The Supreme Court of South Carolina

RE: Relaxation of Rule 238(c), SCACR, for State Agencies.

O R D E R

Rule 238(c), SCACR, Forms of Papers, provides that copy may be typed or reproduced on both sides if the type or reproduction does not show through. At the present time, all petitions for certiorari, motions, and briefs received by the appellate courts are printed on only one side of the piece of paper. Because of the current budget crisis, we relax the Rule for State Agencies so, if it is more cost-effective to use double-sided printing, they may do so.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

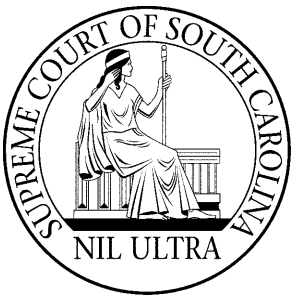
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 24, 2003



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

FILED DURING THE WEEK ENDING

February 24, 2003

ADVANCE SHEET NO. 7

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2003-UP-134 - The State v. Joseph Harlan Clark
(Anderson, Judge Alexander S. Macaulay)

2003-UP-135 - The State v. Michael Frierson
(Marion, Judge John M. Milling)

2003-UP-136 - Christian Maurer v. Carol Hilliard
(Berkeley, Judge Clifton Newman)

2003-UP-137 - The State v. Jerome Johnson
(Sumter, Judge Thomas W. Cooper)

2003-UP-138 - Teresa Pritcher v. Roger Pritcher
(Orangeburg, Judge Maxey G. Watson)

2003-UP-139 - Loretta O'Quinn v. Hubert O'Quinn
(Dorchester, Judge Nancy Chapman)

2003-UP-140 - The State v. Manning Peterson
(Lee, Judge Howard P. King)

2003-UP-141 - Edward Quick v. Landstar Poole
(Sumter, Judge Thomas W. Cooper, Jr.)

2003-UP-142 - The State v. Daryl S. Jackson
(Laurens, Judge James W. Johnson)

2003-UP-143 - The State v. Richard Kevin Patterson
(Anderson, Judge J. C. Buddy Nicholson, Jr.)

2003-UP-144 - The State v. Hoyt Morris
(York, Judge John C. Hayes, III)

2003-UP-145 - The State v. Willie James Mathis
(Greenwood, Judge Wyatt T. Saunders, Jr.)

2003-UP-146 - The State v. Timmy McFadden
(Florence, Judge L. Casey Manning)

2003-UP-147 - The State v. Tywan N. Reed)
(Orangeburg, Judge Luke N. Brown)

2003-UP-148 - The Statev. Billy Ray Smith
(Cherokee, Judge John C. Hayes, III)

2003-UP-149 - Major Tim Stephenson, et al. v. Dorchester County
(Dorchester, Judge R. Markley Dennis, Jr.)

2003-UP-150 - Gail Wilkinson v. David Wilkinson
(Aiken, Judge C. David Sawyer)

2003-UP-151 - The State v. Lerone J. Rouse
(Charleston, Judge Jackson V. Gregory)

2003-UP-152 - The State v. Israel Wilds
(Richland, Judge Marc H. Westbrooks)

2003-UP-153 - James W. Williams v. Otis David Gould
(Colleton, Judge Luke N. Brown, Jr.)

2003-UP-154 - The State v. Kendrick Leon Taylor
(Florence, Judge Paul M. Burch)

2003-UP-155 - The State v. Dale O. Watson
(Laurens, Judge James W. Johnson, Jr.)

2003-UP-156 - The State v. Lavon Stone
(Berkeley, Judge Paula H. Thomas)

PETITIONS FOR REHEARING

3565 - Clark v. SCDPS	Pending
3573 - Gallagher v. Evert	Pending
3574 - Risinger v. Knight	Pending
3579 - The State v. Dudley	Pending
3580 - FOC Lawshe v. International Paper	Pending
3581 - Nexsen v. Haddock	Denied 2/20/03

3585 - The State v. Adkins	Pending
3587 - The State v. Vang	Pending
3588 - In the Interest of Jeremiah	Denied 2/20/03
3591 - Pratt v. Morris Roofing	Pending
3592 - Gattis v. Murrells Inlet	Denied 2/20/03
3593 - McMillian v. Gold Kist	Pending
3598 - Belton v. Cincinnati	Pending
2001-UP-522 - Kenney v. Kenney	Held in Abeyance
2002-UP-611 - Allgood, V., et al. v. GE Capital	Denied 2/21/03
2002-UP-628 - Thomas v. Cal-Maine	Pending
2002-UP-765 - The State v. Raysor	Denied 2/21/03
2002-UP-785 - The State v. Lucas #2	Denied 2/20/03
2002-UP-786 - The State v. Lucas #3	Denied 2/20/03
2002-UP-787 - Fisher v. Fisher	Denied 2/21/03
2002-UP-788 - City of Columbia v. Floyd	Denied 2/20/03
2002-UP-792 - SCDSS v. Ihantiuk	Denied 2/21/03
2002-UP-794 - Jones v. Rentz	Denied 2/20/03
2002-UP-798 - Brantley v. Newberry	Denied 2/20/03
2002-UP-800 - Crowley v. NationsCredit	Pending
2003-UP-009 - Belcher v. Davis	Denied 2/20/03
2003-UP-014 - The State v. Lucas	Denied 2/20/03

2003-UP-017 - Green-Daniels v. Briggs	Denied 2/20/03
2003-UP-018 - Rogers Grading v. JMC Corp	Pending
2003-UP-019 - The State v. Wigfall	Denied 2/21/03
2003-UP-021 - Capital Coating v. Browning	Denied 2/20/03
2003-UP-022 - Settles v. Settles	Denied 2/21/03
2003-UP-023 - The State v. Killian	Denied 2/20/03
2003-UP-029 - SCDOR v. Spring Industries	Pending
2003-UP-033 - Kenner v. USAA	Denied 2/20/03
2003-UP-036 - The State v. Traylor	Pending
2003-UP-052 - SC 2nd Injury v. Liberty Mutual	Pending
2003-UP-053 - Cherry v. Williamsburg County	Pending
2003-UP-054 - University of Georgia v. Michael	Pending
2003-UP-055 - Benn v. Lancaster	Pending
2003-UP-056 - McClain v. Jarrard	Pending
2003-UP-059 - SCDSS v. Ceo	Denied 2/21/03
2003-UP-062 - Lucas v. Rawl	Denied 2/20/03
2003-UP-070 - SCDSS v. Miller	Pending
2003-UP-072 - Waye v. Three Rivers	Pending
2003-UP-073 - The State v. Walton	Pending
2003-UP-076 - Cornelius v. School District	Pending
2003-UP-083 - Miller v. Miller	Pending

2003-UP-084 - Miller v. Miller	Pending
2003-UP-085 - Miller v. Miller	Pending
2003-UP-088 - The State v. Murphy	Pending
2003-UP-091 - The State v. Thomas	Pending
2003-UP-096 - The State v. Boseman	Pending
2003-UP-098 - The State v. Dean	Pending
2003-UP-101 - Nardon V. Davis	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3314 - The State v. Woody, Minyard	Pending
3489 - The State v. Jarrell	Pending
3500 - The State v. Cabrera-Pena	Pending
3501 - The State v. Johnson	Pending
3504 - Wilson v. Rivers	Granted 2/20/03
3505 - L-J v. Bituminous	Pending
3518 - Chambers v. Pingree	Pending
3521 - Pond Place v. Poole	Pending
3523 - The State v. Arnold	Granted 2/20/03
3527 - Griffin v. Jordan	Pending
3533 - Food Lion v. United Food	Pending
3539 - The State v. Charron	Pending
3540 - Greene v. Greene	Pending

3541 - Satcher v. Satcher	Pending
3543 - SCE&G v. Town of Awendaw	Pending
3544 - Gilliland v. Doe	Pending
3545 - Black v. Karrottukunnel	Pending
3546 - Lauro v. Visnapuu	Pending
3548 - Mullis v. Trident	Pending
3549 - The State v. Brown	Pending
3550 - State v. Williams	Pending
3551 - Stokes v. Metropolitan	Pending
3552 - Bergstrom v. Palmetto Health Alliance	Pending
3558 - Binkley v. Burry	Pending
3559 - The State v. Follin	Pending
3561 - Baril v. Aiken Medical	Pending
3562 - Heyward v. Christmas	Pending
2002-UP-220 - The State v. Hallums	Pending
2002-UP-329 - Ligon v. Norris	Pending
2002-UP-368 - Roy Moran v. Werber Co.	Pending
2002-UP-401 - The State v. Warren	Pending
2002-UP-411 - The State v. Roumillat	Pending
2002-UP-412 - Hawk v. C&H Roofing	Pending
2002-UP-480 - The State v. Parker	Pending

