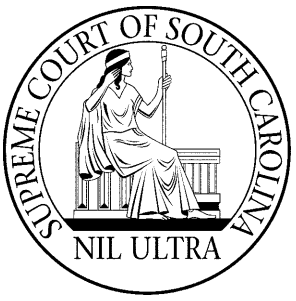

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 50
December 23, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

The State, Petitioner,

v.

Francis Larmand, Respondent.

Appellate Case No. 2013-001143

ORDER

The petition for rehearing is granted on allegations 1 and 4 in the petition, and denied as to all other allegations in the petition. This Court dispenses with any further briefing and substitutes the attached opinion for the opinion previously filed in this matter. Contrary to the position taken by respondent in the petition for rehearing, the remand ordered in the substituted opinion is to a panel of the South Carolina Court of Appeals and not to the Court of Appeals *en banc*.

As to petitioner's motion to revoke bond, this Court declines to rule on this motion. Instead, this motion should be considered by the Court of Appeals once this matter is returned to that Court.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 23, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Francis Larmand, Respondent.

Appellate Case No. 2013-001143

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 27562
Heard February 3, 2015 – Refiled December 23, 2015

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W Elliott and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia, for Petitioner.

C. Rauch Wise, of Greenwood, for Respondent.

CHIEF JUSTICE TOAL: The State appeals the court of appeals' decision in *State v. Larmand*, 402 S.C. 184, 739 S.E.2d 898 (Ct. App. 2013), reversing the trial court's denial of Frank Larmand's (Respondent) motion for a directed verdict on

charges for lynching, conspiracy, and pointing and presenting a firearm. We reverse.

FACTS/PROCEDURAL BACKGROUND[1]

Respondent and his wife (collectively, the Larmands) are residents of Kannapolis, North Carolina. Together, they own a branch of Pop-A-Lock, a national locksmith franchise company providing customers with roadside assistance and locksmith services, and operate their branch in and around the Charlotte metropolitan area. Ryan Lochbaum worked at the Larmands' branch of Pop-A-Lock for several years until his termination in October 2008 for misconduct and providing unauthorized services to customers.

Approximately seven months after Lochbaum's termination, the Larmands became suspicious that he and one of their current employees, Mike Taylor, were conspiring to defraud Pop-A-Lock. Specifically, the Larmands believed that Taylor would occasionally relay a customer's location to Lochbaum, who would then place a removable magnetic sign on his vehicle and masquerade as the Pop-A-Lock locksmith. According to the Larmands, after the customer paid Lochbaum for "Pop-A-Lock's" services, Taylor and Lochbaum would split the money between themselves, and Taylor would inform the Larmands that the customer had left the designated location before he arrived.

To confirm their suspicions, the Larmands set up a "mystery shopper call" for Taylor. During the call, Respondent's brother-in-law, Leo Lemire, posed as a customer needing locksmith services at the Charlotte Knights' former stadium (Knights' Stadium) located in Fort Mill, South Carolina. Respondent and Lemire waited at the stadium in the hope of catching Taylor and Lochbaum.

Ultimately, neither Taylor nor Lochbaum responded to the telephone call. Therefore, around midnight, Respondent and Lemire drove to Lochbaum's house in Rock Hill, South Carolina, to investigate further, and potentially confront Lochbaum.[2] The two men parked at least one-quarter mile away from Lochbaum's

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[1] Because this appeal involves Respondent's motion for a directed verdict, we view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002).

[2] At trial, a police officer and Lochbaum testified that it takes approximately one-and-a-half hours to drive from Respondent's home in Kannapolis to Lochbaum's home in Rock Hill.

house, despite the ample street parking available closer to the house. Further, they parked their vehicle facing the neighborhood's sole entrance and exit.

Meanwhile, Lochbaum and three of his neighbors—Mark Whittington, Devin Fivecoat, and Ron Lee—were socializing outside Lochbaum's house. Respondent, dressed in all-black clothing, approached the group and stood and stared silently, looking "edgy" and "agitated." Eventually, Respondent stated he wanted to speak to Lochbaum, and Lochbaum asked his neighbors to give them some privacy.

