless, the court declined to find their huddling together, Poindexter's attempt to hide his face from Riccio, or their departure established reasonable suspicion. Id. Significantly, the court reiterated Riccio could see inside Poindexter's vehicle and observed nothing of a criminal nature taking place or any attempt to conceal criminal activity. Id. at 618.

Sprinkle differed from U.S. v. Lender, 985 F.2d 151 (4th Cir. 1993), because "although the police could not see . . . into Lender's open hand, the fact that several men were looking to his hand indicated there was actually

[15] The government also argued if Sprinkle's initial stop was illegal, his intervening illegal acts made his handgun admissible evidence. Sprinkle, 106 F.3d at 619. As Riccio pursued Sprinkle, Sprinkle discharged a handgun in Riccio's direction. Id. The Fourth Circuit Court of Appeals agreed with the government, determining Sprinkle's illegal acts after the initial stop triggered an exception to the exclusionary rule because he "committed a new crime that was distinct from any crime he might have been suspected of at the time of the initial stop." Id. at 619. The court cited additional examples of intervening acts triggering the exception, including assaulting an officer and attempting to retrieve the officer's gun, aiming a weapon at an officer, shooting at an officer, and fleeing at 115 miles per hour in a vehicle while shooting at police. Id. at 619 n.4.

something in it." Id. at 619 n.3. In Sprinkle, "Riccio's initial suspicion that Sprinkle was about to pass something to Poindexter was simply not confirmed by what Riccio actually saw" when the officers were close enough to see both men's hands. Id. Additionally, Lender exhibited evasive conduct by turning his back and walking away from the approaching officers, whereas Poindexter did not. Id. Also, while "Poindexter was parked in broad daylight on a busy street," Lender was observed on the street corner at 1:00 a.m.; therefore, the lateness of the hour contributed to reasonable suspicion to stop Lender. Id. Accordingly, the court found Lender was distinguishable and not controlling. Id.

B. Application of Reasonable Suspicion Factors in the Instant Matter

In this case, Deputy Bellamy stated his belief that Taylor was involved in criminal activity was based on: (1) the anonymous tip; (2) Taylor's presence in an area associated with high crime; (3) Taylor's closeness to his companion; and (4) each man's departure from the scene when the officers approached.[16] We find the anonymous tip Bellamy relied on was one in which the reliability could not be tested because the tipster was nameless, the tipster's location was unidentified, the tipster remained unaccountable, and the tipster failed to explain the origin of the allegation of criminal activity, provide any predictive information, or supply a basis for believing the tipster possessed inside information into Taylor's affairs. Furthermore, the tip failed to provide any specific information indicating the tipster's knowledge of concealed criminal activity; therefore, the tipster did not risk his or her credibility and was free to fabricate the information with impunity. The tip described readily observable information, such as the individual's location and appearance, and stated the individual was possibly selling drugs. While the anonymous tip was trustworthy in the limited sense it assisted Bellamy in

[16] The Dissent also references the lateness of hour as a circumstance establishing reasonable suspicion. However, Bellamy did not testify he considered the time of day to contribute to his decision to stop Taylor, nor did the State argue the time of day was a contributing factor to the trial court when opposing Taylor's motion to suppress.

identifying Taylor as a person matching the description of the individual whom the tipster wished to accuse, the tip demonstrated neither an extensive degree of familiarity with Taylor's actions, nor any independent reliability in terms of the alleged possibility of criminal activity as required by Florida v. J.L., 529 U.S. 266, 272 (2000). Therefore, due to the tip's inherent unreliability, the tip was merely a conclusory allegation and more information was required to establish the requisite quantum of suspicion before the officers were entitled to stop Taylor.

