The Supreme Court of South Carolina

In the Matter of Matthew Kiel Mahoney, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 2003, petitioner was admitted and enrolled as a member of the Bar of this State. On March 1, 2007, the South Carolina Bar suspended petitioner for non-payment of his license fees. On May 1, 2007, the Commission on Continuing Legal Education and Specialization (CLE Commission) suspended petitioner for failing to comply with CLE requirements.

By letter dated April 30, 2007, petitioner submitted his confirmation of resignation.[1] He requests the Court make the resignation effective either July 1, 2006 (when he moved to Virginia)

[1] The Clerk received petitioner's letter on May 3, 2007, after he was suspended by the CLE Commission.

or March 7, 2007 (when he made an initial inquiry about resigning) and, thereby, vacate his administrative suspensions.

We accept petitioner's resignation. However, we deny petitioner's request that his resignation be made effective prior to his suspensions by the Bar and the CLE Commission.

Within fifteen (15) days of the issuance of this order, petitioner shall deliver his certificate to practice law in this State to the Clerk of the Supreme Court. In addition, petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation. Finally, within fifteen (15) days of the issuance of this order, petitioner shall file an affidavit with the Clerk of the Supreme Court showing that he has fully complied with the provisions of this order. The resignation of Matthew Kiel Mahoney shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Waller, J., not participating

Columbia, South Carolina

May 23, 2007

The Supreme Court of South Carolina

In the Matter of Tammie T. McConnell, Petitioner

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 29, 1993, petitioner was admitted and enrolled as a member of the Bar of this State. On March 1, 2007, the South Carolina Bar suspended petitioner for non-payment of her license fees. On April 4, 2007, the Court suspended petitioner for non-payment of her license fees.

By letter dated April 13, 2007, petitioner submitted her resignation. She asserts that she made inquiries about resigning prior to the issuance of the suspensions and, accordingly, requests that her resignation be made effective prior to her suspensions by the Bar and the Court.

We accept petitioner's resignation. However, we deny petitioner's request that her resignation be made effective prior to her suspensions by the Bar and the Court.

Within fifteen (15) days of the issuance of this order, petitioner shall deliver her certificate to practice law in this State to the Clerk of the Supreme Court. In addition, petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation. Finally, within fifteen (15) days of the issuance of this order, petitioner shall file an affidavit with the Clerk of the Supreme Court showing that she has fully complied with the provisions of this order. The resignation of Tammie T. McConnell shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

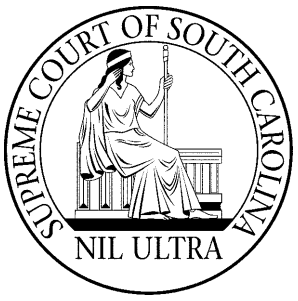
s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Waller, J., not participating

Columbia, South Carolina

May 23, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21

June 4, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kristopher M. Miller, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26332
Heard May 22, 2007 – Filed June 4, 2007

DISMISSED AS IMPROVIDENTLY GRANTED

Appellate Defender LaNell Durant, 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 Deborah R. J. Shupe, all of Columbia, and Solicitor Christina Theos Adams, of Anderson, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in State v. Miller, 363 S.C. 635, 611 S.E.2d 309 (Ct. App. 2005). After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

TOAL, C.J., MOORE, BURNETT, PLEICONES, JJ., and Acting Justice J. Michelle Childs, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Marcus Stevens, Appellant.

Appeal from Spartanburg County
Gordon G. Cooper, Special Circuit Court Judge

Opinion No. 26333
Heard May 2, 2007 – Filed June 4, 2007

REVERSED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

John Benjamin Aplin, of S.C. Department of Probation, Parole and Pardon, of Columbia, for Respondent.

PER CURIAM: Appellant contends the circuit court erred in revoking six months of his probation because the revocation was not predicated on appellant's violation of a condition of probation imposed by the sentencing judge. We agree and reverse the partial revocation.

FACTS

Appellant was on probation following 2002 convictions for stalking and domestic violence of a high and aggravated nature. In 2005, appellant was alleged to have violated certain of his probationary conditions. Furthermore, a woman with whom he had been cohabiting complained to respondent Department of Probation, Parole, and Pardon Services (DPPPS) that while she had ended a romantic relationship with appellant, he "refused to leave her alone." In lieu of issuing a probation revocation warrant based upon the alleged violations, DPPPS entered an agreement with appellant in June 2005 whereby appellant consented to participate in DPPPS' Global Positioning Satellite (GPS) Program. Under this agreement, appellant agreed not only to be electronically monitored, but also to avoid certain "exclusion zones" areas near the former girlfriend's home and work.

In August 2005, DPPPS issued a probation revocation warrant alleging appellant had violated his probation by "entering a known exclusion zone" established by the June 2005 agreement. At the circuit court hearing, appellant argued that the violation of a non-judicially mandated term could not be the basis for a probation revocation. Specifically, appellant argued that such a revocation would violate the separation of powers doctrine as enunciated in State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996). The judge revoked six months for appellant's violation of an exclusion zone.

ISSUE

> Whether the circuit court erred in revoking appellant's probation where he did not violate a judicially imposed condition?

ANALYSIS

Appellant contends his violation of an exclusion zone established by his GPS agreement with DPPPS cannot be the basis for a probation violation. Under the facts of this case, we agree.

DPPPS acknowledges that revoking appellant's probation for his violation of a non-judicially imposed term would have violated the separation of powers doctrine under the version of § 24-21-430 in effect when State v. Archie was decided. DPPPS contends, however, that any such constitutional problem was eliminated by a 1996 amendment to the statute. The current version of § 24-21-430 retains the language affirming the sentencing court's authority to "impose…and…at any time modify the conditions of probation…" but adds these sentences:

> To effectively supervise probationers, the [DPPPS] director shall develop policies and procedures for imposing conditions of supervision on probationers. These conditions may enhance but must not diminish court imposed conditions.

We agree with DPPPS that the statutory change authorizes it to create policies and procedures which implement and support "**conditions of supervision** on probationers." (emphasis added). To read the statute as DPPPS urges, however, as authorizing it to add **conditions of probation**, would render the statute violative of the constitutional requirement of separation of powers. It is well-settled that the determination of those conditions is a judicial function which cannot, consonant with S.C. Const. art. I, § 8, be delegated to an executive agency such as DPPPS. State v. Archie, *supra*.

The statute permits DPPPS to impose "conditions of supervision" which "enhance…court imposed conditions" of probation. Under the statute, one requirement which a court may impose as a condition of probation is that the probationer "submit to intensive surveillance which may include surveillance by electronic means." Section 24-21-430(11). Where condition 11 is imposed by the court, DPPPS may require the probationer to participate in the GPS program as a condition of supervision under § 24-21-430 because this program would "enhance…court-imposed conditions" Under these circumstances, a violation of GPS monitoring would be a violation of the "enhanced court imposed conditions" and therefore grounds for a revocation.

In this case, however, the sentencing court chose not to require appellant to "submit to intensive surveillance;" DPPPS therefore could not unilaterally impose GPS monitoring on appellant as this method of supervision did not enhance a judicially-ordered condition of probation. Nothing prevented DPPPS and appellant from reaching an agreement whereby appellant would participate in the program. While appellant's failure to abide by the "exclusion zone" was a breach of his agreement with DPPPS, it was not a violation of the conditions of his probation. Under these circumstances, the circuit court erred in revoking a portion of appellant's probation.

CONCLUSION

The order revoking six months of appellant's probationary sentence is

REVERSED.

TOAL, C.J., MOORE, BURNETT, PLEICONES, JJ., and Acting Justice J. Cordell Maddox, concur.

The Supreme Court of South Carolina

Elwood Porter Tomlinson and
Frances Goins Tomlinson, Petitioners,

v.

Kenneth B. Mixon d/b/a
Pavillion Custom Homes and
All American Homes of NC,
LLC, Defendants,

of whom All American Homes
of NC, LLC, is Respondent.

ORDER

By order dated March 8, 2007, we granted certiorari to review the Court of Appeals' decision in Tomlinson v. Mixon, 367 S.C. 467, 626 S.E.2d 43 (Ct. App. 2006). Petitioners have filed their brief. Respondent's brief is due May 9, 2007. However, the parties have now submitted a "Consent Agreement to Dismiss Appeal," in which they state they have amicably resolved the case, agreed to dismiss this matter, and agreed to bear their own costs and expenses. Accordingly, they request that we enter an order of dismissal and that the case be remitted to the circuit court so the parties can seek an order disbursing funds on deposit with the clerk of court.

We find the parties have complied with the requirements of Rules 231(b) and 232(a), SCACR. We therefore accept the parties' "Consent Agreement to Dismiss Appeal," vacate the Court of Appeals' opinion in Tomlinson v. Mixon, supra, and dismiss this matter.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Waller, J., not participating

Columbia, South Carolina
May 23, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brandi Rhodes, Respondent,

v.

Benson Chrysler-Plymouth, Inc. d/b/a Benson Chrysler-Plymouth Dodge, Inc., Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 4222
Withdrawn, Substituted, and Refiled on May 31, 2007

AFFIRMED

Bradford N. Martin, Laura W.H. Teer, Lora E. Collins, and Robin Foster, of Greenville, for Appellant.

Lane W. Davis, of Greenville, for Respondent.

KITTREDGE, J.: Benson Chrysler-Plymouth, Inc. appeals the denial of its motion to compel arbitration. We affirm.[1] We hold a party waives its right to enforce an arbitration provision when it delays in demanding arbitration and engages in extensive discovery resulting in prejudice to the party opposing arbitration.