Respondent and Lochbaum began arguing loudly and pushing one another. Approximately one minute into the exchange, Respondent broke eye contact with Lochbaum and looked toward the vacant, darkened field abutting Lochbaum's house. Lochbaum then saw Lemire (also wearing all-black clothing) approaching quickly and pointing a handgun at Lochbaum. Lemire said, "This is what you get when you fuck with my family," and pulled the hammer of the gun back.

Lochbaum seized the gun and began to struggle with Lemire. Respondent placed Lochbaum in a chokehold and attempted to pull him away from Lemire. Whittington, Fivecoat, and Lee, who had been watching the exchange from several houses away, ran down the street and jumped into the fray in an effort to separate Lemire, Respondent, and Lochbaum. Lochbaum's next-door neighbor, Jesse Harris, also heard the commotion and ran out to stop the fight.[3] Throughout the scuffle, Lemire screamed at everyone, "F-you, he's f'ing with my family, he's f'ing with my family."

Lochbaum, Whittington, Fivecoat, Lee, and Harris were able to wrestle the gun away from Lemire and pull Respondent away from Lochbaum. Respondent and Lemire quickly left the scene, driving at approximately sixty miles per hour in a thirty-five mile per hour zone without illuminating the vehicle's headlights.

Ultimately, a grand jury indicted Respondent and Lemire for lynching, conspiracy, and pointing and presenting a firearm. At trial, Respondent moved for a directed verdict at the conclusion of the State's case. He argued that the State had failed to provide any testimony that the attack on Lochbaum was premeditated, or that Respondent and Lemire jointly planned the attack. Rather, Respondent

[3] During the struggle, Harris placed his finger between the gun's hammer and the gun to prevent it from being fired. At some point, the hammer of the gun "clicked" on Harris's finger, indicating that the gun would have discharged during the fight had Harris's finger not stopped the hammer.

asserted he was merely speaking with Lochbaum when Lemire appeared, and he only reacted to Lochbaum's "affirmative action" of "jump[ing] on [] Lemire" to grab the gun. The trial court denied Respondent's motion, and the jury later convicted Respondent and Lemire of second-degree lynching, criminal conspiracy, and pointing and presenting a firearm.

The court of appeals reversed the trial court's decision to deny Respondent's motion for a directed verdict. *Larmand*, 402 S.C. at 187, 739 S.E.2d at 900. Specifically, with respect to the lynching and conspiracy charges, the court of appeals found a complete lack of evidence of premeditation or a common plan to assault Lochbaum. *Id.* at 190–94, 739 S.E.2d at 901–03. With respect to the firearm charge, the court of appeals found that the State did not present any evidence of a conspiracy between Respondent and Lemire, and it was undisputed that Respondent never had possession of the gun. *Id.* at 194, 739 S.E.2d at 903–04. Therefore, the court of appeals reversed all three of Respondent's convictions. *Id.* at 194, 739 S.E.2d at 904.[4]

We granted the State's petition for a writ of certiorari to review the court of appeals' decision.

ISSUE

Whether the court of appeals applied the correct standard of review in considering the trial court's denial of Respondent's directed verdict motion?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

ANALYSIS

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing a defendant's motion for a directed verdict, the trial judge is only concerned with the existence of evidence, not with its weight. *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) (citation omitted).

[4] Because the court of appeals found these issues dispositive, it did not reach the remainder of Respondent's arguments on appeal.

On appeal from the denial of a directed verdict, appellate courts must view the evidence and reasonable inferences in the light most favorable to the State. *Id.* If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find that the trial judge properly submitted the case to the jury. *State v. Cherry*, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004); *see also Walker*, 349 S.C. at 53, 562 S.E.2d at 315 ("When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, the trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (citation omitted)).

In pursuing a lynching conviction, the State must produce at least some evidence that two or more persons had a common, premeditated intent to commit a joint act of violence on the person of another. *See* S.C. Code Ann. § 16-3-220 (2003) (defining second-degree lynching as "[a]ny act of violence inflicted by a mob upon the body of another person and from which death does not result") (recodified as amended at S.C. Code Ann. § 16-3-210(C) (Supp. 2014)); S.C. Code Ann. § 16-3-230 (2003) (defining a mob as "the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another") (recodified at S.C. Code Ann. § 16-3-210(A) (Supp. 2014)); *State v. Smith*, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002). The premeditated intent to do violence may be formed either before or during the assemblage, but by definition cannot be spontaneous. *Smith*, 352 S.C. at 137, 572 S.E.2d at 475.

