The Supreme Court of South Carolina

O R D E R

Pursuant to S.C. Code Ann. § 22-2-5 (Supp. 2001), the Office of South Carolina Court Administration, in cooperation with the technical college system, is required to select and administer an eligibility examination to test basic skills of persons seeking an initial appointment as magistrate on or after July 1, 2001. No person is eligible to be appointed as magistrate unless he receives a passing score on the eligibility examination, the results of which are valid for six months before and six months after the time the appointment is to be made.

After thoughtful deliberation, the Magistrates Advisory Council, created pursuant to S.C. Code Ann. § 22-1-19 (Supp. 2001), has made certain recommendations to this Court concerning the eligibility examination.

Pursuant to the provisions of Section 4, Article V, South Carolina Constitution,

IT IS ORDERED that the eligibility examination for the initial appointment of magistrates shall consist of the Wonderlic Personnel Test and

the Watson-Glasser Critical Thinking Appraisal Test. In order to successfully complete the eligibility examination and be considered for an initial appointment as a magistrate, an individual must achieve a minimum aggregate point score of 68 on the two tests. All individuals seeking an initial appointment as a magistrate must take the eligibility examination. If an individual does not achieve a passing score on the eligibility examination, that individual may retake the examination whenever available and as many times as necessary to achieve a passing score. The actual score achieved shall be provided to the individual taking the examination, as well as to the members of the senatorial delegation in the county where the individual is seeking initial appointment as a magistrate. Otherwise, the score shall remain confidential unless this Court authorizes the release of confidential information to other persons or agencies.

The Office of South Carolina Court Administration shall provide a list of readily available texts and periodicals, which may be used by applicants preparing for the eligibility examination, to all eligibility examination applicants.

The Office of South Carolina Court Administration, in cooperation with the technical college system, shall designate times and

locations for the administration of the eligibility examination. Those entities shall develop procedures for notification of applicants, distribution of scores, and any other matters necessary for the administration of the eligibility examination. The technical college system may assess a reasonable fee from each participant who takes the examination in order to pay for all associated costs.

The provisions of this Order become effective immediately and remain in effect until amended or revoked by Order of this Court.

s/Jean H. Toal C.J.

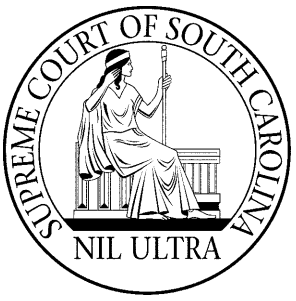
s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
October 9, 2002



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

October 14, 2002

ADVANCE SHEET NO. 34

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

Norma Drew, Petitioner,

v.

Waffle House, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Jasper County
Gerald C. Smoak, Sr., Circuit Court Judge

Opinion No. 25532
Heard May 14, 2002 - Filed October 7, 2002

AFFIRMED IN PART; REVERSED IN PART

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia; and Samuel S. Svalina, of Svalina Law Firm, P.A., of Beaufort, for petitioner.

Weyman T. Johnson, Jr., Nancy E. Rafuse, David E. Gevertz, and R. Lawrence Ashe, Jr., all of Paul, Hastings, Janofsky & Walker, L.L.P., of Atlanta; and E.

Mitchell Griffith, of Griffith, Sadler & Sharp, P.A., of Beaufort, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision[1] reducing petitioner's damages award under the Family and Medical Leave Act (FMLA).[2] We affirm in part and reverse in part.

FACTS

Petitioner Drew was employed by respondent Waffle House, Inc. as a restaurant manager in Hardeeville, South Carolina. In March 1993, she injured herself on the job while trying to secure a wind-blown sign in the restaurant parking lot. As a result, she had shoulder surgery for which she was authorized to take twelve weeks of leave from work. Although her supervisor authorized an extension of her leave, petitioner was fired for absenteeism when she reported back to work.

Petitioner subsequently commenced this action which ultimately resulted in a jury verdict in her favor on her cause of action alleging a violation of the FMLA. By agreement of the parties, damages were submitted to the trial judge for determination. Pursuant to the FMLA, the trial judge awarded petitioner $103,273 in back pay for her pre-trial loss of wages, plus prejudgment interest of $32,756.90. He further awarded petitioner $304,845.69 in "front pay." Finally, the trial judge applied 29 U.S.C. § 2617(a)(1)(A)(iii) which allows for an award of "liquidated damages" for an FMLA violation. He calculated the amount of liquidated damages by adding the amount of back pay, prejudgment interest, and front pay, for a total of $440,875.59 in liquidated damages.

On appeal, Waffle House contested the award of front pay claiming it was highly speculative because it was based on the assumption petitioner would have

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[1] 341 S.C. 461, 534 S.E.2d 282 (Ct. App. 2000).

[2] 29 U.S.C. § 2615 et seq.

worked for Waffle House for another nineteen years until her retirement at age sixty-five. The Court of Appeals agreed and modified the front pay award from $304,845.69 to $84,251.80, based on four years of front pay rather than nineteen.

Waffle House further argued to the Court of Appeals that the front pay award should not have been included in the calculation of liquidated damages. The Court of Appeals agreed and reduced the liquidated damages award from $440,875.59 to $136,029.90.

ISSUES

1. Was front pay properly included in the calculation of liquidated damages?

2. Was the amount of front pay proper?

DISCUSSION

1. Liquidated damages

The FMLA provides specific statutory relief for a violation of its provisions. Under 29 U.S.C. § 2617(a)(1), an employer who violates the Act is liable to the employee:

> (A) for **damages** equal to–
>
> > (i) the amount of –
> >
> > (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
> >
> > (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses...;
> >
> > (ii) the **interest on the amount described in clause (i)**

calculated at the prevailing rate; and

(iii) an additional amount as **liquidated damages** equal to the sum of the amount described in clause (i) and the interest described in clause (ii) ....; and

(B) for such **equitable relief** as may be appropriate, including employment, reinstatement, and promotion.

(emphasis added).

Under this statute, the liquidated damages award is affected by whether front pay is classified as "damages" under clause (a)(1)(A)(i) or "equitable relief" under clause (a)(1)(B) because relief classified as equitable is not included in the calculation of liquidated damages. Citing federal case law, the Court of Appeals ruled front pay was equitable relief and therefore should not be included in the calculation of liquidated damages.

The classification of front pay as legal or equitable relief impacts a substantial right of the plaintiff and therefore federal case law controls. *See* Felder v. Casey, 487 U.S. 131, 151 (1988) (in ruling on federal causes of action, state courts have a constitutional duty to protect all the substantial rights of the parties under controlling federal law); Johnson v. Fankell, 520 U.S. 911 (1997) (where application of state rule will produce a different outcome depending on whether claim is brought in state or federal court, state rule is pre-empted). The Fourth Circuit Court of Appeals has specifically held front pay is equitable relief under § 2617(a)(1)(B) of the FMLA. Nichols v. Ashland Hosp. Corp., 251 F.3d 496 (4th Cir. 2001) *citing* Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998); *accord* Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000).[3]

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[3]Under federal law generally, front pay is considered equitable relief in lieu of reinstatement. *See, e.g.,* Mota v. Univ. of Texas Houston Health Science Ctr., 261 F.3d 512 (5th Cir. 2001) (Title VII); Duke v. Uniroyal, Inc., 928 F.2d 1413 (4th Cir. 1991) (ADEA); *see generally* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (construing the term

Applying federal precedent, we hold front pay is equitable relief under clause (a)(1)(B). Because liquidated damages do not include equitable relief, the Court of Appeals properly excluded front pay from the calculation of liquidated damages.

2. Amount of front pay award

The Court of Appeals held the front pay award for nineteen years was "highly speculative and unsupported by the record." It then held, without explanation, that under its view of the preponderance of the evidence, four years' front pay was "a more appropriate award." Petitioner contends the evidence supports the award because petitioner testified she would have worked at Waffle House until she retired at age sixty-five.[4]

In considering the issue of front pay, federal courts have recognized its speculative character and therefore give wide latitude to the trial court. Duke v. Uniroyal, Inc., 928 F.2d 1413 (4th Cir. 1991); Deloach v. Delchamps, Inc., 897 F.2d 815 (5th Cir. 1990). As stated by the Fourth Circuit Court of Appeals: "The infinite variety of factual circumstances that can be anticipated do not render any remedy of front pay susceptible to legal standards for awarding damages." Duke, 928 F.2d at 1424. Accordingly, where the trial court has used permissible bases for awarding front pay, no abuse of discretion will be found. Duke, *supra*; Deloach, *supra*. The factors that may be considered in awarding front pay include the length of prior employment, the permanency of the position held, the

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"equitable relief" in ERISA statute to mean "those categories of relief that were typically available in equity") *and* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001) (under Title VII, front pay is an award made in lieu of reinstatement and is not an element of compensatory damages).

[4]The trial judge found petitioner would have continued her job but for her unlawful termination. He considered the fact petitioner had an excellent work record at Waffle House and that there was no evidence she could not have continued her job as restaurant manager. Further, she had been working for 3½ years at her present employment with no promotion.

nature of the work, and the age and physical condition of the employee, along with other factors affecting the employer-employee relationship. Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869 (5th Cir. 1991). Evidence of future employment prospects may also be considered. Nichols, *supra.*

Front pay is awarded as a complement or as an alternative to reinstatement. Duke, 928 F.2d at 1424. If reinstatement is shown to be infeasible, for instance because of a hostile atmosphere, front pay may be awarded in lieu thereof or to reimburse the employee until the time of reinstatement. *See generally* Pollard, 532 U.S. at 853-54.

Under the FMLA, an employee is entitled to reinstatement upon return from leave. 29 U.S.C. § 2614(a)(1)(A). Once an employee proves she was denied reinstatement, the employer must prove the employee would have been laid off in any event for some other reason in order to defeat a claim for reinstatement. Smith v. Diffee Ford-Lincoln-Mercury, Inc., ___ F.3d ___ (5th Cir. 2002) (2002 WL 1753175 (5th Cir. filed July 29, 2002); *see also* 29 C.F.R. § 825.216 (a) ("An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."). Similarly, the employer must bear the burden of proving the employee is not entitled to front pay, which is awarded in lieu of reinstatement, if the employee seeks front pay rather than reinstatement.

It is uncontested petitioner was denied reinstatement upon her return from FMLA leave. She claimed front pay based on her entitlement to reinstatement. It was Waffle House's burden to show petitioner would have been terminated for an unrelated reason while on FMLA leave, or that her continued employment would have been limited, in order to defeat or reduce the claim for front pay; in the alternative, Waffle House could have asserted the feasibility of reinstatement in lieu of a front pay award. Waffle House failed to carry its burden on this issue. We defer to the trial judge's judgment and affirm the award of front pay. The Court of Appeals's decision vacating the award is reversed.

AFFIRMED IN PART; REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Richard C. Bell, Respondent.

Opinion No. 25533
Submitted September 9, 2002 - Filed October 14, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Richard C. Bell, of San Antonio, Texas, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction ranging from a public reprimand to a definite suspension. We accept the agreement and issue a two-year definite suspension, but decline to run the two year suspension concurrent with the nine month suspension imposed on respondent in 1998.[1] The facts as admitted in the agreement are as follows.

[1] In re Bell, 332 S.C. 6, 503 S.E.2d 731 (1998).

Facts

This is the third occasion in which the Court has sanctioned respondent. In addition to the nine month suspension imposed in 1998, this Court has publicly reprimanded respondent. In re Bell, 289 S.C. 290, 345 S.E.2d 475 (1986).

Judge Thomas Foster Matter

Respondent was an officer of A Loving Choice Adoption Agency, Inc. (Loving Choice). Loving Choice was pursuing an adoption case before Judge Foster on December 29, 1998. As required by law, Loving Choice was required to submit an accounting of all expenses paid during the adoption. Loving Choice submitted an accounting, and it was discovered that a check in the amount of $500 had been paid to respondent as an attorney.