I.

In April 2005, Brandi Rhodes sued Benson Chrysler-Plymouth, Inc. (Benson) for breach of contract in connection with the purchase of a vehicle.[2] Benson answered, pleading the contract contained an arbitration provision that encompassed Rhodes' allegations. Benson, however, did not promptly pursue arbitration, opting instead to engage in extensive discovery. Benson and Rhodes exchanged written interrogatories and requests for production. Benson also noticed and took five depositions. Benson sought the circuit court's assistance in executing out-of-state subpoenas, which the circuit court granted. The circuit court heard two motions for protective orders.

In February 2006, ten months after Rhodes initiated this action, Benson filed a motion to compel arbitration. Rhodes opposed Benson's attempt to resurrect its right to arbitrate under the contract. Rhodes argued Benson waived its right to compel arbitration by participating in significant discovery before pursuing arbitration. The circuit court agreed with Rhodes, and denied Benson's motion to compel arbitration. It further appears that the case was scheduled for trial before the circuit court ruled on Benson's motion to compel arbitration. Benson appeals.

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

[2] According to the complaint, Rhodes agreed to purchase a properly-titled, undamaged 2001 Dodge Durango from Benson, and not the stolen, damaged 1999 Dodge Durango Rhodes received from Benson.

II.

"[D]etermining whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999).

III.

South Carolina favors arbitration. Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). The right to enforce an arbitration clause, however, may be waived. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Id. "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Id.

Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. What is "a substantial length of time" varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration. Compare Deloitte & Touche, LLP v.

Unisys Corp., 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver); and Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003) (finding a nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); and Liberty Builders, 336 S.C. at 666, 521 S.E.2d at 753-54 (finding a two-and-a-half year period where the parties sought assistance from the court on approximately forty occasions demonstrated waiver); with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen month period where discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions," did not demonstrate waiver); and Rich v. Walsh, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (finding a thirteen month period where "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes did not demonstrate waiver); and Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645 (finding a period of less than eight months where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" did not establish waiver).

To establish prejudice, the non-moving party must show something more than "mere inconvenience." Evans, 352 S.C. at 550, 575 S.E.2d at 76-77. To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." Id. at 548, 575 S.E.2d at 76. This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will likely not exist, and the law would favor arbitration; (2) if the parties conduct significant discovery, then the party seeking arbitration has taken "advantage of the judicial system," prejudice will likely exist, and the

law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

This case, we believe, falls between the General Equipment line of cases (Toler's Cove and Rich) and the Liberty Builders line of cases (Evans and Deloitte). Because Benson sought arbitration less than a year after Rhodes brought suit, General Equipment suggests that a substantial length of time may not have transpired to warrant waiver. Indeed, as cited above, there is precedent where arbitration was compelled with an even greater length of time between the commencement of the action and the commencement of the motion to compel arbitration. See Toler's Cove, 355 S.C. at 612, 586 S.E.2d at 585 (finding a thirteen month period did not demonstrate waiver); Rich, 357 S.C. at 72, 590 S.E.2d at 507 (finding a thirteen month period did not demonstrate waiver). What distinguishes this case from the General Equipment line of cases, however, is the extensive discovery engaged in by Rhodes and especially Benson, as well as the fact that the trial was imminent.

Benson and Rhodes exchanged written interrogatories and requests to produce. Benson also noticed and took five depositions.[3] Furthermore, before the circuit court ruled on Benson's tardy motion to compel arbitration, the chief administrative judge set the case on the trial docket for an upcoming term of court. The parties completed virtually all discovery *before* Benson moved to compel arbitration. The extent of discovery, in conjunction with the status of the case on the trial docket, provides a direct nexus to the presence and degree of prejudice sustained by Rhodes, the party opposing arbitration. We are persuaded that under the facts presented here Benson waived its right to compel arbitration.

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[3] Depositions entail more than "routine administrative matters," Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645, and could not be considered "limited discovery" in any sense of the phrase. Certainly, taking five depositions was more than a "mere inconvenience" to Rhodes. Depositions involve substantial time, effort, and money, all of which could have been avoided if Benson had pursued arbitration earlier.

IV.

The record amply supports the findings of the learned special circuit court judge. Benson, with full knowledge of its right to arbitrate this dispute, cannot invoke and enjoy the full benefits of discovery and then belatedly assert a right to arbitrate at the eleventh hour with the case approaching trial. The order of the circuit court denying the motion to compel arbitration is

AFFIRMED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Larry Gene Moore, **Appellant.**

Appeal From Spartanburg County
Roger L. Couch, Special Circuit Court Judge

Opinion No. 4247
Submitted May 1, 2007 – Filed May 18, 2007

AFFIRMED

Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

ANDERSON, J.: Larry Gene Moore appeals his conviction of armed robbery. He argues the evidence does not show he used force or intimidation in his asportation of stolen property. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On January 17, 2004, Mark Hayes, a loss prevention officer at a Wal-Mart store in Spartanburg, was on duty when he observed a shopper, Larry Gene Moore, exhibiting suspicious behavior. Only minutes earlier, Hayes noticed the customer had placed several items of merchandise in his shopping cart, and thus became alarmed when he realized Moore's cart was presently vacuous. Hayes witnessed Moore pick up a package of over-the-counter medication from the shelf, place it inside his jacket, and begin walking toward the door.

Hayes approached Moore shortly after he stepped outside onto the store's sidewalk. After identifying himself and his position with Wal-Mart, Hayes informed Moore he needed to speak with him regarding some unpaid merchandise. During the time Hayes was talking, Moore began digging around in his back pocket. At first, Hayes believed Moore might be looking for a receipt. However, when Moore stated, "What this, are you sure," Hayes looked down at Moore's hand to discover the thief was brandishing a semiautomatic .22 caliber handgun.

Fearing for his own safety and that of Wal-Mart's customers, Hayes immediately ended the encounter and went back into the building to make certain the police were apprised of the situation. Moore walked off of Wal-Mart's premises but was apprehended by police a short time later. $454.60 in unpaid Wal-Mart merchandise was recovered from Moore's possession.

Moore was charged with armed robbery. At the close of the State's case, he moved for a directed verdict and requested the charge be lowered to petty larceny. Moore argued, inter alia, that armed robbery could not be

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

proven because asportation of the property occurred before the confrontation and no force or threat of force was used to take the merchandise. After extensive arguments, the trial judge denied the motion for a directed verdict, finding the offense of armed robbery requires asportation, which includes the escape. It was during the commission of the crime that Moore threatened use of the weapon. At the close of the evidence, Moore renewed his directed verdict motion. The motion was denied. Moore was convicted of armed robbery and sentenced to fifteen years.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Douglas, 367 S.C. 498, 506, 626 S.E.2d 59, 63 (Ct. App. 2006) cert. pending; State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

"The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 863 (Ct. App. 2005) (citing State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)). On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); Douglas, 367 S.C. at 506, 626 S.E.2d at 63; State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). An abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (" '[E]rror at law' exists:

(1) when the circuit judge, in issuing [the order], was controlled by some error of law ... or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v. Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) ("[T]he determination of the court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law.").

When ruling on a motion for a directed verdict, the trial judge is concerned with the existence or nonexistence of evidence, not its weight. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006); Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005); State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004); State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758-59 (2003); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). A case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001); State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003); see also State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) (stating where the evidence is circumstantial, a trial court has the duty to submit a case to jury so long as there is substantial circumstantial evidence that reasonably tends to prove guilt of accused or from which his guilt may be fairly and logically deduced). "[I]n ruling on a motion for directed verdict, the trial court must view the evidence in the light most favorable to the State." State v. Prince, 316 S.C. 57, 64, 447 S.E.2d 177, 181-82 (1993).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003); State v. Rothschild, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002); State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct. App. 2003); State v. Wilds, 355 S.C. 269, 274, 584 S.E.2d 138, 141 (Ct. App. 2003). The trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984); State v. Horne, 324 S.C. 372, 379, 478 S.E.2d

289, 293 (Ct. App. 1996). "Suspicion" implies a belief or opinion as to guilt that is based upon facts or circumstances that do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478; State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001); Zeigler 364 S.C. at 103, 610 S.E.2d at 863. A trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypotheses. Cherry, 361 S.C. at 594, 606 S.E.2d at 478; State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996).

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Wilds, 355 S.C. at 274, 584 S.E.2d at 141; State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002); State v. Patterson, 337 S.C. 215, 232, 522 S.E.2d 845, 853 (Ct. App. 1999).

LAW/ANALYSIS

Moore argues the trial court erred in refusing to direct a verdict of acquittal on the charge of armed robbery. He alleges the charge of armed robbery was improper because the evidence does not show he used force or intimidation to take Wal-Mart's merchandise, but only to retain the property and escape. We disagree.

1. THE LAW EXTANT AS TO ARMED ROBBERY

Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon. S.C. Code Ann. § 16-11-330 (2003); see also State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct. App. 2003) ("Armed robbery occurs when a person commits robbery either while armed with a deadly weapon or while the person was alleging he was armed and was using

a representation of a deadly weapon."). Included in armed robbery is the lesser included offense of robbery. State v. Scipio, 283 S.C. 124, 125-126, 322 S.E.2d 15, 16 (1984). Our statutory scheme specifies that the definition of robbery is to be provided by South Carolina's common law. See S.C. Code Ann. § 16-11-325 (2003) (stating: "The common law offense of robbery is a felony. Upon conviction, a person must be imprisoned not more than fifteen years."); see also Al-Amin, 353 S.C. at 424, 578 S.E.2d at 42 ("Our statutory scheme provides that the crime of robbery is defined by the common law.").

"Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." Al-Amin, 353 S.C. at 424, 578 S.E.2d at 42 (citing State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002); Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002)). Our supreme court has described robbery as "the felonious taking and carrying away of goods of another against the will or without consent." State v. Scipio, 283 S.C. 124, 126, 322 S.E.2d 15, 16 (1984). "The gravamen of a robbery charge is a taking from the person or immediate presence of another by violence or intimidation." State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758-59 (2003) (citing State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981)). "When determining whether the robbery was committed with intimidation, the trial court should determine whether an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts." Rosemond, 356 S.C. at 430, 589 S.E.2d at 759.

The elements of robbery and armed robbery include asportation of the property. State v. Keith, 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985).

"The common-law offense of robbery is essentially the commission of larceny with force." State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979). "In common parlance[,] larceny is just plain stealing." State v. Roof, 196 S.C. 204, 209, 12 S.E.2d 705, 707 (1941); see also Gill v. Ruggles, 95 S.C. 90, 78 S.E. 536 (1913) (noting that "stealing" is the popular word for the technical word "larceny"). Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent." Al-Amin, 353 S.C. at 424, 578 S.E.2d at 42 (citing Broom v. State, 351 S.C.

219, 569 S.E.2d 336 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct.App.2002)). Larceny is a lesser-included offense of the crime of armed robbery. See State v. Parker, 351 S.C. at 570-71, 571 S.E.2d at 290 ("Larceny has been found to be a lesser-included offense of robbery by this Court on several occasions."); State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (petit larceny is a lesser-included of strong armed robbery); State v. Harkness, 288 S.C. 136, 341 S.E.2d 631 (1986) (petit larceny is a lesser included offense of robbery). "Larceny is also implicit within the crime of shoplifting." Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42; see also S.C. Code Ann. § 16-13-110 (2003) (defining the offense of shoplifting).

Thus, it is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny. See Scipio 283 S.C. at 126, 322 S.E.2d at 16 (the additional element of being armed with a deadly weapon distinguishes robbery and armed robbery); Brown, 274 S.C. at 49, 260 S.E.2d at 720 (adding force to larceny creates the common-law offense of robbery).

2. THE CONTINUOUS OFFENSE THEORY

State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985), is edifying. In Keith, although unarmed at the time the confrontation began, the defendant accosted a man walking along a public street. After rifling through the victim's pockets and taking the cash from his wallet, the defendant found the victim's pocketknife and stabbed the man repeatedly. The assailant was convicted of armed robbery and on appeal contended the conviction was improper because he did not become armed until after having taken the victim's money. The South Carolina Supreme Court disagreed:

> [W]e hold that when a defendant commits robbery without a deadly weapon, but becomes armed with a deadly weapon before asportation of the victim's property, a conviction for armed robbery will stand. "[T]he robber need not be armed at all times during the robbery in order to be guilty of (armed robbery). [H]e is guilty . . . if he arms himself or becomes armed with a deadly weapon at any time during the

> progress of the taking or while the robbery is being perpetrated . . . **[T]he crime of robbery is not completed the moment the stolen property is in the possession of the robbers, but may be deemed to continue during their attempt to escape.**" 77 C.J.S. Robbery, § 25 (1952). See also, State v. Bridges, 444 So.2d 721 (La. App. 1984); People v. Heller, 131 Ill.App.2d 799, 267 N.E.2d 685 (Ill. 1971).

Id., 283 S.C. at 598-99, 325 S.E.2d at 326 (emphasis added) (ellipses and parenthesis in the original).

Keith pellucidly adopts the "continuous offense theory." In the context of robbery, the continuous offense theory provides that the crime has occurred "not only if the perpetrator uses force or intimidation to 'take' possession of the property, but also if force or intimidation is used to retain possession immediately after the taking, or to carry away the property, or to facilitate escape." State v. Meyers, 620 So.2d 1160, 1163 (La. 1993) (citing Charles E. Torcia, 4 Wharton's Criminal Law § 478 (14th ed.1981)); see also People v. Randolph, 648 N.W.2d 164 (Mich. 2002) (explaining what it referred to as "the transactional approach" as follows: "Under this approach, a defendant has not completed a robbery until he has escaped with stolen merchandise. Thus a completed larceny may be elevated to a robbery if the defendant uses force after the taking and before reaching temporary safety.").

American Jurisprudence elucidates:

> The other basic perspective is that the use of force or intimidation in retaining the property generally, or in effecting retention of the property in an escape attempt, or even merely as a means of escaping after the property has been abandoned supply the element of force or intimidation necessary to make the offense a robbery.

67 Am. Jur. 2d Robbery § 27 (2003) (internal footnotes omitted).

The Model Penal Code espouses the theory, focusing on whether the force or intimidation asserted against the victim is part of the entire act, and includes the use of force or intimidation to retain possession of the thing taken or to escape or prevent pursuit. Model Penal Code § 222.1(1) (2001). The code has adopted the position that a robbery occurs if the force or intimidation takes place "in the course of committing a theft" and specifies that the commission of a theft includes the flight after the attempt or commission. Id.

The efficacy of the rule is to distinguish the perpetration of a robbery from the commission of a larceny and a subsequent assault, limiting the latter to cases where the intimidation or force is not directly related to the taking. The rationale behind the differentiation of robbery and larceny buttresses the adoption of the continuous offense approach:

> [T]he purpose of the force or intimidation element of the crime of robbery is to distinguish, by imposition of a more severe penalty, those takings which pose a greater risk to the victim. The danger to the victim, however, is identical whether the force or intimidation is employed against the victim immediately before or immediately after the actual taking. We therefore conclude that the force or intimidation element of robbery is satisfied by evidence that force or intimidation directly related to the taking occurred in the course of completing the crime.

State v. Meyers, 620 So.2d 1160, 1163 (La. 1993).

In instances when a thief must use force to retain the stolen property, the thief does not acquire full possession of the property until the force or threat of force has overcome the custodian's resistance to the taking. See Wharton's Criminal Law § 463, at 39-40 (15th ed. 1996). Thus, a "taking" is not complete—that is to say, has not come to an end—until the perpetrator has neutralized any immediate interference with his or her possession. Id.

This does not mean, of course, that a thief has not committed a robbery or larceny unless and until resistance to his possession has been overcome. Indubitably, the point of asportation is not absolutely determinative. A criminal is guilty of the crime, and not merely of an attempt, if he moves the stolen goods a short distance, and concomitantly, the crime is ongoing until the thief has reached a place of temporary safety. See Ball v. State, 699 A.2d 1170, 1185 (Md. 1997).

An exhaustive review of the relevant authorities reveals plenitudinous jurisdictions adopting the continuous offense theory by statute. See, e.g., Ala. Code § 13A-8-43 (LexisNexis 2005); Alaska Stat. § 11.41.510 (2006); Ariz. Rev. Stat. Ann. §§ 13-1901 to -1902 (2001); Ark. Code Ann. § 5-12-102 (2005); Conn. Gen. Stat. Ann. § 53a-133 (West 2001); Del. Code Ann. tit. 11, § 831 (2001); Fla. Stat. Ann. § 812.13 (West 2006); Haw. Rev. Stat. Ann. §§ 708-841 to -842 (LexisNexis Supp. 2006); Iowa Code Ann. § 711.1 (West 2003); Ky. Rev. Stat. Ann. §§ 515.020 to .030 (LexisNexis 1999); Me. Rev. Stat. Ann. tit. 17-A, § 651 (2006); Minn. Stat. Ann. § 609.24 (West 2003); Mont. Code Ann. § 45-5-401 (2005); Nev. Rev. Stat. Ann. § 200.380 (LexisNexis 2006); N.H. Rev. Stat. Ann. § 636.1 (1996); N.J. Stat. Ann. § 2C:15-1 (West 2005); N.Y. Penal Law § 160.00 (McKinney 1999); N.D. Cent. Code § 12.1-22-01 (1997); Ohio Rev. Code Ann. § 2911.02 (LexisNexis 2006); Okla. Stat. Ann. tit. 21, §§ 791 to 792 (West 2002); Or. Rev. Stat. Ann. § 164.395 (West 2005); Pa. Cons. Stat. Ann. § 3701 (West 2000); S.D. Codified Laws §§ 22-30-1 to -2 (LexisNexis 1998); Tex. Penal Code Ann. § 29.01 to .02 (Vernon 2003); Utah Code Ann. § 76-6-301 (Supp. 2006); Wash. Rev. Code Ann. § 9A.56.190 (West 2000); Wyo. Stat. Ann. § 6-2-401 (2005).