Moreover, "[t]o establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." *State v. Kelsey*, 331 S.C. 50, 63, 502 S.E.2d 63, 70 (1998).[5] Because the crime of conspiracy is the agreement itself, the State need not show any overt acts in furtherance of the common scheme or plan. *State v. Wilson*, 315 S.C. 289, 292, 294, 433 S.E.2d 864, 867, 868 (1993). Nonetheless, substantive crimes committed

[5] *See also* S.C. Code Ann. § 16-17-410 (2003 & Supp. 2014) (defining a criminal conspiracy as "a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means"); *State v. Gunn*, 313 S.C. 124, 134, 437 S.E.2d 75, 80 (1993) (stating that the "gravamen of the offense of conspiracy is the agreement or combination," not merely a common objective between similarly situated people (citations omitted)).

in furtherance of the conspiracy may constitute circumstantial evidence from which a jury could infer the existence of the conspiracy, its object, and scope. *Id.*

At issue here is whether the State presented any evidence demonstrating a premeditated intent on the part of Respondent to assault Lochbaum (for the lynching charge), or that Respondent and Lemire entered into an agreement to perpetrate the assault (for the conspiracy charge).[6] The State contends that the court of appeals applied an improper standard of review in conducting its inquiry. Specifically, the State argues that the court of appeals expressly credited the defense evidence and made credibility determinations, thereby erroneously substituting its own judgment for that of the trial court and the jury. We agree.

While the court of appeals should have considered the evidence in the light most favorable to the State, it instead primarily cited to *Respondent's and Lemire's* testimony, including their explanations for their actions. *See, e.g.*, *Larmand*, 402 S.C. at 191–92, 739 S.E.2d at 902; *id.* at 194, 739 S.E.2d at 903. In doing so, the court of appeals incorrectly minimized the circumstantial evidence the State presented regarding premeditation and an agreement between Respondent and Lemire.

Specifically, the State demonstrated: (1) Respondent and Lemire lived approximately one-and-a-half hours away from Lochbaum's house; (2) Respondent and Lemire arrived at Lochbaum's neighborhood late at night, unannounced; (3) Respondent and Lemire wore all-black clothing; (4) Respondent and Lemire parked their vehicle over one-quarter mile away from Lochbaum's house, facing the sole entrance and exit to the neighborhood, despite ample street parking near Lochbaum's house; (5) Respondent and Lemire approached Lochbaum's house on foot, rather than conducting a "drive by" to look for incriminating evidence of Lochbaum's involvement in the scheme to defraud Pop-A-Lock, such as the magnetic sign on Lochbaum's vehicle; (6) Respondent was "edgy" and "agitated" when he approached Lochbaum's house, and stood and stared silently at Lochbaum and his neighbors; (7) Respondent broke off arguing with and pushing Lochbaum to observe Lemire's approach from the adjoining vacant, darkened lot; (8) Lemire approached Respondent and Lochbaum a mere one minute after Whittington, Fivecoat, and Lee departed, despite parking at least one-quarter mile away; (9) Lemire approached from a vacant, darkened lot rather than from the lit street or sidewalk; (10) upon his approach, Lemire immediately pointed the gun at

[6] We need not address the firearm charge separately, as its validity rises and falls on the existence of a conspiracy under the "hand of one is the hand of all" theory.

Lochbaum and drew the hammer of the gun back; (11) Lemire told Lochbaum, "This is what you get when you fuck with my family," and later during the altercation refused to let go of his gun because Lochbaum was "f'ing with [his] family;" (12) Respondent never confronted Lemire or tried to get him to lower the weapon or return to their vehicle; and (13) Respondent and Lemire drove away together at a high rate of speed without illuminating their vehicle's headlights.

Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was substantial circumstantial evidence from which the jury could infer Respondent's guilt. *Cf. Jackson v. Virginia*, 443 U.S. 307, 317 n.9 (1979) (citing *Holland v. United States*, 348 U.S. 121, 140 (1954) (rejecting the contention that circumstantial evidence must exclude every hypothesis but that of guilt)). Given the deferential standard of review, we find the State presented sufficient circumstantial evidence of premeditation and a common plan or scheme such that the trial judge properly denied Respondent's motion for a directed verdict. Accordingly, the court of appeals erred in reversing Respondent's convictions.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is reversed. However, because the court of appeals did not address the remainder of Respondent's arguments on appeal, we remand the matter to the court of appeals for further action not inconsistent with this opinion.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip D. Grimsley, Sr. and Roger M. Jowers, on Behalf of Themselves and Others Similarly Situated, Respondents,

v.

South Carolina Law Enforcement Division and the State of South Carolina, Defendants,

of whom South Carolina Law Enforcement Division is the Petitioner.

Appellate Case No. 2014-001059

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27598
Heard September 23, 2015 – Filed December 23, 2015

REVERSED

William H. Davidson, II and Kenneth P. Woodington, both of Davidson & Lindemann, P.A., of Columbia, for Petitioner.

A. Camden Lewis and Ariail E. King, both of Lewis, Babcock & Griffin, L.L.P., of Columbia; Richard A. Harpootlian, of Richard A. Harpootlian, P.A., of Columbia; John A. O'Leary, of O'Leary & Associates, P.A., of Columbia; and James Walter Fayssoux, Jr., of Fayssoux Law Firm, P.A., of Greenville, for Respondents.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' opinion in *Grimsley v. South Carolina Law Enforcement Division* (*Grimsley II*), 408 S.C. 38, 757 S.E.2d 542 (Ct. App. 2014), which reversed the trial court's grant of summary judgment in favor of Petitioner South Carolina Law Enforcement Division (SLED). We reverse.

Respondents are former SLED agents who retired and were rehired by then SLED Chief Robert Stewart for a period of four years pursuant to a rehire program formulated by Chief Stewart. At the conclusion of Respondents' service under the rehire program, they filed suit against SLED and the State under various theories, all premised on the allegation that SLED deducted from their salaries the amount of the employer's contribution to the retirement system. The State was granted dismissal of the Complaint pursuant to Rule 12(b)(6), SCRCP.[1] On appeal, taking the allegations of the Complaint as true, we reversed and remanded. *Grimsley v. S.C. Law Enforcement Div.* (*Grimsley I*), 396 S.C. 276, 279, 283–86, 721 S.E.2d 423, 424, 427–28 (2012).

On remand and following discovery, the trial court granted SLED summary judgment, which the court of appeals reversed. Having carefully reviewed the record, we find the trial court properly granted summary judgment to SLED, for the record makes clear that Respondents were rehired at reduced salaries and the employer contributions to the retirement system were not deducted from those salaries, but were paid by SLED. As a result, we reverse the court of appeals and direct that judgment be entered for SLED.

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[1] SLED did not join in the State's motion to dismiss or participate in the appeal that followed. *Grimsley v. S.C. Law Enforcement Div.* (*Grimsley I*), 396 S.C. 276, 280 n.2, 721 S.E.2d 423, 425 n.2 (2012).

I.

This case arises out of a dispute over a hiring program created by SLED involving participants in the Police Officers Retirement System (PORS). We now have the benefit of an extensive record following discovery, and the essential facts are not in dispute. In 2002, the General Assembly eliminated salary caps for so-called working retirees, that is, state employees who retired and then returned to work. This allowed state employees, including members of the PORS like Respondents, to retire, collect full retirement benefits, and then return to their former jobs at salaries that could have been, but were not required to be, the same as their pre-retirement salaries. Shortly after the salary cap was eliminated, Chief Stewart developed the program in question, informally called the Retirement/Rehire program (Program).