Moreover, the officers were on Ervin Street based solely on the anonymous and unreliable tip and made no supplemental observations suggesting any illegal activity was afoot. The officers' observations did nothing more than confirm the readily noticeable conditions communicated by the anonymous tipster.[17] Additionally, Bellamy's initial suspicion remained unsubstantiated when he failed to observe Taylor behave in a way to suggest drug activity. Hence, this scenario involved an anonymous tip far less specific than the tip in State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000). There, the officer knew the individual's gender, race, name, point of origin, the model and color of his vehicle, and that he would be carrying a large sum of money and narcotics. Id. at 216, 532 S.E.2d at 896. Here, the officers knew a nameless tipster suspected a black man riding a bicycle on the dirt portion of Ervin Street might be selling drugs. The tipster failed to supply a specific description of the individual other than his general mode of transportation, his readily-observable location, his gender, and his race. Accordingly, we find the anonymous tip lacked the requisite indicia of reliability to be employed as reasonable suspicion for conducting an investigatory stop.

Although our courts have recognized the nature of the neighborhood as a contributing factor for reasonable suspicion, our courts have specifically stated an individual's mere presence in an area associated with high-crime is

[17] For example, in Green v. State, 551 A.2d 127, 130 (Md. Ct. Spec. App. 1989), the Maryland Court of Special Appeals found the verification of the description of an individual's clothing and location accused of criminal activity "failed to serve as sufficient corroboration to establish reliability."

not reasonable suspicion for an investigatory stop.[18] Thus, Taylor's presence on Ervin Street alone did not give rise to reasonable suspicion. We also find the high-crime nature of the area failed to corroborate the anonymous tipster's information so as to impart a degree of reliability to the other allegations contained in the tip.[19]

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[18] See U.S. v. Perrin, 45 F.3d 869, 873 (4th Cir. 1995) ("Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside of his control.").

[19] Our neighboring state of Georgia addressed a similar issue in Swanson v. State, 412 S.E.2d 630 (Ga. Ct. App. 1991). In Swanson, an officer stopped an individual after receiving an anonymous tip alleging an individual was selling drugs. Id. at 631. The tip included a detailed description of the individual's clothing and his exact address. Id. Relying on White, the Georgia Court of Appeals determined even though the officer knew the address was located within a high drug trafficking area, "further observation and corroboration was required before a forcible stop was authorized." Id. at 632. Specifically, the court stated:

> [T]he anonymous tip contained no detailed information demonstrating the caller's ability to predict [the individual's] future behavior, and thus contained no information from which the police could have reason to believe the tipster was not only honest but also well informed enough to justify the stop . . . [and the officer's] knowledge that the address was in a high drug trafficking area [failed to corroborate] the anonymous tipster's information so as to impart a degree of reliability to the other allegations made by the caller.

Id.

Additionally, we find the close conversation between Taylor and his companion also did not enhance the officers' curiosities to the level of "reasonable suspicion."[20] Deputy Bellamy did not testify he saw anything pass between the two men when he noticed them "huddled" close together, nor did he witness Taylor attempt to conceal anything. While Bellamy's curiosity was understandably aroused after observing an individual matching the description given by the anonymous tipster engaged in a close conversation with another male in an area known to have previous drug activity at night, we find the officers needed additional particularized facts indicating criminal activity in order to support a finding of reasonable suspicion. Moreover, we find because the officers lacked reasonable suspicion to stop Taylor, his riding his bicycle toward the officers was lawful. See Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (maintaining an individual can lawfully ignore an officer if the officer approaches without reasonable suspicion or probable cause). Furthermore, we emphasize Taylor was neither pedaling abnormally fast nor riding away from the officers; thus, his departure was not indicative of evasion or flight.