Multitudinous states have, by judicial fiat, embraced the theory. See, eg., People v. Chamblis, 217 N.E.2d 422 (Ill. App. 1966) ("if a struggle immediately ensues to keep possession of the property and the thief overcomes the resistance * * * the violence is sufficient to constitute an act of robbery."); People v. Kennedy, 294 N.E.2d 788 (Ill. App. 1973) ("while the taking may be without force, the offense is robbery if the departure with the property is accomplished by the use of force."); People v. Estes, 147 Cal.App.3d 23 (1983) ("The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of

relative safety. It is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape. . . . Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction."); State v. Bell, 233 N.W.2d 920 (Neb. 1975) ("a robbery is not completed at the moment the robber obtains possession of the stolen property . . . robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property."); State v. Meyers, 620 So.2d 1160, 1163 (La. 1993) ("the force or intimidation element of robbery is satisfied by evidence that force or intimidation directly related to the taking occurred in the course of completing the crime."); Ball v. State, 699 A.2d 1170 (Md. 1997) ("The mere fact that some asportation has occurred before the use of force does not mean that the perpetrator is thereafter not guilty of the offense of robbery. . . . [When] the use of force enables the accused to retain possession of the property in the face of immediate resistance from the victim, then the taking is properly considered a robbery."); People v. Bartowsheski, 661 P.2d 235 (Colo. 1983) ("The gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a transaction culminating in the taking of property from the victim's person or presence. There is no requirement that the application of force or intimidation must be virtually contemporaneous with the taking."); Commonwealth. v. Rajotte, 499 N.E.2d 313 (Mass. App. Ct. 1986) ("A larceny may be converted into a robbery if . . . an assault is committed on a person who, having some protective concern for the goods taken interferes with the completion of the theft.").

3. A TEMPORAL AND SPATIAL ANALYSIS OF THE EVIDENTIARY RECORD

Citing the Tennessee case of State v. Owens, 20 S.W.3d 634 (Tenn. 2000), Moore urges this court to hold that robbery requires the act of violence or intimidation "precede or be concomitant to or contemporaneous with the taking of the property." See also State v. Hope, 345 S.E.2d 361, 364 (N.C. 1986) ("to be found guilty of armed robbery, the defendant's use or threatened use of a dangerous weapon must precede or be concomitant with

the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable.").

A priori the reasoning and analysis in Owens is bottomed and premised upon the minority view in this country. Owens plucks its rationale from a flawed and defective academic exercise. The minority view does not give any credence to the criminal activity in totality. Rather, the minority rule restricts and insulates the criminal activity to the zone of coinstantaneous and synchronous conduct.

In contrariety to Moore's contention, the crime was not "complete" prior to his confrontation with Hayes. Hayes confronted Moore immediately after he walked out the front doors of the store but before he left the retailer's parking lot. If not for Moore's display of a handgun, Hayes would likely have been able to thwart the thief at that time. However, while still standing on Wal-Mart's grounds, Moore employed the weapon to threaten Hayes with force and create fear. The gun allowed Moore to actually remove the merchandise from Wal-Mart's domain. Perspicuously, the threat of weapon was contemporaneous to and not separable with his taking of the goods from the premises of the merchant.

Simplistically put, the requisite elements of larceny are met at the point when a thief possesses an item of stolen property. See State v. Keith, 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985) ("asportation is an element of robbery and armed robbery."). However, Moore's crime continued as he attempted his escape through the Wal-Mart parking lot, where his threat to Hayes raised the offense from larceny to armed robbery. See Burko v. State, 313 A.2d 864, 71 (Md. App. 1974) vacated on other grounds, 422 U.S. 1003, 95 S.Ct. 2624, 45 L.Ed.2d 667 (1975) ("when one commits a larceny and then displays a weapon so as to overcome the resistance of the witness, the crime is then elevated to robbery") (citing Clark and Marshall, A Treatise on the Law of Crimes, § 12.09 (6th ed. Wingersky rev. 1958); Perkins, Criminal Law, ch. 4, § 2C at 284 (2d ed. 1969). At the point he was escaping through Wal-Mart's parking lot, Moore's asportation of the stolen property was luculently within the ambit and aegis of the doctrine of asportation, an indispensable element of the offense of armed robbery. The striking similitude in the factual scenario depicted in Keith as juxtaposed to this

factual record brings this court to the ineluctable conclusion that Moore committed the offense of armed robbery.

CONCLUSION

We adopt the continuous offense theory based on the efficacy and rationale of the doctrine and our supreme court's decision in State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985). Accordingly, the trial judge did not error in refusing to grant a directed verdict of acquittal. Appellant's conviction for armed robbery is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anthony Wade Motley, **Respondent,**

v.

Clarence Williams, **Appellant.**

Appeal From Kershaw County
Jeffrey M. Tzerman, Master-In-Equity

Opinion 4248
Submitted May 1, 2007 – Filed May 18, 2007

AFFIRMED

Stevens C. Elliott, of Columbia, for Appellant.

George W. Speedy, of Camden, for Respondent.

ANDERSON, J.: Clarence Williams appeals the denial of his motion to set aside the master-in-equity's settlement order. We affirm.[1]

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

FACTUAL/PROCEDURAL BACKGROUND

This action emanates from a dispute involving a 9.68 acre parcel of land in Kershaw County. In 1987, Clarence Williams' father contracted to sell the plot at issue to Anthony Motley's father. In 2002, Motley brought suit against Williams seeking transfer of the title of the subject property.[2] In his complaint, Motley alleged he was entitled to relief under the theories of specific performance, part performance, and adverse possession. In response, Williams raised the doctrines of statute of limitations, laches, estoppel, waiver, and innocent purchaser as defenses. By consent of the parties, the matter was referred to the Kershaw County master-in-equity.

A hearing before the master was held on June 3, 2005. Although the prior communication between the lawyers and their clients is in dispute, shortly before the trial was set to convene, counsel for both sides met with the master in chambers and informed him they had reached a settlement that they desired to put on record.

When the hearing convened, a proposed agreement was jointly presented by counsel for both parties. During the hearing, the court posed questions regarding the settlement to both sides' attorneys. Motley and Williams were present throughout the entire proceeding. Ultimately, the master reduced the agreement to a written order, filed on September 29, 2005.

Subsequently, Williams retained different counsel, who moved to set aside the settlement order. The master denied the motion. Williams again hired a new attorney, through whom this appeal was filed.

LAW/ANALYSIS

Williams contends the master erred in denying his motion to set aside the settlement order. He alleges his trial attorney mistakenly entered into the

[2] At the time suit was brought, both Wade Motley and Willie Williams were deceased, having assigned or sold all of their rights, title and interest in the land to their sons, the named parties in this action.

agreement against his wishes and specific instructions, therefore invalidating the agreement. We disagree.

1. SETTLEMENT AGREEMENTS

To be enforceable, settlement agreements must either be entered into the court's record or acknowledged in open court and placed upon the record. Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006); Galloway v. Regis Corp., 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1997); Kumar v. Third Generation, Inc., 324 S.C. 284, 485 S.E.2d 626 (Ct. App. 1995). This requirement is provided by Rule 43(k) of the South Carolina Rules of Civil Procedure. Ashfort Corp. Palmetto Construction Group, Inc., 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995) ("In our opinion, Rule 43(k) is applicable to settlement agreements."); Widewater Square Assocs. v. Opening Break of America, Inc., 319 S.C. 243, 245, 460 S.E.2d 396, (1995) ("a settlement order is unenforceable where it fails to set forth the terms of the settlement as required by Rule 43(k), SCRCP."); Reed v. Associated Invs. of Edisto Island, Inc., 339 S.C. 148, 528 S.E.2d 94 (Ct. App. 2000). The rule states:

> Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

Rule 43(k), SCRCP.

"Like former Circuit Court Rule 14 on which it is based, Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." Ashfort at 493-94, 458 S.E.2d at 534. "[A]pplication of Rule 43(k) will increase the certainty of settlement agreements by avoiding disputes. Id. at 494-95, 458 S.E.2d at 535.

2. ATTORNEY/CLIENT CONTRACTUAL RELATIONSHIP

It is a long-standing and well-settled rule that an attorney may settle litigation on behalf of his client and that the client is bound by his attorney's settlement actions. See Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 488 S.E.2d 334 (1997); Shelton v. Bressant, 312 S.C. 183, 439 S.E.2d 833, (1993); Poore v. Poore, 105 S.C. 206, 89 S.E. 569 (1915); Arnold v. Yarborough, 281 S.C. 570, 572 316 S.E.2d 416, 417 (Ct. App. 1984). "This rule is based on the principles of agency law." Crowley at 70, 488 S.E.2d at 335.

> It will never do, in the absence of fraud, to allow the undoubted attorneys of record for a party to a suit to enter into a solemn agreement to settle and adjust the issues and subject-matter of a suit and then later, if it is done, because for any reason the party is dissatisfied, to allow him to repudiate this agreement and employ different counsel to upset and set aside what his first counsel has done.

Poore at 211-12, 89 S.E. at 571.

"Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." Shelton at 184, 439 S.E.2d at 834 (quoting Arnold v. Yarborough, 281 S.C. 570, 572 316 S.E.2d 416, 417 (Ct. App. 1984)). This court has held:

> [E]mployment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause. Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court. Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud.

Arnold at 572, 316 S.E. at 417 (quoting Ex parte Jones, 47 S.C. 393, 397, 25 S.E. 285, 286 (1896)).

Any communication failure or mistake on the part of an attorney is directly attributable to his client. See Kirkland v. Moseley, 109 S.C. 477, 96 S.E. 608 (1917) (a party cannot set aside settlement agreement signed pursuant to attorney's erroneous legal advice); see also Graham v. Town of Loris, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978) ("The general rule in this jurisdiction is that the neglect of the attorney is attributable to the client."). Relief from such an error rests in an action against the lawyer:

> [I]f the attorney has apparent authority to confess, or consent to, judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party, the sole remedy in such a case being against the attorney.

Lord Jeff Knitting Co., Inc. v. Mills, 281 S.C. 374, 377, 315 S.E.2d 377, 379 (Ct. App. 1984) (citing 7A C.J.S. Attorney & Client § 200 at 332 (1980); Poore at 212, 89 S.E. at 569); see also Crowley at 70, 488 S.E.2d at 335 ("where a client alleges his former attorney was negligent in advising him to accept a settlement, that alleged negligence is not a ground for attacking the settlement itself but rather is a matter left for a malpractice suit between the client and his attorney.").