Judge Thomas was aware that the Court suspended respondent from the practice of law on July 20, 1998, and informed the Commission on Lawyer Conduct that respondent had accepted $500 while being suspended from the practice of law. The Commission sent respondent a copy of Judge Foster's complaint, and inquired as to whether respondent had received money for practicing law during his suspension. The Commission requested that respondent provide written documentation related to the $500 payment.

Respondent explained that he received the $500 payment prior to his suspension but that he could not locate any documentation supporting his claim. Because respondent could not produce documentation supporting his claim, the Commission concluded that respondent had violated Rule 417, SCACR. Specifically, respondent failed to keep copies of accountings to clients or third persons; failed to keep copies of bills for legal fees and expenses rendered to clients; and failed to keep copies of records showing disbursements on behalf of clients.

Samuel Crews and Lyn Howell Hensel Matter

Samuel Crews represented a couple seeking an adoptive family for their child. Crews' clients chose an adopting family who were represented by Lyn Howell Hensel. Hensel's clients paid Crews' clients' expenses during the pregnancy; however, Crews' clients decided that they did not want Hensel's clients adopting their child.

Crews' clients selected another adopting family through Loving Choice. Respondent represented to Crews that he was Loving Choice's attorney. As a result, Crews repeatedly requested that respondent identify the new adoptive family, identify the new adoptive family's attorney, and inform him of the location of the eventual adoption hearing. Mr. Crews also repeatedly requested that respondent reimburse him for the attorney's fee expended by Crews, as well as the expenses paid by Hensel's clients.

Respondent never reimbursed Crews' attorney's fee, nor did respondent pay the expenses incurred by Hensel's clients.

Client Matter

Clients entered into an agreement with Loving Choice to assist them with the adoption of a child, and retained respondent to represent them. Prior to representing clients, respondent informed clients that he was married to the director of Loving Choice and that he was Loving Choice's attorney. Respondent further informed clients that a conflict of interest may arise, and if a conflict of interest did arise, he would withdraw from representing clients and Loving Choice in the matter.

Clients paid Loving Choice $6,000. Loving Choice located a birth mother for clients; however, when the baby was born, the birth mother elected not to proceed with the adoption. Loving Choice refunded $1,843.87 to clients.

Loving Choice then located another birth mother for clients. An employee of Loving Choice or respondent informed clients that the child would be born on June 6, 1997. In May 1997, respondent informed clients

that the baby would be born in September 1997 or November 1997. In June 1997, respondent informed clients that the baby would be born on September 13, 1997.

Sometime in October or November of 1996, clients requested the birth mother's medical records from Loving Choice. On March 12, 1997, clients contacted respondent, and he informed them that the birth mother had been examined by a doctor in Clark's Hill. This information was false.

In June 1997, clients received a copy of birth mother's medical records. The medical records evidenced that the birth mother had a greater number of prior pregnancies than represented by Loving Choice. The medical records also suggested contradictory due dates for the birth of the baby. The medical records contained a document showing that the birth mother tested positive for pregnancy on January 15, 1997, that she was nineteen and one-half weeks pregnant, and that her delivery date was June 17, 1997. This document was a forgery. The birth mother was not pregnant on January 15, 1997, and no pregnancy test had been performed.

Respondent acknowledged the discrepancies in the medical records, offered regret, and concluded, "[t]he fact seems to be that the [birth mother] is pregnant [and] will deliver a healthy baby in September." Respondent then informed clients that if they wanted to follow through with the adoption, they would be required to remit $4,915.75 to bring their account current and remit another payment of $6,329 by July 13, 1997. Clients responded by informing respondent that they did not want to adopt the baby, but asked respondent to locate another birth mother. Clients also requested that respondent refund the money they paid, $12,015. Loving Choice refunded $12,000 to clients.

Clients also requested that respondent provide them with an expense statement and a copy of the bills showing how their money was spent during the failed adoption. Respondent never provided clients with this information.

Respondent failed to disclose the pitfalls associated with the representation of multiple clients. Respondent also failed to disclose actual

or potential conflicts of interest to clients, and he failed to explain whose interests he represented. Moreover, when a conflict of interest arose between clients and Loving Choice, respondent failed to explain the conflict of interest to clients, and he did not withdraw from representation as he indicated that he would. Furthermore, respondent did not disclose to clients the advantages and risks involved in an adoption proceeding.

Law

As a result of his conduct, respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent); Rule 1.7 (a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client); and Rule 8.4(d) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent has also violated Rule 7(a)(5) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR; by engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute.

Finally, respondent admits that he violated the financial record keeping requirements found in Rule 417, SCACR.

Conclusion

We find that respondent's misconduct warrants a two-year suspension. We therefore accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for two years. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of F. Mikell Harper, Respondent.

Opinion No. 25534
Submitted August 26, 2002 - Filed October 14, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Assistant Deputy Attorney General Tracey C. Green, both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent conditionally admits misconduct and consents to a definite suspension from the practice of law for a period of up to nine months.[1] We accept the agreement and suspend respondent for nine months.[2] The facts as admitted in the agreement are as follows.

[1] In 1997, this Court suspended respondent for 60 days for engaging in business dealings with a client. In the Matter of Harper, 326 S.C. 186, 484 S.E.2d 376 (1997).

[2] Respondent is 62 years old and formerly practiced in Beaufort. Due to health problems, respondent has ceased the practice of law and has resided in Georgia since April 2001.

Facts

Respondent was retained by Client, a personal acquaintance, to represent Client in various matters from January 1993 through September 1994. Client had previously recovered a sum of money in a divorce proceeding and, after consulting respondent, invested the funds in Waterhouse II, L.P (Waterhouse), a company in which respondent owned a substantial interest. Waterhouse owned property in Beaufort County, South Carolina and planned to construct and operate an assisted living complex for elderly people.

Client invested $69,500 in Waterhouse through loans evidenced by four promissory notes. The first note was in the amount of $49,500 and executed by Atlantis Title Agency (Atlantis Title), which was the general partner of Waterhouse and solely owned by respondent. The note was secured by 11% of the shares of stock in Waterhouse. A second note in the amount of $25,000 was also executed by Atlantis Title and secured by 7% of the shares of stock in Waterhouse.

A third note in the amount of $15,000 and secured by 2 ½ % of the shares of stock in Waterhouse was executed by another acquaintance of respondent (Acquaintance) and prepared by respondent. The fourth note, also prepared by respondent, was in the amount of $5000 and unsecured. None of these notes were paid on maturity or thereafter by respondent or Acquaintance.

Throughout all periods relevant to this agreement, respondent, Atlantis Title, and Acquaintance owned interests in Waterhouse, and respondent was the sole owner of Atlantis Title.

After respondent began representing Client, respondent became aware that Acquaintance was having significant financial difficulties, was involved in a divorce, and had filed for bankruptcy protection. However, respondent failed to advise Client of Acquaintance's financial difficulties. Respondent was also aware that Atlantis Title would be unable to honor Client's notes upon maturity, but failed to notify Client. Respondent did not

advise Client how to seek legal recourse against Acquaintance and Atlantis Title, and did not inform Client that Client might have had certain remedies of recision relating to the issuance of stock in Waterhouse. Respondent also failed to advise Client that she might have been able to seek additional security for payment of the notes. Further, respondent failed to advise Client of possible conflicts of interest and that she should seek independent legal advice concerning her investments in Waterhouse.

As a result of the default on the notes, Client initiated legal proceedings. Respondent consented to an order of judgment against him to expedite recovery by the Client from respondent's insurance carrier. As a result, Client has partially recovered her claimed losses under a confidential settlement agreement with the insurance carrier.

Law

Respondent admits that his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation); Rule 1.2 (failing to abide by a client's decisions concerning the objectives of representation, and failing to consult with the client as to the means by which they are to be pursued); Rule 1.3 (failing to act with reasonable diligence and promptness while representing a client); Rule 1.4 (failure to keep a client reasonably informed about the status of a matter and failing to promptly comply with requests for information); Rule 1.7 (a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests); Rule 1.8 (a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless the terms of the transaction are in writing and fair and reasonable to the client and the client is given an opportunity to seek advice from independent counsel); Rule 2.1 (failing to exercise independent professional judgment and render candid advice to client); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Conclusion

We find that respondent's misconduct warrants a definite suspension. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Johnny Harold Harris,
a/k/a Johnny Harold
Miller, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 25535
Heard June 11, 2002 - Filed October 14, 2002

AFFIRMED

Jack B. Swerling, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, State Grand Jury

Chief Robert E. Bogan, and Assistant Attorney General
Tracey Colton Green, all of Columbia, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Miller, 342 S.C. 191, 535 S.E.2d 652 (Ct. App. 2000).[1] We affirm in result.

FACTS

This case arose out of a single State Grand Jury (SGJ) prosecution involving numerous co-defendants. Essentially, the state's case involved a conspiracy to traffic cocaine in the upstate between 1990-1996. Each time police made an arrest, they would seek cooperation from the arrestee and arrange controlled buys from other members of the conspiracy. The state alleged that Jose Castineira was the head supplier, who supplied large amounts of cocaine to O'Bryant (O.B.) Harris who in turn supplied to other distributors, including petitioner Miller,[2] and a distributor named Todd Brank. Brank sold to Timothy Hammitt. Ultimately, the SGJ indicted twenty-six defendants, eighteen of whom pled guilty; the remaining eight, including Timothy Hammitt, Jose Castineira and Miller, were tried together in April-May 1997. Miller was convicted of conspiracy to traffic in 400 grams of cocaine and sentenced to twenty-five years imprisonment.

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[1] We simultaneously granted certiorari to review the related cases of State v. Hammitt, 341 S.C. 638, 535 S.E.2d 459 (Ct. App. 2000) and State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000). Our opinions in those cases are filed separately.

[2] Miller's legal name is Johnny Harold Miller. His mother married Jerome Harris subsequent to his birth, which is why Miller is also known as Johnny Harris.

ISSUES

1. Was Miller properly sentenced for trafficking pursuant to S.C. Code Ann. § 44-53-370 (e)(2)(e)(2002)?

2. Was Miller's conspiracy conviction prohibited by virtue of his 1991 plea to conspiracy under a federal indictment?

3. Did the court err in denying Miller's motion for a severance?

4. Did the court err in denying Miller's motion for a directed verdict?

1. MAXIMUM SENTENCE FOR CONSPIRACY

Pursuant to S.C. Code Ann. § 44-53-370 (e)(2)(e)(2002),

(e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, **or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State**, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:

(2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), **is guilty of a felony which is known as "trafficking in cocaine"** and, upon conviction, must be punished as follows if the quantity involved is:

(e) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars. . . .

(Emphasis supplied). The statute goes on to state that, **"[n]otwithstanding Section 44-53-420**, **a person convicted of conspiracy pursuant to this subsection must be sentenced as provided in this section with a full sentence or punishment and not one-half of the sentence** or punishment prescribed for the offense." (Emphasis supplied).

Petitioner cites S.C. Code Ann. § 44-53-420 (2002), contending his punishment should not have exceeded one-half of that for trafficking in excess of 400 grams of cocaine (i.e., one-half of thirty years). Section 44-53-420 provides:

> Any person who attempts or conspires to commit any offense made unlawful by the provisions of this article shall, upon conviction, be fined or imprisoned in the same manner as for the offense planned or attempted; but such fine or imprisonment shall not exceed one half of the punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The Court of Appeals held in Castineira, supra, that section 44-53-420 did not apply; it found the language of section 44-53-370(e), under which the defendant was indicted, incorporates conspiracy within the substantive offense. 341 S.C. at 625-26, 535 S.E.2d at 452-53. We agree. Clearly, the plain and unambiguous language of section 44-53-370(e) reflects a legislative intent that those guilty of conspiring to traffic drugs thereunder are subject to the full sentence for the offense, rather than the one-half sentence provided in section 44-53-420.

Recently, in Harris v. State, Op. No. 25437 (filed April 8, 2002) (Shearouse Adv. Sh. No. 10 at 29, 31), this Court noted that "as defined in [section 44-53-370(e)(2)], there is no distinction between conspiracy to traffick and the substantive offense of trafficking. . . . The legislature clearly intended that conspiracy to traffic be treated as trafficking under § 44-53-370(e)."

