The Supreme Court of South Carolina

IN THE MATTER OF WILLIAM A. EDMUNDSON, RESPONDENT.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 1986, William A. Edmundson was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated February 25, 2002, Mr. Edmundson submitted his resignation from the South Carolina Bar. We accept Mr. Edmundson's resignation.

Mr. Edmundson shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Edmundson shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of William A. Edmundson shall be effective upon full compliance with this order. His name

shall be removed from the roll of attorneys.

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
March 25, 2002

The Supreme Court of South Carolina

IN THE MATTER OF DEWEY THOMAS O'KELLEY, III, RESPONDENT.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1992, Dewey Thomas O'Kelley, III was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated December 30, 2001, Mr. O'Kelley submitted his resignation from the South Carolina Bar. We accept Mr. O'Kelley's resignation.

Mr. O'Kelley shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. O'Kelley shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Dewey Thomas O'Kelley, III shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

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
March 25, 2002

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

March 25, 2002

ADVANCE SHEET NO. 8

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

State of South Carolina, Respondent,

v.

Tracy McMillian, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25430
Heard January 8, 2002 - Filed March 18, 2002

REVERSED AND REMANDED

Assistant Appellate Defender Tara S. Taggart, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy

Attorney General Robert E. Bogan, Senior Assistant Attorney General Harold M. Coombs, Jr., and Solicitor Warren B. Giese, all of Columbia, for respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' unpublished opinion in State v. McMillian, Op. No. 2000-UP-257 (S.C. Ct. App. filed April 5, 2000). We reverse and remand for a new trial.

FACTS

Petitioner, Tracy McMillian, was indicted for first-degree burglary in regard to the May 25, 1996 burglary of the residence of his cousin, Diane Macon. He was initially tried on January 5-6, 1998. McMillian's first trial resulted in a mistrial, when the jury could not reach a verdict. The jury advised the trial judge it was deadlocked after re-hearing the testimony of the state's only neutral witness, Dorothy Williams Rumph.[1]

On January 13, 1998, McMillian's attorney requested portions of the first trial transcript (including the testimony of Rumph and Morris) from the court reporter. Prior to receipt of the transcript, however, the case was called for trial by the state on Jan. 15-16, 1998. McMillian moved for a continuance to obtain the first trial transcript in order to effectively impeach the witnesses against him. The motion was denied.

Upon re-trial, the state presented the testimony of Rumph, Morris, and Lawanda Bea Murray. The jury convicted McMillian of first-degree burglary,

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[1] The only other eyewitness for the state at the first trial was Alexander Morris, who drove McMillian to the Eastover/Hopkins residence where the burglary took place. Morris was charged with burglary, but the charges against him were apparently dropped after he gave a statement implicating McMillian. Lawanda Bea Murray, who was allegedly a passenger in Morris' vehicle at the time of the crime, did not testify at the first trial.

and he was sentenced to 18 years imprisonment. After oral argument at which only two of three Court of Appeals judges were present, McMillian's conviction was affirmed in an unpublished opinion.

ISSUES

1. Did the Court of Appeals erroneously proceed with oral argument when one judge could not be present?

2. Did the Court of Appeals err in affirming the denial of McMillian's motion for a continuance and subsequent motion for a new trial?

1. ORAL ARGUMENT

McMillian contends the Court of Appeals erred in holding oral argument with only two of the three panel judges present. We agree.

McMillian's oral argument was set for 2:45 pm on March 8, 2000. Upon arrival, counsel was advised that only two of the three panel judges would be present for oral argument and that the third member would listen to the tapes of oral argument. Arguments proceeded over the objection of counsel for McMillian. No questions were asked during the argument, and the Court of Appeals affirmed in an unpublished opinion signed by three judges. McMillian contends this denied him of the quorum required for the Court of Appeals to act. We agree.

Under S.C. Code Ann. § 14-8-80 (d)(Supp 2001), three judges are necessary to constitute a quorum of the Court of Appeals, and a concurrence of the majority is necessary for reversal of the judgment below. This Court has recognized that no valid act can be done in the absence of a quorum. Care and Treatment of Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001); Gaskin v. Jones, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942).

In Mills v. Atlantic Coast Line Ry. Co., 87 S.C. 158, 69 S.E. 91 (1910), a case involving the quorum requirement as applied to this Court, we stated, "[i]t

is obvious that the provision of the Constitution above quoted (which . . . must be construed to be mandatory) **absolutely requires that there shall be a hearing by a quorum of the Supreme Court, and this quorum cannot consist of less than three members**." Accordingly, we hold a quorum was necessary such that the Court of Appeals should not have continued over the objection of McMillian's counsel.[2] In the interest of judicial economy, rather than remand this matter to the Court of Appeals, we will address the merits of McMillian's appeal.

2. DENIAL OF CONTINUANCE/NEW TRIAL

At the outset of the second trial, McMillian moved for a continuance in order to obtain portions of the transcript of his Jan. 5-6 trial, which resulted in a hung jury and a mistrial. McMillian asserted the transcript was necessary in order for him to properly impeach the witnesses against him. The trial court denied the motion.

A trial judge's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S. 853 (1997). Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth. State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957).

The only "neutral" witness for the state during McMillian's second trial was Dorothy Williams Rumph.[3] Accordingly, her credibility was essential to

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[2] In Mills, the parties had stipulated to have the merits of the appeal decided by the quorum of the Court which was present at a hearing on a motion to dismiss; accordingly, the Court held the parties had consented to Judge Woods participating (notwithstanding his absence at oral argument). In the present case, however, counsel for McMillian did not consent to oral argument in the presence of only two judges.

[3] Although Alexander Morris and Bea Murray both inculpated McMillian in the second trial, both Morris and Murray could feasibly have been prosecuted

McMillian's defense. Moreover, at the first trial, the jury deadlocked, 8-4, after re-hearing her testimony. The crucial nature of Rumph's testimony cannot be overstated.