In Shelton v. Bressant, 312 S.C. 183, 439 S.E.2d 833 (1993), the appellant and his attorney appeared in open court and advised the presiding judge they had been able to settle their case with the opposing party. The following day, an oral agreement between the two sides was tape-recorded and subsequently transcribed. Shortly thereafter, the appellant attempted to repudiate the settlement agreement, contending it failed to meet his terms. Our supreme court found the agreement binding and held:

> [Appellants'] contention that the suit was not settled according to his instructions does not entitle him to rescind the agreement.

> When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney.

Id. at 185, 439 S.E.2d at 834 (citing Petty v. The Timken Corp., 849 F.2d 130, 133 (4th Cir.1988) (emphasis removed from original).

In his brief to this court, Williams asserts that he "repeatedly instructed his attorney not to settle the case under any circumstances . . . ." However, during the hearing before the master, his attorney did in fact settle the case and did so directly in Williams' presence. Williams makes no claim of fraud, and offers simply that mistake existed. Although he compares the issue with contract doctrine, stating "there was no meeting of the minds in regard to the settlement agreement," the exact cause of and parties involved in this alleged mistake are never fully articulated. Williams argues: "[N]o one ever explained to Mr. Williams to what he was agreeing, nor did anyone ask. Because of his lack of education and experience with the court system, he was completely confused as to what was transpiring in the courtroom."

Undoubtedly, Williams was, or should have been, well apprised that his attorney was entering into a settlement agreement. As detailed in the record:

> COURT: . . . Both parties are present today. The Plaintiff is represented by George W. Speedy of the Kershaw County Bar, and the Defendant is represented by Roderick M. Todd of the Kershaw County. I did briefly discuss this matter with the attorneys prior to the commencement of this proceeding, and I understand the parties have reached a settlement in this matter; is that correct, Mr. Speedy?

SPEEDY: That is correct, Your Honor.

COURT: If one of you would advise me of what it is.

SPEEDY: Yes, Your Honor. . . .

. . .

SPEEDY: And I believe that is the agreement of the parties.

TODD: Each party will be responsible for their own costs. . . .

COURT: Did you want to question either of your parties?

SPEEDY: I don't think that's necessary. I just wanted to put it on the record, and we are good to go.

COURT: Okay. Well, having heard the agreement in open Court, I am glad that the parties [] were able to resolve this matter between themselves privately without me having to make another difficult decision as is typically the case when cases make it to Court. . . .

As such, the transcript of the proceeding decidedly and incontestably reflects Williams' attorney's consent to the settlement agreement.

Furthermore, the record illustrates clarity as to nature and contents of the settlement. More specifically, during the hearing, the judge and two attorneys comprehensively and conspicuously laid out the manner in which the land at issue was to be divided between Motley and Williams:

SPEEDY: . . . We have agreed to equally divide that parcel of property, and we have agreed to divide it - - how would you determine it - - -

TODD: Such that Mr. Motley would receive the parcel closest to land now or formerly Loblolly which looks to be on the eastern side of the property.

SPEEDY: That's right.

TODD: And Mr. Williams would receive, of course, the other half on the western side.

COURT: And if you would, just discuss for me the access road of that parcel that would be cut off for the Plaintiff.

SPEEDY: It has access; there's a deeded right-of-way across the property of Edward Evans.

Although simple, the agreement is nonetheless complete and thorough, calling for the 9.68 acre property to be divided in equal shares. The arrangement clearly requires a line to be drawn from north to south through the center of the land, providing Motley with the eastern half and Williams with the remaining western portion.

While Williams may at one time have had every intention of having the case tried, his attorney consented to a settlement before the court. His counsel presumptively possessed the authority to make such an agreement, particularly in light of the fact that Williams was present in the courtroom at that time. Any mistake that may have occurred was solely a result of a communication breakdown between Williams and his attorney. As prescribed by the law of this state, Williams is bound by the actions of his lawyer.

Williams claims the trial court erred in not questioning the parties during the initial hearing nor requiring affidavits in deciding his motion to set aside the order. He alleges the settlement agreement read into the record fails

to meet the requirements of SCRCP 43(k) because it lacks the required specificity as to the terms of the agreement. These issues were never raised before the master, and we therefore decline to rule on their merits, as they are not preserved for review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); see also I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."); Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

CONCLUSION

Accordingly, the master-in-equity's ruling denying appellant's motion to set aside the settlement order is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of
Edward Ray Patterson,
Deceased,

Jody Carroll, Appellant,

v.

The Palmetto Bank, As
Personal Representative, Respondent.

Appeal from Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4249
Heard April 5, 2007 – Filed May 31, 2007

REVERSED AND REMANDED

W. Allen Reese, of Greer, for Appellant.

Anthony H. Randall, of Spartanburg, for Respondent.

CURETON, A.J.: In this probate action, Jody Carroll appeals the circuit court's order reversing and remanding to the probate court the issue of whether Edward Ray Patterson breached the general warranty in his deed to Carroll. We reverse and remand.

FACTS

Patterson owned 1.15 acres of property (the Property) in Greenville County. On May 6, 2002, he conveyed 5,128 square feet of the Property to the South Carolina Department of Transportation (SCDOT) for $12,000. However, SCDOT improperly recorded the deed in Spartanburg County. On March 31, 2003, Patterson conveyed the Property to Carroll by general warranty deed without mentioning the prior conveyance to SCDOT.

Patterson died on December 6, 2003. Subsequently, Carroll filed a claim against Patterson's estate (the Estate) for monetary damages for breach of the deed's general warranty. The Estate disallowed this claim, and the case was tried in the probate court. At trial, the Estate argued Patterson did not breach his general warranty to Carroll because Carroll could claim paramount title against SCDOT as a subsequent purchaser for value without notice. Carroll maintains he may elect to sue Patterson for breach of the warranty rather than asserting paramount title with respect to SCDOT.[1]

The probate court held Patterson breached his covenant of quiet enjoyment and awarded Carroll the value of the 5,128 square feet conveyed to SCDOT. The Estate appealed to the circuit court, which reversed and remanded. The circuit court held the probate court properly found Carroll entitled to damages but erred in refusing to consider the priority of Carroll's title with respect to SCDOT. For this reason, the circuit court held, sua sponte, that SCDOT was an

[1] Carroll testified at trial that he acquiesced to SCDOT's ownership of the area it claimed. Moreover, at oral argument before this court, Carroll's counsel waived any right he may have to pursue a claim against SCDOT.

indispensable party and should be joined on remand. This appeal followed.

STANDARD OF REVIEW

An action for the breach of a deed warranty is one at law. Welsh v. Davis, 37 S.C. 215 (1872). On appeal from an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses that no evidence supports them. Neely v. Thomasson, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005). Questions of law may, however, be decided by this court without deference to the lower court. Mariarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

LAW/ANALYSIS

Carroll contends the circuit court erred in refusing to hold he may maintain his breach of deed warranty action against the Estate despite his ability to assert a claim of paramount title against SCDOT. Because Patterson breached the covenant of seisin in his deed to Carroll, we agree.

Preliminarily, we note the probate court technically erred in finding Patterson breached the covenant of quiet enjoyment contained in the deed to Carroll. However, the probate court's ruling is substantively correct because Patterson breached the deed's covenant of seisin. In addition, the issue tried by the parties was whether Patterson breached the general warranty in the deed. Accordingly, we hold the probate court's error did not prejudice either party and forms no basis for reversal.

In Bennett v. Investors Title Ins. Co., 370 S.C. 578, 592, 635 S.E.2d 649, 656 (Ct. App. 2006), this court explained:

> A South Carolina general warranty deed embraces all of the following five covenants

> usually inserted in fee simple conveyances by English conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances.

(quoting Martin v. Floyd, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)).

The covenant of seisin is the grantor's covenant that he owns title to the property being conveyed. See Johnson v. Veal, 14 S.C.L. (3 McCord) 449, 450 (Ct. App. 1826) ("[I]t has been held that under a general warranty of title the purchaser may maintain an action against the grantor before eviction if he can shew [sic] that he had no title at the time of sale."); 21 C.J.S. Covenants § 16 (2006) ("The covenant of seisin is the grantor's promise that he or she owns the property interest he or she purports to convey to the grantee."); 20 Am.Jur.2d Covenants, Conditions, and Restrictions § 82 (2005) ("The covenant of seisin is a promise that the grantor has good title to the estate which he or she is purporting to convey.").

On the other hand, "[t]he covenant of quiet enjoyment obligates the grantor to protect the estate against the lawful claim of ownership asserted by a third person." Martin, 282 S.C. at 51, 317 S.E.2d at 136. However, "[n]o breach of this covenant occurs until there has been a disturbance of possession by actual or constructive eviction." Id. at 51, 317 S.E.2d at 136.

In this case, the probate court held Patterson breached his covenant of quiet enjoyment, but the Estate correctly recognizes Carroll has not been evicted because he voluntarily surrendered his right to claim title against SCDOT. See 21 C.J.S. Covenants (2006) ("Even if there has been a claim of title asserted by a third party and the grantee surrendered title because of it, that will not establish a breach of covenants in a warranty deed unless the third party actually holds

superior title."). Accordingly, the probate court erred in finding Patterson breached his covenant of quiet enjoyment.