Additionally, we find this situation differs considerably from U.S. v. Lender, 985 F.2d 151 (4th Cir. 1993). While Taylor and his friend were

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[20] While the Dissent notes the trial court emphasized Bellamy's curiosity that Taylor was engaged in criminal activity based on his closeness with his companion, no evidence existed to confirm Bellamy's curiosity or suggest the men were positioned close together to conceal criminal activity. Bellamy's belief that two males engaged in a close "huddle" conversation are conducting illegal activity ninety percent of the time was not evidence that Taylor was engaged in criminal activity. Respectful of Bellamy's experience as a police officer and inferences drawn therefrom, he was still required to point to specific and articulable facts that, when considered in conjunction with those experiences and inferences, would reasonably warrant stopping Taylor. Furthermore, while the Dissent contends the time of day and proximity of the officers caused difficulty in observing any potential suspicious activity, especially if Taylor and his companion were attempting to conceal it, the fact remains that the officers failed to observe any activity suggesting illegality was afoot.

talking in close proximity, the officers lacked the additional observation of an action by Taylor to insinuate his involvement in criminal activity. Moreover, Taylor's actions of concluding his conversation, departing from his companion, and riding his bicycle toward the officers cannot be characterized as evasive behavior to confirm Bellamy's hunch that Taylor was engaged in criminal activity. Accordingly, we distinguish this case from Lender. Taylor was in a close conversation, but with only one other individual, and he was in a high-crime area at a late hour; however, unlike Lender, Taylor exhibited no behavior suggesting criminal activity. We do not find Taylor's presence in a high-crime area at a late hour while engaged in a close conversation with another individual indicative of criminal activity.

Ultimately, we find U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997), is sufficiently similar to this case and compels a finding that the officers lacked reasonable suspicion to stop Taylor. First, in both cases, the initial suspicion of illegal activity resulting from the two men's closeness was not confirmed by the officers' observations. Here, Bellamy suspected Taylor was engrossed in criminal activity after observing Taylor's close conversation with another individual; however, Bellamy stated he did not see anything pass between Taylor and his companion. Thus, Bellamy failed to observe Taylor attempt to conceal criminal activity and Bellamy's suspicions remained unsubstantiated. Second, both Sprinkle and Taylor possessed the right to depart the scene; therefore, neither engaged in evasive behavior or flight. Additionally, in both scenarios, the neighborhood was considered a high-crime area. In fact, in Sprinkle, Riccio's personal knowledge of Poindexter's previous narcotics violations was more specific and credible than the anonymous tipster's description of a readily observable situation in the instant case. Although we recognize the time of day in Sprinkle was four-and-a-half to five hours earlier than the case sub judice, we do not find the time of day significant enough to weigh in favor of finding Bellamy demonstrated the necessary amount of reasonable suspicion to stop Taylor.

CONCLUSION

Mindful of our "any evidence" standard of review,[21] we find no reasonable suspicion existed for stopping Taylor. Specifically, we find Bellamy failed to articulate facts leading to the conclusion that an objective manifestation of criminal activity existed under the totality of the circumstances. Any inference of illegal activity drawn from Taylor's close proximity to his companion was dispelled by Bellamy's failure to observe anything pass between the two men or Taylor act in a way to indicate criminal activity. Additionally, the anonymous tip was substantially unreliable. Further, the high-crime nature of the area and the time of day are not in and of themselves indicative of criminal activity. Lastly, Taylor's attempted departure from his companion, by riding his bicycle toward the officers, was not attempted flight or evasive behavior because he had the right to ignore Bellamy's commands and go about his business.[22] Thus, we find Taylor's actions required either no police response or further investigation confirming Bellamy's curiosities before a forcible stop was authorized. Therefore, the admission of the drug evidence was clear error, and we reverse Taylor's conviction and vacate his sentence.[23] Accordingly, the circuit court's order is

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[21] See State v. Green, 341 S.C. 214, 219 n.3, 532 S.E.2d 896, 898 n.3 (Ct. App. 2000) (providing an "any evidence" standard of review for search and seizure cases).

[22] See Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (holding when an officer lacks reasonable suspicion or probable cause, if he approaches an individual, "the individual has a right to ignore the police and go about his business").

[23] Due to the officers' lack of reasonable suspicion to warrant an investigatory stop, we decline to address Taylor's remaining issue on appeal regarding whether the officers had probable cause to search his tennis ball. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding when one issue is dispositive, the remaining issues need not be addressed). In any event, because Bellamy lacked reasonable

REVERSED.