Chief Stewart created the Program, in part, because an existing program, the Teacher and Employee Retention Incentive (TERI) program, was not available for members of the PORS. Chief Stewart described the Program as benefiting all involved—SLED, its employees, and the people of South Carolina. SLED benefited because the Program allowed more experienced employees to remain in service after becoming eligible to retire, working alongside agents with less experience. To the extent employees were rehired at reduced salaries, SLED also benefited by saving money, thereby allowing the agency to avoid layoffs while maintaining services. The citizens and taxpayers of South Carolina benefited from SLED's ability to maintain a high level of service at a reduced cost. Finally, Program participants benefited by drawing retirement benefits while still working and earning a salary, albeit a reduced salary.[2]

To participate in the Program, employees had to retire, submit a request to be rehired, and if selected to be rehired, agree to a number of conditions. Chief Stewart cautioned employees considering the Program that they should not participate unless they were ready to immediately and permanently retire. Respondents Phillip Grimsley and Roger Jowers were longtime SLED employees who decided to apply to participate in the Program. Between April and August 2004, Respondents retired, requested to be rehired, and were rehired by SLED.

Respondents clearly understood the Program's conditions, which included a reduction in their salaries and a term of employment not to exceed four years.

[2] This was no minor benefit. For 2005, the first full year that Respondent Phillip Grimsley participated in the Program, his rehire salary and retirement benefits totaled $81,476.04. His annual pre-retirement salary was approximately $55,000.

Respondents signed multiple forms confirming the details of the arrangement were just as SLED had asserted. One of those forms, a re-employment orientation form, stated that Respondents' salaries were being reduced "to cover the amount it will cost SLED to pay the employer portion of retirement." Chief Stewart said that he decided to reduce the salaries of Program participants by the amount of the employer retirement contribution to provide some degree of savings to taxpayers from rehiring retired agents. He also stated that using that percentage established a uniform reduction figure for working retirees' salaries. This uniform approach to determining Program participants' rehire salaries lessened the potential for complaints from the rehired agents and simplified the Program's administration.

After participating in the Program for the agreed-upon four years, Respondents received letters in 2008 thanking them for their service and informing them that their employment would be ending. During their service as rehired agents, Respondents never complained about their salaries or the issue of the employer retirement contribution.

A few months later, in December 2008, Respondents filed suit seeking recovery for alleged statutory and constitutional violations. Respondents' statutory claims were premised on alleged violations of section 9-11-90(4)(b) of the South Carolina Code, which requires employers, such as SLED, to "pay to the [retirement] system the employer contribution for active members prescribed by law with respect to any retired member engaged to perform services for the employer, regardless of whether the retired member is a full-time or part-time employee or a temporary or permanent employee." S.C. Code Ann. § 9-11-90(4)(b) (Supp. 2014).

As noted, the trial court granted the State's motion to dismiss as to all of Respondents' claims. On appeal, we reversed based on the standard of review; accepting as true the allegation that SLED rehired Respondents at their former salaries and then deducted the employer retirement contribution from those salaries, Respondents had pled a viable claim. *Grimsley I*, 396 S.C. at 283–86, 721 S.E.2d at 427–28. After this Court issued its decision in *Grimsley I* and the parties engaged in discovery, the parties filed cross-motions for summary judgment. It is the trial court's ruling on those motions that led to the current appeal.[3]

In their motion, Respondents sought summary judgment on the ground that the Program required Respondents to pay the employer's retirement contribution to the

[3] By the time the trial court ruled on the cross-motions for summary judgment, the State had been dismissed as a party, without objection.

state retirement system, in violation of section 9-11-90, the constitutional prohibition against takings, and constitutional due process requirements. Respondents argued that SLED violated the plain language of section 9-11-90, which requires employers to pay retirement contributions for working retirees in the same manner as non-retired employees, by deducting the employer contribution from their salaries.[4] Respondents' constitutional claims relied in part on this Court's decision in *Grimsley I*, in which we held Respondents had a cognizable property interest in their salaries, unreduced by any amount required to be paid by their employer. *See Grimsley I*, 396 S.C. at 284–85, 721 S.E.2d at 427–28 (concluding that Respondents' Complaint alleged interference with a property interest rooted in state law and was sufficient to maintain a takings claim).

In support of its motion for summary judgment, SLED relied on the facts as revealed in discovery. More to the point, SLED contended it had conclusively established that the required employer retirement contribution was never deducted from Respondents' salaries but was, in fact, always paid by SLED. SLED further noted that Respondents retired unconditionally and agreed to be rehired at a reduced salary, and an employee who retires has no unconditional right to be rehired at all, much less at a particular salary. The trial court agreed, granting SLED's motion for summary judgment and denying Respondents' motion.

