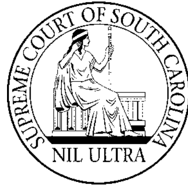


The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF HENRY H. CABANISS, PETITIONER

On January 26, 1998, Petitioner was definitely suspended from the practice of law for a period of two years, retroactive to February 7, 1997. In the Matter of Cabaniss, 329 S.C. 366, 495 S.E.2d 779 (1998). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than September 20, 2002.

Columbia, South Carolina

July 22, 2002

The Supreme Court of South Carolina

In the Matter of
David Brian Butler, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Butler and the interests of Mr. Butler's clients.

IT IS ORDERED that Robert Theo Williams, Esquire, is hereby appointed to assume responsibility for Mr. Butler's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Butler may have maintained. Mr. Williams shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Butler's clients and may make disbursements from Mr. Butler's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of David

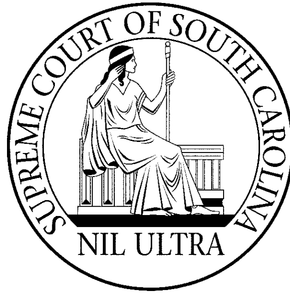
Brian Butler, Esquire, shall serve as notice to the bank or other financial institution that Robert Theo Williams, Esquire, has been duly appointed by this Court.

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

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

July 22, 2002



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 29, 2002

ADVANCE SHEET NO. 26

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mack
Arthur Smith, Respondent.

Opinion No. 25506
Heard May 30, 2002 – Filed July 29, 2002

Definite Suspension

Attorney General Charles M. Condon and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Mack Arthur Smith, of Florence, pro se.

PER CURIAM: This opinion resolves two separate attorney disciplinary matters involving Respondent.

The first is a default matter which includes approximately twenty-five counts of practicing law while under suspension and allegations that, during the suspension period, Respondent continued to maintain a trust account which occasionally had a negative balance. The second consolidates two separate disciplinary matters: one count of practicing under suspension, and one criminal conviction arising from Respondent's June 2000 plea to

attempted possession of powder cocaine. We impose a six month suspension in the first case and a concurrent eighteen month suspension in the second case, both retroactive to Respondent's interim suspension on February 16, 2000.[1] The two cases are discussed separately below.

A. Case # 1

On February 1, 1999, Respondent's membership in the South Carolina Bar was terminated because he failed to pay his 1999 Bar dues. Thereafter, he continued to practice law in violation of Rule 410(d), SCACR, which prohibits a person from engaging in the practice of law in South Carolina if he is not in good standing with the Bar. In addition to the twenty-five allegations of practicing under suspension, the complaint in this matter also alleges that Respondent's trust account had a negative balance on several occasions.[2]

On August 21, 2000, Respondent was personally served with the Notice of Filing of Formal Charges and the formal charges. Respondent did not file an answer nor seek an extension to answer within the thirty day period provided by Rule 23(a), Rule 413, SCACR. On October 3, 2000, Disciplinary Counsel filed an Affidavit of Default. On October 13, 2000, Disciplinary Counsel received an Answer with a cover letter dated September 25, 2000. The envelope containing these documents was postmarked October 11, 2000. On or about October 11, Respondent filed a motion to be allowed to file a late answer.

The subpanel found that by his failure to timely file an answer, Respondent was in default and deemed to have admitted the formal charges.

---

[1]This Court suspended Respondent on this date following his indictment for possession of crack cocaine.

[2]There is no contention that any client suffered any loss as the result of these trust account deficits.

See Rule 24(a), Rule 413, SCACR. The subpanel also found:

> (1) Respondent failed to pay his 1999 Bar dues and his membership in the South Carolina Bar was terminated February 1, 1999;
>
> (2) After February 1, 1999, Respondent engaged in the unauthorized practice of law and/or the practice of law without a proper license by representing twenty-five individuals in various civil and criminal matters; and
>
> (3) In six of the first eight months of 1999, Respondent's trust account statement reflected a negative balance.

The subpanel concluded that Respondent violated the following provisions of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR:

> (1) Rule 7(a)(1) by violating a Rule of Professional Conduct;
>
> (2) Rule 7(a)(5) by engaging in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute or demonstrate an unfitness to practice law; and
>
> (3) Rule 7(a)(6) by violating the oath of office taken upon his admission to practice law.

Further, the subpanel found two violations of the Rules of Professional Conduct (RPC), Rule 407, SCACR: Rule 5.5(a), practicing law in violation of the rules and regulations of the jurisdiction, and Rule 8.4, misconduct. Finally, it concluded Respondent had violated Rule 410(d), SCACR, which prohibits any person from engaging in the practice of law in South Carolina who is not in good standing with the South Carolina Bar.

The subpanel recommended Respondent be required to pay the costs of the proceedings and be suspended for six months and one day.[3] Respondent filed exceptions to the subpanel's report. The full panel adopted the subpanel's report and recommendations. Respondent has filed a brief with this Court.

Respondent contends the subpanel erred in holding him in default for failure to timely answer the formal charges. He claims that he should have been allowed to file a belated answer because he was not receiving his mail in a timely manner. Whether his mail was delayed is irrelevant here, however, since Respondent was personally served with the Notice of Filing of Formal Charges and the formal charges.

The standards for setting aside a default and allowing a late answer is found in the SCRCP. In re Moore, 342 S.C. 536 S.E.2d 367 (2000). Respondent has shown no cause, much less good cause, for his failure to timely respond to the formal charges. See Rule 55(c), SCRCP. Accordingly, we find no abuse of discretion in the subpanel's refusal to set aside the default.

Since Respondent is deemed to have admitted the factual allegations of the suspension charges and the trust account deficits, the sole issue remaining is that of the appropriate sanction. The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. E.g., In re Purvis, 347 S.C. 605, 557 S.E.2d (2001). While Respondent cannot contest the formal charge's allegations that the South Carolina Bar sent him notice of his failure to pay his 1999 Bar dues, there is neither an allegation nor any evidence of Respondent's actual receipt of the Bar's

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[3]At the time the subpanel and full panel reports were issued, an attorney who received a definite suspension of more than six months was required to petition the Supreme Court for reinstatement. The rule has since been amended to impose this requirement on attorneys who are suspended for a minimum of nine months. Rule 33, Rule 413, SCACR.

notice. Although Respondent had constructive notice that he had not paid his dues, we find that a lesser sanction than that recommended by the subpanel is warranted here. Similarly, while there were minor deficits in Respondent's trust account, there is no contention that any client money was lost or compromised. We therefore impose a six month suspension, retroactive to February 1, 2000, and require Respondent to pay the costs assessed by the subpanel in Case #1.

B. Case #2

In January 2000, Respondent was indicted for possession of crack cocaine. He pled guilty to attempted possession of powder cocaine in June 2000, and this case involves, in part, the appropriate disciplinary sanction for this plea. The second disciplinary infraction involved in Case #2 is a finding that Respondent practiced law while under suspension when he assisted a woman in procuring a name change in November 2000.

The subpanel concluded that Respondent had performed legal services while under suspension and that attempted possession of cocaine was a serious crime. It found Respondent violated the following RLDE found in Rule 413, SCACR:

(1) 7(a)(1) by violating a Rule of Professional Conduct;

(2) 7(a)(3) by violating a valid order of the Supreme Court;

(3) 7(a)(4) by his conviction for a serious crime;

(4) 7(a)(5) by engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute; and

(5) 7(a)(6) by violating the oath of office.