Rumph was a next-door neighbor of the victim and testified she witnessed the 2:00-2:30 am burglary through the window blind beside her bed. At both trials, Rumph testified she saw a car driven by Alexander Morris pull up across the street. She saw McMillian get out of the car and go around to the back of the house. He was gone for about five minutes and returned and put something in the back seat of the car. The two men drove off in the car, but returned a little while later. McMillian went back toward Macon's back door, and returned with a stereo component set. Rumph was certain of her identification because she had known McMillian since 1976, and he had been to her house earlier that evening, wearing a white tank top and camouflage pants, the same attire he wore at the time of the burglary. Rumph testified the area was "lit up pretty good." Rumph knew Morris because he used to stay with her cousin. She also recognized his grey and black car. Notwithstanding both Morris and Murray testified that Murray was present in the back seat of the car, Rumph testified she did not see a third person.

During the second trial, Rumph testified that she was no longer neighbors with the victim. However, at the first trial two weeks earlier, Rumph testified that she still lived at the address across from the victim. McMillan contends he "was prevented from showing that if a given witness lied in the past or was now lying about a minor point, then he/she could very well be lying about a major point." We agree. Although the fact that Rumph no longer lived at the Lewis Scott address is not in any way relevant to McMillian's guilt, the fact that she lied about her address at the first trial is relevant to her overall credibility. Given that Morris was potentially culpable in the crime, and that there was no

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by the state since they admitted driving him to the location where the burglary occurred. In fact, Morris was initially indicted for the crime.

other direct evidence linking McMillian to the burglary,[4] we find his testimony inherently suspect.[5] Murray was also feasibly subject to prosecution for her participation in the crime, her testimony is likewise dubious. The lack of credibility of these witnesses simply highlights the significance of Dorothy Rumph's testimony, and the critical need of the defense to be able to properly impeach her.[6] On the present record, we simply cannot escape the conclusion that the verdict hinged upon her credibility, and that McMillian was hindered in his ability to impeach her.

We do not find recent cases of this Court and the Court of Appeals controlling under the circumstances of this case.

In State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997), the defendant requested a continuance when his case which originally ended in a mistrial was called for retrial and the transcript was not yet available. Asbury argued the

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[4] The stolen goods were never recovered, and no fingerprint or other evidence was located at the scene. McMillian presented a witness who testified he was at home sleeping at the time of the crime as she let him in around midnight. He also presented testimony of his aunt, Alice Scott, who testified she had, on one occasion in May 1996, seen a bald-headed man in the car with Morris and mistaken him for McMillian (who is balding).

[5] Further, Morris testified at the first trial that the car in which he drove McMillian was a 1986 or 1987 blue Chevrolet, and that McMillian came out of the apartment with a television and stereo. At the second trial, Morris testified that he was driving a silver 1985 Sierra at the time of the incident. Although defense counsel asked Morris if he recalled his prior testimony that he was driving a blue car at the time of the incident, counsel did not have a transcript of the first trial, such that he was unable to impeach Morris with specifics concerning his prior testimony.

[6] The defense also hoped to impeach Rumph with inconsistencies concerning the lighting in the area at the time of the crime, and the time at which McMillian allegedly visited her residence on the evening of the crime.

transcript was necessary for the effective impeachment of witnesses. The trial court denied the motion, concluding the transcript would have been beneficial, but was not essential. This Court affirmed the trial court's ruling, finding Asbury failed to establish prejudice from the lack of access to the transcript from the first trial, noting that the court reporter's back-up tapes were available and could have been used for impeachment purposes as needed. See also State v. Owenby, 267 S.C. 666, 668, 230 S.E.2d 898 (1976)("it is preferable to have available the written transcript taken at the former hearing, but the unavailability of such a transcript does not preclude utilization of other means of proving to the court what the witness stated on a prior occasion"). Asbury is distinguishable. Unlike Asbury, there is no court reporter's tape available as the transcript was done solely on a stenographic machine without a backup tape.[7]

Similarly, in State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000), the Court of Appeals rejected the defendant's claim that he should have been granted a continuance in order to obtain the transcript of his first trial. The Court of Appeals held Mansfield did not need a continuance as he could have served the court reporter with a subpoena to appear in court and a subpoena duces tecum to bring the tapes with her, and accomplished his impeachment in that manner. 538 S.E.2d at 262. Again, in the present case, there were no tapes available to subpoena. Accordingly, we find Mansfield inapplicable.

Under the limited circumstances of this case, we find the trial court abused its discretion in denying McMillian's motion for a continuance. Given the limited amount of time between the first and second trial, the critical nature of Rumph's testimony, and the fact that no tapes or transcripts were available at the

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[7] Moreover, in Asbury there was abundant evidence of the defendant's guilt. The defendant's fingerprints were found at the victim's residence, there was testimony that electrical cords which bound the victim's hands and ankles had been cut by a pair of scissors found in defendant's home, and there was evidence that some severed electrical cords had at one time been attached to an electric blanket found in the defendant's home. As noted previously, there was no such evidence in the present case.

time of the second trial, we find that McMillian should have been granted a continuance in order to obtain portions of the transcript, and the lack of such a transcript prejudiced his ability to effectively cross-examine the witnesses against him. Accordingly, the Court of Appeals' opinion in reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

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

JUSTICE PLEICONES: I respectfully concur in part and dissent in part. I agree with the majority that a party is entitled to insist that a quorum of the Court of Appeals be present at her oral argument. I disagree, however, that petitioner is entitled to a new trial because his motion for a continuance was denied. In my view, it matters not that the court reporter in petitioner's first trial used a stenographic machine rather than a steno-mask machine with a back-up tape: in either case, the presence of the court reporter and her record may be had through the use of a subpoena and a subpoena duces tecum. State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000).