Petitioner asserts there is a difference between "trafficking by conspiracy" and a "conspiracy to traffic." Essentially, he claims one may be guilty of the substantive offense of "trafficking by conspiracy" only if that person conspires to sell, manufacture, deliver or bring into the state more than 10 grams of cocaine. Any other conspiracy to violate the trafficking statute, he contends, is "conspiracy

to traffic" which is exempted by section 44-53-420.[3] This contention is untenable. Contrary to petitioner's contention, the Harris court specifically found that the legislature intended conspiracy to traffic be treated as trafficking. Petitioner's attempt to circumvent this result with a distinction between a substantive offense of "trafficking by conspiracy" and "conspiracy to traffic" is unavailing.[4] Accordingly, Miller's twenty-five year sentence is affirmed.

2. MILLER'S FEDERAL CONSPIRACY ARREST

On May 16, 1991, Miller was arrested by federal authorities in conjunction with a cocaine transaction which occurred between May 7, 1991 and May 16, 1991. A three-count indictment was issued charging Miller and one James Nesbitt with conspiracy to distribute two kilos of cocaine, distribution of two kilos of cocaine, and possession with intent to distribute eight ounces of cocaine. No other conspirators were named in the federal indictment; the indictment did state, however, that Miller and Nesbitt conspired "with various other persons both known and unknown." Miller agreed to plead guilty to one count upon the government's agreement to move to dismiss the other two counts.[5] Accordingly, on September 6, 1991, Miller pled guilty to conspiracy to possess with intent to distribute cocaine. However, he remained out of jail for nearly two years (until May 1993), when he was sentenced to sixty months in prison by a federal judge.

In August 1993, the SGJ began an undercover investigation (dubbed

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[3] In State v. Raffaldt, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995), we recognized that trafficking under 44-53-370(e)(2) may be accomplished by a variety of acts, including such acts as providing financial assistance or knowingly having actual or constructive possession of cocaine.

[4] Moreover, a majority of this Court rejected the analysis of Justice Finney's dissent in State v. Wilson, 315 S.C. 289, 296, 433 S.E.2d 864, 869-70 (1993), drawing a distinction between the offenses of "conspiracy to traffic" and "trafficking by conspiracy."

[5] Miller was also pled guilty to conspiracy to possess marijuana with intent to distribute, and given a concurrent sixty month sentence on the same day.

Operation Cue Ball) by making undercover drug buys from an individual named Michael Greer. Greer gave police information which led to the arrest of James Smith a/k/a Smitty, who in turn implicated James Hattaway, who then implicated Todd Brank, who set up controlled buys from Jerome "Babe" Harris, who is Miller's half-brother. Brank, who implicated Miller, testified that Miller had been his cocaine supplier until Miller went to prison in May 1993. Miller admitted his participation but maintained that his involvement in the conspiracy had ended with his federal arrest. Contrary to Miller's testimony, however, O.B. Harris testified he continued to supply Miller with cocaine from the time of his 1991 arrest until his 1993 incarceration, and had even had continued drug dealings with Miller while Miller was in jail. Brank testified he had purchased approximately 3 kilos of cocaine from Miller between 1991-1993.

Miller was indicted by the SGJ on October 8, 1996, for conspiring to traffic 400 grams of cocaine between 1991-1996. He moved to dismiss the SGJ indictment on the ground that there had been but one conspiracy, to which he had already pled guilty in conjunction with his 1991 federal drug arrest, such that the state prosecution was prohibited by S.C. Code Ann. § 44-53-410 (2002) and the Double Jeopardy clauses.[6] The trial court ruled Miller's involvement in the conspiracy ended on the date of his arrest on May 16, 1991, and instructed the jury that in order to convict Miller, it would have to find he conspired after that date. The Court of Appeals agreed finding, as a matter of law, that Miller's involvement in the conspiracy ended with his arrest and conviction. 342 S.C. at 199, 535 S.E.2d at 656.[7] Accordingly, it found his continued participation thereafter constituted a new act for which he could be prosecuted. We agree.

S.C. Code Ann. § 44-53-410 (2002) states, "If a violation of this article is a violation of a Federal law or the law of another state, the conviction or

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[6] U.S. CONST. amend. V; S.C. CONST. art. I, § 12.

[7] The Court of Appeals erroneously held that the trial court ruled Miller's involvement ended with his arrest **and conviction**. The trial court held only that Miller's participation terminated with his May 16, 1991 **arrest** and so instructed the jury.

acquittal under Federal law or the law of another state **for the same act** is a bar to prosecution in this State." (Emphasis supplied). Accordingly, the issue before us is whether Miller's arrest effectually ended his participation in the initial conspiracy, such that his "re-entry" or continued participation thereafter constitutes a separate act, or a new "agreement" for which he was properly prosecuted.[8] Under several authorities, we find that it is.

In United States v. Asher, 96 F.3d 270 (7th Cir.1996), cert. denied, 519 U.S. 1100 (1997), the Seventh Circuit held a conspirator's re-entry into the same conspiracy for which he was previously convicted can lead to a second prosecution for conspiracy without violating the Double Jeopardy Clause. 96 F.3d at 273-74. Asher pled guilty to an automobile theft conspiracy. He served a term of imprisonment and upon release immediately became involved in the same conspiracy. He was again charged with conspiracy and raised a double jeopardy claim. The Seventh Circuit upheld the second prosecution finding Asher entered into a new agreement to commit a crime when he decided to rejoin the stolen vehicle ring following his release from prison. The court noted "[u]doubtedly, Congress could have chose to punish rejoining a conspiracy in addition to punishing the original conspiracy without running afoul of the Double Jeopardy Clause." Id. at 274.

Similarly, in United States v. Dunn, 775 F.2d 604 (5th Cir.1985), the defendant was separately indicted for two conspiracies to manufacture amphetamines, one conspiracy running from early 1979-April 1983 (the San Antonio indictment), and the other between July 23, 1980-November 1980, the date of Dunn's arrest (the Austin indictment). The San Antonio indictment was specifically amended to limit Dunn's participation in the conspiracy to dates after his November 1980 arrest. Dunn was convicted of the San Antonio conspiracy and maintained he was convicted twice for his uninterrupted activities in a

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[8] Miller does not contest that he participated in a conspiracy after his arrest, specifically conceding that he "continued to actively participate from the date of his federal arrest on May 16, 1991, through the time he pled guilty to the federal charges . . . on September 6, 1991, and continuing until his incarceration on May 28, 1993.

continuing criminal conspiracy when there was no evidence of a second agreement. See Dunn, 775 F.2d at 606. The Dunn court stated, "it is well settled that a person's participation in a conspiracy ends when that person is arrested for his role in the conspiracy." Id. at 607, citing United States v. Postal, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979).

The Dunn court went on to note that "further [participation in an] 'old' conspiracy after being charged with that crime becomes a new offense **for purposes of a double jeopardy claim.**" Id., citing United States v. Stricklin, 591 F.2d 1112, 1121 n. 2 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979) (emphasis supplied). See also United States v. Lopez, 153 F.3d 723 (4th Cir.), cert' denied 525 U.S. 975 (1998)(defendant indicted for a second conspiracy for his post-arrest activities while out on bond; court adopted reasoning of Asher and Dunn to find defendant's involvement in first conspiracy ended with arrest and conviction such that they could be subjected to prosecution for any further involvement in the on-going conspiracy); United States v. Romero, 967 F.2d 63, 68 (2d Cir.1992)(defendant not subjected to double jeopardy when tried for conspiracy to violate federal narcotics statutes and engaging in a continuing criminal enterprise, even though he had previously pled guilty to conspiracy to violate RICO in connection with drug dealing and the new charges dealt with the period after his guilty plea); United States v. Sharpe, 193 F.3d 852 (5th Cir. 1999), cert. denied, 528 U.S. 1173 (2000) (person's participation in conspiracy ends when that person is arrested for his role in the conspiracy); United States v. Goff, 847 F.2d 149 (5th Cir.), cert. denied, 488 U.S. 932 (1988)(arrest of several members of conspiracy does not necessarily terminate conspiracy, although arrested member's participation in conspiracy ends at time of arrest); People v. Wilson, 563 N.W.2d 44 (Mich. 1997) (defendants' role in conspiracy ended with their arrest notwithstanding underlying conspiracy may have been on-going).

We adopt the reasoning of the above authorities. We hold that the re-entry into a continuing conspiracy subsequent to the defendant's arrest is, for purposes of double jeopardy, the formation of a new agreement. Accordingly, we find Miller's participation, subsequent to his May 1991, arrest constituted a new offense for which he could be prosecuted. Dunn, supra.

3. SEVERANCE/PRIOR BAD ACTS

Miller next asserts the trial court erred in refusing to sever his trial from that of his codefendants; he claims prejudicial error in admission of evidence of his "prior bad acts" in the conspiracy, which occurred prior to May 16, 1991 (the date of his federal arrest). He contends this evidence was prejudicial and reversible.

Initially, as noted by the Court of Appeals, although Miller requested a severance and claimed this evidence would be prejudicial, he did not request a severance based upon the issue which he now raises, i.e., that lack of a severance would result in admission of improper prior bad act evidence under Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).[9] Accordingly, this issue is not preserved. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (party may not argue one ground at trial and then an alternative ground on appeal). In any event, Miller has not demonstrated prejudice from the lack of a severance.

A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown. Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) cert. denied 520 U.S. 1200 (1997). Recently, this Court noted that "a severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. . . . An appellate court should not reverse a conviction

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[9] Miller did object to the admissibility of his statement to police on grounds that it contained evidence of activities for which he had already been punished. Moreover, evidence of the prior conviction was admissible under Rule 609(a)(1)(evidence that accused has been convicted of a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused).

achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. " Hughes v. State, 346 S.C. 554, 558-59, 552 S.E.2d 315, 317 (2001).

Here, the trial court explicitly instructed the jury that Miller could only be convicted of conspiracy if it found he conspired to traffic in cocaine after May 16, 1991. Further, Miller's defense at trial was that he had, in fact, participated in the conspiracy up until his federal arrest, but that he had ceased participating thereafter. Since Miller's sole defense was that his participation in the conspiracy ended in May 1991, introduction of his prior drug conviction was inextricably linked with his defense, such that it would necessarily have been admitted in a separate trial. Hughes, supra. Accordingly, Miller was not prejudiced by admission of this evidence, nor is there any reasonable probability he would have obtained a more favorable result at a separate trial.

4. DIRECTED VERDICT

Finally, Miller asserts he was entitled to a directed verdict as there was insufficient evidence of a separate conspiracy subsequent to his federal arrest. We disagree.

In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001).

Miller concedes the state presented evidence of his participation in the conspiracy subsequent to his federal arrest. Accordingly, given our holding in Issue 1 that his participation in the initial conspiracy ended with his federal arrest, we find the issue of his re-entry or subsequent participation in the conspiracy was properly submitted to the jury. The Court of Appeals properly upheld the denial of Miller's motion for a directed verdict.

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority that there is no distinction for sentencing purposes between "trafficking by conspiracy" and "conspiracy to traffic." I do not agree, however, that we should adopt the Fifth Circuit's rule[1] that an arrest ends the arrestee's role in a conspiracy as a matter of law. See, e.g. United States v. Dunn, 775 F. 2d 604 (5th Cir. 1985). I would hold that petitioner may be prosecuted in state court for his role in this conspiracy only if the jury finds that he withdrew and then rejoined it. I would therefore reverse petitioner's conviction and remand for a new trial.

The gravamen of a conspiracy is the agreement. E.g., State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993). An individual who joins the conspiracy remains a party to it until he withdraws or until the conspiracy terminates. A withdrawal is effective only when it is communicated to the other members of the conspiracy. State v. Woods, 189 S.C. 281, 1 S.E.2d 198 (1939); see also State v. Gunn, 313 S.C. 124, 437 S.E.2d 175 (1993). "It is always a question for the jury to determine by the facts and circumstances in the case if a person has retired from the unlawful and illegal conspiracy . . . . ." State v. Rook, 174 S.C. 225, 235, 177 S.E. 143, 147 (1934).