The subpanel also found Respondent violated Rules 5.5(a) and 8.4(a), (b), (c), (d), and (e) of Rule 407, and Rule 410(d), SCACR. It recommended Respondent be indefinitely suspended and that he be required to pay the costs of the proceedings.

Respondent filed objections to the subpanel's report. The full panel adopted that report, and Respondent has raised several issues in his brief to this Court.

Respondent first contends the subpanel erred in finding he engaged in the unauthorized practice of law when he assisted a woman in obtaining a name change. We disagree. The women testified that Respondent filled out paperwork and drafted the complaint for her, and that he charged her $100 for his services. The preparation of pleadings and the giving of advice in connection with the name change constitute the practice of law. E.g., State v. Robinson, 321 S.C. 286, 468 S.E.2d 290 (1996). Clear and convincing evidence supports the finding that Respondent practiced law while under suspension. E.g., In re Devine, 345 S.C. 633, 550 S.E.2d 308 (2001).

Respondent next contends that attempted possession of powder cocaine is not a "serious crime" subjecting him to discipline. We disagree. Among other definitions,[4] a serious crime is one that "reflects adversely on the lawyer's honesty, trustworthiness or fitness" to practice law. Rule 2(z), RLDE, Rule 413, SCACR. The attempt to commit a serious crime, in and of itself, subjects an attorney to discipline. Id. We hold possession of powder cocaine is a serious crime because it reflects adversely on an attorney's fitness to practice law. Respondent's attempt to possess cocaine is therefore a serious crime as well. Id.

Respondent's remaining contentions challenge the constitutionality of the subpanel's recommendation of an indefinite suspension in this case. We

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[4]See also full text of Rule 2(2), and Rule 7(a)(4), RLDE, Rule 413, SCACR.

perceive no constitutional infirmity in this recommendation, but hold that the appropriate sanction is an eighteen month suspension, retroactive to February 18, 2000, and concurrent with the six month suspension imposed in the first case. Respondent shall also pay the costs assessed by the subpanel.

C. Conclusion

Respondent's concurrent six month and eighteen month suspensions are retroactive to February 18, 2000. Prior to applying for readmission under Rule 33, RLDE, Rule 413, SCACR, Respondent shall pay the costs of these two proceedings and comply with any requirements imposed by, and pay all dues and fees required by, the South Carolina Bar and the Commission on Continuing Legal Education and Specialization.

DEFINITE SUSPENSION.

MOORE, A.C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

____

The State, Respondent,

v.

Michael J. Passaro, Appellant.

____

Appeal From Horry County
H. Dean Hall, Circuit Court Judge

____

Opinion No. 25507
Heard May 29, 2002 - Filed July 29, 2002

____

AFFIRMED

____

Deputy Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor J. Gregory Hembree, of Conway, for respondent.

____

JUSTICE BURNETT: Michael J. Passaro ("Passaro") pled guilty to murder and arson and was sentenced to death. Passaro's counsel filed an appeal to which Passaro filed a motion to dismiss. We ordered the circuit court to conduct a competency hearing. The court found Passaro competent to waive his right to appeal his conviction.

FACTS

The facts are not disputed. Passaro and his wife, Karen Passaro ("Karen"), separated because of marital difficulties. Karen, subsequently, filed for divorce. The family court issued a temporary order affecting custody of the Passaro's child, Maggie.

The order granted Passaro weekend custody of Maggie, beginning on Friday, when he would pick her up from daycare, and ending Monday, when he returned her to daycare. Karen would pick up Maggie on Monday afternoon and keep her until Friday. Passaro and Karen had conflicts concerning the custody arrangement, particularly during holidays.

On the Monday before Thanksgiving, Passaro did not take Maggie to daycare. Instead, he drove his van to Karen's condominium complex; poured gasoline on the floor of the vehicle; ignited the gasoline and jumped out leaving Maggie to die strapped in a child's safety seat. Investigators found a suicide note in the van, written by Passaro, explaining his wish to kill himself and Maggie so they could spend time in heaven away from Karen.[1]

After Passaro's indictment, the State served notice of its intent to

[1] The letter is caustic in tone, urging at one point for Karen to not kill herself so she may "live in pain [because of Maggie's death] for the rest of her life."

seek the death penalty. The trial judge conducted a Blair[2] hearing and found him competent, *i.e.*, he understood the charges against him and was able to assist his court-appointed counsel.

Passaro was arraigned on the day of the competency hearing and entered pleas of guilty to both charges. The trial court accepted the pleas after finding they were entered freely, voluntarily and intelligently.[3] The court reconvened two days subsequent to begin the required sentencing phase.

At the conclusion of the sentencing hearing the trial judge found the existence of the following statutory aggravating circumstances beyond a reasonable doubt: 1) physical torture;[4] 2) offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;[5] 3) the murder of a child 11 years of age or younger.[6] Although the court found mitigating circumstances,[7] Passaro waived his right for the court to consider any mitigation.

---

[2] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

[3] The judge noted Passaro took 40 milligrams/daily of the drug Prozac, which did not impair his ability to assist counsel.

[4] S.C. Code Ann. § 16-3-20(C)(a)(1)(h) (Supp. 2001).

[5] S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 2001).

[6] S.C. Code Ann. § 16-3-20(C)(a)(10) (Supp. 2001).

[7] The trial court found the existence of two statutory mitigating circumstances: 1) Passaro had no significant history of prior criminal conviction involving the use of violence against another person; 2) the murder was committed while the defendant was under the influence of mental or emotional disturbance. See S.C. Code Ann. § 16-3-20(C)(b)(1)-(2) (Supp. 2001).

Passaro's counsel, at Passaro's behest, waived closing arguments. Passaro made a brief closing statement:

> Donna[8] was a big part of my life. I was devastated by her passing, and when I met Karen I thought I would have another chance at happiness. We started having difficulties in our marriage and happiness turned to tragedy. Thank you, your honor.

The trial judge concluded the evidence warranted the imposition of the death sentence for murder and a concurrent sentence of 30 years for arson.

Passaro's counsel filed a timely notice of appeal. Passaro, *pro se,* filed a motion to dismiss his appeal. We remanded the matter to the circuit court pursuant to Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993), to determine whether Passaro was competent to waive his right to appeal.

At the Singleton hearing Dr. Pamela Crawford ("Dr. Crawford"), an expert qualified in forensic psychiatry, testified Passaro was competent, under the Singleton standard, to waive his appeal and to be executed. She found he suffered from no major mental illness, though he had suffered from mild depression in his past, including periods after the death of his first wife and after his incarceration for the murder of his daughter. Dr. Crawford's findings were consistent with the report of the findings of the defense psychiatric expert.

The court found Passaro competent under the Singleton standard. Specifically, the court found Passaro able to understand the nature of the proceedings, the crimes for which he was tried, the reason for and the nature of the punishment, and he possessed sufficient mental capacity or ability to

[8] Donna was Passaro's first wife. She was struck and killed by an automobile while attempting to help another motorist involved in a separate accident. She died in 1988.

rationally communicate with counsel.

We required the parties submit briefs on Passaro's competence to waive his appeal. We also denied Passaro's motion to dismiss his counsel and appear *pro se*. However, we allowed Passaro to file an additional *pro se* brief. In a letter received March 5, 2002 waiving his right to file a *pro se* brief, Passaro wrote to appellate counsel:

> In following the court's order of December 17, 2001, I understand that I have 20 days to respond to your [Office of Appellate Defense] brief and the state's brief.
>
> I received a copy of your brief and the state's brief on February 11, 2002 and after reading both briefs, I do not feel that any more [sic] is needed to be said. I agree with the state.
>
> Therefore, I am waiving the 20 days for my response.