GEATHERS, J., concurs.

THOMAS, J., dissents in a separate opinion.

THOMAS, J. (dissenting): I respectfully dissent. I would hold that under our standard of review, the evidence presented during the suppression hearing warrants affirming the trial judge's findings that the police had reasonable suspicion to approach and detain Taylor as well as the right to take precautions for their own safety when he refused to cooperate. I would also affirm the trial judge's rejection of Taylor's arguments for suppressing the drugs found on his person when the police attempted to search him for weapons.

In State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000), the South Carolina Supreme Court set forth the standard of review for rulings in Fourth Amendment search and seizure cases: the appellate court "will review the trial court's ruling like any other factual finding and reverse if there is clear error. . . . [The appellate court] will affirm if there is any evidence to support the ruling." In holding reasonable suspicion was lacking, the majority appears to have departed from this standard in favor of relying on its own view of the totality of the circumstances in the case.

I agree a determination of reasonable suspicion requires consideration of "the totality of the circumstances—the whole picture." U.S. v. Cortez, 449 U.S. 411, 417 (1981). In this State, however, this analysis of the totality of the circumstances is a function of the trial court and does not alter the

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suspicion to stop Taylor, any evidence acquired as a direct result of the illegal stop is inadmissible pursuant to the fruit of the poisonous tree doctrine. See In re Jeremiah W., 361 S.C. 620, 624 n.2, 606 S.E.2d 766, 768 n.2 (2004) ("The 'fruit of the poisonous tree' doctrine holds that evidence which is produced by or directly derived from an illegal search is generally inadmissible against the defendant because of its original taint.").

deferential standard that appellate courts must observe when reviewing a trial judge's finding as to whether a Fourth Amendment violation has occurred. See State v. Khingratsaiphon, 352 S.C. 62, 69-70, 572 S.E.2d 456, 459-60 (2002) (adhering to the deferential standard of review, but stating that Brockman "does not hold the appellate court may not conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence").

Using the deferential standard of review mandated by our Supreme Court, I would hold the State presented evidence during the suppression hearing to support the trial judge's finding that Officer Bellamy's decision to approach and detain Taylor was based on "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant[ed] [the] intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968), quoted in State v. Lesley, 326 S.C. 641, 643-44, 486 S.E.2d 276, 277 (Ct. App. 1997).

As the trial judge stated when denying Taylor's motion to suppress, this case involved more than an anonymous tip. There was testimony from the police officers that the location named by the tipster was a well-known drug area. Furthermore, although Taylor pedaled toward the officers when he separated from his companion, it appears undisputed that he was attempting to avoid them.

In addition, the trial judge placed great emphasis on Officer Bellamy's testimony that he observed Taylor and his companion "huddled up trying to hide something" and that, in Bellamy's experience, "[i]t's 90 percent of the time it's some sort of illegal activity going on." Although the majority acknowledged in its recitation of the facts that Officer Bellamy relied on his law enforcement experience in deciding the situation warranted detaining Taylor, it appears to dismiss his reliance on this experience and instead emphasize the fact that none of the officers at the scene saw anything pass between the two men while they were observed "huddled up." What the majority appears to overlook is that the meeting between Taylor and his companion happened late in the evening and apparently at some distance from where the officers first sighted them. This is unlike the encounter in