2002-UP-485 - Price v. Tarrant	Pending
2002-UP-489 - Fickling v. Taylor	Pending
2002-UP-498 - Singleton v. Stokes Motors	Pending
2002-UP-504 - Thorne v. SCE&G	Denied 2/24/03
2002-UP-509 - Baldwin Const v. Graham, Barry	Granted 2/20/03
2002-UP-513 - Frazier, E'Van v. Badger	Pending
2002-UP-514 - McCleer v. City of Greer	Pending
2002-UP-516 - The State v. Parks	Pending
2002-UP-537 - Walters v. Austen	Pending
2002 -UP-538 - The State v. Ezell, Richard	Pending
2002-UP-547 - Stewart v. Harper	Pending
2002-UP-549 - Davis v. Greenville Hospital	Pending
2002-UP-586 - Ross v. USC	Pending
2002-UP-587 - Thee Gentlemen's Club v. Hilton Head	Pending
2002-UP-594 - Williamson v. Bermuda	Pending
2002-UP-598 - Sloan v. Greenville	Pending
2002-UP-599 - Florence v. Flowers	Pending
2002-UP-603 - The State v. Choice	Pending
2002-UP-609 - Brown v. Shaw	Pending
2002-UP-613 - Summit Contr. v. General Heating	Pending
2002-UP-615 - The State v. Floyd	Pending

2002-UP-656 - SCDOT v. DDD(2)	Pending
2002-UP-657 - SCDOT v. DDD	Pending
2002-UP-691 - Grate v. Georgetown	Pending
2002-UP-715 - Brown v. Zamias	Pending
2002-UP-724 - The State v. Stogner	Pending
2002-UP- 753 - Hubbard v. Pearson	Pending
2002-UP-769 - Babb v. Estate of Charles Watson	Pending
2002-UP-775 - The State v. Charles	Pending
0000-00-000 - Dreher v. Dreher	Pending
0000-00-000 - Hattie Elam v. SCDOT	Pending

PETITIONS - UNITED STATES SUPREME COURT

2002-UP-029 - Poole v. South Carolina	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of John Phillip Corley, Appellant.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25596
Heard January 9, 2003 - Filed February 24, 2003

AFFIRMED

P. Andrew Anderson, of Aiken, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Treva Ashworth, Assistant Attorney General Deborah R.J. Shupe, Assistant Attorney General Steven R. Heckler, of Columbia, for Respondent.

JUSTICE WALLER: Appellant John Phillip Corley appeals his commitment pursuant to the South Carolina Sexually Violent Predator Act ("the SVP Act"). See S.C. Code Ann. § 44-48-10 *et seq.* (2002). We affirm.

FACTS

In March 1993, a jury convicted appellant of assault and battery of a high and aggravated nature (ABHAN); he was sentenced to ten years. In August 1993, appellant pled guilty to criminal sexual conduct (CSC) in the second degree and was sentenced to 14 years, concurrent.

Shortly before his scheduled release from prison, the State filed a petition pursuant to the SVP Act seeking appellant's commitment for long term control, care and treatment. Prior to trial, appellant moved to prevent the details of the ABHAN and CSC convictions from being admitted into evidence via the indictments. He argued that because he would admit to the convictions, the details surrounding his prior offenses were not necessary and admission of the information would be prejudicial.[1] The trial court denied the motion.

At trial, both the State's expert, Dr. Donna Swartz-Watts, and appellant's expert, Dr. Harold Morgan, diagnosed appellant with depression and anti-social personality disorder.[2] Both experts also discussed appellant's past drug abuse. Dr. Swartz-Watts testified it was her opinion that appellant

---

[1] Although appellant pled guilty to second degree CSC, he was indicted for CSC first degree. The indictment states, in pertinent part, that appellant engaged in sexual intercourse with the female victim, and that the sexual battery "was accomplished by the use of force of a high and aggravated nature, to wit: [appellant] used physical force and threatened [the victim] with a knife while she was also the victim of a kidnapping." The ABHAN indictment states that appellant committed an assault and battery upon the female victim and describes the aggravating circumstances as follows: "[appellant] armed himself with a deadly weapon and used physical force to unlawfully restrain [the victim] and there existing a difference in the sex, age and physical conditions of the parties."

[2] Dr. Swartz-Watts characterized appellant's depression as being in "full remission." Dr. Morgan diagnosed appellant with "major depression, recurrent," but also stated that because it was being adequately treated with medication, the depression was "controlled."

met the SVP Act's criteria for a sexually violent predator. Dr. Morgan stated that, based on his evaluation and diagnoses of appellant, there was a seven to twenty percent likelihood appellant would engage in acts of sexual violence if not committed for long-term control, care and treatment. Dr. Morgan noted, however, that if appellant continued his treatment for depression, that likelihood would be reduced.

Appellant testified he did not think he was violent or dangerous. He attributed his problems and the assaults to his abuse of crack cocaine.

The jury found the State proved, beyond a reasonable doubt, that appellant is a sexually violent predator under the SVP Act. As a result, the trial court entered an order committing appellant to the Department of Mental Health for his long-term control, care and treatment.

ISSUES

1. Did the trial court err by admitting the ABHAN and CSC indictments?

2. Does the SVP Act comply with Kansas v. Crane, 534 U.S. 407 (2002)?

DISCUSSION

Appellant argues the trial court erred by admitting the ABHAN and CSC indictments. Specifically, he argues that because he was willing to stipulate he had previous convictions which triggered the SVP Act, there was no legitimate reason to admit the details of the offenses. We disagree.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. E.g., State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). Evidence is relevant if it tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE. Relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE. In the context

of a criminal case, we have noted that while evidence of other crimes is generally inadmissible to show criminal propensity or to demonstrate that the accused is a bad individual, evidence of other crimes is admissible if necessary to establish a material fact or element of the crime charged. See State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987); see also State v. Benton, 338 S.C. 151, 156, 526 S.E.2d 228, 230 ("while generally inadmissible, propensity evidence is not prohibited"), cert. denied, 530 U.S. 1209 (2000).

Under the SVP Act, the State bears the burden of proving beyond a reasonable doubt that a person is a sexually violent predator. See S.C. Code Ann. § 44-48-100 (2002). A sexually violent predator is defined as a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. S.C. Code Ann. § 44-48-30(1)(a) & (b) (2002).

Past criminal history is therefore directly relevant to establishing section 44-48-30(1)(a). As such, the State was not required to accept appellant's stipulation. Cf. Benton, 338 S.C. at 155-56, 526 S.E.2d at 230 (since evidence of other crimes is admissible to establish an element of the crime charged, the appellant's two prior burglary convictions were properly admitted to prove a statutory element of the first degree burglary charge; the evidence was not admitted to suggest appellant was a bad person); State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997) (the State could not be forced to stipulate generally to the prior offenses required for first degree burglary because such stipulation might cause a substantial gap in the evidence needed for the jury to find the defendant guilty of the offense), cert. denied, 525 U.S. 904 (1998).

Moreover, appellant's offer to stipulate to the requirement in section 44-48-30(1)(a), with the details of the offenses suppressed, would have hampered the State's ability to establish the requirement in section 44-48-30(1)(b). The Act defines "[l]ikely to engage in acts of sexual violence" to mean "the person's **propensity** to commit acts of sexual violence is of such a

degree as to pose a menace to the health and safety of others." § 44-48-30(9) (emphasis added). Therefore, a person's dangerous propensities are the focus of the SVP Act.

In the instant case, the State sought to prove that appellant's likelihood to re-offend was based in part upon the fact that his previous offenses were similar to one another. The testimony of the State's expert illustrates why evidence regarding the details of the offense was directly relevant to the ultimate issue of this case. Dr. Swartz-Watts testified it was important if a person's past crimes were similar in nature, e.g., similar sex, race, and age of the victims. She testified that where there is similarity, it is significant because it evinces a pattern of behavior which in turn indicates the person would be at an increased risk to commit future offenses. In addition, Dr. Swartz-Watts stated that appellant's two victims were similar age, race and gender. Thus, it is clear the details of appellant's prior offenses found in the indictments were relevant to the issue of whether appellant was likely to engage in acts of sexual violence again. Rule 401, SCRE. Furthermore, we note that the details -- as presented in the indictments -- were not unduly prejudicial. Rule 403, SCRE.

Accordingly, we hold the trial court correctly allowed the indictments into evidence.

We affirm appellant's remaining issue pursuant to Rule 220, SCACR, and the following authority: In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Regina D. McKnight, Respondent.

Appeal From Horry County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 25597
Heard February 4, 2003 - Filed February 24, 2003

APPEAL DISMISSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia, and John Gregory Hembree, of Conway, for appellant.

C. Rauch Wise, of Greenwood, for respondent.

Suzanne E. Groff, of Charleston, for amicus curiae.

PER CURIAM: McKnight was indicted for homicide by child abuse and distribution of cocaine after giving birth to a stillborn infant which had benzoylecgonine, a substance metabolized by cocaine, in its system. At the conclusion of the state's evidence, the trial court granted McKnight a directed verdict on the distribution of crack cocaine charge.[1] The state appeals the grant of a directed verdict to McKnight.