ISSUE

I. Can an individual who pleads guilty to murder and waives introduction of mitigating evidence waive his right to general appellate review?

II. Is Passaro's waiver of his right to general appellate review competent, knowing and voluntary?

DISCUSSION

I

Right to Waive Appeal

A capital defendant may waive the right to general appellate review. State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994) (Torrence II).

However, this right is limited to competent individuals whose decision is knowing and voluntary. Id.

Appellate counsel argues this Court should not allow Passaro to waive his right to general appellate review. Appellate counsel bases this argument on the theory that Passaro, who pled guilty to capital murder and then waived mitigation at the penalty phase, should not be allowed to prevent review of his conviction and sentence by waiving appellate review. To do so, counsel insists, is "little more than government-assisted suicide."[9]

Our decisions in Torrence II and State v. Torrence, 322 S.C. 475, 473 S.E.2d 703 (1996) (Torrence III), permit an individual to waive general appellate review of a death penalty conviction. Appellate counsel suggests the distinction between the Torrence line of cases and the instant case is our affirming Torrence's underlying conviction in our initial review of the case. See State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Torrence I) (affirming conviction, but reversing the sentence of death and remanding for new sentencing proceeding). Because this Court has never reviewed Passaro's conviction, counsel asserts we should refuse any request to waive appeals in the case. We disagree.

It is true Torrence did not waive his right to appellate review until after this Court upheld his conviction. When Torrence was sentenced to death the second time, he chose to waive appellate review because he could,

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[9] Death row volunteers are neither new or unusual. See Christy Chandler, note, Voluntary Executions, 50 Stan. L. Rev. 1897 (1998); Richard C. Dieter, Ethical Choices for Attorneys Whose Clients Elect Execution, 3 Geo. J. Legal Ethics, 799, 802-03 (1990); Jane L. McClellan, Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases, 26 Ariz. St. L.J. 201, 202, 212 (1994). States executed 302 inmates between 1973 and 1995, with 12% of those being the result of inmates refusing their right to appeal or petition for various post-conviction relief. NAACP Legal Defense and Education Fund, Death Row U.S.A. 3-9 (1995).

at best, receive life without parole at a new sentencing hearing. Torrence preferred the execution of his death sentence to the only alternative, life without parole.

Passaro, unlike Torrence, pled guilty. Allowing individuals, even defendants facing capital punishment, to plead guilty is recognized both in this state and throughout the nation. See State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979) (upholding death sentence of two defendants who pled guilty to murder) overruled on other grounds by Torrence I, supra; see generally Barry J. Fisher, Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty, 65 Alb. L. Rev. 181 (2001) (noting all states except Arkansas, Louisiana and New York allow a defendant in a capital case to plead guilty). By allowing Passaro to plead guilty, we allow him to significantly restrict the scope of review on appeal because a guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (stating "[t]he general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea"). Counsel does not argue or suggest Passaro was not guilty or his guilty plea defective.

We disagree with appellate counsel's argument that allowing an individual to plead guilty to murder, be sentenced to death and waive his right to general appellate review is tantamount to State assisted suicide. While the competency of the guilty verdict may be in doubt in some future case, it is not in doubt here as Passaro pled guilty below and confirmed his guilt before this Court. See State v. Sroka, 267 S.C. 664, 230 S.E.2d 816 (1976) (affirming guilty verdict by jury based on overwhelming evidence presented at trial and later admission of guilt by defendant in open court).

Importantly, this Court is the final body to decide whether to grant Passaro's waiver. Because of the uniqueness of the death penalty, we carefully review, individually, a petition to waive appellate review. We discern no reason Passaro should be denied his right to waive appellate

review because he chose to plead guilty.

II

Ability to Waive Appeal

We limit a death row inmate's ability to waive appeals to those who are competent and whose decision to do so is both knowing and voluntary. See Torrence II, supra. Passaro is competent to waive his right to appeal. His decision to do so is knowing and voluntary.

A. Competency

The standard to determine competency, set forth by Singleton v. State, supra, is: 1) whether the defendant can understand the nature of the proceedings, the crimes for which he was tried, and the reason for the punishment; and 2) whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel. See Torrence II, supra.

The State argues the only evidence, particularly Dr. Crawford's report, presented at the competency hearing demonstrates Passaro is competent under Singleton. We agree.

The evidence presented at the hearing establishes Passaro suffers from no major mental illness. The evidence also shows he understands the nature of appellate proceedings, including the relevant issues of appeal, the role of his attorneys and the function of the court system in the process. Passaro was able to state why he was tried and why he received a death sentence.

Dr. Crawford noted Passaro was aware of the finality of the death penalty and was able to discuss in detail his reason for waiving his appeal. The defense expert's report provided a similar evaluation.

We questioned Passaro at length during oral arguments. Our own questioning of him leaves no doubt of his competency. At oral arguments we questioned Passaro extensively about his trial, the appeals process and the consequence of his request to terminate any appeals on his behalf. It is our observation that Passaro possesses the capacity and ability to communicate with counsel.

There is no evidence suggesting Passaro is not competent under the Singleton standard. We conclude, based on the hearing below and our questioning, that Passaro is competent to waive his appeal.

B. Knowing and Voluntary

The evidence presented at the competency hearing and Passaro's testimony before this Court establishes the wavier of his right to appellate review is knowing and voluntary.[10] Dr. Crawford noted Passaro understood the consequences of his action. No evidence suggests Passaro is being coerced into waiving his appeal.

While defense counsel notes Passaro, at Dr. Crawford's second visit on March 20, 2001, expressed the possibility he may change his mind, he made no such comments at the competency hearing. In his letter to defense counsel waiving his right to file a *pro se* brief, Passaro unequivocally agreed with the State's brief. Such a statement reaffirms his prior commitment to waive his right to appeal.

At oral argument, we questioned Passaro extensively about the voluntary nature of his request. We also questioned whether he fully understood the appellate process and what he could hope to gain by

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[10] Passaro has been prescribed medication, primarily Prozac, to calm him and to help him sleep. Passaro stated the medication does not affect his ability to reason, coherently or rationally. The medical evidence presented at the hearing below confirms this assessment.

appealing his sentence. We conclude Passaro's request is knowingly and voluntarily made.

III

Sentence Review

Having concluded Passaro may waive his right to general appellate review, we proceed to review the sentence as required by S.C. Code Ann. § 16-3-25(C) (1976).[11]

A. Arbitrariness Review

We are required to consider whether a death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor." S.C. Code Ann. § 16-3-25(C)(1) (1976). Appellate counsel has not argued Passaro's sentence was influenced by passion, prejudice or any other arbitrary factor. Having reviewed the record we conclude the sentence was not influenced by such arbitrary factors, but was the product of sound deliberation based on the evidence. See State v. Shaw, supra, overruled on other grounds by Torrence I, supra.

B. Circumstances of Aggravation Review

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[11] We have never directly addressed whether a defendant may waive sentence review under S.C. Code Ann. § 16-3-25 (C) (1976). See, e.g., Patterson v. Commonwealth, 262 Va. 301, 551 S.E.2d 332 (Va. 2001) (allowing death row defendant to waive general appeal for errors but not sentence review) State v. Dodd, 120 Wash.2d 1, 838 P.2d 86 (Wash. 1992). We do not address Passaro's ability to waive sentence review here because the issue has neither been raised nor briefed by either party. Because this case arises from the direct appeal filed by appellate counsel, we have conducted the sentence review. See S.C. Code Ann. § 16-3-25(F).