While the better practice in these situations is to grant the continuance so that a copy of the pertinent part of the transcript may be obtained, I would not find an abuse of discretion warranting a new trial here. State v. Asbury, supra.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Moscoe Rhodes, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 25431
Submitted February 21, 2002 - Filed March 25, 2002

AFFIRMED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Donald J. Zelenka, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Douglas E. Leadbitter, of Columbia, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the post-conviction relief court's denial of relief to petitioner Moscoe Rhodes. We affirm.

FACTS

Petitioner was convicted of two counts of assault and battery with intent to kill (ABIK), and one count each of: attempted armed robbery, possession of a weapon during a violent crime, possession of a pistol by a person under 21, giving false information to a law enforcement officer, and resisting arrest. The trial court sentenced him to two consecutive 20-year terms of imprisonment for the ABIK convictions; for the remaining counts, petitioner received concurrent sentences of 20 years, five years, one year, three months, and one year, respectively. The Court of Appeals affirmed on direct appeal. State v. Rhodes, Op. No. 96-UP-240 (S.C. Ct. App. filed July 30, 1996). Petitioner thereafter filed for post-conviction relief (PCR), which the PCR court denied.

The majority of the charges stem from a shooting which occurred at a mobile home park on Saturday night, February 19, 1994. Victim Horace Cook was driving in the park looking for a party at a friend's house; victim Kendra Wilson was riding in the passenger seat, while another friend, Tonya Shannon, was in the back seat. Upon arriving where they thought the party was going to be, they discovered the party had moved to a motel. Cook began to drive out when they saw a group of guys.[1] Thinking they might be coming from the party, Cook asked the group where the party was. One member of the group, whom Cook later identified as petitioner, approached Cook and addressed him by name. As petitioner and Cook spoke, some of the other guys were talking to Shannon in the backseat. Cook testified that petitioner then walked off and dug

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[1]Cook described the group as being comprised of eight black teen-age males.

a pistol out of his pants. Cook "threw the car in drive" while petitioner ran up to the driver's side window, said "Give me all your shit," and then fired into the car. Cook only heard one shot, but Wilson testified she heard three shots. Cook was not injured; however, Wilson was shot in both her legs and one of her hands.

The day after the shooting, Cook spoke with his friend, Tracy Thompson. Thompson testified that he had heard petitioner was involved with the shooting. On direct examination, Thompson testified as follows:

> Well, when I found out what happened – I have several yearbooks and the name – I hear a lot of stuff. Some's true. Some's not. I didn't know if it was true or not but [Cook] being my friend I told him what I heard and I had a bunch of yearbooks, showed him pictures – well, I gave him the yearbooks and told him to look through them.
>
> Q. . . . You also provided a name?
>
> A. Yes, I did.
>
> Q. Okay.
>
> A. That I heard.
>
> Q. But –
>
> A. But I told him – when I told him the name – I told him that I wasn't sure whether it was him or not. That's just what I heard.

Petitioner's counsel made no objection to Thompson's testimony. On cross-examination, counsel asked:

> Q. What you actually in fact heard was a grapevine rumor

> that [petitioner] may have been involved in a shooting of a guy and a girl, isn't it?
>
> A. Like I said I hear a lot of stuff. Some's true. Some's not.

Both Cook and Thompson testified that after Thompson gave Cook petitioner's name, Cook looked up petitioner in the middle-school yearbook Thompson had provided and identified petitioner as the person who shot at him. Cook stated that the giving of the name did not influence him, but it was the picture which caused him to identify petitioner as his assailant.

Cook brought the yearbook to Investigator Richard Nelson who had been assigned to the case. Investigator Nelson testified that Cook told him he had identified petitioner from the yearbook based on what someone had heard and then communicated to Cook. Petitioner's counsel did not object. Based on Cook's identification, Investigator Nelson had petitioner arrested. Investigator Nelson used a photograph taken of petitioner after his arrest as part of a photographic line-up. Both Wilson and Cook, at separate times, identified petitioner from this line-up.[2] Wilson testified that Cook told her he had seen petitioner's picture in a yearbook, but that Cook never showed her the yearbook.

Petitioner presented an alibi defense. During closing argument, petitioner's counsel argued that the entire case boiled down to identity since no physical evidence linked petitioner to the shooting. He stressed that Cook's identification stemmed solely from a rumor "picked up off the street." Regarding Thompson's testimony, counsel argued: "He hears so much stuff out there and a lot of it is untrue. If [petitioner] is convicted that's the real basis for him being convicted. That's the genesis of all this is that rumor. That can't be avoided. That can't be allowed. There is reasonable doubt." Finally, counsel

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[2]Petitioner's counsel challenged these identifications prior to trial. After a hearing, the trial court ruled the identifications admissible. During the trial, counsel consistently attacked the identifications made by the victims and the suggestiveness of the line-up.

asked the jury to not "send a man away on rumor and innuendo."

At the PCR hearing, petitioner alleged that counsel should have objected to the testimony that Thompson had heard it was petitioner who committed these crimes. Counsel, however, testified that he did not believe this testimony constituted hearsay. Moreover, counsel stated that when he cross-examined Thompson and characterized what Thompson had heard as rumor, his intent was to "plant seeds in the jury's mind that they didn't want to convict someone and send them to prison on a rumor."

As to this issue, the PCR court held counsel was not ineffective and that even if counsel could be considered ineffective for failing to object, there was no prejudice to petitioner.

ISSUE

Did the PCR court err in finding counsel was not ineffective?

DISCUSSION

Petitioner argues counsel was ineffective for failing to object to testimony that Thompson had heard petitioner was responsible for the shooting. He contends this testimony was improper hearsay and served to bolster the victims' identifications.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

We find that the testimony admitted in this case about Thompson hearing petitioner was the shooter does not constitute hearsay. The rule against

hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted. E.g., Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). Here, it was repeatedly made clear during trial that the information Thompson had heard was "from the street," i.e., a "rumor."[3] It was not offered to prove that petitioner had committed the crimes, but rather to explain Cook's identification of petitioner in the yearbook. This in turn led to petitioner's apprehension and the subsequent identification of him by both victims via the photographic line-up.