In State v. Holliday, 255 S.C. 142, 177 S.E.2d 541 (1970), this Court recognized limited situations where the state may appeal, stating,

> While a limited right of appeal in criminal cases has been conferred upon the State by statute in a number of jurisdictions, the extent of the right of the prosecution to appeal in this jurisdiction has been defined by our judicial decisions.
>
> Based primarily upon the double jeopardy provisions of the Constitution, we have long recognized that the State has **no right of appeal from a judgment of acquittal in a criminal case**, State v. Lynn, 120 S.C. 258, 113 S.E. 74; **unless the verdict of acquittal was procured by the accused through fraud or collusion,** State v. Johnson, 248 S.C. 153, 149 S.E.2d 348.

(Emphasis supplied). Citing State v. Rogers, 198 S.C. 273, 17 S.E.2d 563 (1941), the Court noted that "no writ of error, appeal, or other proceeding lies on behalf of the state to review or to set aside a verdict or a judgment of acquittal in a criminal case, **although there may have been error committed by the court,** or a perverse finding by the jury." 255 S.C. at 145, 177 S.E.2d at 542-43. (Emphasis supplied). These cases are premised upon the basic double jeopardy principle that

[1] The jury convicted McKnight of homicide by child abuse, and we affirmed that conviction in State v. McKnight, Op. No. 25585 (filed Jan. 27, 2003)(Shearouse Adv. Sh. No. 3 at 42)(McKnight I).

a defendant in a criminal prosecution is in legal jeopardy when he has been placed upon trial under a valid indictment and a competent jury has been sworn. State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950).[2]

Accordingly, as there is no right in this state[3] to appeal the grant of a directed verdict in the defendant's favor, the state's appeal is dismissed.

APPEAL DISMISSED.

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

---

[2] The state may appeal an order quashing an indictment, State v. Bouknight, 55 S.C. 353, 33 S.E. 451 (1899); State v. Young, 30 S.C. 399, 9 S.E. 355 (1889), or the grant of a new trial after conviction if based on an error of law. State v. Dasher, 278 S.C. 395, 297 S.E.2d 414 (1982); State v. DesChamps, 126 S.C. 416, 120 S.E. 491 (1923). These situations, however, involve either a dismissal prior to the jury being sworn, or the grant of a new trial following **conviction**, not an **acquittal**.

[3] The state's reliance on federal caselaw is misplaced. This Court has specifically noted that the state's right of appeal is governed by statute and caselaw. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986)(federal cases cited by appellant concern federal statute and had no applicability to state court appeals); State v. Holliday, supra (extent of the right of the prosecution to appeal in this jurisdiction has been defined by our judicial decisions).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jo Ann Riggs, Respondent,

v.

Dennis Riggs, Appellant.

Appeal from Greenville County
Stephen S. Bartlett, Family Court Judge

Opinion No. 25598
Heard January 9, 2003 – Filed February 24, 2003

AFFIRMED

Robert M. Rosenfeld, of Porter & Rosenfeld, of Greenville; and David A. Wilson, of Horton, Drawdy, Ward & Black, P.A., of Greenville, for appellant.

D. Michael Henthorne, of McNair Law Firm, of Myrtle Beach, for respondent.

JUSTICE MOORE: This appeal is from a family court order requiring appellant (Husband) to pay child support for his adult disabled child and refusing to terminate his alimony payments to respondent (Wife). We affirm.

FACTS

Husband and Wife divorced in 1985. By consent, a modification order was entered in 1987 setting Husband's periodic alimony payments at $400 per month and child support at $800 per month for their three minor children. As each child reached eighteen, Husband reduced his child support payment proportionately. Finally, in 1995, the youngest child reached eighteen and Husband ceased paying child support altogether.

Wife commenced this action in 1998 seeking an increase in alimony or, in the alternative, child support for Nancy, the parties' middle child, who turned eighteen in 1993 but still lives with Wife. Nancy is disabled from Leigh's Syndrome, a degenerative metabolic disease with which she was diagnosed in 1995. Nancy first started experiencing problems related to her condition sometime in 1993, the year she turned eighteen. Nancy functions on the level of an eight- to ten-year-old and has eye and muscle mobility problems. She also suffers from obsessive-compulsive disorder and is afraid of strangers. She insists on sleeping in Wife's bed and cannot be alone for any significant amount of time. Wife assists Nancy with her daily care including meals, bathing, and dressing.

In response to Wife's complaint, Husband counterclaimed for a termination or reduction of alimony. He contested child support on the ground Nancy was over eighteen years of age.

After a hearing, the family court reduced Husband's alimony payment to $150 per month but ordered him to pay child support for Nancy in the amount of $553.14 per month, reduced by the amount of his monthly health insurance premium for Nancy. Child support was ordered retroactive to the date of filing of Wife's complaint.

ISSUES

1. Does the family court have jurisdiction under § 20-7-420(17) to order child support for an adult disabled child who has never been emancipated?

2. Does this section violate equal protection?

3. Did the family court abuse its discretion in refusing to terminate alimony?

DISCUSSION

1. Continuation of child support

The family court's jurisdiction to order child support in this case derives from S.C. Code Ann. § 20-7-420(17) (Supp. 2002) which provides:

> The family court shall have exclusive jurisdiction:
>
> (17) To make all orders of support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first or to provide for child support past the age of eighteen years if the child is in high school and is making satisfactory progress toward completion of high school, not to exceed the nineteenth birthday unless exceptional circumstances are found to exist or unless there is a preexisting agreement or order to provide for child support past the age of eighteen years; and in the discretion of the court, to provide for child support past age eighteen where there are physical or mental disabilities of the child or other exceptional circumstances that warrant the continuation of child

> support beyond age eighteen for as long as the physical or mental disabilities or exceptional circumstances continue.

(emphasis added).

Husband contends the family court could not order child support in this case because § 20-7-420(17) provides only for the "continuation" of child support past eighteen. Husband claims since Nancy's disability was not diagnosed before she reached eighteen and child support for Nancy had already terminated, the family court's order was not a "continuation" of support within the terms of the statute.

First, medical testimony in the record indicates Nancy's condition is "a genetic error of metabolism." Although this condition was not definitively diagnosed until she was past eighteen, the fact that it is of genetic origin indicates Nancy's disability was not caused by some event that occurred after she reached majority. It is uncontested that Nancy has never been emancipated. Further, Husband's child support obligation was not judicially terminated; Husband relied on the presumption of emancipation to terminate payment on his own.

Most jurisdictions recognize a common law duty of parental support for a child who has reached majority but is so physically or mentally disabled as to be unable to support herself.[1] Where the

---

[1] *See* Streb v. Streb, 774 P.2d 798 (Alaska 1989); Towery v. Towery, 685 S.W.2d 155 (Ark. 1985); Nelson v. Nelson, 548 A.2d 109 (D.C. 1988); Pocialik v. Fed. Cement Tile Co., 97 N.E.2d 360 (Ind. App. 1951); Davis v. Davis, 67 N.W.2d 566 (Iowa 1954); In re: Glass' Estate, 262 P.2d 934 (Kan. 1953); State ex rel. Kramer v. Carroll, 309 S.W.2d 654 (Mo. App. 1958); Kruvant v. Kruvant, 241 A.2d 259 (N.J. 1968); Wells v. Wells, 44 S.E.2d 31 (N.C. 1947); Cohn v. Cohn, 934 P.2d 279 (N.M. App. 1996); Castle v. Castle, 473 N.E.2d 803 (Ohio 1984); Commonwealth ex rel. Cann v. Cann, 418 A.2d 403 (Pa. 1980);

disability prevents the child from becoming emancipated, the presumption of emancipation upon reaching majority is inapplicable. Parker v. Parker, 230 S.C. 28, 31, 94 S.E.2d 12, 13 (1956) (emancipation is effected by operation of law when a child attains majority unless there is some "infirmity of mind or body rendering the child unable to take care of itself").

We construe the language of § 20-7-420(17) to be consistent with this common law duty and hold the family court is vested with jurisdiction to order child support for an unemancipated disabled adult child. Further, we discern the legislature's intent that a noncustodial parent share the burden of supporting a child who cannot be emancipated because of a disability that arose before majority but was diagnosed only after the child turned eighteen.

Emancipation is a factual issue dependent upon the circumstances of each case. Timmerman v. Brown, 268 S.C. 303, 233 S.E.2d 106 (1977). In this case, there is no challenge to the fact that Nancy is not emancipated. Further, her disability has prevented her emancipation. The family court therefore had jurisdiction under § 20-7-420(17) to order child support in this case.[2]

2. Equal protection

Husband contends the underscored language of § 20-7-420(17) violates equal protection because a married parent has no legal

---

Sayne v. Sayne, 284 S.W.2d 309 (Tenn. App. 1955); Van Tinker v. Van Tinker, 229 P.2d 333 (Wash. 1951).