However, the probate court's substantive ruling is correct because Patterson breached his covenant of seisin at the time he conveyed the Property to Carroll. Moreover, the Estate is not prejudiced by the technical error because the parties litigated the issue of whether Patterson breached the covenant of seisin. Carroll's claim against the Estate generally alleged a breach of deed warranty and did not specify that only the covenant of quiet enjoyment had been breached.

While Carroll failed to specify the breach as a breach of the covenant of seisin, we recognize "[a] party need not use the exact name of a legal doctrine in order to preserve it . . ." State v. Dunbar 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Further, the Estate's appeal to the circuit court merely alleged error in the probate court's general ruling that Patterson breached the deed warranty.

Having determined Patterson breached his covenant of seisin, we proceed to the issue of whether Carroll could elect to claim damages for that breach rather than instituting an action claiming superior title to the tract against SCDOT. We hold the circuit court erred in ruling Carroll could not litigate his claim against the Estate rather than attempting to assert paramount title against SCDOT.

A breach of the covenant of seisin arises at the time of the conveyance and supports an action against the grantor prior to actual or constructive eviction. See Lessly v. Bowie, 27 S.C. 193, 198, 3 S.E. 199, 201 (1887) (recognizing the breach of a covenant that the vendor is seized in fee "was as old as the deed itself, and as it has been held, would have supported an original action at law for damages, even before eviction."); 14 Powell on Real Property § 81A.06[2][a][iv] (2005) ("[The covenant of seisin] is broken, if at all, at the time of the conveyance . . . . It is not necessary that the grantee actually be evicted from the premises in order for the cause of action to accrue."). Consequently, Carroll had the ability to file suit on the breach at the

time Patterson delivered the deed without regard to whether Carroll was evicted or could be evicted.

Here, the circuit court's order presupposes that the probate court must make a finding of eviction before allowing Carroll to proceed with his claim against the Estate. However, as we have explained, Patterson's covenant of seisin was breached when he conveyed the Property to Carroll regardless of whether an eviction occurred. Accordingly, the circuit court's decision is reversed and remanded for entry of an order consistent herewith.

REVERSED AND REMANDED.[2]

BEATTY, J., and WILLIAMS, J., concur.

[2] Based on this decision, we need not address Carroll's other issues on appeal. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (recognizing appellate courts need not address the remaining issues when one issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joshua Willard, Appellant.

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

Opinion No. 4250
Heard April 10, 2007 – Filed May 31, 2007

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

STILWELL, J.: Joshua Willard appeals his conviction for trafficking methamphetamine. We affirm.

FACTS

William Eugene Adams (Informant) was arrested on a family court bench warrant and found with a quantity of methamphetamine. Officer Kevin Smith notified Officer John Sherfield, a narcotics officer. Sherfield went to the jail and met with Informant. Informant told Officer Sherfield he and Joshua Willard were related, that Informant had purchased drugs from Willard in the past, and he intended to purchase drugs from Willard that day. Informant agreed to set up the buy and Officer Sherfield agreed to "try to help" Informant on his drug charge in exchange for his cooperation. Informant and Willard had not set a meeting place for the buy and Officer Sherfield directed Informant to arrange for the meeting to take place at a local movie theater parking lot.

Using Sherfield's mobile telephone, Informant called Willard. A transcription of the conversation was introduced into evidence:

> Willard: Hello.
>
> Informant: Hey.
>
> Willard: Yo.
>
> Informant: What's up man?
>
> Willard: What's up?
>
> Informant: . . . I dunno, I'm trying to figure that out with you man . . . <unclear> . . . I've been shooting smooth, just wanna know where you at, where I need to be[.]
>
> Willard: I've been <unclear>
>
> Informant: You can't come to Union man?

Willard: Yeah I can come to Union.

Informant: Alright.

Willard: Hey, where you gonna be at?

Informant: Uhhhhh come to the movie theater parking lot man. <garbled noise>

Willard: . . . <unclear> . . . come see you.

Informant: What you mean the house or something?

Willard: Yeah I mean I'm getting ready to meet up with somebody and it's gonna take a . . . <unclear> . . .

Informant: Okay.

Willard: . . . I'm in Union already.

Informant: Just meet me at the movie theater at the same time.

Willard: Alright.

Informant: Alright.

Sherfield testified the phrase "shooting smooth" meant smoking methamphetamine. Sherfield had no previous experience with Informant but testified Informant accurately described Willard's black Honda Civic that had dark tinted windows. Sherfield also claimed Willard had been identified as being involved in drug transactions with methamphetamine by other informants in the past, although he had never been arrested.

The telephone call on Sherfield's mobile phone to Willard originated at the car dock area of the Union County jail. Sherfield admitted there was a magistrate on duty at the courthouse in the same location at the time. However, Sherfield believed he had reasonable suspicion to search Willard's car and question him without a warrant from the magistrate.

Later that day, Officer Kitchens radioed Sherfield and told him he had spotted Willard within a half mile of the movie theater. Sherfield's mobile phone rang, reporting a call from the number Informant called earlier. Sherfield did not answer. Constable Billy Bennett arrived at the theater in a green pickup truck. Kitchens was in the parking lot and watched Willard drive into the parking lot. Officer Smith also pulled into the parking lot. Sherfield pulled in and the four officers converged on Willard's car, blocking it in. Informant was not present, as he had already been booked and incarcerated.

Kitchens testified he asked Willard and the other occupant of his vehicle, a male, to exit the car. After the men exited the car, Sherfield explained their rights to them. Sherfield asked Willard "where the drugs were." Willard denied any knowledge of drugs. Sherfield held up his mobile phone and said "you (sic) been calling my phone." Willard "dropped his head and said they're in the console . . . ." Kitchens approached the vehicle and found 17.46 grams of methamphetamine, digital scales, and $1,012 in cash.

At trial, the court heard pre-trial motions, including Willard's motion to suppress the drugs. Officers Sherfield and Kitchens testified. The court denied the motion finding, inter alia, Willard consented to the search.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in

criminal cases. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Our review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-01 (Ct. App. 2003).

DISCUSSION

Willard argues the trial judge erred in denying his motion to suppress the drugs as the product of an unlawful search. We disagree.

The Fourth Amendment guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless search generally offends the Fourth Amendment. State v. Dupree, 319 S.C. 454, 456, 462 S.E.2d 279, 281 (1995). A warrantless search withstands constitutional scrutiny under the Fourth Amendment if it meets the requirements of one of several exceptions, including the automobile exception. Id. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. The police, however, may also stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity." State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (internal citations omitted).

"'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). In determining whether reasonable suspicion exists, the court must consider the totality of the circumstances. State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). Reasonable suspicion is more than a general hunch but less than what is required for probable cause. Butler, 343 S.C. at 202, 539 S.E.2d at 416.

In State v. Green, this court held an anonymous telephone tip provided insufficient indicia of reliability to justify an investigatory stop. 341 S.C. 214, 218, 532 S.E.2d 896, 897 (Ct. App. 2000). However, in State v. Rogers,

this court found a stop based on a known, reliable, confidential informant sufficient to meet the reasonable suspicion standard. 368 S.C. at 535, 629 S.E.2d at 682. We find this case meets the criteria of Rogers. Although the informant in this case was not previously proven reliable, as in Rogers, he was more than a mere tipster. The informant correctly identified Willard's vehicle, knew Willard's telephone number, and mentioned drugs during the conversation with Willard. Although the informant's reliability had not previously been tested, a non-confidential informant is given a higher level of credibility because he exposes himself to liability should the information prove to be false. See State v. Bellamy, 323 S.C. 199, 204, 473 S.E.2d 838, 841 (Ct. App. 1996). We thus find support to affirm the trial court's finding of reasonable suspicion for the stop.

We likewise find the requisite exigent circumstances for a warrantless search, arising from mobility, as required under California v. Carney, 471 U.S. 386 (1985). In Carney, the court upheld the warrantless search of a lawfully parked but fully mobile motor home under the automobile exception. 471 U.S. at 395. Willard argues because the officers surrounded his vehicle, it was not "mobile" under Carney. However, temporary immobility may still be considered readily mobile so as to qualify for the automobile exception. See Myers v. State, 839 N.E.2d 1146, 1152 (Ind. 2005) (cases cited therein).

In any event, we find Willard voluntarily consented to the search.[1] "Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). "Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005) (emphasis

[1] Although the State argues this issue is not preserved for appellate review as not raised on appeal, we find sufficient argument in Willard's brief to address the issue.

in original). Whether consent to a search is voluntary is a question of fact to be determined from the totality of the circumstances. State v. McKnight, 352 S.C. 635, 656, 576 S.E.2d 168, 179 (2003).

We find evidence to support the trial court's finding that the consent was voluntary. Willard's consent to search was obtained after Officer Sherfield read Willard his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Willard consented to the search by nodding his head toward the vehicle and telling the officers the drugs were in the console, after notification of the calls to Sherfield's mobile phone.

We likewise find the search was not an exploitation of an unlawful detention. As previously discussed, we find reasonable suspicion existed to make the stop and detention. Furthermore, although Willard allegedly noticed the officers' guns when first surrounded, there is no evidence of any threat of force against Willard once he had exited his vehicle. Nor is there evidence of coercion or promises made. After review of all the circumstances, we find no error by the trial court in denying Willard's motion to suppress the drugs. See Green, 341 S.C. at 219 n.3, 532 S.E.2d at 898 n.3 (holding "the 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.").

AFFIRMED.

HEARN, C.J., and GOOLSBY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Braxton J. Bell, Appellant.