In my view, petitioner's state prosecution for his role in the drug

[1] The majority cites several cases from other jurisdictions that it contends adopt this same rule. In my opinion, however, none of these other cases stand squarely for this proposition. For example, the unpublished decision of the Fourth Circuit in United States v. Lopez, 1998 WL 776788 (4th Cir. 1998), holds that "The Defendants' involvement in the conspiracy . . . ended with their arrest **and conviction**." Id. (emphasis supplied). While the Michigan decision does rely on Fifth Circuit precedent in "noting" the defendants' part in the conspiracy ended when they were arrested, the issue in that case was whether the government could invoke an exception to the Double Jeopardy bar which allows the state to prosecute a greater crime following a conviction for a lesser included offense where the state learned of additional facts after the first conviction. People v. Wilson, 454 Mich. 421, 563 N.W.2d 44 (1997) (holding government had not met its burden allowing it to invoke the Brown v. Ohio, 432 U.S. 161 (1977) exception).

conspiracy is barred by S.C. Code Ann. §44-53-410 (Supp. 2000)[2] unless the state can prove, beyond a reasonable doubt, that petitioner withdrew and then reentered (by making a new agreement) the continuing conspiracy. This evidentiary requirement is consistent with that imposed in successive conspiracy prosecutions by both the Second and the Seventh Circuits. See, e.g. United States v. Romero, 967 F.2d 63, 67 (2d Cir. 1992)(Double Jeopardy no bar to a second conspiracy prosecution if the government can "demonstrate that **every element** of [the second] conspiracy offense happened after the date of the plea [to the first conspiracy indictment]")(emphasis supplied); United States v. Asher, 96 F.3d 270, 272 (7th Cir. 1996) (Double Jeopardy no bar to second conspiracy prosecution if government can show defendant withdrew after his first arrest, conviction, and incarceration, and "that after his release from prison, [he] reentered the conspiratorial agreement thereby committing a new offense").

There is some appeal to the hard and fast rule adopted by the majority that an arrest terminates participation in a conspiracy as a matter of law. As explained above, however, such a rule does not comport with our conspiracy jurisprudence. I would therefore reverse the decision of the Court of Appeals, and remand this matter for a new trial.

[2] Petitioner has no valid Double Jeopardy claim since he is being prosecuted by the state following a federal conviction. Abbate v. United States, 359 U.S. 187 (1959).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Jose Gustavo Castineira, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 25536
Heard June 11, 2002 - Filed October 14, 2002

AFFIRMED

James M. Griffin, of Simmons and Griffin, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, State Grand Jury Chief Robert E. Bogan, and Assistant Attorney General

Tracey Colton Green, all of Columbia, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000). For the reasons set forth in Issue 1 of our decision in the companion case of State v. Miller, Op. No. 25535 (filed October 14, 2002) (Shearouse Adv. Sh. No. 34 at 32), the Court of Appeals' opinion is affirmed.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Timothy James Hammitt, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 25537
Heard June 11, 2002 - Filed October 14, 2002

AFFIRMED

James M. Griffin, of Simmons and Griffin, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, State Grand Jury Chief Robert E. Bogan, and Assistant Attorney General

Tracey Colton Green, all of Columbia, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Hammitt, 341 S.C. 638, 535 S.E.2d 459 (Ct. App. 2000). For the reasons set forth in Issue 1 of our decision in the companion case of State v. Miller, Op. No. 25535 (filed October 14, 2002) (Shearouse Adv. Sh. No. 34 at 32), the Court of Appeals' opinion is affirmed.

AFFIRMED.

TOAL, MOORE, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Sally Caulder Parker and
Timothy Kirby, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 25538
Heard May 15, 2002 - Filed October 14, 2002

AFFIRMED IN RESULT

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Jay E. Hodge, Jr., of Darlington, for petitioner.

Katherine Carruth Link, of Columbia; and the South Carolina Office of Appellate Defense, of Columbia, for respondents.

JUSTICE MOORE: We granted certiorari to review the Court of Appeals' decision that grand larceny is not a lesser-included offense of armed robbery. We affirm in result.

FACTS

Respondents were indicted for armed robbery for perpetrating a sham armed robbery of a convenience store where respondent Sally Parker worked. At the close of the State's case at trial, respondents moved for a directed verdict on the armed robbery charge. The trial court granted the motion on the armed robbery charge, but stated he would charge the jury on the lesser-included offense of grand larceny. No objection was made. The jury found respondents guilty of grand larceny.[1]

The Court of Appeals, in a two to one decision, vacated respondents' convictions, finding grand larceny was not a lesser-included offense of armed robbery. The majority found the 1993 amendments to S.C. Code Ann. § 16-13-30 (Supp. 2001) converted grand larceny from a common law offense to a statutory offense.[2] The majority further held the amendment made the

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[1]Respondent Timothy Kirby was also convicted of contributing to the delinquency of a minor. That conviction was not challenged on appeal.

[2]S.C. Code Ann. § 16-13-30(B) (Supp. 2001), as amended, provides:

> Larceny of goods, chattels, instruments, or other personalty valued in excess of one thousand dollars is grand larceny. Upon conviction, the person is guilty of a felony and must be fined in the discretion of the court or imprisoned not more than:

requirement that the goods taken be valued in excess of one thousand dollars an element of grand larceny. State v. Parker, 344 S.C. 250, 543 S.E.2d 255 (Ct. App. 2001).

The dissent felt the Court of Appeals should not be passing upon this issue because this Court had already held that grand larceny is a lesser-included offense of armed robbery, a ruling which the dissent felt was binding on the Court of Appeals. He further stated that §16-13-30 was primarily a sentencing statute, and the statute did not abrogate the common law crime of grand larceny. The dissent concluded because the larceny statute did not replace the state's continued use of the common law, this Court's precedent bound the Court of Appeals until that precedent was overruled. However, the dissent noted if the Court of Appeals was free to pass upon this issue, he was inclined to agree with the majority that grand larceny is not a lesser-included offense of armed robbery. State v. Parker, *supra*.

ISSUE

Is grand larceny a lesser-included offense of armed robbery?

DISCUSSION

The circuit court does not have subject matter jurisdiction to convict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-

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> (1) five years if the value of the personalty is more than one thousand dollars but less than five thousand dollars;
>
> (2) ten years if the value of the personalty is five thousand dollars or more.

included offense of the crime charged in the indictment. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). The test for determining when an offense is a lesser-included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense. State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000). If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997).

Larceny involves the taking and carrying away of the goods of another, which must be accomplished against the will or without the consent of the other. State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979). Specifically, grand larceny is the felonious taking and carrying away of the goods of another, where the value exceeds $1,000. *See* State v. Moultrie, 283 S.C. 352, 322 S.E.2d 663 (1984) (grand larceny is felonious taking and carrying away of goods of another where value exceeds $200).[3] Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1060, 98 L.Ed.2d 1021 (1988); State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984) (robbery is felonious taking and carrying away of goods of another, accomplished against will or without consent of other with force); State v. Brown, *supra* (same). Armed robbery occurs when a person commits robbery while armed with a deadly weapon. *Id.*

Larceny has been found to be a lesser-included offense of robbery by this Court on several occasions. *See* State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (petit larceny is lesser-included of strong armed robbery);

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[3]Previously, the value of goods for grand larceny was $200 or more. *See* S.C. Code Ann. § 16-13-30 (1985). Now, the statute sets the value of goods for petit larceny at $1,000 or less and for grand larceny at more than $1,000. S.C. Code Ann. § 16-13-30 (Supp. 2001).

State v. Harkness, 288 S.C. 136, 341 S.E.2d 631 (1986) (petit larceny is lesser of robbery); State v. Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983) (grand larceny is lesser-included of robbery); State v. Brown, *supra* (larceny, without indicating whether petit or grand, is lesser of robbery); Young v. State, 259 S.C. 383, 192 S.E.2d 212 (1972) (grand larceny is lesser-included of robbery). *See also* State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979) (in dicta, we stated one may be guilty of armed robbery which involves grand larceny or petit larceny).[4]

The cases of State v. Lawson, Young v. State, and State v. Ziegler are overruled to the extent they found grand larceny to be a lesser-included offense of robbery. The monetary value of the goods taken is an element of the offense of grand larceny. *See* Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995) (grand larceny involved taking and carrying away of goods valued at $200 or more; value is element of grand larceny offense); State v. Ates, 297 S.C. 316, 318, 377 S.E.2d 98, 99, n.1 (1989) (in grand larceny prosecution, value is critical element; it is State's burden to prove value of stolen goods exceeds $200); State v. Moultrie, *supra* (defining grand larceny as felonious taking and carrying away of goods of another, where value exceeds $200); State v. Humphery, 276 S.C. 42, 274 S.E.2d 918 (1981) (trial court did not abuse discretion in allowing State to reopen case and prove value, an essential element of grand larceny); State v. Smith, 274 S.C. 622, 266 S.E.2d 422 (1980) (grand larceny is felony which includes all elements of lesser offense of petit larceny except that grand larceny involves theft of goods valued at fifty dollars or more; State must present credible evidence establishing each element of crime charged); State v. Bethea, 126 S.C. 497,

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[4]Further, robbery has been found to be a lesser-included offense of armed robbery. State v. Scipio, *supra* (citing State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)). However, we have not directly answered the question of whether grand larceny is a lesser-included offense of armed robbery. *Cf.* State v. Pressley, 288 S.C. 128, 132, 341 S.E.2d 626, 628 (1986) (stated unnecessary to decide whether grand larceny is lesser-included offense of armed robbery given error would be harmless).

120 S.E. 239 (1923) (to convict of grand larceny there must be proof property was worth $20 or more).

Accordingly, grand larceny cannot be a lesser-included offense of armed robbery because the offense of armed robbery does not include the element that the value of the goods taken must exceed $1,000. *See* Hope v. State, *supra* (if lesser offense includes element which is not included in greater offense, then lesser offense is not included in greater offense).

The indictments in this case charge armed robbery, but also appear to describe grand larceny.[5] However, the trial court lacked subject matter jurisdiction to sentence respondents on grand larceny because the indictments only specifically charged armed robbery, which does not include all the elements of grand larceny. *See* State v. Summers, 276 S.C. 11, 274 S.E.2d 427 (1981) (conviction may be had of an offense different from the one specifically charged only when such offense is essential element of that charged and only when greater offense charged includes all legal and factual elements of lesser offense), *overruled in part on other grounds by* State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000); State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974) (same). *See also* State v. Owens, *supra* (court does not have subject matter jurisdiction to convict defendant unless offense is lesser-included offense of crime charged in indictment).

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[5] Each indictment charged each respondent with "ARMED ROBBERY 16-11-330(A)" and stated that they

> did in Marlboro County on or about November 02, 1997, along with a co-defendant while armed with a deadly weapon, feloniously take from the person or presence of the victim, Blvd Express, by means of force or intimidation goods or monies of said victim, such goods or monies being described as follows: $1192.00 and two pistols.

Accordingly, because the trial court lacked subject matter jurisdiction to convict respondents of grand larceny, the Court of Appeals' decision is **AFFIRMED IN RESULT.**

TOAL, C.J., WALLER and PLEICONES, JJ., concur.
BURNETT, J., dissenting in a separate opinion.

JUSTICE BURNETT (dissenting): I respectfully dissent. In my opinion, grand larceny is a lesser included offense of armed robbery and, therefore, the trial judge had subject matter jurisdiction to convict respondents of grand larceny.

The circuit court has subject matter jurisdiction to convict a defendant of an offense if 1) there is an indictment which sufficiently states the offense, 2) the defendant waives presentment, or 3) the offense is a lesser included offense of the crime charged in the indictment. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002). The test for determining whether when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense. Id. If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. Id.