U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997), on which the majority relies. See id. at 616 (noting the arresting officers had "walked by the driver side" of the vehicle in which the defendant was "huddling and talking to" another individual and quoting testimony from the officers that their observations of the defendant before arresting him took place on a " 'fairly bright day' with 'plenty of light' "). Thus, whereas in Sprinkle the officers actually saw at close range and in bright light the absence of fruits or instruments of any crime, the officers in the present case could have been prevented by distance and lighting conditions from observing any suspicious activity, particularly if the subjects engaged in that activity were attempting to conceal it. Considering that the officers had less than optimal conditions to view the scene, I can fault neither Officer Bellamy for his decision to rely on his professional experience and training in determining that what he saw warranted further investigation nor the trial judge for ruling that this reliance was reasonable. Courts have allowed such reliance when reviewing probable cause determinations. See State v. Peters, 271 S.C. 498, 504, 248 S.E.2d 475, 478 (1978) ("In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."); State v. Davis, 354 S.C. 348, 357, 580 S.E.2d 778, 783 (Ct. App. 2003) ("[T]he law is well settled that the officer's knowledge of general trends in criminal behavior is a relevant consideration in determining probable cause."). I see no reason not to apply a similar policy when reviewing determinations of reasonable suspicion, which require " 'less than the level of suspicion required for probable cause.' " State Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000) (quoting Nebraska v. Soukharith, 570 N.W.2d 344, 354 (Neb. 1997)).

I would therefore follow the reasoning set forth by the Fourth Circuit Court of Appeals in U.S. v. Lender, 985 F.2d 151 (4th Cir. 1993), which the majority has referenced but attempted to distinguish. In that case, the court, in rejecting the defendant's argument that he was unlawfully stopped by the police after officers observed him extending his hand with his palm up while talking with friends on a street corner in a poor section of town, stated that "[w]hile the defendant's mere presence in a high crime area is not by itself

enough to raise reasonable suspicion, an area's propensity toward criminal activity is something that an officer may consider." Id. at 154. The court also noted "[t]he lateness of the hour is another fact that may raise the level of suspicion." Id. Finally, notwithstanding the absence of evidence of drugs or other contraband at the scene, the court justified the officers' decision to approach the defendant, explaining as follows:

> Additionally, the officers observed the defendant engaged in behavior that they suspected to be a drug transaction. In this neighborhood at this late time of night, a group of men was gathered around Lender looking down into his open palm. We cannot say that a reasonable police officer was required to regard such conduct as innocuous. Even though the officers acknowledged that from their passing patrol car they could not see drugs or other contraband in the defendant's hand, the officers were not required in the absence of probable cause simply to "shrug [their] shoulders and allow a crime to occur." Because they suspected illegal activity, Officers Hill and Thornell responded precisely as the law provides: they attempted to investigate further.

Id. (citations omitted) (emphasis added).

Because I would hold that there was evidence presented during the suppression hearing to support a finding of reasonable suspicion, I would also reject Taylor's argument that the drugs discovered by the police after they stopped him should have been excluded as the fruits of an illegal stop.

As to Taylor's other argument, that the officers did not have the legal right to intrude into the tennis ball because there was nothing inherently incriminating about it, I would hold the testimony presented during the suppression hearing supports the trial judge's finding that Officer Bellamy acted reasonably when he discovered it on Taylor's person. During the pat-

down search, Officer Bellamy could determine only that the bulge in Taylor's pocket was a "hard object" that warranted further investigation to ascertain that it was not a weapon. When Officer Bellamy asked Taylor what was in his pocket, Taylor attempted to extricate himself, and Officer Bellamy managed to manipulate the object out of Taylor's pocket and onto the ground. According to Officer Bellamy, he noticed the drugs inside the tennis ball through the slit on the surface on the ball as he was picking it up from the ground. Thus, the incriminating nature of the contents of the tennis ball became apparent to the police while they were still in the process of ensuring Taylor was not armed. See State v. Abrams, 322 S.C. 286, 288, 471 S.E.2d 716, 717 (Ct. App. 1996) (holding that once the police discovered the defendant was not armed, "they could not carry the intrusiveness of their search further unless the incriminating character of the object discovered during the search was immediately apparent to the officer performing the pat-down"). Nothing in Officer Bellamy's testimony suggested that he squeezed the ball for any purpose other than to pick it up off the ground. Moreover, it was as he was picking up the ball that he noticed the drugs inside it through the slit on the surface.

For the foregoing reasons, I would affirm the trial judge's denial of Taylor's motion to suppress the drug evidence offered by the State against him and would likewise affirm his conviction.