[2] Husband also argues the award of child support was not in Nancy's best interest because she will lose benefits such as Social Security Income and medicaid. The record indicates an administrative law judge has ruled that the child support payments do not make Nancy ineligible for Social Security Income. Although there is speculation in the record that Nancy's eligibility for other government programs may be affected, it is mere speculation. This issue is without merit.

obligation to support a disabled adult child and therefore a divorced parent cannot constitutionally be ordered to support such a child.[3] This issue is without merit. Equal protection essentially requires that all those similarly situated are treated alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). As we construe it, § 20-7-420(17) treats divorced parents the same as all other parents regarding support for an unemancipated disabled adult child. We find no equal protection violation.

3. Alimony

The family court reduced Husband's monthly alimony obligation from $400 per month to $150 per month, a reduction of about 62%. Husband contends alimony should have been terminated, rather than reduced, because of Wife's increased financial ability.

The modification of alimony is within the sound discretion of the family court and will not be overturned absent an abuse thereof. Thornton v. Thornton, 328 S.C. 96, 492 S.E.2d 86 (1997). A modification of alimony must be based on a substantial or material change in circumstances. Sharps v. Sharps, 342 S.C. 71, 535 S.E.2d 913 (2000). In addition to the changed circumstances of the parties, the financial ability of the supporting spouse to pay is a specific factor to be considered. S.C. Code Ann. § 20-3-170 (1985).

Although both parties have increased income, Wife still earns substantially less than Husband. Wife's original earnings were 22% of

[3]This issue was not raised to the family court. The issue of a statute's constitutionality may be raised for the first time on appeal, however, where the statute determines subject matter jurisdiction. State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 (1982). Because § 20-7-420 determines the family court's subject matter jurisdiction, Amisub of South Carolina, Inc. v. Passmore, 316 S.C. 112, 447 S.E.2d 207 (1994), this issue is properly before us.

Husband's; Wife now earns 37% of Husband's income.[4] The family court found Wife's increased income justified a reduction in alimony but properly considered Wife's continued custodial care of Nancy in refusing to terminate it. *Cf.* S.C. Code Ann. § 20-3-130(C)(9) (Supp. 2002) (in making award of alimony, family court must consider custody of children). In light of the substantial reduction in alimony ordered by the family court, Husband has failed to show an abuse of discretion.

CONCLUSION

Husband's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See* Issue IV: Smith v. Smith, 275 S.C. 494, 272 S.E.2d 797 (1980); Hatfield v. Hatfield, 327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997) (issue must be raised to and ruled on by family court to be preserved for review); *and* Issue V: Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991) (beneficial result a factor to be considered in awarding attorney's fees). The order of the family court is

AFFIRMED.

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

---

[4]At the time of the 1987 consent order setting alimony at $400 per month, Wife was earning $12,000 to 13,000 per year. The family court found her current income to be $4,091 per month, or $49,092 per year, from her salary as an accountant, investment income, and part-time work. At the time the parties divorced, Husband earned $56,000 to 58,000 per year. The family court found he now earns $11,066 per month, or $132,792 per year. Husband does not contest the family court's findings regarding the parties' income.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Walker Scott Russell, Respondent/Appellant,

v.

Wachovia Bank, N.A. as Putative Trustee of the Alleged Donald Stuart Russell Revocable Trust and as Putative Trustee of the Alleged Donald Stuart Russell Irrevocable Trust; Virginia U. Russell; Donald S. Russell, Jr.; Mildred Russell Williams Neiman; John R. Russell; Thaddeus Russell Williams; Virginia Carol Williams; and Cecilia Frances Williams, Respondents.

AND

Mildred R. Neiman, Appellant/Respondent,

v.

Wachovia Bank, N.A. as Personal Representative of the Estate of Donald S. Russell, Sr., Virginia C. Williams, T. Russell Williams, Cecilia F. Williams, Virginia U. Russell, Donald S. Russell, Jr., W. Scott Russell, and John R. Russell, Respondents.

AND

Mildred R. Neiman, Appellant/Respondent,

v.

Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell Williams, Sr., Virginia C. Williams, T. Russell Williams, Cecilia F. Williams, Virginia U. Russell, Donald S. Russell, Jr., W. Scott Russell, and John R. Russell, Respondents.

AND

In The Matter of the Estate of Donald S. Russell, Deceased

Walker Scott Russell, Respondent/Appellant,

v.

Virginia U. Russell, Donald S. Russell, Jr., Mildred Russell Williams Neiman, John R. Russell, and Wachovia Bank, N.A. as Personal Representative, Respondents,

AND

Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell, deceased, Respondent,

v.

Virginia Williams, Russell Williams, Cecilia Williams, Walker Scott Russell, Jr., and Grace Johnson Russell, Respondents,

Of whom Walker Scott Russell, a/k/a W. Scott Russell is Respondent/Appellant,

AND

Mildred Russell Williams Neiman, a/k/a Mildred R. Neiman is Appellant/Respondent,

And

Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell, deceased, Virginia U. Russell, Donald S. Russell, Jr., John R. Russell, Thaddeus Russell Williams, a/k/a T. Russell Williams, a/k/a Russell Williams, Virginia Carol Williams, a/k/a Virginia C. Williams, a/k/a Virginia Williams, and Cecilia Frances Williams, a/k/a Cecilia F. Williams are Respondents.

Appeal From Spartanburg County
Henry F. Floyd, Circuit Court Judge

Opinion No. 25599
Heard November 20, 2002 - Filed February 24, 2003

AFFIRMED AS MODIFIED

Joseph M. McCulloch, Jr., of Columbia, for Appellant/Respondent.

J. Neil Robinson, of Charlotte, and Leo A. Dryer, Jr., of Columbia, for Respondent/Appellant.

G. Dewey Oxner, Jr. and Moffatt G. McDonald, of Greenville; R. Ray Dennis, of Spartanburg; Stanley T. Case and Edward G. Smith, of Spartanburg; and Thomas E. McCutchen and Hoover C. Blanton, of Columbia, for Respondents.

JUSTICE PLEICONES: Walker Scott Russell ("Scott") and Mildred Neiman ("Mim"), collectively "Appellants", each filed Summons and Complaints in the Spartanburg County Probate Court seeking to set aside the Last Will and Testament of their father, Donald S. Russell, Sr. ("Testator"), and seeking to set aside the Revocable Trust and Irrevocable Trust of Testator. Appellants contend both the will and the trust instruments resulted from undue influence exerted on Testator. Wachovia Bank ("Wachovia"), Executor of Testator's estate and trustee of both trusts, as well as the other Defendants, moved for summary judgment, which was granted. These appeals followed.[1] We affirm as modified.

[1] Appellants' actions were consolidated for purposes of discovery and trial, and have remained consolidated on appeal.

FACTS

Testator was married to Virginia U. Russell ("Mrs. Russell") and they had four children, Donald Russell, Jr. ("Donnie"), Mim, John Russell ("Johnny") and Scott. Mim married Thad Williams ("Thad") and had three children, Russell Williams ("Russell"), Virginia Williams ("Virginia") and Cecilia Williams ("Cecilia"), collectively "The Williams Children." Mim and Thad divorced, and Mim married Leonard Neiman in June of 1997.

Testator served as an active United States Circuit Judge for the Fourth Circuit until his death on February 22, 1998, at the age of 92. Prior to his appointment to the federal bench, Testator served as a governor of and United States senator from South Carolina, as well as President of the University of South Carolina. Testator's physical condition deteriorated in his later years, and he was occasionally hospitalized.

The Williams Children lived with Testator and his wife for most of their lives. Cecilia lived in the home until Testator's death, while Russell and Virginia resided in the home intermittently.

Testator executed many wills, codicils, and trusts beginning in 1959. His final will and trusts were executed on February 27, 1996, with codicils executed on May 15, 1996, November 6, 1996, October 9, 1997, and November 6, 1997. The last codicil was executed on February 20, 1998, just two days before his death. Testator's estate totaled 33 million dollars.

Testator's final estate plan provided that his estate be held in trust for Mrs. Russell for her lifetime, and at her death the trust property be distributed as follows:

(1) $750,000 to Scott in trust for life, if he is not living then to Scott's spouse and descendants then living, also in trust.
(2) One-third of the balance to Donnie.
(3) One-third of the balance to Johnny.
(4) The remaining one-third of the balance to Mim and her three children, the Williams Children, as follows:

a. One-fourth to Mim in trust for life, and then to the Williams Children in trust for life.
b. One-fourth to Virginia in trust for life.
c. One-fourth to Cecilia in trust for life.
d. One fourth to Russell in trust for life.

Mim is to receive only the income from her trust, but the trustee has the discretion to distribute principal. At Mim's death, the property remaining in the trust shall be divided per stirpes into trusts for Mim's descendants living at the time of her death. The Williams Children receive distributions of principal and income at the sole discretion of the trustee. The Williams Children are to have a power of appointment over their trusts through their wills, and cannot appoint the trust property to their estates or to creditors. If the Williams Children do not exercise their powers of appointment, their shares are divided per stirpes into trusts for their descendants living at the time of their death.