Robbery is the felonious taking and carrying away of the goods of another against the will or without consent of the other with force. State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984). Armed robbery occurs when a person commits robbery while armed with a deadly weapon. Id. Robbery is a lesser included offense of armed robbery. Id.

Larceny is the felonious taking and carrying away of the goods of another against the will or without the consent of the other. State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979); State v. Sweat, 221 S.C. 270, 70 S.E.2d 234 (1952). See W. McAninch & W. Fairey, *The Criminal Law of South Carolina* 246 (1995) ("South Carolina continues to use the standard common law definition of larceny. . .").

Relying on prior opinions which state value is an element of grand larceny,[1] the majority concludes grand larceny is not a lesser included offense

[1] See Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995), State v. Ates, 297 S.C. 316, 377 S.E.2d 98 (1989), State v. Moultrie, 283 S.C. 352, 322 S.E.2d 663 (1984), State v. Humphery, 276 S.C. 42, 274 S.E.2d 918 (1981), State v. Smith, 274 S.C. 622, 266 S.E.2d 422 (1980), State v. Bethea, 126 S.C. 497, 120

of robbery because value is not an element of robbery. None of the cited cases, however, compared the elements of robbery with grand larceny.[2]

Instead, the Court has already determined that grand larceny is a lesser included offense of robbery. In Young v. State, 259 S.C. 383, 386, 192 S.E.2d 212, 214 (1972), the Court noted robbery is "basically larceny compounded or aggravated by force used in the taking of property from the person or in the presence of another" and that "larceny is included in the charge of robbery." Accordingly, ". . . a verdict finding [the defendant] guilty of robbery, of necessity, carrie[s] with it a finding that he was guilty of larceny." Id. In State v. Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983), the Court specifically held grand larceny is a lesser included offense of robbery. See State v. Brown, supra (larceny is lesser included offense of robbery); State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (petit larceny is lesser included offense of robbery).

It is my opinion the terms "grand" and "petit" are not elements of either grand or petit larceny, but rather distinguish the two sub-categories of the crime of larceny for sentencing purposes. While the determination of whether a particular larceny is "grand" or "petit" is a matter for the trier of fact, "grand" or "petit" larceny do not constitute unique substantive crimes but rather sub-categories of the crime of larceny. See W. McAninch and W. Fairey, *The Criminal Law of South Carolina,* supra ("The basic South Carolina larceny statute does very little to define the offense; the statute is primarily concerned with providing penalties for the different categories of the offense, depending on the value of the property taken.").

The majority's conclusion will permit the trial court to convict and punish a defendant for both robbery and larceny arising out of the same act

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S.E. 239 (1923).

[2] Moreover, commentators recognize value is not an element of the crime of larceny. W. McAninch & W. Fairey, *The Criminal Law of South Carolina,* supra.

without violating double jeopardy. This holding contravenes the precedent of State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989), State v. Harkness, 288 S.C. 136, 341 S.E.2d 631 (1986), and State v. Lawson, supra. Moreover, it defies common sense because larceny is subsumed in the offense of robbery; larceny is robbery accomplished without force. See State v. Brown, supra.

Because it is my opinion grand larceny is a lesser included offense of armed robbery, I would reverse the Court of Appeals' decision and reinstate respondents' grand larceny convictions.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marcus A. Joseph, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Clarendon County
Thomas W. Cooper, Jr., Circuit Court Judge

Marcus A. Joseph, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Jasper County
James E. Lockemy, Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 25539
Heard May 15, 2002 - Filed October 14, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for respondents.

JUSTICE MOORE: We consolidated these cases because they involve the same underlying guilty pleas. We granted the petitions for writs of certiorari to determine whether grand larceny is a lesser-included offense of armed robbery, whether petitioner's plea to murder was knowingly and voluntarily entered, and whether the plea court lacked subject matter jurisdiction on the murder indictment. We affirm.

FACTS

Petitioner was indicted for murder, armed robbery, accessory before the fact, and possession of a weapon during a violent crime. In 1988, he pled guilty to murder and grand larceny and was sentenced to life imprisonment and a concurrent ten-year sentence, respectively. No direct appeal was taken.

After a hearing on petitioner's post-conviction relief (PCR) action, the PCR court ruled the plea court did not have subject matter jurisdiction to accept petitioner's plea to grand larceny because grand larceny is not a lesser-included offense of armed robbery. His conviction for grand larceny was vacated. The PCR court denied petitioner's claim that his entire guilty plea was rendered unknowing and involuntary because the plea court lacked jurisdiction to accept his plea to grand larceny.

Petitioner also filed for a writ of *habeas corpus* before a different judge. After a hearing, the *habeas* court denied petitioner's claim that the plea court lacked subject matter jurisdiction to accept his plea to murder due to an insufficient indictment.

Johnson[1] petitions were filed in both the PCR and the *habeas* cases. The Court granted the petitions for a writ of certiorari in both cases after the Johnson issues in the PCR case had been briefed.

ISSUES

I. Whether the PCR court erred by finding grand larceny is not a lesser-included offense of armed robbery?

II. If the plea court did not have subject matter jurisdiction to accept petitioner's plea to grand larceny, was petitioner's plea to murder knowingly and voluntarily entered?

III. Whether the plea court lacked subject matter jurisdiction on the murder indictment since the indictment omitted the words "wilfully" and "feloniously?"

DISCUSSION

I

The circuit court does not have subject matter jurisdiction to convict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). The test for determining when an offense is a lesser-included offense of another is whether the greater of the two offenses

[1]Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) (approving the withdrawal of counsel in meritless appeals of PCR actions by following a certain procedure).

includes all the elements of the lesser offense. State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000). If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997).

Larceny involves the taking and carrying away of the goods of another, which must be accomplished against the will or without the consent of the other. State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979). Specifically, grand larceny is the felonious taking and carrying away of the goods of another, where the value exceeds $200. *See* S.C. Code Ann. § 16-13-30 (1985) (stating petit larceny involves stolen goods whose value is less than $200); State v. Moultrie, 283 S.C. 352, 322 S.E.2d 663 (1984) (grand larceny is felonious taking and carrying away of goods of another, where value exceeds $200).[2] Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1060, 98 L.Ed.2d 1021 (1988). Armed robbery occurs when a person commits robbery while armed with a deadly weapon. *Id.*

Larceny has been found to be a lesser-included offense of robbery by this Court on several occasions. *See* State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (petit larceny is lesser-included of strong armed robbery); State v. Harkness, 288 S.C. 136, 341 S.E.2d 631 (1986) (petit larceny is lesser of robbery); State v. Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983) (grand larceny is lesser-included of robbery); State v. Brown, *supra* (larceny, without indicating whether petit or grand, is lesser of robbery); Young v. State, 259 S.C. 383, 192 S.E.2d 212 (1972) (grand larceny is lesser-included of robbery). *See also* State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979) (in

[2]Petitioner pled guilty in 1988 prior to the 1993 amendment that distinguished petit and grand larceny and increased the dollar amount of the value of goods stolen, therefore, the value of goods for grand larceny at the time petitioner pled guilty was $200 or more. *See* S.C. Code Ann. § 16-13-30 (1985). Now, grand larceny is the larceny of goods valued in excess of $1,000. S.C. Code Ann. § 16-13-30 (Supp. 2001).

dicta, Court stated one may be guilty of armed robbery which involves grand larceny or petit larceny).[3]

We now overrule the cases of State v. Lawson, Young v. State, and State v. Ziegler to the extent they found grand larceny to be a lesser-included offense of robbery. It is well-settled that the monetary value of the goods taken is an element of the offense of grand larceny. *See* Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995) (grand larceny involved taking and carrying away of goods valued at $200 or more; value is element of grand larceny offense); State v. Ates, 297 S.C. 316, 318, 377 S.E.2d 98, 99, n.1 (1989) (in grand larceny prosecution, value is critical element; it is State's burden to prove value of stolen goods exceeds $200); State v. Moultrie, *supra* (defining grand larceny as felonious taking and carrying away of goods of another, where value exceeds $200); State v. Humphery, 276 S.C. 42, 274 S.E.2d 918 (1981) (trial court did not abuse discretion in allowing State to reopen case and prove value an essential element of grand larceny); State v. Smith, 274 S.C. 622, 266 S.E.2d 422 (1980) (grand larceny is felony which includes all elements of lesser offense of petit larceny except that grand larceny involves theft of goods valued at fifty dollars or more); State v. Bethea, 126 S.C. 497, 120 S.E. 239 (1923) (to convict of grand larceny there must be proof property was worth $20 or more). Grand larceny cannot be a lesser-included offense of armed robbery because the offense of armed robbery does not include the element that the value of the goods taken must exceed a certain amount. *See* Hope v. State, *supra* (if lesser offense includes element which is not included in greater offense, then lesser offense is not included in greater offense).

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[3]Further, robbery has been found to be a lesser-included offense of armed robbery. State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984) (citing State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)). However, we have not directly answered the question of whether grand larceny is a lesser-included offense of armed robbery. *Cf.* State v. Pressley, 288 S.C. 128, 132, 341 S.E.2d 626, 628 (1986) (stated unnecessary to decide whether grand larceny is lesser-included offense of armed robbery given error would be harmless).

Consequently, the PCR court properly vacated petitioner's conviction for grand larceny.

The indictment in this case charges the crime of armed robbery and appears to describe the crime of grand larceny.[4] However, the plea court lacked subject matter jurisdiction to sentence petitioner for grand larceny because the indictment specifically charged armed robbery, which does not include all the elements of grand larceny. *See* State v. Summers, 276 S.C. 11, 274 S.E.2d 427 (1981) (conviction may be had of offense different from one specifically charged only when such offense is essential element of that charged and only when greater offense charged includes all legal and factual elements of lesser offense), *overruled in part on other grounds by* State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000); State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974) (same). *See also* State v. Owens, *supra* (court does not have subject matter jurisdiction to convict defendant unless offense is lesser-included offense of crime charged in indictment).

Accordingly, because the plea court lacked subject matter jurisdiction to accept petitioner's plea of guilty to grand larceny, the PCR court properly vacated petitioner's grand larceny conviction.

II

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[4]The indictment charged:

> COUNT TWO – ARMED ROBBERY
>
> That one MARCUS A. JOSEPH . . . did in Clarendon County on or about March 18, 1987, while armed with a deadly weapon, to wit: Colt .357 Magnum PIstol [sic], feloniously take from the person in the presence of Alfred Cole by means of force or intimidation, goods or monies of the said Alfred Cole, such goods or monies being described: approximately $700.00 cash.

Petitioner argues the PCR court erred by finding his plea to murder was knowingly and voluntarily entered since the murder and grand larceny pleas were entered pursuant to a "package deal."

Petitioner was indicted for murder, armed robbery, accessory before the fact, and possession of a weapon during the commission of a violent crime. He pled guilty to murder and grand larceny.

The solicitor recommended a sentence of life with eligibility for parole in twenty years on the murder charge with the grand larceny sentence to run concurrently. The plea court asked petitioner whether he understood that the court did not have to accept the solicitor's recommendation, and petitioner indicated he so understood and still wished to plead guilty. The plea court asked petitioner whether his attorneys had done everything he asked of them; whether he was pleading guilty of his own free will and accord; whether he was guilty; and whether he understood that he was giving up his constitutional rights to remain silent and to a jury trial. Petitioner answered yes to these questions. Petitioner answered no when the plea court asked if anyone had promised him anything or threatened him to acquire his guilty plea, and when he was asked if he was under the influence of alcohol or drugs. The court accepted the recommendation and sentenced petitioner accordingly.

At the PCR hearing, arguments were heard but petitioner did not present any testimony. The court denied petitioner's claim that his entire guilty plea was rendered unknowing and involuntary by the trial court's lack of jurisdiction to accept his plea to grand larceny. The PCR court stated the evidence revealed that petitioner entered his guilty plea freely, knowingly, intelligently, and voluntarily. The court found his claims to the contrary not credible, particularly where the grand larceny conviction was vacated due to a legal technicality.