Appeal From Anderson County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4251
Submitted May 1, 2007 – Filed June 4, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek of the South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Special Assistant Attorney General Amie L. Clifford, all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

HUFF, J.: Appellant, Braxton J. Bell, was convicted of voluntary manslaughter and possession of a firearm during the commission of a violent crime. He appeals, asserting the trial judge erred in (1) failing to disqualify the Tenth Judicial Circuit Solicitor's Office and (2) refusing to dismiss a juror. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Braxton Bell was indicted for murder and possession of a firearm during the commission of a violent crime in regard to the shooting death of Jonathan Gambrell at the Newport Commons apartment complex in Anderson County. The case proceeded to trial, at which time Bell presented a claim of self-defense. The jury convicted Bell of the lesser offense of voluntary manslaughter, as well as the weapon possession charge. The trial court sentenced him to thirty years for manslaughter and five years for possession of the firearm during the commission of a violent crime.

LAW/ANALYSIS

Bell raises two issues on appeal. He contends the trial court erred in refusing to disqualify the Tenth Judicial Circuit Solicitor's Office from prosecuting the case because a current investigator with the Solicitor's Office was a former investigator for the Anderson County Public Defender's Office who had interviewed appellant while with the Public Defender's Office. He further maintains the trial court erred in refusing to dismiss a juror who reported she was asked by a daycare worker whether she was serving on the case where the daycare worker's cousin had been shot.

I. Disqualification of Solicitor's Office

The record shows that at the start of the case, Bell made a motion to disqualify the Solicitor's Office from prosecuting his case arguing there was a conflict of interest based on the investigator for the Solicitor's Office,

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

Jimmy Penn, having previously interviewed Bell while Penn was an investigator for the Public Defender's Office. Counsel for the defense stated it was his belief that "there was information transferred from Mr. Penn to the Solicitor's Office" resulting in actual prejudice to Bell. Counsel further asserted, even if the court found no actual prejudice, the Solicitor's Office should be disqualified based on "the perception of a conflict" in Penn "switching from one side to the other." Finally, counsel maintained failure to disqualify the Solicitor's Office would violate Bell's constitutional right to effective assistance of counsel because when Penn "switched sides" it caused a chilling effect on Bell being able to talk to his attorneys.

The trial court held an in camera hearing on the matter at which time the defense presented Bell's testimony. Bell stated that on November 16, 2004, Penn came to the jail to talk to him about his case. Penn identified himself at that time as an investigator with the Public Defender's Office. Penn asked Bell some questions and Bell told him he was being charged with murder, that he and the victim had been arguing, and that someone else shot the victim and he, Bell, ran with the others. This information was recorded on the bottom of an interview sheet. Penn spoke with Bell for about fifteen or twenty minutes. Bell testified that Penn only came to see him that one time, and sometime after January 1, 2005, he learned from other inmates that Penn had become an investigator for the Solicitor's Office. Bell maintained that he felt betrayed when Penn switched sides and that when a different attorney appeared to represent him at his preliminary hearing than the one who had been to see him twice before, he felt betrayed again. According to Bell, this created a difficulty in him discussing the case with his current attorney, and the first time they discussed self-defense was approximately two weeks before trial.

The State then called Penn to the stand to testify in the hearing. Penn stated that he began working for the Solicitor's Office on January 12, 2005, having previously worked for the Anderson County Public Defender's Office. Penn acknowledged it was his handwriting on the client interview sheet[2] dated November 16, 2004. However, he stated it was routine for him

[2] The client interview sheet is a form document wherein Penn recorded personal information about Bell such as his address, age, social security

to go to the jail and speak with clients and he would see approximately ten to twenty clients a week. He did not remember what he had written on the document until defense counsel stated what the interview sheet included. Penn stated he remembered a bond reduction request form for Bell that had been faxed to him at the Solicitor's Office from the Public Defender's Office. He recalled he brought the matter to the prosecuting attorney's attention, who relayed to Penn there was no change of circumstances justifying a reduction in bond, which Penn then relayed to the Public Defender's Office. His only other involvement with this case was to serve subpoenas on witnesses, which he did because the prosecuting attorney's investigator was off work that week. He further denied ever speaking to the other investigator about the case and denied talking to the witnesses he served about the case. When asked if he had shared any confidential information with the solicitor that he learned from Bell at the interview, Penn replied, "Absolutely not." He further denied having any confidential conversations with anyone else involved in the matter.

The trial court found there was no prejudice to Bell, noting he believed Penn did not even remember the interview and, even if he had, that information was not unduly prejudicial. It found that Penn's service of subpoenas was a ministerial act and the evidence showed Penn did not take that opportunity to discuss the case with anyone. It further determined there was nothing Penn did in response to the bond reduction request that would amount to prejudice to Bell. Finally, the court found any chilling effect on Bell's cooperation with his attorney was an unreasonable reaction. The court therefore denied Bell's motion to disqualify the Solicitor's Office.

On appeal, Bell contends the trial court erred in failing to disqualify the Solicitor's Office based on the fact that Bell initially denied to Penn that he shot the victim, and this denial was clearly inconsistent with the self-defense claim he presented at trial. He argues his right to effective representation was

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number, marital status and education. At the bottom of the form was a section for notes wherein Penn handwrote the name of the victim and the location of the incident, and noted "[Defendant and] victim had an argument at the apartment . . . . Somebody shot him [and defendant] ran with everybody else."

adversely affected by Penn's betrayal, that Penn's later participation in his prosecution created more than just an appearance of impropriety, and that there was no clear evidence that no actual breach of confidence occurred. Bell also asserts Penn's participation likely led the Solicitor's Office to feel, because of Bell's initial statement to Penn, that Bell's claim of self-defense was not genuine, therefore adversely affecting the trial and any effort to plea bargain his case. He thus maintains the trial court abused its discretion in refusing to disqualify the Solicitor's Office and he is therefore entitled to a new trial. We disagree.

In State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), our supreme court addressed the standard for disqualification of a Solicitor's Office where an attorney in that office had been employed by the Public Defender's Office during the pendency of charges against the appellant. There, the court rejected the standard of a presumption of betrayal from mere allegation of successive adverse representation resulting in a per se disqualification. Id. at 518, 299 S.E.2d at 688. Instead, the court adopted the requirement of a showing of actual prejudice to the defendant's case. Id. at 518-19, 299 S.E.2d at 688. Finding no evidence that any secrets or confidences of Smart were revealed, the court affirmed the denial of Smart's motion for disqualification. Id. at 520-521, 299 S.E.2d at 689. Thereafter, in State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994), our supreme court again articulated that an appellant who seeks disqualification of a Solicitor's Office must show actual prejudice. Id. at 238, 439 S.E.2d at 852.

Bell attempts to distinguish Smart on the basis that the attorney involved in that case did not discuss evidentiary matters or trial strategy with Smart while working for the defense, whereas investigator Penn interviewed Bell regarding the circumstances surrounding the incident. He argues that involvement with the defense, along with Penn's later involvement in the request for bond reduction and service of subpoenas while working for the Solicitor's Office, adversely affected the trial of his case and any effort to plea bargain. We disagree.

In Smart, attorney DuTremble was assigned to prepare a brief on behalf of Smart while working for the Public Defender's Office. Thereafter,

attorney DuTremble's work for the prosecution consisted of research on a narrow issue of law regarding admissibility of certain psychiatric evaluations. Our supreme court, noting attorney DuTremble denied under oath that he personally spoke with Smart or that he discussed evidentiary matters or trial strategy with Smart's counsel, determined the facts failed to suggest betrayal of any secrets or confidences. Smart, 278 S.C. at 519, 299 S.E.2d at 688-89. While, in the case at hand, investigator Penn admitted the client interview document regarding Bell was in his handwriting, he denied remembering the contents of the document, stating he interviewed anywhere from ten to twenty clients a week when he worked for the Public Defender's Office. Further, his involvement with Bell's case once he moved to the Solicitor's Office was minimal, involving only ministerial acts. There simply is no evidence investigator Penn was involved with any substantive or strategic prosecution work suggestive of betrayal of any secrets or confidences. Indeed, Penn denied ever speaking to the prosecuting attorney or the other investigator at the Solicitor's Office or any of the witnesses he served about the case, and adamantly maintained under oath that he had no confidential conversations with anyone else involved in the matter. Contrary to Bell's assertion, a thorough review of the record reveals no breach of confidence occurred and there was no actual prejudice to Bell.

Additionally, we find no merit to Bell's argument that he was adversely affected in any effort to plea bargain his case. First, we note there is no evidence of record that Bell ever attempted to attain a plea bargain. Second, Bell has no constitutional right to plea bargain. See State v. Chisolm, 312 S.C. 235, 237-38, 439 S.E.2d 850, 851-52 (1994) (holding, where appellant claimed prejudice because the solicitor failed to negotiate any plea agreement in matter where assistant solicitor had inappropriate communication with appellant during pendency of charges, appellant failed to show actual prejudice necessary to disqualify the solicitor's office, noting appellant had no constitutional right to plea bargain).

Finally, Bell cites the case of State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) for the proposition that our courts will not tolerate "interference or corruption into attorney-client confidences" and that a solicitor's office should be disqualified based on the damage such interference does to our entire criminal justice system. Quattlebaum is

clearly distinguishable from the case sub judice. There, our supreme court found the solicitor's office should have been disqualified based on a violation of Quattlebaum's Sixth Amendment right to counsel, as well as to protect the integrity of the judicial system, where a member of the prosecution team intentionally eavesdropped on a confidential defense conversation. The court held in Quattlebaum that a defendant must show either deliberate prosecutorial misconduct or prejudice to make out a Sixth Amendment violation of right to counsel, but not both. Id. at 448, 527 S.E.2d at 109. It noted that deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. Id. The court further held the solicitor's office should have also been disqualified because the deliberate prosecutorial conduct threatened rights fundamental to liberty and justice, calling into question the integrity of the entire judicial system. Id. at 449, 527 S.E.2d at 449. Here, however, there is no such deliberate prosecutorial misconduct. Because we have found no actual prejudice to Bell, the trial court did not abuse its discretion in refusing to disqualify the Solicitor's Office from the prosecution of Bell's case.