Petitioner cites State v. Pollard, 260 S.C. 457, 196 S.E.2d 839 (1973), in support of his argument. Pollard was an armed robbery case and, like the instant case, involved identification of the defendant by the victim as the central issue. In Pollard, the investigating officer was permitted to testify that he signed the arrest warrant for Pollard "'from information received in the investigation' of the case" and that this information did not come from the victim. Id. at 459-60, 196 S.E.2d at 840. The Court held that this testimony was "clearly hearsay and inadmissible." Id. at 460, 196 S.E.2d at 840. The Court explained that the "only effect of the questioned testimony of the officer was to bolster the identification of appellant by conveying to the mind of the jury that there were others who connected appellant with the crime" and that Pollard had therefore been prejudiced by the denial of his right of confrontation. Id. at 461, 196 S.E.2d at 840.

While Pollard appears to be applicable on the facts, this Court expressly abrogated Pollard in German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996). In German, the petitioner had been convicted of possession with intent to distribute crack cocaine. At trial, the undercover agent testified he had received several tips that the petitioner was distributing or selling crack cocaine. We held counsel was ineffective for failing to request a curative instruction when her hearsay objection to the agent's testimony was sustained and for failing to object to related statements made by the solicitor in his opening

[3]Thompson himself acknowledged that he heard "a lot of stuff. Some's true. Some's not."

statement. Because the statements specifically referred to petitioner, and not to drug activity in general, we found them objectionable. Id. at 27, 478 S.E.2d at 688.[4] Specifically, we stated in German that trial counsel "should have objected to these statements as improper comments **on petitioner's character** and her failure to do so prejudiced appellant." Id. at 28, 478 S.E.2d at 688 (emphasis added). We explained that Pollard, as well as a Court of Appeals case relying on Pollard,[5] "were incorrectly decided. The statements were not objectionable as hearsay. However, they were objectionable as improper comments on the defendant's character." Id. at 28 n.2, 478 S.E.2d at 688 n.2.

Thus, in the instant case, petitioner's hearsay argument and his reliance on Pollard do not help him because he did not argue to the PCR court that counsel was ineffective for failing to object to this testimony on the basis of improper character evidence. See id.; see also State v. Jones 343 S.C. 562, 575, 541 S.E.2d 813, 820 (2001) (where the Court, relying on German, stated that the "identification of an individual as the suspect of a criminal investigation, based upon speculation and effectively calling into question that individual's character is" inadmissible). Any argument based on the reasoning of German is clearly unpreserved for this Court's review. Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (an issue which was neither raised at the PCR hearing nor ruled upon by the PCR court is procedurally barred); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same).

However, even assuming we could construe petitioner's ineffectiveness argument as one based on character pursuant to German, we find the PCR court correctly denied relief.

Counsel stated at the PCR hearing he purposely sought to convert this evidence to petitioner's advantage by portraying it as rumor. He brought

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[4]In contrast, evidence that police began an investigation because of generalized reports of criminal activity is admissible pursuant to State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994).

[5]State v. Dennison, 305 S.C. 161, 406 S.E.2d 383 (Ct. App.1991).

this out in his cross-examination of Thompson and based much of his closing argument on the idea that the victims' identifications stemmed purely from rumor and innuendo. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. E.g., Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). In our opinion, counsel articulated an objectively reasonable strategy for his failure to object to this testimony. Indeed, it appears this was the only real strength in petitioner's defense and that counsel effectively capitalized on this evidence.

Accordingly, we hold there is no merit to petitioner's argument that counsel was ineffective in this case.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dewey Ackerman, Jr., deceased, and The Children of Dewey Ackerman, Jr., Petitioners,

v.

3-V Chemical, Inc., employer, and Travelers Insurance Company, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 25432
Heard February 6, 2002 - Filed March 25, 2002

AFFIRMED

Preston F. McDaniel and H. Eugene Trotter, of Columbia, and Robert Lumpkin, Jr., of Georgetown, for petitioners.

Harry B. Gregory, Jr., of Tally & Gregory, LLC, of Columbia, for respondents.

JUSTICE WALLER: We granted certiorari to review Ackerman v. 3-V Chemical, Inc., S.C. Ct. App. Order dated February 8, 2000. We affirm.

FACTS

Fifty-eight year old Dewey Ackerman died of a heart attack on January 31, 1992, while working for his employer, 3-V Chemical, Inc. He was found dead on the break room floor. His children (Petitioners) filed for Worker's Compensation death benefits; the single commissioner awarded benefits, utilizing the "unexplained injury and death presumption." The full commission reversed, finding the "unexplained death presumption" inapplicable to this case. In an order filed January 7, 1997, the circuit court affirmed the full commission's ruling, finding the "unexplained death presumption" inapplicable.

It is undisputed that Petitioners received written notice of the entry of judgment on January 10, 1997; however, the written order did not accompany the judgment form. Petitioners requested a copy of the order from the clerk's office approximately three and one-half weeks later, on February 3, 1997, which they received on February 5, 1997. On February 18, 1997, they filed a motion for rehearing or new trial pursuant to Rule 59(a)(2), SCRCP.[1] Over Employer's objection, the trial court reheard the matter and issued a new order, applying the "unexplained death presumption," thereby reinstating the single commissioner's award. The Court of Appeals reversed in an unpublished order, finding the circuit court was without jurisdiction to rehear the matter as Petitioners' Rule 59 motion was untimely.

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[1] February 15 was a Saturday, and Monday, February 17 was President's Day, such that the motion was filed within 10 days of their receipt of the written **order**, but not within 10 days of their receipt of **notice** of the written order.

ISSUE

The sole issue on certiorari is what constitutes timeliness in filing a Rule 59, SCRCP, motion to reconsider.