A guilty plea may not be accepted unless it is voluntary and entered into with an understanding of the nature and consequences of the charge and plea. A plea is properly accepted if the record establishes it was voluntarily and knowingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23

L.Ed.2d 274 (1969); Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991).

A defendant who enters a plea on the advice of counsel may attack the voluntary and intelligent character of a plea only by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding. *Id.* In Roscoe, the Court noted, "[a]lthough we have consistently held a defendant must have a full understanding of the consequences of his plea and of the charges against him, the defendant must also demonstrate prejudice to be entitled to relief on PCR." Roscoe v. State, 345 S.C. at 20, 546 S.E.2d at 419, n.6 (internal citations omitted).

Petitioner has not framed this issue in the context of ineffective assistance of counsel and has not made a showing of prejudice in this case. Regardless, we note the PCR court correctly concluded the guilty plea to murder was entered into knowingly and voluntarily. Petitioner was properly advised and sentenced on the murder charge. Further, petitioner failed to show he was induced to plead guilty or that he would have not pled guilty to murder but for the grand larceny charge. *See*, *e.g.*, Roscoe v. State, *supra* (Court denied Roscoe's claim that *all* of his pleas were affected by erroneous advice concerning armed robbery charge; found Roscoe was properly advised and sentenced on kidnapping and burglary charges and had failed to demonstrate pleas to those offenses were in any way affected by mis-advice concerning armed robbery charge).

Consequently, the PCR court's finding that petitioner knowingly and voluntarily entered a guilty plea to murder is affirmed.

III

Petitioner argues the plea court lacked subject matter jurisdiction on the murder indictment since the indictment omitted the words "willfully" and

"feloniously."

The indictment charged:

COUNT ONE – MURDER

> That one MARCUS A. JOSEPH, one BARBARA ANN MAYERS and one ERROL MAYERS did in Clarendon County on or about March 18, 1987, with malice aforethought, kill one Alfred Cole by means of shooting him with a Colt .357 Magnum Pistol, and that the said Alfred Cole did die in Clarendon County as a proximate result thereof on or about March 18, 1987.

At the *habeas corpus* hearing, petitioner claimed the murder indictment failed to state the crime had been committed "wilfully" and "feloniously." The *habeas* court held petitioner was not entitled to relief because the indictment was sufficient to confer subject matter jurisdiction on the plea court.

The circuit court does not have subject matter jurisdiction to convict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Owens, *supra*.

S.C. Code Ann. § 17-19-30 (1985) provides:

> Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges the defendant did feloniously, wilfully and of his malice aforethought kill and murder the deceased.

An indictment for murder is sufficient "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or a conviction thereon may be pleaded as a bar to any subsequent prosecution." State v. Owens, *supra* (citing State v. Owens, 293 S.C. 161, 165, 359 S.E.2d 275, 277 (1987);[4] State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) (test of sufficiency of indictment is whether it contains necessary elements of offense intended to be charged and sufficiently apprises defendant of what he must be prepared to defend)).

The murder indictment was sufficient to confer subject matter jurisdiction on the plea court. As mentioned in § 17-19-30, the indictment set forth the time ("on or about March 18, 1987") and place ("in Clarendon County") of the crime, and stated the manner in which the death of the deceased was caused ("kill one Alfred Cole by means of shooting him with a Colt .357 Magnum Pistol"). While the indictment did not state petitioner "feloniously" and "wilfully" committed the murder, the indictment included the elements of murder by stating petitioner killed another with "malice aforethought." *See* S.C. Code Ann. § 16-3-10 (1985) (murder is "killing of any person with malice aforethought, either express or implied"). The offense of murder was stated with sufficient certainty and particularity in the indictment such that the plea court knew what judgment to pronounce and petitioner knew what he was being called upon to answer. *See* State v. Owens, *supra*.

While § 17-19-30 indicates that an indictment for murder will be deemed sufficient which charges the defendant did "feloniously, wilfully . . . kill and murder the deceased," we will not construe this statutory language such that it leads to an absurd result. *See* State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (courts will reject ordinary meaning of statutory language when to accept it would lead to result so absurd that it could not possibly have been intended by Legislature, or would defeat plain legislative intention; and if possible will construe statute so as to escape absurdity and carry intention into effect). Here, the word

[4] *Cert. denied*, 484 U.S. 982, 108 S.Ct. 496, 98 L.Ed.2d 495 (1987).

"feloniously" is encompassed in the word "murder" because murder is a felony. Further, the word "wilfully" is encompassed in the word "malice" because malice is "the *intentional* doing of a wrongful act toward another without legal justification or excuse." State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 669, 671 (1941) (emphasis added). "Wilfully" and "intentionally" are synonymous terms.

Certainly, the General Assembly did not intend to burden the writing of murder indictments by requiring surplus words when their obvious intent in promulgating § 17-19-30 was to simplify indictments. *See* State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000) (all rules of statutory construction are subservient to rule that legislative intent must prevail if can be reasonably discovered in language used, and that language must be construed in light of intended purpose of statute); Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998) (cardinal rule of statutory construction is to ascertain and effectuate legislative intent); State v. Rector, 158 S.C. 212, 155 S.E. 385 (1930) (General Assembly has sought to simplify indictments in criminal cases and to do away with useless phraseology). Section 17-19-30 is a procedural statute not intended to alter the elements of the offense of murder.

We find the indictment was sufficient to confer subject matter jurisdiction because it informed petitioner of the elements of murder.

CONCLUSION

We find that grand larceny is not a lesser-included offense of armed robbery, that petitioner entered his plea to murder knowingly and voluntarily, and that the plea court did not lack subject matter jurisdiction on the murder indictment. Accordingly, the decisions of the PCR and *habeas* courts are **AFFIRMED.**

TOAL, C.J. and WALLER, J., concur. PLEICONES, J., concurring in a separate opinion. BURNETT, J., concurring and dissenting in a separate opinion.

JUSTICE PLEICONES: I concur but write separately because I would reach the same result as the majority, although by a different approach. I agree that the failure to allege in the indictment that the murder was committed "feloniously**,** wilfully, and of [the petitioner's] malice aforethought" does not create a subject matter jurisdiction defect. See State v. Rector, 158 S.C. 212, 155 S.E. 385 (1930)(purpose of the 1887 revisions to criminal procedure, which include the statute currently codified at S.C. Code Ann. §17-19-30, was to simplify indictments); see also State v. Cheathwood, 2 Hill (20 S.C.L.) 459(1834)(no jurisdictional defect where elements of offense charged in indictment using "words which are either wholly synonymous or much of the same meaning").

I further agree that grand larceny is not a lesser-included offense of armed robbery because it contains an element (value of goods taken) that is not an element of the purported greater offense. See State v. Elliot, 346 S.C. 603, 552 S.E.2d 727 (2001)(test for lesser-included offense). As the majority points out, the "armed robbery" count here alleges all the elements of both armed robbery and grand larceny. It thus conferred jurisdiction over both offenses, and petitioner waived any right to object to this jumbling when he failed to object prior to the entry of his plea. Cf. State v. Hutto, 252 S.C. 36, 165 S.E.2d 72 (1968)(jumbling objection waived pursuant to S.C. Code Ann. § 17-19-90 when not raised before jury sworn). However, since the post-conviction relief judge vacated petitioner's grand larceny plea, and since the State did not appeal that order, the law of the case is that petitioner's grand larceny conviction is vacated. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997)(unappealed ruling, whether correct or not, is law of the case).

I agree that petitioner's murder conviction stands, and that his grand larceny conviction falls. I agree that this result does not require a new proceeding on the murder charge, despite the fact that both pleas were the result of a single bargain, because I believe, in fact, that each plea was independently valid. I therefore concur in the majority's decision to affirm the appealed orders.

JUSTICE BURNETT (concurring/dissenting): I agree petitioner knowingly and voluntarily entered a guilty plea to murder and the murder indictment was sufficient to confer subject matter jurisdiction. I disagree grand larceny is not a lesser included offense of armed robbery. In my opinion, grand larceny is a lesser included offense of armed robbery and, therefore, the trial judge had subject matter jurisdiction to accept petitioner's guilty plea to grand larceny. Accordingly, I would reverse the post-conviction relief (PCR) judge's order.

The circuit court has subject matter jurisdiction to convict a defendant of an offense if 1) there is an indictment which sufficiently states the offense, 2) the defendant waives presentment, or 3) the offense is a lesser included offense of the crime charged in the indictment. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002). The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense. Id. If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. Id.

Robbery is the felonious taking and carrying away of the goods of another against the will or without consent of the other with force. State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984). Armed robbery occurs when a person commits robbery while armed with a deadly weapon. Id. Robbery is a lesser included offense of armed robbery. Id.

Larceny is the felonious taking and carrying away of the goods of another against the will or without the consent of the other. State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979); State v. Sweat, 221 S.C. 270, 70 S.E.2d 234 (1952). See W. McAninch & W. Fairey, *The Criminal Law of South Carolina* 246 (1995) ("South Carolina continues to use the standard common law definition of larceny. . .").

Relying on prior opinions which state value is an element of grand

larceny,[1] the majority concludes grand larceny is not a lesser included offense of robbery because value is not an element of robbery. None of the cited cases, however, compared the elements of robbery with grand larceny.[2]

Instead, the Court has already determined that grand larceny is a lesser included offense of robbery. In Young v. State, 259 S.C. 383, 386, 192 S.E.2d 212, 214 (1972), the Court noted robbery is "basically larceny compounded or aggravated by force used in the taking of property from the person or in the presence of another" and that "larceny is included in the charge of robbery." Accordingly, ". . . a verdict finding [the defendant] guilty of robbery, of necessity, carrie[s] with it a finding that he was guilty of larceny." Id. In State v. Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983), the Court specifically held grand larceny is a lesser included offense of robbery. See State v. Brown, supra (larceny is lesser included offense of robbery); State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (petit larceny is lesser included offense of robbery).

It is my opinion the terms "grand" and "petit" are not elements of either grand or petit larceny, but rather distinguish the two sub-categories of the crime of larceny for sentencing purposes. While the determination of whether a particular larceny is "grand" or "petit" is a matter for the trier of fact, "grand" or "petit" larceny do not constitute unique substantive crimes but rather sub-categories of the crime of larceny. See W. McAninch and W. Fairey, *The Criminal Law of South Carolina,* supra ("The basic South Carolina larceny statute does very little to define the offense; the statute is

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[1] See Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995), State v. Ates, 297 S.C. 316, 377 S.E.2d 98 (1989), State v. Moultrie, 283 S.C. 352, 322 S.E.2d 663 (1984), State v. Humphery, 276 S.C. 42, 274 S.E.2d 918 (1981), State v. Smith, 274 S.C. 622, 266 S.E.2d 422 (1980), State v. Bethea, 126 S.C. 497, 120 S.E. 239 (1923).

[2] Moreover, commentators recognize value is not an element of the crime of larceny. W. McAninch & W. Fairey, *The Criminal Law of South Carolina,* supra.

primarily concerned with providing penalties for the different categories of the offense, depending on the value of the property taken.").

The majority's conclusion will permit the trial court to convict and punish a defendant for both robbery and larceny arising out of the same act without violating double jeopardy. This holding contravenes the precedent of State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989), State v. Harkness, 288 S.C. 136, 341 S.E.2d 631 (1986), and State v. Lawson, supra. Moreover, the result is untenable because larceny is subsumed in the offense of robbery; larceny is robbery accomplished without force. See State v. Brown, supra.

Because it is my opinion grand larceny is a lesser included offense of armed robbery, I would reverse the order of the PCR judge.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James R. Corbin, Claimant,

Respondent,

v.

Kohler Company, Self-Insured Employer,

Appellant.

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

Opinion No. 3554
Heard September 12, 2002 – Filed October 7, 2002

AFFIRMED

Mary Lou Hill, of Greenville, for Appellant.

J. Mark Hayes, II, of Spartanburg, for Respondent.

ANDERSON, J.: Kohler Company appeals the decision of the Circuit Court affirming an award of Workers' Compensation. Kohler argues: (1) the Circuit Court did not apply the correct standard of review; (2) the record does not support the Circuit Court's decision; and (3) the Circuit Court erred in finding Kohler was not entitled to set off for payments it made to Corbin under a salary continuation plan. We affirm.