The trial judge imposed the death penalty after finding the following statutory aggravating circumstances beyond a reasonable doubt: 1) physical torture;[12] 2) offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;[13] 3) the murder of a child 11 years of age or younger.[14]

It is not disputed Maggie Passaro was under 11 years of age at the time of the murder. The child was 2 years of age at the time of her death. Because the State has proved the existence of at least one aggravating circumstance beyond a reasonable doubt it is not necessary to address the other aggravating circumstances. See State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984), overruled on other grounds by Torrence I, supra (death penalty may be imposed upon finding at least one statutory aggravating factor).

After a review of the record, we conclude the evidence supports the trial judge's findings beyond a reasonable doubt.

C. Proportionality Review

The United States Constitution requires the death penalty to be imposed only if the sentence is "neither excessive nor disproportionate in light of the crime and the defendant." State v. Copeland, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, this court searches for "similar cases" where the death sentence has been upheld. Id.

A review of case law reveals no factually similar case, *i.e.*, the murder of a person under eleven years of age by arson.

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[12] S.C. Code Ann. § 16-3-20(C)(a)(1)(h) (Supp. 2001).

[13] S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 2001).

[14] S.C. Code Ann. § 16-3-20(C)(a)(10) (Supp. 2001).

This Court has, however, upheld the death sentence in cases where a defendant has murdered a person under the age of eleven. See State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) (upholding death sentence for defendant convicted of murder of his unborn, but viable, son); State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999) (death penalty was proper for a defendant who murdered his girlfriend's ten-year old daughter by shooting her); State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992) (death sentence was proportional to crime where defendant gunned down elementary school students). Passaro's crime is no less gruesome than those, perhaps more so considering the evidence Passaro knowingly and intentionally started the fire, jumped from the van, and failed to inform rescuers that his child was still strapped to a safety seat in the vehicle. The brutality of the murder is underscored by evidence the victim was alive during the fire, succumbing to death only after the intense heat caused her severe pain and suffering.

Evidence of Passaro's individual characteristics show he suffered slight mental or emotional disturbance at the time of the murder and did not have a substantial history of violent criminal conduct. We upheld a death sentence under similar mitigating circumstances in State v. Wilson, supra. The death sentence is proportional to the characteristics of this crime and the individual defendant.

CONCLUSION

Passaro may waive his right to general appellate review. He is competent to do so, and his request is both knowing and voluntary. We further find the death sentence was properly imposed after finding the existence of at least one aggravating circumstance. The sentence was not imposed arbitrarily and was not disproportionate.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,

Respondent,

v.

Isaac Goodwin (Goodman), Jr.,

Appellant.

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Appeal From Richland County
James R. Barber, III, Circuit Court Judge

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Opinion No. 3536
Submitted May 6, 2002 - Filed July 29, 2002

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AFFIRMED

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Senior Assistant Appellate Defender Wanda H. Haile, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Charles H. Richardson and Senior Assistant Attorney General Norman Mark Rapoport;

and Solicitor Warren B. Giese, all of Columbia, for respondent.

HUFF, J.: Appellant, Isaac Goodman,[1] was indicted for resisting arrest, trafficking in cocaine, possession with intent to distribute (PWID) crack cocaine, PWID marijuana, and PWID crack within the proximity of a school or park. Following a bench trial, the court found him guilty as charged and sentenced Goodman to concurrent sentences of twenty-five years on the trafficking charge, five years for PWID marijuana, ten years for PWID crack, five years for PWID crack within a half mile of a school, and one year for resisting arrest. He now appeals, challenging the trial judge's failure to suppress the drug evidence. We affirm.[2]

FACTUAL/PROCEDURAL BACKGROUND

On February 17, 1999, shortly after 2:00 a.m., Deputies Slicer and Turner from the Richland County Sheriff's Department, along with Deputy Swain following in another car, were patrolling an area in Columbia near Eau Claire High School when they observed a moped being driven in the opposite direction. Deputy Slicer initiated a traffic stop because the moped, designed for one person, was carrying two people, in violation of S.C. Code Ann. § 56-5-3710.[3]

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[1] The defendant's last name was listed as "Goodwin" on the indictments, but the court, with defense counsel's consent, amended the indictments at trial to state the last name as "Goodman" based on the representation of counsel and the defendant that "Goodwin" was a misnomer.

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

[3] This section provides, "No person may ride upon a moped other than upon or astride a permanent and regular seat attached to the moped. No moped

Goodman was the driver of the moped, and his girlfriend was the passenger. When the deputy requested a driver's license, Goodman stated that his license was under suspension and that he understood he did not need a moped license. After running a license check, Deputy Slicer determined, because Goodman's license was suspended for more than six months, he was required to have a moped license pursuant to S.C. Code Ann. § 56-1-1720.[4]

Deputy Slicer testified it was a very cold night and Goodman was wearing bulky clothing, but he could clearly see something protruding from Goodman's right front jacket pocket. Based on prior information he had received about Goodman, the deputy was concerned the protrusion might be a weapon. He asked Goodman for his consent to search his person and Goodman agreed. The deputy felt something large and hard outside of the pocket, and thought it could be a weapon. When he pulled it out, he found a very large roll of cash the size of a duct tape roll, secured with rubber bands. The moment he showed Goodman what he found, Goodman grabbed the money and started striking the deputy with the back of his arms, pushing backward and trying to get away. At the time he began hitting the deputy, Goodman revoked his consent to search. As soon as Goodman began assaulting him, Deputy Slicer told him he was under arrest.

Two other officers who were on the scene assisted Deputy Slicer with Goodman. As they struggled, one of Goodman's gloves came off and a

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may be used to carry more persons at one time than the number for which it is designed and equipped." S.C. Code Ann. § 56-5-3710 (1991).

[4] South Carolina Code Ann. § 56-1-1720 (1991) states, in pertinent part, "After December 31, 1986, to operate a moped on the public highways and streets of this State, a person must possess a valid driver's license . . . or a valid moped operator's license . . . , except that a person whose driver's license has been suspended for a period of six months or less is not required to obtain a moped operator's license or possess a valid driver's license during the period of suspension."

package of crack cocaine fell out of the glove. One of the deputies sprayed Goodman's eyes with a chemical spray, and they were then able to subdue him. Based on the discovery of the drugs from Goodman's glove, Deputy Slicer seized the moped and conducted an inventory search. He found a loaded handgun, a large bag of marijuana, three bags of cocaine, and twenty-one rounds of ammunition under the seat of the moped.[5]

At trial, Goodman moved to suppress all the drug evidence arguing, even if probable cause existed to make the stop, the two traffic violations with which he was charged were not "arrestable offenses" that carried jail time. He contended Deputy Slicer testified he was arrested for the traffic violations and resisting arrest, but the deputy did not state he was arrested for assault. He asserted no valid, underlying arrest was made to support the resisting arrest charge. Therefore, his arrest was illegal and the subsequent discovery of drugs was fruit of the poisonous tree.

The trial judge denied Goodman's motion to suppress ruling (1) there was probable cause to stop Goodman, (2) Goodman consented to a voluntary search, (3) when the deputy found the money and pulled it out of the pocket, Goodman assaulted the deputy, (4) the deputy told Goodman he was under arrest, and (5) Goodman was ultimately charged with resisting arrest. He determined that a chain of events occurred which ultimately led to an event which would permit Goodman to be arrested, and only thereafter were the drugs discovered.