On appeal, the court of appeals reversed, finding there was a genuine issue of material fact as to whether SLED rehired Respondents at their pre-retirement salaries and whether SLED deducted the employer contribution to the retirement system from those salaries. This Court granted SLED's petition for a writ of certiorari to review the court of appeals' decision.

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[4] Respondents also claimed that SLED misappropriated funds that were earmarked to pay employees' salaries. *See* S.C. Code Ann § 11-9-10 (2011) ("It shall be unlawful for any monies to be expended for any purpose or activity except that for which it is specifically appropriated . . . ."). Respondents argued that because the General Assembly appropriated funds to SLED that would allow SLED to pay the retired agents' pre-retirement salaries, SLED violated section 11-9-10 by paying Respondents the lower, post-retirement salaries. Respondents misapprehend the budgeting and appropriations process. The total amount appropriated to a state agency for a class of employees' salaries in no manner determines an individual employee's salary. Moreover, as is explained more fully below, the record establishes that SLED paid the employer contribution to the retirement system as required.

II.

SLED argues the court of appeals erred in reversing the trial court's grant of summary judgment in its favor because the undisputed facts establish that Respondents were rehired at new salaries and no employer retirement contribution was deducted from those salaries; therefore, SLED contends, it is entitled to a judgment as a matter of law. We agree.

A.

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court . . . ." *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). "[A] trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 234, 692 S.E.2d at 505 (quoting Rule 56(c), SCRCP). "'In determining whether any triable issue of fact exists, the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party.'" *Id.* at 235, 692 S.E.2d at 505 (emphasis added) (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)).

B.

Following remand from this Court in *Grimsley I*, the parties engaged in discovery which revealed Respondents were rehired with new, reduced salaries and were never responsible for paying the employer retirement contribution. To the contrary, the evidence showed SLED paid the required employer retirement contribution at all times.

On May 20, 2004, Respondent Grimsley sent a letter to Chief Stewart expressing his intention to retire on June 30 of that year and acknowledging that he would have to request to be rehired. That June, Grimsley formally requested to be

rehired, agreeing to a salary "13.6% less than [his] previous base salary." In July, SLED agreed to rehire Grimsley based on Grimsley's written acceptance of a salary equal to his "previous base salary less 13.6%." Respondent Jowers signed forms that, while containing different dates and amounts, were identical in all relevant respects.

Deposition testimony and affidavits from SLED employees confirm that Respondents received exactly what they bargained for. Lynn Hutto, the director of human resources at SLED at the time, testified that Respondents and other Program participants were "rehired . . . at a new salary." Chief Stewart avowed that, although "[Respondents'] new salaries upon rehire were in fact 13.6% lower than their pre-retirement salaries, . . . the employer contribution has never been deducted from their paychecks." He further explained that "there is no such thing as a payroll deduction for the employer contribution to the PORS, because the employer contribution is paid from the amount appropriated to the agency for benefits funding, and not from the amount appropriated and used for employees' salaries." The record fully confirms this assertion. Teresa Kitchens, Director of Human Resources at SLED, stated that each employee's pay stub has a block to show the employee's retirement contribution, but does not have a block to show the employer's retirement contribution "because the employer contribution is never deducted from the gross salary of the employee[]." In fact, Jowers's first pay stub after being rehired showed that no funds were deducted under the "retirement" category, indicating that, at the time, not even an employee retirement contribution was deducted from the salaries of working retirees like Respondents. Finally, Donald Royal, Director of Administration at SLED, confirmed that the employer's retirement contribution "is not included within the salary of the employee, and therefore is not deducted from the salary of the employee." The contribution is "completely separate from, and in addition to, the amount of the employee's salary." Again, the record bears out SLED's contention that it paid the employer's contribution to the retirement system, as the evidence demonstrates that SLED transferred the employer's retirement contribution periodically, out of funds appropriated to pay for employees' fringe benefits, "in an amount equal to the appropriate percentage . . . of the total salary amount actually paid."

C.