DISCUSSION

Rule 59(b), SCRCP, provides, in part,

> The motion for a new trial shall be made . . . not later than 10 days [after the jury is discharged]. In non-jury actions the motion shall be made not later than 10 days after the **receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered**.

(Emphasis supplied). Similarly, Rule 59(e) provides that "A motion to alter or amend the judgment shall be served not later than 10 days after **receipt of written notice of the entry of the order**." (Emphasis supplied).[2]

Petitioners assert their Rule 59 Motion, filed 10 days after receipt of the written **order** on February 5, 1998, as opposed to within 10 days of their receipt of **notice of entry of judgment**, was timely. We disagree. There is simply no language in the rule permitting the motion to be served 10 days after receipt of the written **order**; it states 10 days after receipt of **written notice of the entry of judgment**. Petitioners received such notice on January 10, 1997.

Recently, the Court of Appeals held that where counsel had received written notice of the entry of judgment, but failed to request a copy of the written order for one month, his motion to reconsider was untimely. Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999), *cert. denied* May 25, 2000. We find the present case analogous to Canal.

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[2] Unlike South Carolina's rule, Federal Rule 59 has no notice provision and requires a motion for new trial or motion to alter to be filed "no later than 10 days after entry of judgment."

Petitioners argue "due process" problems in requiring an appeal to be taken when the party is not in receipt of the order. The short and simple answer to this contention is that upon receiving written notice of the entry of an order or judgment, an attorney may immediately call and request a copy of the order. In this day of automation, virtually every court in the state has access to a fax machine via which an order may be immediately forwarded. To accept Petitioners' contention that they have 10 days from the receipt of the written order itself would mean that a party could effectively control the time in which to file a Rule 59 motion, simply by delaying a request for a copy of the order.

Petitioners also rely on Rule 203(b)(1), SCACR. This rule requires a notice of appeal be served "within 30 days after receipt of **written notice of entry** of the order or judgment," and states that "when a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment." However, Rule 203 requires a copy of the order be filed with the notice of appeal if it has been reduced to writing.

In the present case, the Form 4 notice of entry of judgment sent to Petitioners does not indicate that a more complete order is to follow; it simply indicates that judgment has been entered. Moreover, although Rule 203 (d)(2)(B) requires the appealing party to file a copy of the order challenged on appeal if it has been reduced to writing, there is no reason Petitioners could not have requested a copy of the order filed on the date they received the written notice of the entry of judgment, i.e., January 10, 1997. Accordingly, their motion for reconsideration, filed more than 30 days after receipt of written notice of entry of judgment, was untimely. As such, the trial judge was without jurisdiction to act upon it. See Leviner v.Sonoco Products Company, 339 S.C. 492, 530 S.E.2d 127 (2000)(when no timely Rule 59 motion is made, trial judge loses jurisdiction over the matter). The Court of Appeals' judgment is

AFFIRMED.

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

The Supreme Court of South Carolina

In the Matter of James A. Cheek, Respondent

O R D E R

On August 27, 2001, Respondent was suspended from the practice of law for a period of ninety days, retroactive to July 5, 2001. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: Daniel E. Shearouse
Clerk

Columbia, South Carolina

March 11, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Curtis L. Lawrence,

Appellant.

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

Opinion No. 3461
Submitted November 14, 2001 - Filed March 18, 2002

AFFIRMED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Robert E. Bogan, all of Columbia; and Solicitor Ralph E. Hoisington, of N.

Charleston, for respondent.

GOOLSBY, J.: Curtis L. Lawrence appeals from his convictions and sentences for discharging a firearm into an occupied structure, armed robbery, and possession of a firearm during the commission of a violent crime. Counsel for the appellant attached to the appellant's final brief a petition to be relieved as counsel, stating she had reviewed the record of Lawrence's trial, and in her opinion the appeal is without merit. Lawrence did not file a pro se response. We affirm.[1]

FACTS & ANALYSIS

After a thorough review of the record in accordance with Anders v. California[2] and State v. Williams,[3] we find the only preserved issue at trial is whether the trial court erred in denying Lawrence's motion for a directed verdict on the charge of discharging a firearm into an occupied structure.

Lawrence discharged a weapon into the wall of a bank during a robbery. The evidence indicates Lawrence was inside the bank when he fired the weapon. At the time of Lawrence's conviction, section 16-23-440 of the South Carolina Code provided in pertinent part: "It is unlawful for a person to discharge or cause to be discharged unlawfully firearms at or into a dwelling house or other building or structure regularly occupied by persons."[4]

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[1] Because oral argument would not aid the court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rules 215 and 220(b)(2), SCACR.

[2] 386 U.S. 738 (1967).

[3] 305 S.C. 116, 406 S.E.2d 357 (1991).

[4] S.C. Code Ann. § 16-23-440 (1985 & Supp. 2000) (emphasis added). The legislature amended this section in 2001. The amendment designated this

Lawrence argued at trial that the "at or into" language of section 16-23-440 only prohibits a party outside a structure from unlawfully discharging a firearm into the structure. Because he was not outside the bank, Lawrence contends the evidence was insufficient to sustain his conviction on this charge.

Criminal statutes are strictly construed against the State.[5] Prior cases involving section 16-23-440 support Lawrence's contention only to the extent that the cases may concern factual situations where a person outside a structure fired a weapon towards or into the structure.[6] The cases do not address whether the statute covers other circumstances as well.

A Georgia case interpreting similar "at or into" language in a statute held, however, "[o]ne who, while inside of an occupied dwelling, shoots a pistol at a floor thereof, is guilty of shooting 'at' or 'into' such dwelling, within the meaning of the act approved August 13, 1910 . . . ."[7] The Kentucky Supreme Court reached a similar conclusion in Gaines v. Kentucky.[8] We likewise conclude the "at or into" language of section 16-23-440 covers situations where a person inside an occupied structure unlawfully discharges a firearm into the structure. We accordingly affirm the judgment of the trial court and grant counsel's petition to be relieved.