LAW/ANALYSIS

On appeal, Goodman argues the trial judge erred in denying his motion to suppress the drug evidence because his arrest was unlawful. He

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[5] During the suppression hearing, Goodman testified that he never gave Deputy Slicer consent to search. Rather, he claimed when he asked the deputy why he wanted to search him, Deputy Slicer told him to get up against the car, and then told Goodman that he was under arrest.

contends the deputy did not state he was under arrest for assaulting him, and to secure a conviction for resisting arrest, there must first be a lawful arrest.

In criminal cases, this court sits to review errors of law only, and we are bound by the trial judge's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases, and our review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Id.

> When determining the constitutional validity of an arrest, a court must consider 'whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [appellant] had committed . . . an offense.'

State v. Robinson, 335 S.C. 620, 634, 518 S.E.2d 269, 276 (Ct. App. 1999) (alterations in original) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers [sic] disposal." Id.

During the suppression hearing, Deputy Slicer testified on cross-examination that Goodman was placed under arrest for "[r]esisting arrest, assault[ing] me, and the moped violations." He stated he did not formally charge Goodman with assault because, in lieu of all the other charges, he did not think it was that important.

The fact that Goodman was not subsequently charged with the assault is immaterial. Goodman has failed to show, or even argue, that the resisting arrest charge could not stand because a charge for assault would have been unlawful under the circumstances. At the moment the arrest was made, Deputy Slicer clearly had probable cause to make it, based on the assault. Goodman was arrested for, and ultimately convicted of, resisting arrest, and therefore was under lawful arrest at the time drugs were initially found. Just as an underlying arrest need not be prosecuted in order to successfully prosecute for resisting arrest, neither should the absence of a charge on the underlying arrest bar evidence seized subsequent to a proper resisting arrest charge. See State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999) (the resisting arrest statute does not mandate the underlying arrest be prosecuted as a prerequisite for the indictment, prosecution, or conviction of resisting arrest). Further, Goodman cites no authority which requires an officer to specifically advise a detainee of the precise nature of his crime at the moment of arrest in order for the arrest, and/or a subsequent charge of resisting arrest, to be lawful. There is evidence to support the trial judge's ruling on the admissibility of the drug evidence. Accordingly, Goodman's convictions are

AFFIRMED.

HEARN, C.J., and HOWARD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Worsley Companies, Inc.,

Appellant,

v.

South Carolina Department of Health and Environmental Control,

Respondent.

Appeal From Florence County
B. Hicks Harwell,Jr., Circuit Court Judge

Opinion No. 3537
Heard May 8, 2002 - Filed July 29, 2002

AFFIRMED

J. Charles Ormond, Jr., of Holler, Dennis, Corbett, Ormond & Garner, of Columbia, for appellant.

Deputy General Counsel Jacquelyn S. Dickman, of South Carolina Department of Health and Environmental Control, of Columbia, for respondent.

HUFF, J.: Worsley Companies, Inc. filed this action against the South Carolina Department of Health and Environmental Control (DHEC) seeking a determination that it was entitled to reimbursement pursuant to the State Underground Petroleum Environmental Response Bank (Superb) Act, S.C. Code Ann. § 44-2-10 et seq. (2002), for a payment it made in settlement of a claim arising out of the release of petroleum product from an underground storage tank it owned. The circuit court found Worsley was not entitled to reimbursement and that DHEC had acted properly in denying the claim. Worsley appeals. We affirm.

FACTS/PROCEDURAL HISTORY

Worsley operates a convenience store and gas station on a site it leases from Byrd Property Ventures (BPV) in Florence County. The lease was originally entered into in 1983 between Southern Bank and Trust Company, as trustee under the will of R. P. Byrd, a predecessor in interest to BPV, and New Seaboard Petroleum, Ltd., a predecessor in interest to Worsley. The site is designated as tract #60 on the Florence County Tax Map. The record establishes that Worsley leased tract #60 from BPV at all relevant times connected with this case, including the time of contamination.

In 1991, Worsley became aware of a release of petroleum product from the underground tanks on tract #60 into the soil and groundwater. It notified DHEC. Pursuant to DHEC requirements, Worsley conducted an assessment and initiated remediation of the plume contaminants that had escaped from the storage tanks. DHEC authorized approximately $360,000.00 to reimburse Worsley for assessment and remediation of the petroleum contamination. It is estimated that the total expenditures by DHEC in connection with the clean-up will be approximately $460,000.00.

The release from tract #60 extended to tract #79 which is also owned by BPV. In 1996, BPV sued Worsley alleging damage to its property.

The parties reached a settlement, approved by the court, for $400,000.00. The settlement resolved claims relating to both tracts #60 and #79.

Worsley requested indemnification for the settlement from the Superb Financial Responsibility Fund. DHEC denied the request. Worsley then filed this declaratory judgment action seeking a determination that it was entitled to reimbursement. The circuit court found that DHEC acted properly and that Worsley was not entitled to reimbursement. This appeal followed.

LAW/ANALYSIS

I. Third Party Claim

Worsley argues the circuit court erred in holding BPV was not a third party as defined by the Superb Act. We disagree.

The Superb Act creates two funds to be administered by DHEC. The statute describes the funds as follows:

> The 'Superb Account' and the 'Superb Financial Responsibility Fund' are created to assist owners and operators of underground storage tanks containing petroleum and petroleum products . . . . The Superb Account must be used for payment of usual, customary, and reasonable costs for site rehabilitation of releases from underground storage tanks containing petroleum or petroleum products. The Superb Financial Responsibility Fund must be used for compensating third parties for actual costs for bodily injury and property damage caused by accidental releases from underground storage tanks containing petroleum or petroleum products.

S.C. Code Ann. § 44-2-40(A) (2002).

The Superb Act defines a third party claim as follows:

> 'Third party claim' means a civil action brought or asserted by an injured party against an owner or operator of an underground storage tank for bodily injury or property damages resulting from a release of petroleum or petroleum products from an underground storage tank. The underground storage tank owner or operator, the owner of the property where the underground storage tank is located, a person to whom properties are transferred in anticipation of damage due to a release, employees or agents of an owner or operator, or employees or agents of the property owner must not be considered a third party.

S.C. Code Ann. § 44-2-20(23) (2002) (emphasis added).

DHEC, which is responsible for the administration of the Superb Financial Responsibility Fund, from which Worsley seeks reimbursement determined BPV could not be considered a third party under the Superb Act because it was the owner of the property where the underground storage tank was located.

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. South Carolina Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 417 S.E.2d 592 (1992)).

The circuit court held "[u]nder the clear and unambiguous limitations of the statute a third party claim by BPV cannot be paid from the state fund." We agree.

On appeal, Worsley argues BPV had only a beneficial interest in tract # 60 and therefore had no control over the use of the property at the time of the release. At trial, however, the parties did not dispute that BPV was the owner of tracts #60 and #79 at all relevant times, including the time when the contamination occurred in 1991. From the record before us, we do not see where Worsley made this argument to the trial court. Accordingly, the argument is not properly before this court. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (holding issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

Worsley argues the language limiting third party claims was intended to preclude fraudulent recovery by tank owners and operators at the site where the release occurred. Even if section 44-2-20 (23) was intended to preclude fraudulent recovery, there is no indication that this was the only purpose of the statute and only fraudulent claims should be denied.

Further, Worsley also argues the statutory language is ambiguous, but we find no ambiguity. We believe the phrase "owner of the property where the underground storage tank is located" includes exactly what it says it includes. We cannot add language to section 44-2-20 (23) to limit to the definition of "third party" to only apply to claims for reimbursement for the property damage to the property where the underground storage tank is located. As BPV is the owner of tract #60, the tract where the underground storage tank is located, it unambiguously falls under the statute and cannot be considered a third party. Thus, the circuit court did not err in finding BPV was not a third party under section 44-2-20 (23).