Appellants contend that the trial court erred in granting summary judgment against them. Since our standard of review requires we review the evidence in the light most favorable to Appellants, Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002), we recount from the record the evidence supporting their claims of undue influence by the Williams Children and their father Thad.

Appellants presented evidence, that at times, Testator was confused. One incident in 1997, detailed by several nurses employed by Testator, involved Testator thinking that he was in Richmond, Virginia, when in fact he was in Spartanburg, South Carolina. The nurses also stated that Testator "doubled up" on his medication, which caused them to regulate the medication Testator took, and put a lock on the medicine cabinet.

There was evidence that the Williams Children were disrespectful to Testator, and frequently yelled at Testator about money. The Williams Children engaged in physical fights in front of Testator. There was evidence that Cecilia monitored Testator's telephone calls while he was in his home,

and sometimes told Testator which clothes to wear. Cecilia would not allow Testator to regulate the thermostat in his house.

The Williams Children spent large amounts of Testator's money, sometimes charging as much as $12,000 in a month. The Williams Children had unfettered access to Testator's office, and lived in his house. There was evidence that Thad[2] had frequent contact with Testator's attorney regarding the estate plans. Two medical doctors testified that Testator could have been susceptible to undue influence. Finally, there was evidence that Russell and Cecilia removed records from Testator's office on the weekend of his death.[3]

There is, however, undisputed evidence that the Testator was mentally competent and worked until the day he died. Testator drove himself to work every day. At the direction of Testator, his secretary, not the Williams Children or Thad, handled Testator's financial transactions. Testator frequently attended social engagements with Donnie and Johnny, as well as other friends and colleagues. There is also undisputed evidence that Mim has not provided for her own children, the Williams Children, in her estate plan. Finally, Testator met with his attorney alone on most occasions, and neither the Williams Children, nor Thad were present at the signing of the will, trust documents or codicils.

ISSUES

Did the trial judge err in granting summary judgment because a genuine issue of material fact existed concerning the exercise of undue influence over the Testator in the execution of his will?

Did the trial judge err in failing to make a specific ruling that North Carolina law governed the validity *vel non* of the trust documents?

---

[2] After receiving his law degree, Thad Williams earned a Master of Law in Taxation from New York University.

[3] Although Appellants tout this as a major indication of undue influence, the records were immediately sent to Wachovia, and the Testator authorized the removal of the records.

Did the trial judge err in granting summary judgment because a genuine issue of material fact existed concerning the validity of Testator's trusts due to undue influence or lack of trust *res*?

DISCUSSION

I. Will Contest

Appellants argue that Testator's entire estate plan is *void ab initio* due to undue influence exerted by the Williams Children as well as by Thad Williams, their father, and that summary judgment was inappropriate as there was a genuine issue of material fact. We disagree.

All parties stipulate that South Carolina law governs the will contest. For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. Last Will and Testament of Smoak v. Smoak, 286 S.C. 419, 334 S.E.2d 806 (1985). Undue influence must be shown by unmistakable and convincing evidence, which is usually circumstantial. Id. The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf. Id. Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker. Id.

Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship. Hembree v. Estate of Hembree, 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993). The "mere existence of influence is not enough to vitiate a Will…A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized." Last Will and Testament of Smoak, *supra*, at 424, 334 S.E.2d at 809. Where the testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but

does not change it, the court as a general rule considers the effect of undue influence destroyed. Smith v. Whetstone, 209 S.C. 78, 39 S.E.2d 127 (1946), as quoted in Estate of Cumbee, *supra*.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When reviewing a summary judgment order, an appellate court applies the same standard as the trial court. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). "The evidence, and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Id. at 494, 567 S.E.2d at 860. Since the standard of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment. Id. A heightened standard for summary judgment is required where "the inquiry involved in a ruling on a motion for summary judgment…necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Taking the facts in the light most favorable to the Appellants, we agree with the trial judge that there is no genuine issue of material fact to preclude the grant of summary judgment as to the validity of the will. Appellants have not presented unmistakable and convincing evidence that the Williams Children or Thad utilized their relationship with Testator to substitute their will for his. The evidence presented points to the conclusion that the Williams Children were churlish, spoiled children, who took advantage of Testator's generosity. While unattractive, such conduct and demeanor does not amount to undue influence.

In previous cases, this Court has found no undue influence existed where the evidence was similar in degree to that presented by Appellants. See, e.g., Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982) (Testator was confined to a nursing home, in feeble physical condition, yet continued

to conduct business affairs three years after the signing of the will. Beneficiary drove testator to the attorney's office, but was not present at the signing of the will. Case should not have gone to the jury because no undue influence.); Last Will and Testament of Smoak, *supra*, (Testator was bedridden, and beneficiary's attorney drafted the will. Directed verdict should have been granted because no evidence of undue influence.);[4] First Citizens Bank v. Inman, 296 S.C. 8, 370 S.E.2d 99 (1988) (Testator was in reasonably good health, worked in her yard, spoke with her neighbors and did some cooking. Testator "exhibited a pattern of changing her will over the years…she went through a consistent procedure of talking with her lawyer…it appears she was the ultimate decision maker." Directed verdict was proper.)

Where undue influence has been found, the facts have been far more egregious than those in this situation. See, Estate of Cumbee, *supra* (Testator's conversations were monitored by beneficiaries through a baby monitor, and testator developed hand signals to communicate with her visitors. The beneficiary controlled the testator's finances, and gave the directions for the new will to the attorney, picked up the will, and had the will executed in the home of the beneficiary.); Byrd v. Byrd, 279 S.C. 425, 308 S.E.2d 788 (1983) (Testator was infirm, both physically and mentally, prior to and contemporaneously with the execution of the will. The beneficiary threatened to send the testator to a nursing home, and visitation was severely restricted by the beneficiary. The will was voided for undue influence.)

Here, it is undisputed that Testator was independent, and physically mobile until a few days before his death. Testator, while elderly, was not infirm, mentally or physically, and was not prevented from seeing relatives, friends or business associates.

In order for the will to be void due to undue influence, "[a] contestant must show that the influence was brought directly to bear upon the

[4] The standard for summary judgment "mirrors the standard for a directed verdict under Rule 50(a)." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

testamentary act." Mock v. Dowling, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976). The record is devoid of any evidence that the Williams Children or Thad influenced the execution or any modification of the will. Neither the Williams Children nor Thad were present when the contents were discussed, or when the will was executed. The circumstances surrounding the will indicate the will was the product of the free and unfettered act of Testator.

Appellants argue that two expert witnesses, both medical doctors, testified that Testator was subject to undue influence, and that this testimony is enough to withstand summary judgment. We disagree. Neither of the experts examined the Testator. Both experts testified that Testator was competent to execute a will. Absent examination of Testator by the expert, or an opinion that Testator was mentally incompetent and therefore more susceptible to undue influence, we fail to see how expert medical testimony can be probative as to undue influence. Further, neither expert based his opinion on the circumstances surrounding the execution of the Will, which is the critical issue when evaluating an undue influence case. "Had his expert testimony related to mental capacity it might have properly been considered on that issue." Smoak v. Smoak, 286 S.C. 419, 427, 334 S.E.2d 806, 810 (1985). The doctors' testimony here did not, and therefore does not preclude summary judgment.

Testator had numerous opportunities to change the will after executing it in 1996. In fact, Testator did amend his estate plan multiple times. The undisputed evidence to the effect that Testator drove his own car, worked, and met alone with his attorney[5] while executing the will, is evidence of the "unhampered opportunity" to change his will, which negates any undue influence evidence that the Appellants put forth. Smith v. Whetstone, *supra*.

When opposing a summary judgment motion, the nonmoving party must do more than "simply show that there is a metaphysical doubt as to the material facts but must come forward with 'specific facts showing that there is a genuine issue for trial.'" Baughman v. American Telephone & Telegraph

[5] We note that Testator's counsel served as President of the American College of Trust and Estate Counsel.

Co., 306 S.C. 101, 107, 410 S.E.2d 537, 545 (1991). Where a verdict is not "*reasonably possible* under the facts presented, summary judgment is proper." Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000) (emphasis added). In this case, the trial judge properly granted summary judgment on the undue influence claim relating to the will. A judgment for Appellants was not reasonably possible under the facts presented when measured against the level of unmistakable and convincing proof.