FACTS/PROCEDURAL BACKGROUND

James R. Corbin (Corbin) worked in the casting department at Kohler Company in Spartanburg for forty-one years. Corbin testified that, during his career at Kohler, he was exposed to significant amounts of silica dust. In 1999, he first began having respiratory symptoms, including a dry cough which progressed to some shortness of breath and loss of stamina. Corbin's family physician referred him to Dr. Douglas Clark, a pulmonary specialist. Additionally, he was seen by Dr. Mary Lou Applebaum, a pulmonary specialist in the same office as Dr. Clark. In August 1999, Dr. Applebaum removed Corbin from work and advised him he had silicosis.

Corbin filed a Form 50 seeking Workers' Compensation benefits for the silicosis. Kohler denied the compensability of his claim.

Corbin was evaluated by several doctors in connection with his illness, in addition to Drs. Applebaum and Clark. Dr. William Stewart reviewed Corbin's medical records and other factors to provide a vocational and rehabilitation assessment. Dr. Donald Schlueter examined the records of Dr. Applebaum and her partners. Drs. Kevin Kopera and Arden Levy also evaluated Corbin.

In his order, the Single Commissioner found that Corbin sustained an occupational disease arising out of and in the course of his employment at Kohler. He found Corbin's occupational disease was silicosis resulting from prolonged exposure to silica dust in the workplace and Corbin was permanently and totally disabled as a result of his occupational disease. The

Commissioner denied Kohler credit for benefits paid to Corbin under his salary continuation program, and ordered the payment of 500 weeks compensation in addition to reimbursement and coverage of all medical, hospital, pharmaceutical, and other expenses related to Corbin's occupational disease. Kohler appealed the order to the full Workers' Compensation Commission.

The Commission upheld the Single Commissioner's decision in its entirety. Kohler appealed. The Circuit Court affirmed the findings of the Commission and dismissed the appeal.

ISSUES

I. Did the Circuit Court apply the correct standard of review in upholding the decision of the Commission?

II. Does the record support the Circuit Court's finding that the Commission's decision was supported by substantial evidence in the record as a whole?

III. Did the Circuit Court err in finding that Kohler was not entitled to a set off from the Commission's award to Corbin for compensation paid under the salary continuation plan?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999). In an appeal from the Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is

affected by an error of law. Hamilton, 336 S.C. at 76, 518 S.E.2d at 601. The appellate court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. Id. The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Hicks v. Piedmont Cold Storage, 335 S.C. 46, 515 S.E.2d 532 (1999); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). It is not within our province to reverse findings of the Commission which are supported by substantial evidence. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986); Broughton, 336 S.C. at 496, 520 S.E.2d 637.

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Miller v. State Roofing Co., 312 S.C. 452, 441 S.E.2d 323 (1994); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). "Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Muir, 336 S.C. at 282, 519 S.E.2d at 591.

LAW/ANALYSIS

I. Standard of Review

Kohler contends the Circuit Court failed to apply the correct standard of judicial review in upholding the decision of the Commission. We disagree.

At the hearing before the Circuit Court, the following colloquy occurred:

THE COURT: All right. I'm looking at Page 12 of the order. And it alleged – I mean, it's based on claimant's functional limitations and report of Dr. William Stewart, it is clear that claimant is and will be permanently and totally disabled. Where can I find Dr. Stewart's – this is it right here. William Stewart?
MS. HILL: Yes. Dr. Stewart talks about disability. But Dr. Stewart does not connect the disability to silicosis. And the finding on functional limitation, there is no functional limitation other than he's got to stay out of dust.
THE COURT: Well, both of you are aware I've got to see if there is any evidence, basically.
MS. HILL: I understand, Your Honor.

. . .

THE COURT: [Dr. Stewart] says he concluded his prognosis was successful vocational rehabilitation to some kind of lighter work job be considered very poor to nonexistent. If we were to assume he could, in fact, return to some kind of alternative work, he has concluded – and then he goes into that he could only earn $7.50 an hour. Is that not enough evidence for the – coupled with what they call functional limitations? Isn't that some evidence on which they could base their opinion?
MS. HILL: This is evidence by a vocational expert that, in his opinion, he is going to have a hard time finding a job with his limitation of not being able to work in dust, strong fumes, or odors. But nowhere in here does he say that his disability is caused by the occupational disease of silicosis. And that's my point. There is no evidence on the causal connection between this man's impairment, even if he has some, even if he has silicosis, and his disability.
THE COURT: Well, I thought Dr. Applebaum said he did have silicosis.
MS. HILL: He – yes, she certainly did.

THE COURT: Well, isn't that enough? You don't have to have 15 doctors. Once the Workers Comp. Commission has any evidence that he had silicosis -- and Dr. Applebaum says he does -- isn't that -- doesn't that jump the hurdle?
MS. HILL: She said he had silicosis. She put no functional limitations on him other than he can't work where it's real dusty.
THE COURT: Well, let's take it one step at the time. Doesn't that get him over the first hurdle, though? Doesn't that put him – having silicosis?
MS. HILL: Yes.
THE COURT: And doesn't that also put it as a result of inhaling silica while employed at Kohler Company, as she states in so many word[s]?
MS. HILL: Yes, but she never states that it resulted in a disability that prevented him from working.
THE COURT: I understand that. I'm just taking it one step at a time.
MS. HILL: Okay.
THE COURT: So she says he's got silicosis and that he has residual pulmonary condition.
MS. HILL: That's right. But she also states, in an earlier report, that his pulmonary functioning was normal. He just can't work where it's dusty.
THE COURT: Well, so, she said two different things. That goes to weight; does it not? Why should I believe the first one and not the second? And – instead of the Commission believing one as opposed to the other? When you got somebody saying two things, you can either believe the first, second, or somewhere in between.
MS. HILL: Well, when she says residual . . .
THE COURT: . . . pulmonary.
MS. HILL: All right. I – I'm . . .
THE COURT: Let's see. In my opinion, within a reasonable degree of certainty, he has a silicosis, condition as a result of

> exposure. It is my opinion, within a reasonable degree of medical certainty, that Mr. Corbin suffers from a significant pulmonary condition, referred to as silicosis. That's what she says he's got. And that's what she says, to a reasonable degree of medical certainty, creates a significant pulmonary condition. She said that, not Dr. Applebaum. I don't know whether it's true or not. But I can't weigh the evidence; I've got to see if there is any. To me the question becomes whether or not he has silicosis and he got it at Kohler Company. So the question becomes, whether or not, based on that and Dr. Stewart's report, that is – jumps the hurdle of some evidence. And I'm going to find that it does. I'm going to dismiss the appeal.
>
> . . .
>
> THE COURT: As I see it, I've got a very little narrow thing I can look at. And once that little hurdle is jumped, I can't say, Well, I'd have found different, or anything like that. Once they get the door open just a crack, that's all it takes. That may be all that's here but that's all it takes.

Kohler asserts the trial judge's statements reflect his misunderstanding of the standard of review. Kohler maintains the Circuit Court reviewed the Commission's decision based on a "cracked door" standard of review in which a mere scintilla of evidence would be sufficient to sustain the decision of the Commission. This argument has no merit because the statements by the judge were merely contemporaneous colloquy. The judge and the lawyers were talking in the course of working through the attorneys' arguments. The judge's final written order represents the decision of the court.

"No order is final until it is written and entered." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992) (citing Rule 58(a),

SCRCP). See also Case v. Case, 243 S.C. 447, 134 S.E.2d 394 (1964) (judgments in general are not final until written and entered); Bayne v. Bass, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990) (divorce decree is not final until written and recorded). "Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); First Union Nat'l Bank, 306 S.C. at 329, 411 S.E.2d at 682. See also Case v. Case, 243 S.C. at 451, 134 S.E.2d at 396 (holding even if the trial judge made oral ruling in favor of one party, such pronouncement is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the judge, and delivered for recordation).

"It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling." Badeaux v. Davis, 337 S.C. 195, 204, 522 S.E.2d 835, 839 (Ct. App. 1999). See also Owens v. Magill, 308 S.C. 556, 419 S.E.2d 786 (1992) (ruling judge was not bound by prior oral ruling and could issue written order which conflicted with prior oral ruling). "To the extent the written order may conflict with the prior oral ruling, the written order controls." Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998). "The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties." Ford, 344 S.C. at 646, 545 S.E.2d at 823 (citing Rule 58, SCRCP).

The judge's final order reads:

> The South Carolina Administrative Procedures Act, S.C. Code Ann. Section 1-23-310, et. seq., establishes the "substantial evidence" rule as the standard for judicial review of a decision of an administrative agency. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). On an appeal from the Workers' Compensation Commission, the court may not substitute its judgment for that of the Commission as to the weight of the

> evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stephen v. Avins Construction Company, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Also see Lyles v. Quantum Chemical Company, 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993).

This paragraph accurately states the "substantial evidence" standard of review which the judge applied in his final written order. Regardless of the colloquy during the hearing, the final written order correctly articulated the "substantial evidence" standard. Thus, we find no error.

II. Substantial Evidence to Support the Decision of the Commission

Kohler argues the record does not support a finding that the Commission's decision was supported by the substantial evidence in the record as a whole. We disagree.

Beginning in April 1999, Corbin was seen by Dr. Applebaum. By August of 1999, Dr. Applebaum had removed Corbin from work and diagnosed him with silicosis. Corbin continued in her care through March 2000, when Dr. Applebaum found he had reached "maximum medical improvement." Dr. Applebaum's memorandum dated March 17, 2000 provided:

> Please be advised that the undersigned is the treating physician for James R. Corbin. A complete copy of my medical records concerning Mr. Corbin is attached.
>
> Based on the history presented, my examination, and x-ray and other diagnostic evaluations, it is my opinion within a reasonable degree of medical certainty that Mr. Corbin suffers from a significant pulmonary condition referred to as silicosis. Based on my examination, treatment records, x-ray and diagnostic

> evaluations, the history presented, and my review of certain Industrial Hygiene Sampling Results, it is my opinion within a reasonable degree of medical certainty that Mr. Corbin's silicosis condition was most probably the result of exposure to respirable silica (Crystalline Quartz) while employed at the Kohler Company, in Spartanburg, South Carolina.
>
> I have been treating Mr. Corbin since April of 1999. I have continued to treat him since August 30, 1999 when I advised that he should leave his work environment at Kohler. It is my opinion that he has now reached maximum medical improvement concerning his condition. However, it is further my opinion that it is medically necessary that he avoid any further exposure to respirable silica dust in any fashion. It is further my opinion that due to his residual pulmonary condition, he will be unable to work in any environment that would result in pulmonary exposure to dust, strong fumes or odors, or extreme hot or cold temperatures.

Dr. William W. Stewart, a vocational rehabilitation specialist, evaluated Corbin. He did not meet with Corbin personally, but he reviewed the records of Dr. Applebaum and Dr. Douglas Clark. He analyzed vocational and occupational factors, labor market access, Corbin's ability to earn, and his earning capacity. His vocational and rehabilitation assessment stated in pertinent part:

> IMPRESSIONS AND CONCLUSIONS
>
> Based on Mr. Corbin's evaluation it is concluded that he is a person who sustained significant work-related injury, or injuries, to his lungs, with continuing problems and limitations, and work restrictions that will prevent him from ever being able to return to the kind of work he had normally performed in the past. And, after considering all vocational/occupational factors relating to

> Mr. Corbin, including his advanced/retirement age, and all medical/pulmonary factors, including his inability to return to the kind of work he had normally performed over the past 41 years, it is concluded that his prognosis for successful vocational rehabilitation to some kind of lighter, alternative worker job has to be considered very poor to non-existent.
>
> If it were assumed that he could, in fact, return to some kind of alternative work, it is concluded that Mr. Corbin's ability to earn has been reduced to no more than approximately $7.50 per hour because of his injuries, continuing problems and limitations, and his permanent work restrictions.