II. Dismissal of Juror

Following jury selection, the trial court informed the jurors the trial would not start until after lunch and they were to be back at 3:00 o'clock that afternoon. The court instructed the jurors that they should not talk to anybody about the case and if anyone asked them, to tell them they had been selected to serve on a jury but they could not even tell them the name of the case. He told the jurors not to discuss the case among themselves or with anyone else. Upon their return, the trial court informed the parties one of the jurors had reported someone talked to her about the case when she took her child to daycare and explained she may be late coming back to get the child because she was on a jury. The trial court then brought the juror in for questioning to determine whether she should be disqualified. The following colloquy occurred between the judge and the juror:

> [Court]: . . . I understand you had something that happened at lunch you wanted to inform the court about?
>
> [Juror]: Yes, sir.

[Court]: Tell us about that, please.

[Juror]: I took my son to a daycare and was explaining to them why it was last minute, that they were squeezing him in, they didn't have room, but I had been selected for the jury, for jury duty. That's all I said.

[Court]: This is not a regular daycare?

[Juror]: It's an after-school type thing.

[Court]: I mean, is it one you regularly use?

[Juror]: Yeah, it's one I go to during the school year, but not during the summer because I teach.

[Court]: All right.

[Juror]: And one of the girls in there said, "My cousin was shot, and his trial begins today. Are you on that jury?" And I said, "I can't talk about it."

[Court]: So you think her cousin was the victim in the case?

[Juror]: The victim, yeah, that's the way it sounded.

[Court]: Okay. And that was the conversation?

[Juror]: (Nodded head.) And then she started to tell another child, and I left the room, and all I heard was, "My cousin was shot." She repeated that.

[Court]: All right. Would anything about that incident cause you to fear your ability to be a fair and impartial juror to both the State and the defendant?

[Juror]: Not me personally. I don't know if she thinks something, if she thinks that I'm on this jury - - I don't . . .

[Court]: But it wouldn't affect your decision?

[Juror]: No, it wouldn't affect my decision.

[Court]: Is she someone that you knew, that you regularly - - -

[Juror]: She was a former student of mine.

[Court]: Okay. But it wouldn't affect your ability; you could put that aside and make your decision based solely on what you hear in this courtroom?

[Juror]: Yes, yes.

[Court]: All right. You did nothing - - you did absolutely right, number one in the way you handled it, and number two telling the bailiff as soon as you got back. So we'll be ready to get started in just a couple minutes, so please retire to the jury room. And don't discuss this with any other juror. Thank you, ma'am.

[Juror]: I won't, I promise.

The State had no objection to having this juror continue in service. The defense, however, did, stating that if the juror was close to the daycare worker, "she may lean that way unintentionally." The defense further expressed concern that when she took her child into the daycare again, the juror might be asked something about the case and, even though she would probably indicate she could not talk about it, the juror would feel pressured. It thus asked that the juror be removed.

The trial court's initial response was that it was going to excuse the juror stating, "I'm going to excuse her, not because I think - - I'm just going to excuse her because I got two alternates, and hopefully we'll finish this trial by Thursday. . . ." After the State and the defense agreed the trial should be

finished in that time, the trial court changed its ruling. The court explained its decision as follows:

> I don't think she's done anything wrong. I was very impressed with the way she answered the questions. She's a school teacher, she's intelligent, she knew what to do. She handled it properly at the time, she didn't discuss it, and she reported it immediately. And so I . . . I'm not gonna excuse her. I think she's a qualified juror. Had she answered the question in the same fashion as we were qualifying the jury, that she knew the cousin of the victim was working at the daycare, then I would not have disqualified her at that time. Of course you [the defense] would have had an opportunity to strike at that time.

The defense noted its exception to the court's ruling. It further requested, if the juror remained on the jury, the court continue to question her in the morning about whether she'd had any further discussions. The trial court agreed to caution the juror that she should not speak to anybody else about the matter and to report it immediately if anyone tried to speak with her. The court refused to excuse the juror, however, stating, "Because I think she's qualified, I think she's very honest when she answered the question. I'm very impressed with the way she handled the entire situation, and so I think there's no need to excuse her from this jury."

In its preliminary instructions to the jury, the trial court informed them they should not speak to anyone about the case, and told them to report back immediately if someone did try to speak to them about it. When the court later recessed for the day, it again instructed the jury not to talk with anyone about the case, and if anyone attempted to talk with them, they should report it to the bailiff the first thing in the morning. After the jury exited the courtroom, the trial court stated, "Let the record note that I admonished the jury not to talk about the case and to report back in the morning of any efforts to contact her. I looked directly at [the juror], who was in previously, and she nodded to me both times. So I don't think there's any point of me singling her out; she got the message and nodded both times." The court further cautioned the members of the victim's family present in the courtroom not to contact the daycare worker who was the cousin of the

victim. When the trial resumed the next morning, the jury was questioned whether any of them heard anything about the case or were contacted by anyone in regard to it, and the court received a negative response. At the conclusion of testimony for that day, the trial court again instructed the jury not to talk about the case, and again received a negative response when it asked the jury the next morning if any of them had been contacted by anyone in regard to the case.

On appeal, Bell contends the trial court erred in refusing to dismiss the juror. He argues the colloquy between the court and the juror shows the juror was apprehensive and uncomfortable about the situation. He further maintains, even accepting the juror would not have been disqualified had the relationship been raised during voir dire, because this juror would continue to see the decedent's cousin who was caring for the juror's child, this juror would have been removed by the exercise of a peremptory challenge. Accordingly, Bell asserts the trial court abused his discretion in refusing to replace the juror. We disagree.

"A 'defendant has a constitutional right to be tried by competent jurors,' which 'implies a tribunal both impartial and mentally competent to afford a hearing.'" State v. Hurd, 325 S.C. 384, 389, 480 S.E.2d 94, 97 (Ct. App. 1996) (quoting Tanner v. United States, 483 U.S. 107, 134, 107 S.Ct. 2739, 2755, 97 L.Ed.2d 90 (1987) (Marshall, J., dissenting)). A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion. State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265 (Ct. App. 1999). More specifically, "[i]t is within the discretion of the trial court to determine whether bias results from a juror's reception of outside information concerning the case being tried." Washington v. Whitaker, 317 S.C. 108, 118, 451 S.E.2d 894, 900 (1994). See also State v. Ivey, 331 S.C. 118, 123, 502 S.E.2d 92, 94 (1998) (noting a juror's competence is within the trial court's discretion and is not reviewable on appeal unless wholly unsupported by the evidence).

Bell relies on the case of State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002) in arguing the trial court abused its discretion in refusing to remove the juror. In Stone, the defendant's aunt was called as a witness during the

sentencing phase of the trial. When the aunt took the stand, one of the jurors informed the court that she knew the aunt. Although the aunt's name had been announced at the start of voir dire, the juror did not know her name. The juror had lived down the street from the aunt some five or six years earlier, and they were casual acquaintances only. The State objected to the continued participation of the juror arguing it would be difficult for the juror to impose a death sentence on a former acquaintance's nephew, and the trial court removed the juror, replacing her with an alternate. Our supreme court reversed, finding the trial court abused its discretion in removing the juror. Id. at 448-49, 567 S.E. 2d at 247-48. Bell maintains, unlike the finding of the court in Stone that failure to disclose an acquaintance with a witness would not have been a material factor in the exercise of a peremptory challenge, the juror here would have been removed by the exercise of a peremptory challenge and therefore the trial court abused its discretion in failing to remove the juror. In Stone, however, the court reaffirmed the following proposition:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

Id. at 448, 567 S.E.2d at 247 (quoting State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001) (citations omitted) (emphasis added). Here, there is no concealment, intentional or otherwise, of information by a juror. Thus, the language from Stone regarding whether the information would have been a material factor in the use of a peremptory challenge is inapplicable to this case.

The record here discloses the trial court properly inquired into the juror's exposure to outside information and the effect the information would have on her ability to be a fair and impartial juror. Contrary to Bell's assertion, the juror unequivocally stated this outside knowledge would not affect her decision or her ability to be fair and impartial. Accordingly, the trial court did not abuse its discretion in allowing her to remain on the jury.

See State v. Ivey, 331 S.C. 118, 122-23, 502 S.E.2d 92, 94 (1998) (holding, where juror sent note to judge during trial that she knew individual who allegedly loaned murder weapon to defendant's accomplice, trial judge properly inquired into the effect juror's knowledge of this person would have on her ability to be fair and impartial, and juror unequivocally stated such knowledge would have no effect on her ability to render an impartial verdict, the trial judge did not abuse his discretion in allowing juror to remain on the jury); Washington v. Whitaker, 317 S.C. 108, 117-18, 451 S.E.2d 894, 900 (1994) (holding, where juror heard a radio announcement concerning the case on the third day of trial but unequivocally stated she would not permit broadcast to influence her decision, trial court properly denied motion to remove juror).

Based on the foregoing, Bell's convictions are

AFFIRMED.

ANDERSON and BEATTY, JJ., concur.