II. Equal Protection

Worsley argues DHEC's interpretation of section 44-2-20 (23) violates the Equal Protection Clause. We disagree.

Worsley asserts that all legitimate, arms length claims of underground storage tank owners should be covered under the statute. It claims that DHEC's interpretation discriminates against "third party claimants who had only a beneficial interest in the property where the release occurred but also own an unconnected and non-adjacent piece of property which has been affected by the plume."

The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. When a case does not involve a suspect or quasi-suspect class, or a fundamental right, the statute should be tested under the rational basis standard. Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998). The right to indemnification under the Superb Financial Responsibility Fund is not a fundamental right protected by the constitution. Further, the class Worsley seeks to distinguish, that of beneficial property owners also owning contaminated land, is not a suspect or quasi-suspect class. Thus, section 44-2-20 (23) must be analyzed under the rational basis standard.

In order to satisfy the Equal Protection Clause under the rational basis standard, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. Lee v. South Carolina Dep't of Natural Resources, 339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000). The courts will uphold a legislative enactment against constitutional attack if there is any reasonable hypothesis to support it. Id.

In considering the statute, the courts must give great deference to the legislature's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue. Id. "Further, '[t]he classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge.'" Id. at

467, 530 S.E.2d at 114 (quoting Foster v. South Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992).

In denying the claim, DHEC did not treat BPV any differently from others similarly situated. There was no evidence of any intentional discrimination against Worsley or BPV. The stated purpose of the Superb Financial Responsibility Fund is to compensate third parties for damages caused by accidental releases from underground storage tanks. S.C. Code Ann. § 44-2-40(A) (2002). As the circuit court found, "The General Assembly is placing a limit on the expenditure of public funds for landowners and tenants who are in positions of joint knowledge, control and benefit." Section 44-2-20 (23) and DHEC's interpretation of it only distinguishes between the owners "of the property where the underground storage tank is located" and property owners who do not also own "the property where the underground storage tank is located." Thus, section 44-2-20 (23) and DHEC's interpretation of it survive rational basis scrutiny. The circuit court did not err in finding there was no violation of the equal protection clause.

Because we find the circuit court did not err in upholding DHEC's denial of Worsley's claim for reimbursement for the above reasons, we need not address Worsley's remaining arguments. Accordingly, based on the foregoing reasons, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and HOWARD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elayne Thomas Ann Scott (Brunson),

Respondent,

v.

John Q. Brunson, Sr., TRUSTEE
Trust for Robert Ashley Brunson
u/w of Muldrow McCoy Brunson,

Appellant.

Appeal From Sumter County
John M. Milling, Circuit Court Judge

Opinion No. 3538
Heard May 7, 2002 – Filed July 29, 2002

AFFIRMED

Lohman D. Reiter, II, of Sumter, for appellant.

Ralph E. Tupper, of Beaufort, for respondent.

HOWARD, J.: Elayne Scott brought this action to collect a judgment out of a trust created for the judgment debtor by the provisions of his late father's will. Scott moved for summary judgment claiming the judgment debtor's trust interest was vested. The circuit court agreed and granted summary judgment. We affirm.

FACTS

Scott was married to Ashley Brunson in December 1977. They had one child, a daughter, and then separated in 1978. In 1983, Brunson was convicted of trafficking in drugs. He absconded, and has been neither seen nor heard from since 1983. Scott was granted a divorce from Brunson on April 10, 1992, and he was ordered to pay monthly child support. Brunson did not pay the child support as ordered, and Scott eventually obtained a judgment against him for the unpaid child support in the amount of $42,262.82.

Brunson's father, Muldrow McCoy Brunson ("the father") died on September 7, 1995. In his will, the father provided for Brunson in the following manner:

> **ITEM IV**
>
> **Specific Bequest of Specific Item of Personal Effects.** I give and bequeath to Ashley Brunson, if he shall survive me, one (1) Winchester Model 42 410 gauge shotgun, serial number 53531, one (1) Winchester Model 12.20 gauge shotgun, serial number 1196190, one (1) Winchester Model .12 gauge shotgun, serial number 1767376, one (1) three horsepower Evinrude boat motor and my gun cabinet and its contents.
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> . . .

ITEM VII

> **Specific Devise of Residential Property.** I give and devise to my surviving issue, if they shall survive me, any interest which I own at the time of my death in the house . . ., with the further understanding that *my Personal Representative shall retain in trust the share of my son Ashley Brunson for a period not to exceed ten (10) years from the date of my death, after which period, if my son Ashley Brunson shall not appear or make his whereabouts known to my Personal Representative, then Ashley Brunson's share shall be distributed equally to my then surviving issue*.

ITEM VIII

> **Outright Gift of All Property to Children.** I give, devise, and bequeath all the rest, residue and remainder of my property . . ., absolutely in fee simple to my surviving children in equal shares, provided, however, that *the share of my son Ashley Brunson shall be retained in trust by my Personal Representative for a period not to exceed ten (10) years from the date of my death, after which period, if my son Ashley Brunson shall not appear or make his whereabouts known to my Personal Representative, then Ashley Brunson's share shall be distributed equally to my then surviving issue*. . . .

Brunson's share placed in trust has a value of $57,270.82.

Scott filed this action to execute on the judgment against Brunson's trust interest. John Q. Brunson, Sr. ("the trustee") defended, contending Brunson's share has not yet vested. Scott moved for summary judgment, which the circuit court granted. The trustee appeals.

STANDARD OF REVIEW

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

DISCUSSION

The trustee argues the circuit court erred in finding Brunson's interest in the devised property was vested. We disagree and conclude the terms of the will established a defeasible fee simple subject to a shifting executory interest. Therefore, Brunson's interest vested on his father's death.

A fee simple absolute is an interest with indefinite duration. 28 Am. Jur. 2d Estates § 13 (2000); see Restatement (Third) of Prop.: Donative Transfers § 10.2 (1995). A defeasible fee simple is a fee simple that may be cut short. 28 Am. Jur. 2d Estates § 403 (2000); see Restatement (Third) § 10.2. A defeasible fee may be (1) a fee simple determinable, (2) a fee simple subject to a condition subsequent, or (3) a fee simple subject to an executory interest. Restatement (First) of Prop. §§ 44, 45, 46 (1936).

A fee simple determinable is a grant that can be cut short when a given term expires. 28 Am. Jur. 2d Estates § 26 (2000). A fee simple subject to a condition subsequent is a grant with a condition attached; for example, to A provided that A appears in ten years. 28 Am. Jur. 2d Estates § 175 (2000). Although a fee simple subject to an executory interest is essentially the same as a fee simple subject to a condition subsequent, a minor difference does exist. When a fee simple subject to an executory interest is cut short, the fee simple automatically passes to a third party instead of merely permitting the *original* grantor the right to re-enter and become revested in the original estate as with a fee simple subject to a condition subsequent. 28 Am. Jur. 2d Estates §§ 386, 387 (2000); see 28 Am. Jur. 2d Estates §§ 28, 29, 175, 381 (2000).

Executory interests are generally classified as either springing or shifting. Restatement (First) § 25, cmt. K. A springing executory interest arises when the grantor retains fee simple title in himself until the subsequent divesting event takes place. See, e.g., Restatement (First) § 46, illus. 15-18. A shifting executory interest occurs when ownership shifts from one transferee to another upon the occurrence of the subsequent event. See id. cmt. K.