II. North Carolina Law

Appellants argue that North Carolina law applies to the trust documents. We agree. The trust documents specifically provide for the application of North Carolina law. Both trusts state, "[t]he situs of this trust shall be the State of North Carolina, and the administration and construction of the trust, and the rights of the beneficiaries hereof, shall be governed by the laws of the State of North Carolina." As to interests in personal property held in testamentary or living trusts, a testator may designate the local law to govern the validity of the trust unless application of the designated law would be contrary to public policy of the state of testator's domicile at death. *Restatement (Second) of Conflict of Laws* §§ 268-270 (1971). See also George Gleason Bogert, *Trusts and Trustees*, § 301, § 332 (2d ed., West 1979). *Cf.* S.C. Code Ann. § 62-7-202 (1987) (suggests the settlor can designate in the trust instrument the principal place of administration of the trust). Further, the designated state must have a substantial relation to the trust. *Restatement (Second) of Conflict of Laws* §§ 268-270. "A state has a substantial relation to the trust when it is the state, if any, which the settlor designated as that in which the trust is to be administered, or that of the place of business or domicil of the trustee at the time of the creation of the trust, or that of the location of the trust assets at that time, or that of the domicil of the settlor, at that time, or that of the domicil of beneficiaries. There may be other contacts which will likewise suffice." *Restatement (Second) of Conflict of Laws* §270 cmt. b.

In this case, the Testator[6] designated that North Carolina law should apply, and the trustee as well as the trust property are located in North Carolina. There is a substantial relationship between the trust and North Carolina. We hold that a settlor may designate the law governing his trust, and absent a strong public policy reason, or lack of substantial relation to the trust, the choice of law provision will be honored. North Carolina law applies to Testator's trusts.

III. Trust Contest

A. Undue Influence

Appellants argue that the trusts are invalid due to undue influence by the Williams Children and/or Thad. Under North Carolina law, which is similar to South Carolina law, undue influence requires that:

> there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy the free agency and to render the instrument, brought into question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.

In re Will of Andrews, 261 S.E.2d 198, 199 (N.C. 1980).
Undue influence must be proved by the greater weight of the evidence. Id. The Appellants must "carry their burden of presenting specific evidence that [Testator's] will was the result of 'overpowering' and 'fraudulent influence' exerted by [the Williams Children and/or Thad] which overcame [Testator's] will." Estate of Whitaker, 547 S.E.2d 853, 858 (N.C. Ct. App. 2001).

There are several factors that the North Carolina courts look to in determining whether undue influence was exerted over the testator. In re Will

[6] Donald S. Russell, Sr. continues to be referenced as "Testator" for consistency, notwithstanding that we discuss the validity of trust instruments.

of Andrews, *supra*. "The test for determining the sufficiency of the evidence of undue influence is usually stated as follows: (i)t is generally proved by a number of facts, each one of which, standing alone, may have little weight, but taken collectively may satisfy a rational mind of its existence." Id. at 200. Analyzing the North Carolina factors one-by-one it is apparent that summary judgment was proper:

(1) **Old age and physical and mental weakness**. Appellants presented evidence that Testator was an elderly man who occasionally showed signs of physical and mental weakness.

(2) **The person signing the paper is in the home of the beneficiary and subject to his constant association and supervision**. Appellants contend the Williams Children lived in the home of Testator. However, evidence that a beneficiary lived with the Testator must be coupled with evidence of constant association and supervision. Appellants presented no evidence that Testator was subject to the Williams Children's constant supervision or association and admit that Testator was free to leave the house, drove himself to work everyday, and freely associated with other friends, family members, and colleagues.

(3) **Others have little or no opportunity to see him**. There is no evidence to support this factor.

(4) **The will is different from and revokes a prior will**. Appellants presented evidence that the Williams Children were not included in any of the estate plans previous to the 1996 plan and contended Testator intended to treat his children equally. However, Testator had never treated his children equally in previous estate plans. Beginning in 1981, Scott received a specific bequest, which increased substantially in all of the subsequent revisions, including the one executed two days before Testator's death, which increased Scott's trust share from $500,000 to $750,000. Although the Williams Children were not included in the previous wills, there was evidence that Mim had disinherited the Williams Children, and that Testator

changed his estate plan to make sure they were provided for. Also, there was evidence that Testator did not approve of Mim's marriage to Neiman, and wanted to insure Mim's bequest passed to her children, and not to Neiman.

(5) **It is made in favor of one with whom there are no ties of blood.** This element is not applicable, as the Williams Children are the grandchildren of the Testator.

(6) **It disinherits the natural objects of his bounty**. This element is also not applicable.

(7) **The beneficiary has procured its execution**. Appellants presented evidence that Thad arranged for the execution of the documents, and was heavily involved in the entire process. However, the Appellants presented no evidence that Thad, or the Williams Children, were present at the execution of any of the documents, nor that they *procured* the execution. Also, Thad is not a beneficiary of the estate plan.

Analyzing North Carolina jurisprudence, and applying these factors in the light most favorable to the Appellants, there is no evidence to make out a *prima facie* case of undue influence under North Carolina law.[7] Appellants

---

[7] Following is an example of a case, with facts far more favorable to a contestant than the one at hand, in which it was held that a *prima facie* case was not presented. In Matter of Will of Prince, 425 S.E.2d 711, 714 (N.C. Ct. App. 1993), the North Carolina Court of Appeals held that the evidence presented was insufficient to warrant submission of the issue of undue influence to a jury.

> The caveator presented evidence that the testatrix was old and at times suffered with memory loss; that the propounder, the testatrix's brother, assisted testatrix with her affairs; that the propounder's former daughter-in-law made an appointment for the testatrix with the attorney; and that the propounder drove the testatrix to see her attorney and sat in the conference she had with her attorney. The caveator also presented evidence that the testatrix did not make provisions in her will

presented evidence of the first factor, "[b]ut evidence of mental or physical condition standing alone is not evidence of undue influence." In re Ball's Will, 33 S.E.2d 619, 621 (N.C. 1945). The only other evidence Appellants presented was that the will was different from prior wills. There is no specific evidence of an "overpowering" or "fraudulent influence" exerted over Testator, therefore the summary judgment motion was proper and we affirm the trial court's ruling. Estate of Whitaker, *supra*.

B. Trust *Res*

Scott argues that the trust was not funded at its creation, and therefore was not validly created. We disagree. There is sufficient evidence that the trusts were funded. Testator expressed an intent to create a trust, designated beneficiaries and a trustee, and funded the trust. "In order to create an enforceable trust it is necessary that the donor or creator should part with his interest in the property to the trustee by an actual conveyance or transfer, and, where the creator has legal title, that such title should pass to the trustee." Tyson v. Henry, 514 S.E.2d 564, 565 (N.C. Ct. App. 1999). Under the Restatement (Second) of Trusts, "[i]f the owner of property executes an instrument purporting to transfer to another in trust such property as he may designate thereafter, the conveyance is incomplete and no trust arises *unless and until he designates and transfers the property*." §26 cmt. e (1959) (emphasis added). There is evidence that a ten dollar bill was attached to the trust documents when Testator executed the documents. "The trust

---

> for her son and her two grandchildren; that on occasions the testatrix expressed to others that she was afraid of the propounder; and that the propounder was a beneficiary under the will. In holding that such evidence was insufficient to support an inference of undue influence, [the court] stated that the evidence "fails 'to support an inference that the will was the result of an overpowering influence exerted by propounder of testatrix which overcame testatrix's free will and substituted for it the wishes of propounder, so that testatrix executed a will that she otherwise would not have executed.'"

In the Matter of Estate of Whitaker, 547 S.E.2d 853, 858 (N.C. Ct. App. 2001).

agreement obviously may precede the transfer of title, as well as occur at the time of the transfer." George Gleason Bogert, *Trusts and Trustees*, § 141, 10 (2d ed., West 1979).

Even if Testator did not fund the trust at the moment the documents were signed, the trusts were funded as of March 21, 1997, one year prior to Testator's death, as evidenced by a partnership agreement. See, e.g. Burbridge v. First Nat. Bank and Trust Co. of Oklahoma City, 415 P.2d 591 (OK 1965) (No property or assets were listed in the trust agreement or attached thereto as exhibits. The trust did not become operative as to any of the settlor's assets when the trust agreement was drawn up, but only later when property was specifically transferred and delivered to the trustee by the settlor.) We therefore conclude that all of the required elements for the formation of a trust were met.

CONCLUSION

We affirm the order of the circuit court judge granting summary judgment on the will under South Carolina law.

We hold that North Carolina law applies to the issues surrounding the trust documents. Under North Carolina law, Appellants presented no evidence that would give rise to a genuine issue of material fact as to their undue influence claim and Respondents are entitled to summary judgment as a matter of law. Finally, we hold that the trust was validly funded.

TOAL, C.J., WALLER, J., and Acting Justices John W. Kittredge and Perry M. Buckner, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Curtis Gibbs, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 25600
Heard January 23, 2003 - Filed February 24, 2003

REVERSED AND REMANDED

Deputy Director for Legal Services Teresa A. Knox; Legal Counsel Tommy Evans, Jr.; and Legal Counsel J. Benjamin Aplin, all of S.C. Dept. of Probation, Parole & Pardon, of Columbia, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of S.C. Office of Appellate Defense, of Columbia, for Respondent.