AFFIRMED.

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

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portion of the statute as subsection (A), added the phrase "or enclosure," and created subsection (B). 2001 S.C. Act No. 98 § 1.

[5] State v. Woody, 345 S.C. 34, 545 S.E.2d 521 (Ct. App. 2001).

[6] See e.g., State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980).

[7] English v. Georgia, 74 S.E. 286, 286 (Ga. Ct. App. 1912).

[8] 505 S.W.2d 174 (Ky. 1974).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Delphine Holden,

Appellant,

v.

A. Lane Cribb in his official capacity as Sheriff of Georgetown County,

Respondent.

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

Opinion No. 3462
Submitted December 3, 2001 - Filed March 25, 2002

AFFIRMED

Thomas J. Rubillo, of Hilliard & Rubillo, of Georgetown, for appellant.

Jack M. Scoville, Jr., of Georgetown, for respondent.

STILWELL, J.: Delphine Holden filed this declaratory judgment action seeking a writ of mandamus to compel the sheriff to accept her non-cash bid

entered at a judicial sale. The trial court dismissed the case, holding that the issues were moot because Holden had withdrawn her bid and additionally ruling that the sheriff had properly refused the bid because it was nonconforming. We affirm.[1]

FACTS/PROCEDURAL HISTORY

Holden obtained a civil judgment of $58,000 against George Singleton, the father of her two children, for assault and battery. She repeatedly sought execution against his property in an effort to collect the judgment. She even sent the sheriff a copy of a deed to a parcel of real estate in Georgetown County, which was Singleton's sole asset of value. It was appraised by the county tax assessor for $17,984. In March 2000, Singleton was held in contempt for willful failure to pay past due child support and was given the option of paying the arrearage plus a fine or serving one year in jail. Singleton did not pay and was jailed.

The eventual execution on the civil judgment resulted in a sale of Singleton's property, at which Holden was the only bidder. Her bid consisted of cash in the amount of unpaid taxes and costs of the sale ($270.74), an additional $1, and an offer to forbear collection on the child support arrearage of $17,119.32. The sheriff refused to accept the bid because Holden did not post 5% of the bid in cash or pay the $5000 homestead exemption to the clerk of court. Holden alleged she was indigent and unable to pay the $5000. She thereafter withdrew her bid, and the sheriff canceled the sale.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). Holden essentially sought a

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

writ of mandamus directing the sheriff to accept her bid. "To obtain a writ of mandamus requiring the performance of an act, the applicant must show 1) a duty of respondent to perform the act, 2) the ministerial nature of the act, 3) the applicant's specific legal right for which discharge of the duty is necessary, and 4) a lack of any other legal remedy." Redmond v. Lexington County Sch. Dist. No. Four, 314 S.C. 431, 437, 445 S.E.2d 441, 445 (1994); see also Knotts v. S.C. Dep't of Natural Res., Op. No. 25395 (S.C. Sup. Ct. filed Jan. 7, 2002) (Shearouse Adv. Sh. No. 1 at 10, 13); Porter v. Jedziniak, 334 S.C. 16, 18, 512 S.E.2d 497, 498 (1999). "'Mandamus is somewhat of a hybrid proceeding . . . . [I]t is not strictly a law case, nor is it one in equity. It is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal.'" Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 179, 519 S.E.2d 567, 570 (1999) (quoting Lombard Iron Works & Supply Co. v. Town of Allendale, 187 S.C. 89, 95-96, 196 S.E. 513, 516 (1938)).

> Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion. An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support. In reviewing a decision on a mandamus petition, an appellate court will not disturb the factual findings of the trial court when those findings are supported by any reasonable evidence.

Id. at 179-80, 519 S.E.2d at 570 (citations omitted).

LAW/ANALYSIS

I. Case or Controversy: Mootness

Holden contends the trial court erred in finding the case was moot and did not present a justiciable controversy because her bid and request for execution

had been withdrawn.[2] She asserts the issues are still reviewable because if the sale were to be reinstituted, she would make the same bid and the sheriff would again reject her non-cash bid. We agree.

"A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995) (holding that ruling was not advisory but was imperative to preserve rights and necessary to determine whether insurance coverage existed and carrier was required to be served); see also Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997).

"'A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.'" Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (quoting Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001); see also Byrd, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness

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[2] Holden withdrew her bid to avoid an upset bidder from obtaining the property after her bid was called into question. See S.C. Code Ann. § 15-39-720 (1976 & Supp. 2001) (requiring bidding to remain open for thirty days after the sale date for judicial sales of real estate made in execution).

doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis, 345 S.C. at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Id.

We agree with Holden that, although she has withdrawn her bid and the judicial sale has been canceled, the issues she raises are "capable of repetition, yet evading review," and will affect the future conduct of these parties and others attending public sales. Therefore, even though we agree that technically the case is moot, it falls within a well recognized exception to the mootness doctrine and should not have been dismissed on this basis.

II. Nonconforming Bid

Even though the trial court dismissed the case as being moot, it also ruled that the sheriff acted properly in refusing to accept the bid because it did not conform to the statutory requirements. The court held that the bid was nonconforming because it was in kind rather than cash, except the portion attributable to costs and overdue taxes, and did not include cash to pay the homestead exemption to which Singleton was entitled.

A. Cash Bid Requirement

Holden argues the sheriff violated the applicable statutory provisions by requiring her bid be in cash. Specifically, she contends her offer to waive past-due child support in lieu of paying cash is acceptable. Although there are significant questions whether Holden can legally waive past-due child support, we do not have to decide that issue in this case. We agree that under these circumstances and long-established custom, but for the homestead exemption, Holden, as the judgment creditor, would not be required to deposit cash with the sheriff.