In this case, the terms of the will provide that the assets of the estate pass "absolutely in fee simple to my surviving children in equal shares." We conclude the circuit court correctly determined that this provision clearly establishes Brunson's ownership of his share of the estate. After this provision, a trust is created to hold Brunson's share for a period not to exceed ten years. The trustee argues that this language creates a condition precedent. We disagree.

Although Brunson's enjoyment is delayed, he owns his share of the estate and therefore, it is vested. See Bean v. Bean, 253 S.C. 340, 345, 170 S.E.2d 654, 656 (1969) ("[U]nder the deed in question [the appellant] took a fee simple defeasible estate whereby the fee to the land *vested* in her, subject to being divested . . . ." (emphasis added)); Bowman v. Lobe, 35 S.C. Eq. (14 Rich. Eq.) 271, 278 (1868) (holding the testator granted a defeasible fee whereby at the happening of a specific contingency "a deceased son's *fee simple* [was defeated and] passed to his surviving brothers" (emphasis added)); see also S.C. Nat'l Bank of Charleston v. Johnson, 260 S.C. 585, 592, 197 S.E.2d 668, 671 (1973) ("It is always necessary to discriminate between a devise which vests immediately, the enjoyment of which is postponed; and a devise which is contingent, because both the vesting in interest and the enjoyment are postponed."). However, because this fee simple could potentially be cut short, the terms of the will created a defeasible fee simple. See, e.g., Bean, 253 S.C. 340, 170 S.E.2d 654; Henderson v. Kinard, 29 S.C. 15, 6 S.E. 853 (1888); Bowman, 35 S.C. Eq. (14 Rich. Eq.) 271.

The terms of the will provide that "if my son Ashley Brunson shall not appear or make his whereabouts known to my Personal Representative, then

Ashley Brunson's share shall be distributed equally to my then surviving issue." Because the fee simple passes to a third party instead of reverting back to the grantor should Brunson not make his whereabouts known to the Personal Representative, the terms of the will created a defeasible fee simple subject to a shifting executory interest. See 28 Am. Jur. 2d Estates §§ 386, 387 (2000); cf. Smith v. Clinkscales, 102 S.C. 227, 244, 85 S.E. 1064, 1066 (1915) (holding the grantor created "a fee [simple] to take effect in place of, or by substitution for, another [fee]" only if a particular contingency occurred).

CONCLUSION

Giving effect to all parts of the will, it is clear the father intended for Brunson to take his share of the estate, if he should appear within ten years, but, if not, that it should go to the other surviving children in fee simple. See Smith, 102 S.C. at 243-44, 85 S.E. at 1066. Therefore, pursuant to the will, Brunson clearly took a defeasible fee. Id. Although Brunson's physical possession of his portion of the estate is held in trust until he makes his whereabouts known to the Personal Representative, his ownership right to that portion of the estate vested upon his father's death. See Bean, 253 S.C. at 345, 170 S.E.2d at 656; Bowman, 35 S.C. Eq. (14 Rich. Eq.) at 278; cf. McDaniel v. Connor, 206 S.C. 96, 102, 33 S.E.2d 75, 77 (1945) (indicating a defeasible fee is a limited form of a fee simple absolute because it may be defeated upon the occurrence of a specified condition).

Therefore, the circuit court correctly granted Scott's motion for summary judgment, allowing execution against the proceeds of Brunson's trust share.

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina,

Respondent,

v.

Robert H. Charron and Jeanne Charron,

Appellants.

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

Opinion No. 3539
Submitted June 3, 2002 – Filed July 29, 2002

AFFIRMED

Robert P. Lusk, of Anderson, for appellants.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General Dean H. Secor, all of

Columbia, for respondent.

HOWARD, J.: Robert and Jeanne Charron (collectively "the Charrons") were each indicted on three separate charges for willful failure to file South Carolina income tax returns. A bench trial was held, and the Charrons were found guilty on each of the charges. We affirm.

FACTS/PROCEDURAL HISTORY

On October 15, 1996, the Charrons were indicted for willful failure to file tax returns in 1992, 1993, and 1994, in violation of South Carolina Code Annotated section 12-54-40.[1] The Charrons moved to quash the indictments. The trial court denied the motion. The Charrons waived their right to a jury trial, and a bench trial was held before the circuit court.

The trial court found the Charrons guilty on all three charges of willful failure to file a tax return, sentencing Mrs. Charron to four months imprisonment on each charge, to run consecutively, and Mr. Charron to one year on each charge, also to run consecutively. This appeal followed.

DISCUSSION

I. Dismissal of the Indictments

The Charrons contend the trial court erred in failing to dismiss the indictments against them because: (1) there is no constitutional authority to levy an income tax in South Carolina, (2) Act Number 201 does not contain an enacting clause, (3) Act Number 201 was enacted in violation of Article III,

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[1] This section was repealed in 1999 and replaced by South Carolina Code Annotated section 12-54-44 (2000).

section 16 of the South Carolina Constitution, and (4) section 12-54-40 was repealed without a savings clause. We disagree.

A. Constitutional Authority

> The supreme legislative power of the State is vested in the General Assembly; the provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution; a statute will, if possible, be construed so as to render it valid.

Moseley v. Welch, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946). Because there is no state or federal constitutional provision prohibiting the South Carolina General Assembly from levying an income tax, we find no merit to the Charrons argument that section 12-54-40 is null and void due to a lack of constitutional authority.

B. Enacting Clause

Section 12-54-40 was created by Act Number 201 of 1985. Act No. 201, 1985 S.C. Acts 1693-99. The Charrons argue that Act Number 201 violates Article III, section 16 of the South Carolina Constitution, which provides: "The style of all laws shall be: 'Be it enacted by the General Assembly of the State of South Carolina.'" S.C. Const. Art. III, § 17.

The Charrons assert that Article III, section 16 requires literal compliance. In support of this proposition they rely on Smith v. Jennings, 67 S.C. 324, 45 S.E. 821 (1903). Jennings, however, does not support the Charrons' position. The court in Jennings expressly stated:

> We hold, while the constitutional provision as to form of enacting clause is mandatory, that a substantial compliance with the mandate will be sufficient. We cannot bring our mind to hold that an

> absolutely literal compliance with the form prescribed is essential to valid legislation.

Id. at 32, 45 S.E. at 824.

It is uncontested that Act Number 201 does not contain the exact language mandated by Article III, section 16. However, Act Number 201 does contain the following language: "It is hereby declared to be the intent of the General Assembly that the following sections shall constitute a part of the permanent laws of the State of South Carolina . . . ." Act No. 201, 1985 S.C. Acts 1633. This language clearly conveys the intent of the General Assembly to enact the laws created by Act Number 201. Therefore, we find this provision substantially complies with the mandates of Article III, section 16.

C. Violation of Article III, Section 17

The Charrons argue Act Number 201 violates Article III, section 17 of the South Carolina Constitution, which provides: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. Art. III, § 17.

"A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution." Westvaco Corp. v. S.C. Dep't of Revenue, 321 S.C. 59, 63, 467 S.E.2d 739, 741 (1995). Article III, section 17 should be liberally construed so as to uphold an act. Id. Article III, section 17 requires "that an act relate to but one subject, with the topics in the body of the act being kindred in nature and having a legitimate and natural association with the subject of the title," and that the title of an act convey "reasonable notice of the subject matter to the legislature and the public." Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 141, 262 S.E.2d 45, 47 (1980).