JUSTICE PLEICONES: Curtis Gibbs ("Gibbs") pleaded guilty to driving under suspension (second) and to uttering a fraudulent check of

more than $500. For DUS, Gibbs was sentenced to six months imprisonment and a fine of $500, provided upon payment of $200, the balance was to be suspended with probation for two months. For the fraudulent check conviction, Gibbs was sentenced to eight years imprisonment and a fine of $1,000. The sentence was to be suspended with probation for two years provided Gibbs paid restitution of $618.28, with at least $200 of the restitution to be paid by June 25, 2000.

Gibbs filed a notice of appeal. The State commenced a probation revocation action after Gibbs failed to report to the probation officer, and failed to pay the $200 restitution due on June 25th. Gibbs argued that the State could not proceed with probation revocation because his sentences were automatically stayed pending the conclusion of the appeal. The State contended the sentences were not automatically stayed and that to obtain a stay, Gibbs was required to post an appeal bond pursuant to Rule 230(a), SCACR. The trial court held the sentences were automatically stayed pending appeal, without the filing of an appeal bond. The Court of Appeals affirmed. State v. Gibbs, 346 S.C. 355, 550 S.E.2d 908 (Ct. App. 2001). We granted the State's petition for writ of certiorari to review this decision, and reverse.

ISSUE

Did the Court of Appeals err in holding that a sentence of confinement suspended to probation is automatically stayed pending appeal, without the necessity of filing an appeal bond?

DISCUSSION

South Carolina Appellate Court Rule 230(a) states that

> [t]he service of a notice of appeal by a criminal defendant shall operate as a stay of the execution of the sentence until the appeal is finally disposed of; provided, however, a sentence of confinement shall not be stayed until the defendant has posted bail under S.C. Code Ann. §§ 18-1-80 and –90 (1985)…

The issue then is whether Gibbs received a sentence of confinement within the meaning of Rule 230(a) SCACR. We hold that he did.

Gibbs received a sentence of eight years imprisonment for the fraudulent check conviction, and a sentence of six months imprisonment for the DUS conviction, each of which were suspended upon the fulfillment of certain conditions. Both of these sentences were sentences of "confinement" even though the committed portions were suspended by the trial court judge under S.C. Code Ann. § 24-21-410 (Supp. 2001). Simply put, a sentence of confinement is no less so because it is suspended.[1]

The Court of Appeals held in State v. Gibbs, supra, that "[t]he sentences did not require Gibbs to be confined and, therefore, the filing of the notice of intent to appeal alone was sufficient to stay the sentences. Thus, we conclude that Gibbs's [sic] sentences were stayed pending appeal without the necessity of an appeal bond being filed." We disagree. The Court of Appeals erroneously focused on Gibbs' *status* at the time of the appeal as an "unconfined probationer" rather than the actual *sentence* that he received. Although Gibbs' confinement was suspended to probation, he was appealing "sentences of confinement." Rule 230(a), SCACR. [2]

Rule 230(a), SCACR is drawn from the S.C. Code Ann. §§ 18-1-70[3] and –80.[4] The statutes distinguish between a defendant who receives a fine

---

[1] "A rose is a rose is a rose is a rose…" Gertrude Stein, *Sacred Emily* in *Selected Writings of Gertrude Stein* (Vintage Books, 1990).

[2] The sentencing sheet for Gibbs' DUS (second) charge states "[w]herefore, the Defendant is committed to the State Department of Corrections for a determinate term of six months…"

[3] "In criminal cases service of notice of appeal in accordance with law shall operate as a stay of the execution of the sentence until the appeal is finally disposed of."

and a defendant who receives a sentence of confinement. The statutes do not require a defendant who is sentenced to pay a fine to post a bond while his appeal is being decided, because that, in essence, would require that the defendant comply with his monetary sentence before his appeal is decided. However, a defendant who receives a prison term must post bond for a different reason:

> [t]he primary purpose of bail in a criminal case is to relieve the accused of imprisonment, and the state of the burden of keeping him, pending the trial (or pending appeal), and at the same time, to put the accused as much under the power of the court as if he were in the custody of the proper officer, and to secure the appearance of the accused so as to answer the call of the court and do what the law may require of him. E.H. Schopler, *Appealability of Order Relating to Forfeiture of Bail,* 78 A.L.R.2d 1180, 1181 (1961).

The practical effect is that an appeal bond relieves the State of the cost of supervising the probationer, perhaps unnecessarily, during the appeal process. At the same time the sentenced defendant remains "…as much under the power of the court as if he were in the custody of the proper officer…." The distinction in Rule 230(a), SCACR, drawn from the statutes, is between sentences that are fines and those that are confinement, not sentences that are suspended to probation and those that are not.

CONCLUSION

We reverse the decision of the Court of Appeals. Gibbs was given two sentences of confinement, therefore, the circuit court erred in holding that Gibbs' probationary sentence should have been stayed pending appeal without Gibbs having to post an appeal bond. We remand the case to the circuit court for proceedings consistent with this opinion.

---

[4] "Pending such appeal the defendant shall still remain in confinement until he give bail in such sum and with such sureties as to the court shall deem proper."

REVERSED AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of Will
T. Dunn, Jr., Respondent.

ORDER

Respondent has been arrested and charged with kidnaping, first degree criminal sexual conduct, possession of methamphetamine with intent to distribute and simple possession of marijuana. The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Richard Vance Davis, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Davis shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's

clients. Mr. Davis may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Richard Vance Davis, Esquire, has been duly appointed by this Court.

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

Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
February 21, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Butler, Appellant.

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

Opinion No. 3601
Heard December 11, 2002 – Filed February 24, 2003

REVERSED AND REMANDED

Assistant Appellant Defender Robert M. Dudek and Assistant Appellate Defender Tara S. Taggart, both of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H.

Richardson and Senior Assistant Attorney General Norman M. Rapoport, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

PER CURIAM: Charles Butler was indicted for trafficking in cocaine and unlawful possession of a pistol. A jury convicted him of both charges and the trial court sentenced him to ten years imprisonment for trafficking in cocaine and three years imprisonment for unlawful possession of a pistol. Butler appeals arguing the trial court erred in denying his motion to suppress the evidence obtained as a result of an unlawful search. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Officer Todd Cook testified that on the evening of February 23, 2000, he stopped a van because the vehicle had no taillights. The driver exited the van and he and Officer Cook walked to the rear of the vehicle. Cook stated that, as he was writing out a warning ticket to the driver for defective rear lights, he could smell an odor of alcohol coming from the driver. He asked the driver whether there was anything inside the van he needed to know about, such as "illegal contraband" (sic) or any alcohol. Cook stated that he had a suspicion that there was some alcohol in the van because he could smell it on the driver and stated, "for my safety and his safety I just wanted to check, make sure nothing illegal—anything else was going on with the traffic stop." Additionally, Officer Cook testified "when he [the driver] was walking towards me from the van, I smelled alcohol." He could not tell if the alcohol was coming from the driver or inside the van, but he suspected there was alcohol in the van. Cook proceeded to the passenger side of the van to get "the passenger out." Butler was the passenger he removed from the van. Officer Cook also indicated there were additional passengers in the back seat of the van.

Butler objected to admissibility of the evidence Officer Cook obtained as a result of the stop and subsequent search of Butler. The trial court excused the jury and conducted an in camera hearing.

During the in camera hearing, Officer Cook testified as follows during direct examination:

> Q: Trooper, why did you get the individuals that were inside the van out?
> A: For my protection and their protection.
> Q: What were you going to do when you got them out?
> A: Do a routine pat down.
> Q: A pat down?
> A: Yes.
> Q: Terry frisk, okay. Did you check the passenger? Did you attempt to check the passenger for weapons or a weapon?
> A: Yes sir, I did.
> Q: What happened after you attempted to check for weapons?
> A: The passenger, Mr. Butler fled on foot.
> Q: What was the result of your check of him or your pat down of him?
> A: Just his outer clothes.
>
> * * *
>
> Q: What did you do and what did you find? Did you feel anything?
> A: Yes, sir. During my pat down I patted down the pocket and outside the pocket, and I felt what felt like to be a pistol. And at that time, he took off running.
>
> * * *
>
> Q: [Y]ou got the individuals out for a pat down because there were other ones there?
> A: Yeah.
> Q: Okay.
> A: I had suspicion that there was alcohol in the van from the traffic stop.

During cross-examination of Officer Cook, he testified as follows:

Q: [W]as [Butler] doing anything wrong, that you could see, in the van . . . when he was sitting there?
A: Well, I was in the process of investigating.
Q: But was he doing anything wrong to cause you to investigate him, sit down in the front seat?
A: I mean - -
Q: What was he doing but sitting there?
A: Well, you know, I smelled alcohol. I thought it was coming from inside the van, and that's what - - if that's what you're asking me.
Q: What was this man doing?
A: I was investigating further.