Under South Carolina law, "[e]very sheriff's sale made by virtue of the directions of an execution shall be for cash. If the purchaser shall fail to comply with the terms aforesaid the [sheriff] shall proceed to resell at the risk of the defaulting purchaser either on the same or some subsequent sale day . . . ." S.C. Code Ann. § 15-39-710 (1976) (emphasis added). See Ex parte Moore, 346 S.C. 274, 294, 550 S.E.2d 877, 887 (Ct. App. 2001) ("This statutory limitation has been in effect in South Carolina for more than a century.").

However, there is case law clearly indicating that if the successful bidder is the judgment holder and is solely entitled to whatever sums may have been bid for the property, it would be senseless to require the bidder to pay cash. The following question was put to a predecessor of this court one hundred sixty years ago: "[W]hy do so senseless and nugatory an act as to make the plaintiff in execution pay the amount of his bid by which he purchased the defendant's property . . . ?" The answer supplied by the court was "it would seem to be a self-evident proposition, that if the [bidder] was entitled to the money, he might legally refuse to pay it to the sheriff." Cobb v. Pressly, 27 S.C.L. (2 McMul.) 416, 418 (1842) (3-2 decision).

The unambiguous statutory scheme requiring a small percentage of the bid be deposited as earnest money and the balance to be in cash prevails when the bidder is other than the judgment holder or when there is a superior claim or a contest about entitlement to the funds. See id. Were it not for the requirement that the portion of the bid attributable to the homestead exemption be paid in cash, the sheriff could have accepted Holden's bid without requiring a cash deposit because it would have been immediately repaid to her in her capacity as judgment creditor.

B. Homestead Exemption

Holden also argues Singleton is not entitled to the homestead exemption because he is currently in jail. We disagree. Under the homestead exemption, certain real and personal property of the debtor is statutorily exempt from sale to enforce a judgment. A homestead exemption exists up to $5,000 for property the debtor uses as a residence. S.C. Code Ann. § 15-41-30(1) (Supp. 2001).

> By what is apparently the majority rule, the word "reside" or "residence" as used in statutes . . . denotes the place of one's fixed abode, not for a temporary purpose alone, but with the intention of making such place a permanent home. . . . "[T]he term [residence] means the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning." . . .
>
> . . . .
>
> It is well established that a person's place of residence is largely one of intent to be determined under the facts and circumstances of each case. No specified length of time is required to fix the residence contemplated by our statute; the act and intent and not the duration of the residence are determinative.

Nagy v. Nagy-Horvath, 273 S.C. 583, 586-87, 257 S.E.2d 757, 759 (1979) (quoting Gasque v. Gasque, 246 S.C. 423, 426, 143 S.E.2d 811, 812 (1965)) (citations omitted); see also Miller v. Miller, 248 S.C. 125, 149 S.E.2d 336 (1966). "The 'rationale for Homestead exemptions is well established: to protect from creditors a certain portion of the debtor's property,' and to prevent citizens from becoming dependent on the State for support." Scholtec v. Estate of Reeves, 327 S.C. 551, 560, 490 S.E.2d 603, 607 (Ct. App. 1997) (citation omitted); accord Cerny v. Salter, 311 S.C. 430, 432, 429 S.E.2d 809, 811 (1993).

We hold that Singleton, though incarcerated, is entitled to the protection of the homestead exemption. "The act and intent as to domicil, and not the duration of residence, are the determining factors." Miller at 129, 149 S.E.2d at 339. Clearly, Singleton had no intent to transfer his residence to the detention center and, in fact, was being involuntarily detained. "'To effect a change of residence or domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last acquired residence a [permanent] home.'" Reynolds v. Lloyd

Cotton Mills, 99 S.E. 240, 242 (N.C. 1919) quoted with approval by and followed in Ferguson v. Employers Mut. Cas. Co., 254 S.C. 235, 239, 174 S.E.2d 768, 769 (1970) (alteration in original). We daresay Singleton has no intent to make the detention center his permanent residence. To hold otherwise would thwart the underlying policy of the homestead exemption.

Holden argues that the homestead exemption is personal and must be claimed by the debtor; hence, she contends the sheriff has no standing to assert it or require it. Because the statute requires that the minimum bid must be in the amount of the exemption, this argument is without merit. S.C. Code Ann. § 15-41-10 (Supp. 2001). Holden also asserts, without citation to legal authority, that Singleton's children are part of the "charmed circle" protected by the exemption; thus she should not have to pay it but should instead be able to assert the child support arrearages in lieu of homestead. However, under the common law, the homestead exemption inures primarily to the benefit of the debtor and only derivatively to dependent children. See Scholtec v. Estate of Reeves, 327 S.C. 551, 490 S.E.2d 603 (Ct. App. 1997). Moreover, because the children do not reside in the home, they cannot claim the homestead exemption. Id. (children of deceased debtor living independently were not entitled to assert homestead exemption). "The homestead interest depends entirely upon constitutional and statutory provisions." Id. at 554, 490 S.E.2d at 604. Because the legislature has not extended the homestead exemption to dependent children living outside the home, it is not for this court to do so.

To summarize, we hold that although technically moot, the issue raised should be addressed under a well-recognized exception to the mootness doctrine; that but for the portion of the bid attributable to the homestead exemption, the sheriff could have accepted the bid without requiring cash other than for costs and the taxes due. However, because the judgment debtor is entitled to the homestead exemption, the trial court's ruling is

AFFIRMED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David and Beverly Pitman,

Appellants,

v.

Republic Leasing Company, Inc.,

Respondent.

Appeal From Lexington County
Gary E. Clary, Circuit Court Judge

Opinion No.3463
Heard February 4, 2002 - Filed March 25, 2002

VACATED

Melvin D. Bannister, of Columbia, for appellants.

W. Cliff Moore, III, of Ellis, Lawhorne & Sims, of Columbia, for respondent.

HEARN, C.J.: David and Beverly Pitman appeal the trial court's award of attorney's fees and costs to Republic Leasing Company under the

Frivolous Proceedings Sanctions Act (the Act), claiming the trial judge lacked jurisdiction and abused his discretion. We vacate.