Citing an isolated phrase in one of many forms signed by Respondents—"[y]ou will have a reduction of 13.6% in your salary to cover the amount it will cost SLED to pay the employer portion of retirement"—the court of appeals concluded that "a reasonable jury could find SLED agreed to pay each rehired employee the

same salary it paid before retirement, and the percentage reduction represents an illegal requirement that the employee pay the retirement contribution the employer is required to pay under subsection 9-11-90(4)(b)." *Grimsley II*, 408 S.C. at 39–40, 757 S.E.2d at 543. Instead of viewing the entirety of the record, the court of appeals cherry-picked a single sentence from a single form, and did so out of context. The court of appeals elevated what is, at best, a metaphysical doubt into a genuine issue of material fact. *See Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) ("When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)) (internal quotation marks omitted)). When properly viewed in the context of the parties' discussion and agreement about what Respondents' salaries were to be upon returning to employment, the form is consistent with the other evidence showing that Respondents retired unconditionally and were rehired at new salaries.

The trial court therefore correctly found Respondents' claims had no basis in fact as Respondents were unable to produce any evidence that they were rehired at their previous salaries or that the employer retirement contribution was ever deducted from their pay. As the evidence leaves no doubt that SLED paid the employer retirement contribution at all times, Respondents' claims fail.

III.

We reverse the court of appeals and reinstate the trial court's entry of judgment for SLED.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Darryl L. Drayton, Petitioner.

Appellate Case No. 2015-000814

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27599
Submitted December 7, 2015 – Filed December 23, 2015

VACATED IN PART, AFFIRMED IN RESULT

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015). We grant the petition as to Questions I and II, dispense with further briefing, vacate the portion of the Court of Appeals' opinion addressing petitioner's expectation of privacy in his historical cell site location data (HCSLD), and affirm in result. We deny the petition as to Question III.

Petitioner was convicted of murder and sentenced to life without parole. Prior to trial, petitioner moved to suppress evidence of his HCSLD on the ground that the affidavits in support of the search warrants did not establish probable cause. During the hearing on the motion, arguments were presented as to whether petitioner had a privacy interest in the information obtained. The State argued no search occurred, but, regardless, petitioner did not have a privacy interest in the records.

The trial judge denied the motion to suppress, finding, in relevant part, that petitioner did not have a privacy interest in the records. The judge applied the Federal Stored Communications Act (SCA), 18 U.S.C.A. 2703 (2015) by analogy, construed the warrants as court orders, found the orders were supported by "reasonable grounds," and determined probable cause was not required. Based on his ruling, the judge did not address whether the affidavits in support of the search warrants established probable cause.

The Court of Appeals affirmed the denial of the motion to suppress, finding, as a matter of first impression, petitioner did not have an expectation of privacy in the records pursuant to the Fourth Amendment because the SCA does not require probable cause and the federal courts have not found that the SCA implicates the Fourth Amendment.

The Court of Appeals further found, as a matter of first impression, petitioner did not have an expectation of privacy in the records under the South Carolina Constitution because the evidence sought in this case was not obtained via electronic surveillance, but was sought as a business record. The court relied on "federal precedent" to determine petitioner did not have a reasonable expectation of privacy in his HCSLD because he voluntarily contracted with Verizon, thereby conveying his HCSLD to Verizon which created records in the ordinary course of business. The court concluded the trial judge properly construed the warrant as a

court order and applied a "reasonable grounds" test. Because the court's findings regarding privacy were dispositive, the court did not address whether the affidavits in support of the warrants established probable cause.

We find the Court of Appeals erred in reaching the novel issue of whether petitioner had an expectation of privacy in his HCSLD because, in view of the totality of the circumstances, the affidavits in support of the warrants established probable cause for the search. *See* S.C. Code Ann. § 17-13-140 (2014) (stating, in part, a search warrant may be issued to search for and seize property tending to show that a particular person committed a criminal offense); *State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) ("When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances."). Accordingly, we vacate that portion of the Court of Appeals' opinion.

Further, any error in the issuance of the warrants was harmless because petitioner's guilt was conclusively established by other competent evidence at trial, such that no other rational conclusion could have been reached. *See State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984); ("[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result."); *see also State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006) (employing a harmless error analysis in the case of a defective search warrant). Accordingly, we affirm petitioner's conviction and sentence.

VACATED IN PART, AFFIRMED IN RESULT

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