When asked on re-direct why he removed Butler from the van, Officer Cook indicated that the driver had given him an incorrect name for the passenger, and that there were "a lot of suspicions going on." Officer Cook stated that he could not see what Butler was doing inside the van and when asked why that was a danger he stated: "Because the driver, when I asked the driver about the alcohol, if there's anything in the van, he stated to me no, there was not, and he gave me the passenger - - or a different name than what the passenger's real name was." He further stated that in order to ascertain whether anybody in the van had a weapon or was a threat to him he had to "[g]et each one of them out and talk to them and pat them down."

Butler argued Officer Cook did not have reasonable suspicion to conduct a search of Butler, and moved to suppress any evidence which resulted from the search. The trial court determined that Officer Cook "was entitled to at least ask the passengers to vacate the van and do a pat down search before" using his flashlight to look in the van because he had a "reasonable suspicion of criminal activity, i.e., the smell of alcohol." The trial court further stated he didn't think Officer Cook was afraid of Butler, but believed Cook conducted the pat down search as part of his continuing investigation for open containers in the van. The court therefore ruled the officer had a reasonable suspicion of criminal activity based on the smell of

alcohol coming from the van, and the officer was therefore entitled to conduct a search for an open container and remove the passengers from the vehicle.

Officer Cook testified in the presence of the jury, that when he searched Butler and found the gun, Butler ran away into some woods. Officer Cook shortly thereafter apprehended Butler and seized a large bag of cocaine and $863.00 from Butler's pants' pocket, as well as the pistol from his jacket pocket.

The jury found Butler guilty of trafficking in cocaine and unlawful possession of a pistol. Butler appeals.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "Our review in "Fourth amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding." State v. Green, 341 S.C. 214, 219 n. 3, 532 S.E.2d 896, 898 n. 3 (Ct. App. 2000) (relying on State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)).

LAW/ANALYSIS

Butler argues the trial court erred in finding there was reasonable suspicion to justify a warrantless search under Terry v. Ohio,[1] and in failing to suppress the evidence obtained as a result of the search of Butler. We agree.

[1] 392 U.S. 1, 88 S.Ct. 1868 (1968).

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment does not proscribe all contact between police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762 (1984) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976)). The stopping of a vehicle and the detention of its occupants constitutes a seizure and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Delaware v. Prouse, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1396 (1979). "A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). In determining whether reasonable suspicion exists, the circumstances must be considered as a whole, and if the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope enlarged. Id. The scope and the duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper. Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994).

Observing that traffic stops may be dangerous encounters for police officers, the United States Supreme Court has held that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver and passengers to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures. Maryland v. Wilson, 519 U.S. 408, 412-15, 117 S.Ct. 882, 885-86 (1997). Under the mandates of Terry, however, a police officer must have a reasonable suspicion that an individual is armed and dangerous before conducting a pat down or frisk of the person. Terry, 392 U.S. at 27, 88 S.Ct. at 1883. The question is whether "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. See also Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136

(1993) (when an officer is justified in believing the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon; purpose of limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence); Maryland v. Buie, 494 U.S. 325, 332, 110 S.Ct. 1093, 1097 (1990) (limited pat-down for weapons is authorized where a reasonably prudent officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual).

It is undisputed Officer Cook had reasonable suspicion to stop the vehicle in which Butler was a passenger, based on the traffic violation. Furthermore, Officer Cook was justified in extending the scope and duration of the traffic stop based on his suspicion that open containers of alcohol may have been in the van. It is also clear the officer could order the driver and passengers to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures. The question before us, however, is whether Officer Cook had reasonable suspicion to conduct a pat-down or frisk of Butler.

> [B]efore the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous. Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer's safety. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). An officer must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (an officer is not entitled to seize and search every person on the street; mere knowledge of the suspect being a known narcotics dealer who put his or her hand into a pocket as the police approached does not provide justification); cf. United States v. Moore, 817 F.2d 1105 (4th Cir. 1987) (justification

> found where suspect was observed in the vicinity of a building late at night, shortly after the alarm sounds, and the street is dark, the officer is alone, and the suspected crime is burglary), *cert. denied*, 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 396 (1987).

State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996); see also State v. Burton 349 S.C. 430, 439, 562 S.E.2d 668, 673 (Ct. App. 2002) (once a basis for a lawful investigatory stop exists, an officer may protect himself during the stop by conducting a frisk for weapons if he has reason to believe the suspect is armed and dangerous; in justifying the intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion).

Noting that "[t]he indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger" to an officer, the United States Fourth Circuit Court of Appeals has found that where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a pat-down or frisk of both the driver and the passengers. U.S. v. Sakyi, 160 F.3d 164, 169-70 (4th Cir. 1998). Thus, the court held, "in connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others." Id. at 169. Additionally, our court has found reasonable suspicion existed for an officer to conduct a pat down search of an individual under a variety of circumstances where the officer articulated sufficient facts to justify the search. See e.g., State v. Blassingame, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (Ct. App. 1999) (frisk by officer was proper under the circumstances because a reasonably prudent man, when faced with a man who met the description of an armed carjacker, kidnapper, and robber who could not satisfactorily explain why he was in the area, would be warranted in a belief that his safety was in danger); State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (Ct. App.1998) (finding reasonable suspicion individual might be armed and

dangerous, justifying a pat down, where officer stated the driver was acting a little bit edgy, fidgeting and looking around on the inside like he was looking for a weapon, such that he thought for officer safety he should remove him from the vehicle to keep him away from any weapons opportunity); State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (finding officer could reasonably have believed driver of a brown Honda would be armed and dangerous where the officer "understood the following from the information related to him by the dispatcher and his own observations: (1) a female complainant had two days earlier reported a shooting incident to the police; (2) the complainant saw two black males in two separate cars drive by her home; (3) she described one automobile as a brown-colored Honda bearing paper tags that advertised Breakaway; (4) the driver in each car had made a gesture toward her; (5) she felt their actions were connected with the shooting incident; (6) there could be weapons on the drivers' persons or in their cars; and (7) a brown-colored Honda equipped with Breakaway paper tags and driven by a black male was in the area where the cars were reported as having been seen.").

Here, the trial court failed to make any determination that the officer had the necessary apprehension of danger to justify a pat-down search of Butler. Indeed, the trial court found the officer had no fear of Butler, but was merely continuing his investigation of a possible open container violation.[2] Clearly, the trial court improperly assumed if the officer was entitled to remove Butler from the vehicle in furtherance of his investigation, he was automatically entitled to frisk the passenger. The law is settled, though, that there must be a showing that the officer had a reasonable fear for himself or for the safety of others to justify the greater intrusion of a pat-down.

---

[2] See State v. Woodruff, 344 S.C. at 553, 544 S.E.2d at 298 (where second search of individual was unrelated to reasonable apprehension individual was armed with a weapon, such behavior constituted "the very type of evidentiary search, or 'fishing expedition,' Terry expressly refused to authorize and which has been condemned time and again by the United States Supreme Court, as well as the courts of this State.").

The appellate court, however, does not review the trial court's determination de novo, but applies a deferential standard of review, and will reverse only if there is clear error in its ruling. State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002). Thus, this court will affirm if there is any evidence to support the decision, regardless of the basis of the trial court's ruling. Id. In accessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed; rather the question is whether a reasonably prudent person in those circumstances would be warranted in the belief that his safety or that of others is in danger. Id. The officer must be able to point to specific articulable facts which, taken together with reasonable inferences, reasonably warrant the intrusion. Id.

Turning to the facts of this case, we find Officer Cook failed to articulate any facts indicating he believed Butler was armed and dangerous, or that he feared for his safety or that of others. Officer Cook merely stated he was suspicious. He did not indicate what his specific suspicions were and, particularly, did not indicate he was suspicious that Butler was armed or dangerous. The only basis for any suspicion he had was that he smelled alcohol and the driver had provided him with an incorrect name for the passenger.[3] See State v. Burton, 349 S.C. at 440, 562 S.E.2d at 673 (where only activity detective pointed to as "suspicious" was individual's refusal to answer questions and fact that individual kept his right hand in his coat pocket, detective failed to articulate valid reasonable suspicion for stop and search of individual, in spite of detective's testimony he feared for safety of those around him). Further, this case does not involve a heightened apprehension of danger based upon a reasonable suspicion of drug activity, allowing the conclusion that guns would likely be present. Finally, although Officer Cook indicated he would have to remove all the passengers from the van and frisk them in order to ascertain whether anyone in the van had a weapon or was a threat to him, he failed to specify the particular facts upon which he based any fear that the passengers were armed and dangerous. See

[3] It is not clear from the record at what point the officer actually determined the driver had provided him with an incorrect name for Butler. Argument of counsel at the trial level suggests the officer assumed the name was incorrect because Butler failed to respond when the officer called the name.

U.S. v. Sakyi, 160 F.3d at 168-69 (generalized risk to officer safety is insufficient to justify a routine pat-down of all passengers as a matter of course).

Accordingly, we find that Officer Cook's search of Butler was unlawful and that the trial court erred in failing to suppress the evidence that resulted from the search. See State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.").

REVERSED AND REMANDED.

GOOLSBY, HUFF, and SHULER JJ., concur.