Corbin testified there was silica dust at Kohler. He provided a photo which showed dust accumulation in his office. He declared his "health has been excellent before this last illness." He stated that, after having trouble breathing, his family doctor referred him to "a set of pulmonary doctors." Corbin explained that he saw Dr. Applebaum and did not return to work after she diagnosed him with silicosis.

In addition to the materials and testimony of Dr. Applebaum, Dr. Stewart, and Corbin, other evidence was presented relating to Corbin's illness. Dr. Arden Levy, of Foothill Allergy and Asthma Associates, saw Corbin on one occasion. In his report, Dr. Levy diagnosed Corbin with possible bronchial asthma and rhinosinusitis, which may have contributed to his cough. Dr. Donald Schlueter did not see Corbin but reviewed some of the records of Dr. Applebaum and her partners. Dr. Schlueter expressed his opinion "to a reasonable degree of medical certainty that Mr. Corbin's asthma was not caused by any occupational exposure at Kohler Company." Dr. Kevin Kopera declared that he did not believe Corbin had silicosis, though he conceded on cross-examination he could not exclude silicosis as a diagnosis. Dr. Kopera was not a pulmonologist.

Expert medical testimony is designed to aid the Commission in coming to the correct conclusion. Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999). Therefore, the Commission determines the weight and credit to be given to the expert testimony. Id. Once admitted, expert testimony is to be considered just like any other testimony. Id.; Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109 (1943).

Dr. Applebaum saw Corbin more than any other doctor. She is a pulmonologist who specializes in the very type of condition Corbin sustained in his workplace. Dr. Schlueter never examined Corbin personally but instead reviewed the records of other doctors. Dr. Kopera performed an evaluation, but he is not a pulmonologist. Dr. Levy saw Corbin only one time. The evidence provided by Dr. Applebaum was entitled to greater weight than that of the other expert medical testimony, as she saw Corbin more and was a specialist in pulmonology.

In our opinion, substantial evidence supports the Commission's finding that Corbin suffered from silicosis arising out of and in the course of his employment at Kohler. This evidence includes the letters of Drs. Applebaum and Stewart, as well as Corbin's own testimony. Because there was substantial evidence in the record to support the decision of the Commission, there was no error by the Circuit Court in affirming the Commission's order.

III. Set Off of Award

Kohler claims the Circuit Court erred in finding it was not entitled to a set off from the Commission's award for compensation paid to Corbin under his salary continuation plan. We disagree.

Under the salary continuation plan, beginning in August 1999, Kohler paid 100% of Corbin's base salary for the first three months of his disability and 80% for the following three months, thus compensating Corbin for a total of 26 weeks. Kohler's pay protection program brochure states: "[y]ou're

eligible to participate in the Pay Protection Program if you're an active full-time exempt associate." Kohler paid the cost of each employee's pay protection program. In the materials relating to the program, there was no mention of Workers' Compensation. Significantly, there was a section explaining "when benefits are not paid," and Workers' Compensation is not mentioned in connection with this list.

South Carolina Code Ann. section 42-9-210 provides:

> Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

S.C. Code Ann. § 42-9-210 (1985).

"The approval of the Commission for such deduction is required by § 42-9-210." Muir v. C.R. Bard, Inc., 336 S.C. 266, 298, 519 S.E.2d 583, 599 (Ct. App. 1999). "In order for payments to be deductible, they must have been made with reference to liability under the provisions of the Act and intended to be in lieu of compensation." Id. "Since only those payments are deductible which are made in contemplation of the legal obligation of the employer to pay compensation to a disabled employee, the intent with which such payments are made becomes important." Id. (citing Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 258, 127 S.E.2d 884, 885 (1962)).

The payments Corbin received were from a compensation plan which was set up internally at Kohler. The intent of the plan was not connected to Workers' Compensation benefits. Rather, it was a benefit Kohler provided to certain employees who became disabled. We find no evidence in the record

that the payments were made with reference to liability under the Workers' Compensation Act or in lieu of compensation. We rule Kohler was not entitled to a credit for the payments.

CONCLUSION

Accordingly, based on the foregoing reasons, the decision of the Circuit Court is

AFFIRMED.

CONNOR and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kevin Cowan & Jimmy Blanding,

Appellants,

v.

Allstate Insurance Company,

Respondent.

Appeal From Anderson County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3555
Submitted September 9, 2002 – Filed October 7, 2002

AFFIRMED

Samuel D. Harms, of Greenville, for appellants.

Robert D. Moseley, Jr., of Greenville, for respondent.

STILWELL, J.: Kevin Cowan and Jimmy Blanding (collectively Appellants) brought this declaratory judgment action against Allstate Insurance Company to recover damages awarded by default against Allstate's insured. The circuit court ruled Allstate could assert its insured's failure to comply with

the cooperation clause of the insurance policy and deny coverage when it lacked actual knowledge of the lawsuit. We affirm.[1]

FACTS

Allstate issued the insurance policy to its named insured, Charles A. Griffis, who was the owner of the vehicle involved in the accident. Stacy Johnson was operating Griffis' automobile with his permission at the time of the accident. Although Appellants' counsel sent a letter of representation to Allstate, they did not send a courtesy copy of the summons and complaint, nor otherwise provide any notice that the lawsuit, which only named Johnson as the defendant, had been filed and served. Johnson did not forward the summons and complaint to Allstate and did not file an answer. Allstate's first notice of the existence of a lawsuit was when Appellants' counsel forwarded a copy of the order awarding damages following the entry of default. Allstate's motion on behalf of Johnson under Rule 60(b), SCRCP to be relieved of the judgment was denied.

Appellants then brought this declaratory judgment action against Allstate to collect the judgment entered against its insured based on coverage provided by the insurance policy. On cross motions for summary judgment, the circuit court held that Allstate could assert its insured's failure to comply with the cooperation clause to deny coverage when it lacked actual knowledge of the lawsuit.

LAW/ANALYSIS

The sole issue on appeal is whether S.C. Code Ann. § 38-77-142(B) (1997) overturned this court's holding in Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993). We hold that the statutory language modified Shores, and affirm the circuit court.

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

In Shores, this court found that a violation of the cooperation clause of an insurance contract providing the statutory minimum amount of automobile liability insurance cannot prevent recovery by an innocent victim. Id. at 355, 433 S.E.2d at 917. This court stated:

> "Furthermore, it appears to us that to allow the insured's failure to give notice of the accident to prevent the injured person's recovery would be to practically nullify the statute by making the enforcement of the rights of the person intended to be protected dependent upon the acts of the very person who caused the injury."

Id. at 354, 433 S.E.2d at 916 (quoting Ott v. Am. Fid. & Cas. Co, 161 S.C. 314, 319, 159 S.E.2d 635, 637 (1931). This court went on to hold:

> In conclusion, we hold, as a matter of public policy, the minimum limits automobile liability insurance policy involved in this case was not defeated or voided by [the insured's] failure to comply with policy notice provisions after the accident resulting in [the victim's] injuries, because the coverage was mandated by the legislature to protect innocent third parties. . . .

Id. at 356, 433 S.E.2d at 917.

Section 38-77-142(B) provides in pertinent part:

> If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

S.C. Code Ann. § 38-77-142(B) (Rev. 2002) (1997 Act No. 154, § 11, eff. Mar. 1, 1999).

Appellants argue Shores is still controlling precedent because USAA v. Markosky, the progeny of Shores, continued to apply it after the effective date of § 38-77-142(B). USAA v. Markosky, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000). Their reliance is misplaced. Markosky did not apply this statute. While it is true Markosky was decided after the effective date of the statute, the accident occurred before its effective date, and this court applied the Shores law. Therefore, Markosky cannot be read to hold that Shores survives the statute. Appellants then reason section 38-77-142(B) expanded Markosky by rendering the insurer liable for the full amount of a judgment, rather than only the minimum limits, if the insurer has notice of the lawsuit. However, as Allstate aptly notes, the statute could not have been intended to expand Markosky because it was enacted in 1997, before Markosky was decided, though it did not take effect until 1999.

The cardinal rule of statutory construction is for the court to ascertain and effectuate the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something. See State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). "Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997).

We find Section 38-77-142(B) is aimed at addressing the concerns stated by this court in Shores, while also addressing some concerns raised by our decision. In Shores, this court concentrated on the unfairness to the innocent victim in having to rely on the insured to forward the complaint to the insurance company and otherwise cooperating with the insurer prior to the insurer having a responsibility to provide coverage. The statute specifically addresses this court's concern by allowing the injured party to provide notice of the lawsuit to the insurer and to no longer have to rely on the injured party to provide the notice. However, the statute also removes the concern that insurers had to pay default judgments, as in this case, where the insurer had no opportunity to participate in discovery or present a defense.

As the trial court noted, "[t]his interpretation allows Plaintiffs the ability to avoid the effects of this section by informing the carrier of the suit by sending a filed courtesy copy of the complaint, which should encourage the open exchange of information and discourage default 'traps' where the insured is not represented by counsel." The alternative is to render meaningless the cooperation clause contained in virtually every policy of automobile liability insurance.

Although the statutory language is couched in terms which address the opposite of the situation in this case, we find the statute is unambiguous and clearly states the insurer cannot enforce a cooperation clause when it has actual knowledge and its insured otherwise cooperates and does nothing to prejudice the insurer's interest. By clear implication the reverse of that proposition must, of necessity, apply. The statute specifically includes the conditions upon which the insurer may not enforce the cooperation clause. When the legislature spells out the specific conditions an insurer may not rely upon to deny coverage or escape liability, then, a fortiori, the legislature intended that the absence of those conditions may be relied upon to provide a viable defense. Therefore, consistent with rules of statutory construction, we find the legislature intended to allow an insurer to enforce its cooperation clause if neither the insured nor the innocent victim provided the insurer with notice of the lawsuit. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction

'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'").

Additionally, under the system established in Shores, attorneys for the injured third party had no incentive to inform the insurer of the lawsuit. However, in addition to being zealous advocates on behalf of their clients, members of the bar are also officers of the court. The Canons of Professional Ethics, the predecessor to the Rules of Professional Conduct, "prohibit an attorney from engaging in practices that bring the courts or the legal profession into disrepute." Norris v. Alexander, 246 S.C. 14, 19, 142 S.E.2d 214, 217-18 (1965). Activities undertaken for the purpose of evading the full and fair litigation of a case on its merits do not promote the essential goals upon which the Rules of Professional Conduct rest.

Finally, the primary policy undergirding the Shores holding has also been changed by statute. Our holding in Shores was premised on the mandatory minimum limits required by statute, which could not be defeated by contract. The same act containing Section 38-77-142(B) also contained the provision codified at Section 56-10-510. Under that section, South Carolina allows a person to be uninsured by paying a fee and registering with the Division of Motor Vehicles. S.C. Code Ann. § 56-10-510 (Supp. 2001). Thus, South Carolina is no longer a mandatory insurance state, the critical difference being that such policies are rendered voluntary. "[I]nsurers have the right to limit their liability and to impose whatever conditions they desire upon an insured, provided they are not in contravention of some statutory inhibition or public policy." Penn. Nat'l Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 550-51, 320 S.E.2d 458, 461 (Ct. App. 1984) (citations omitted); see also USAA v. Markosky, 340 S.C. 223, 226, 530 S.E.2d 660, 662 (Ct. App. 2000).

CONCLUSION

We hold section 38-77-142(B) is unambiguous and was clearly intended by the legislature to address the situation presented in Shores. We find the trial court's interpretation promotes the "truth-seeking" function of the courts and

allows for an open process aimed at a full examination of all relevant facts. Thus, we conclude the interpretation of section 38-77-142(B) offered by the trial court—that an insurer who has no actual notice of a complaint or motion for judgment having been served on an insured and with whom the insured fails to cooperate to the prejudice of the insurer can rely on its cooperation clause as a defense to deny a claim—is the correct construction of the legislative intent.

AFFIRMED.

CONNOR and ANDERSON, JJ., concur.