Act Number 201 is a General Appropriations Act and contains numerous provisions relating to the "ordinary expenses of State Government." Act No. 201, 1985 S.C. Acts 793. The enforcement of the filing of state income tax

returns is reasonably and inherently related to the expenditure of tax money and, therefore, appropriate for inclusion in the General Appropriations Act. See Caldwell v. McMillan, 224 S.C. 150, 159, 77 S.E.2d 798, 802 (1953) ("[T]he title of an Act is not of necessity a full index of the contents and, therefore, need not go into detail of every expenditure provided in the act itself when the general subject of the Act is expressed in the title. The details, names, *methods or instrumentalities* with which the general purpose is to be accomplished, and are germane to the act, may be expressed in the body thereof without violating the provisions of the Constitution that provide every Act [must] relate to one subject which should be expressed in the title." (emphasis added)); Hercules, Inc., 274 S.C. at 142, 262 S.E.2d at 48 (holding a statute passed as part of General Appropriations Act requiring notification to State Tax Commission of any IRS audit as a pre-condition to running of statute of limitations is reasonably and inherently related to collection of tax revenues, and therefore germane to General Appropriations Act, thereby meeting the requirements of Article III, section 17).

D. Savings Clause

The Charrons contend the trial court erred in failing to dismiss the charges against them because section 12-54-40 was repealed without a savings clause.

A criminal defendant may not be convicted under a repealed statute when the repealing act does not contain a savings clause. See State v. Rider, 320 S.C. 533, 534, 466 S.E.2d 367, 368 (1996). However, our supreme court has indicated that a pending prosecution of a defendant may continue when a criminal statute is amended, but not repealed. Pierce v. State, 338 S.C. 139, 147, 526 S.E.2d 222, 226 (2000). Therefore, the crucial question before this Court is whether the Legislature repealed or amended section 12-54-40 by passing sections 12-54-43 and 12-54-44 as part of Act Number 114 of 1999. Act No. 114, 1999 S.C. Acts 1117- 1189-94.

Act Number 114 contained amendments to Chapter 54 of Title 12. Section 12-54-40 was simply renumbered as section 12-54-44. However, the statutory language remained the same, and the penalties were not changed. The

new statutory scheme placed civil penalties in section 12-54-43 and the unmodified criminal penalties in section 12-54-44. Act 114 also contained language repealing section 12-5-40, which occurred upon the signing of the Act into law by the Governor. No savings clause was included within the Act specifically addressing section 12-54-40, but the Act's preamble contained the following description: "An act . . . to amend Article I, Chapter 54, Title 12, relating to the enforcement and collection of taxes, by adding sections 12-54-43 and 12-54-44 so as to describe separately the civil and criminal penalties, respectively, in that connection." Act No. 114, 1999 S.C. Acts 1179.

"The repeal and simultaneous reenactment of substantially the same statutory provision are to be construed, not as an implied repeal of the original statute, but as an affirmance and continuation thereof." S.C. Mental Health Comm'n v. May, 226 S.C. 108, 116, 83 S.E.2d 713, 716 (1954). However, our supreme court has recognized that "where substantial doubt exists as to construction and interpretation of legislative action with respect to enactment and enforcement of tax statutes, the doubt must be resolved against the government." Columbia Ry., Gas & Elec. Co. v. Carter, 127 S.C. 473, 482, 121 S.E. 377, 380 (1924).

> When the Legislature said "[the code sections at issue] are hereby repealed," it meant that these sections were abrogated, destroyed--no longer of force and effect. This is the usual and ordinary meaning of the simple language used. It is entirely to the point and free from all ambiguity. The Legislature had the right to destroy these sections, and it did so. And the minute it did so its agents (the tax commission and treasurer), lost all authority to act under them.
>
> The argument that the Legislature did not intend this result, that it made a mistake, that it was poor policy, assumes a supervisory power in the court that it does not possess. The Legislature said so; therefore it so intended. If it made a mistake, the court cannot correct it.

Id. at 479, 121 S.E. at 380 (citations omitted).

This principle, regarding tax statutes, would be controlling, were it not for the clearly stated intention of the Legislature to the contrary. Sections 12-54-43 and 12-54-44 are unchanged from former section 12-54-40 in wording and enforcement. The preamble to Act 114 clearly states the intended action of renumbering the sections for the purpose of separating the civil and criminal enforcement provisions. Perhaps most convincing, the Legislature enacted section 12-54-30, which reads as follows:

> The repeal or amendment of a code section or act does not release or extinguish any tax, interest, penalty, forfeiture, or liability incurred, unless the repealing section or act expressly so provides. The repealed or amended code section or act must be treated as remaining in force for the purpose of sustaining any proper action *or prosecution* for the enforcement of the tax, interest, penalty, forfeiture, or liability.

S.C. Code Ann. § 12-54-30 (Supp. 2001) (emphasis added). We conclude this language provides the clearest statement by the Legislature that the repeal of section 12-54-40 did not impair prosecution for the enforcement of the criminal liability of the Charrons under section 12-54-40. Indeed, as is plainly stated, section 12-54-40 *remained in force* for the purpose of enforcing the liability.

The Legislature did not decriminalize the offenses or change the substance of the offense. Act 114 simply reenacted section 12-54-40 in two additional, separate sections, which more clearly delineated the differences between civil and criminal penalties. For the above stated reasons, we conclude the Legislature intended for the indictment and pending prosecutions of defendants under the former section 12-54-40 to remain valid after the effective date of Act 114. The convictions of the Charrons under section 12-54-40 are valid. See Pierce, 338 S.C. at 139, 526 S.E.2d at 222.

II. Procedural and Trial Errors

The Charrons argue various procedural and trial errors, as a result of which they contend their convictions should be reversed. These include the assertion that the trial court proceeded to trial without an arraignment, without publishing the indictments, or without obtaining Mrs. Charron's plea on the record. They also argue the trial judge did not inform the Charrons of their rights not to testify, which they argue was prejudicial because the Charrons were not exercising their own judgment, but were clearly controlled by their counsel.

These issues are not preserved for our review because they were not raised in the trial proceedings. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (stating that "[h]aving denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object . . ., Appellant is procedurally barred from raising these issues for the first time on appeal"); State v. Peay, 321 S.C. 405, 413, 468 S.E.2d 669, 674 (Ct. App. 1996) (finding a contemporaneous objection and ruling at trial are required to preserve an error for review); see also State v. Ariail, 311 S.C. 35, 37, 426 S.E.2d 751, 753 (1993) (stating that by proceeding to trial, defendant waived any objection regarding sufficiency of court's inquiry regarding waiver of arraignment).

III. Judicial Prejudice

The Charrons assert the trial judge became "prosecutor and inquisitor" and demonstrated such a degree of bias as to totally destroy any appearance of impartially. Again, this issue is not properly before us because the Charrons did not raise the issue of the trial judge's partiality at any point during the trial. See Butler v. Sea Pines Plantation Co., 282 S.C. 113, 122-23, 317 S.E.2d 464, 470 (Ct. App. 1984) ("Generally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known."). In any event, we find this argument to be without merit.

IV. Constitutionality of Statute

The Charrons contend they were denied due process and equal protection under the law because of an invidious classification of wages within the tax code that exempts certain wages from state income taxes. They also assert the code sections relating to section 12-54-40 are void because they are vague, confusing, and ambiguous. There is no indication that these issues were raised to the trial court; therefore, they are not preserved for our review. See State v. Nichols, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997); State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is

AFFIRMED.[2]

HEARN, C.J., and HUFF, J., concur.

2 Because oral argument would not aid the Court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.