FACTS

David and Beverly Pitman filed suit against Republic Leasing for violation of the Payment of Wages Act, S.C. Code Ann. § 41-10-10 (Supp. 2000), and breach of contract to recover allegedly unpaid vacation time, incentive pay, moving expenses, and bonus pay. Republic Leasing answered, denying that the Pitmans were their employees. The Pitmans admitted that they were employees of HRC ARMCO, not Republic Leasing, and that HRC ARMCO issued their paychecks and prepared their W-2 forms. On January 17, 2000, Republic Leasing filed a motion for summary judgment which was granted by the trial court. The summary judgment order was filed April 28, 2000. Republic Leasing thereafter filed its notice of motion and motion for sanctions pursuant to the Frivolous Proceedings Sanctions Act on June 23, 2000. The circuit judge held the hearing in Spartanburg County on August 23, 2000 and awarded attorney's fees of $9,766.00 against the Pitmans as a sanction for filing a frivolous claim. The Pitmans appeal.

DISCUSSION

The award of statutory attorney's fees sounds in equity. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). Therefore, in reviewing the award to Republic Leasing we may take our own view of the preponderance of the evidence. Id. However, we must always take notice of the lack of subject matter jurisdiction. Amisub of S.C. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994); see also Johnson v. State, 319 S.C. 62, 64, 459 S.E.2d 840, 841 (1995) (stating issues related to subject matter jurisdiction can be raised at any time).

The Pitmans claim the trial court lacked subject matter jurisdiction to award attorney's fees against them under the Act because the motion was not timely. The Pitmans analogize the motion for sanctions to a post-trial motion and argue that pursuant to Rule 59, SCRCP, the motion for sanctions must be

filed within ten days of final judgment. Republic Leasing, however, interprets the Act to allow a motion for sanctions to be brought at any time after receipt of final judgment, barring the equitable defenses of laches and estoppel. We agree with the Pitmans that the trial judge in this case lacked subject matter jurisdiction to consider sanctions, and we vacate the award of attorney's fees.

The cardinal rule of statutory construction is that the court must ascertain and effectuate the intent of the legislature. State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999). Statutes "should be construed with reference to the whole system of law of which they form a part," and "must receive [a] practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Father v. S.C. Dep't of Soc. Servs., 345 S.C. 57, 65, 545 S.E.2d 523, 527 (Ct. App. 2001) (citations omitted).

The Act provides for the assessment of attorney's fees and court costs against:

> Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding . . . if: (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (Supp. 2000). The Act allows the trial court to award attorney's fees and court costs to the successful litigant "determined . . . at the conclusion of a trial upon motion of the aggrieved party. . . ." S.C. Code Ann. § 15-36-30 (Supp. 2000). Other than the phrase "at the conclusion of the trial," no specific time limit is contained within the Act for the filing of a motion for sanctions.

Initially we note that section 15-36-30's use of the word "trial" is a misnomer because when a case survives summary judgment and proceeds to trial,

an award of sanctions is precluded. Hanahan v. Simpson, 326 S.C. 140, 157-58, 485 S.E.2d 903, 912-13 (1997); Whitfield Constr. v. Bank of Tokyo Trust Co., 338 S.C. 207, 221, 525 S.E.2d 888, 896 (Ct. App. 1999). Thus, we cannot interpret the phrase "at the conclusion of the trial" literally because a request for sanctions is not cognizable when there has been a trial in the case. Id. Moreover, section 15-36-10(2) provides that a sanctions claim is viable only when "the proceedings have terminated in favor of the person seeking an assessment of the fees and costs." Construing these provisions together in light of the established case law, it is clear that Republic Leasing's request for sanctions did not have to be raised until it received notice of the summary judgment ruling in its favor.[1] Additionally, because a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment. Here, however, Republic Leasing waited until almost two months after the grant of summary judgment to move for sanctions under the Act. At that time, the trial judge no longer had jurisdiction over the case.

We cannot accept Republic Leasing's argument that because

[1]Until the adoption of the South Carolina Rules of Civil Procedure, the well-settled rule in this state was that a trial judge possessed the authority to modify his own judgments only until the expiration of the term of court. Center v. Center, 269 S.C. 367, 372, 237 S.E.2d 491, 494 (1977); see Leviner v. Sonoco Prods. Co., 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000). Furthermore, "[n]o authority is given to him to hear and determine [a] new matter, even though such new matter may arise in the same case." State v. Best, 257 S.C. 361, 370, 186 S.E.2d 272, 276 (1972). Whether or not Rule 59(e), SCRCP, supersedes this rule entirely or is merely an exception to it has not been decided by our supreme court. See Doran v. Doran, 288 S.C. 477, 478, 343 S.E.2d 618, 619 (1986). While the Act does not provide a specific exception to this rule, it provides that a request for sanctions does not ripen until there has been a termination of the proceedings in favor of the moving party. Therefore, the trial judge here necessarily retained jurisdiction to consider a request for sanctions because the summary judgment motion was under advisement when he left the circuit.

proceedings under the Act sound in equity, the trial judge retains jurisdiction to consider a motion for sanctions limited only by the equitable defenses of estoppel and laches. Absent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment. Such an interpretation would run counter to our established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. See Cox v. Fleetwood Homes of GA, Inc., 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999) (stating that an exception to the rule that a judge assigned to a circuit must exercise his judicial powers while within the territorial limits of that circuit "is that a judge retains jurisdiction to consider timely post-trial motions even though no longer assigned to the circuit.") (citing Rules 50(e), 52(c), and 59(f), SCRCP).

Accordingly, we vacate the trial court's award of attorney's fees.

VACATED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Augustus "Pete" Hall and Beverly J. Hall,

Appellants,

v.

David A. Fedor,

Respondent.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 3464
Heard March 6, 2002 - Filed March 25, 2002

AFFIRMED

James R. Gilreath and William M. Hogan, both of Gilreath Law Firm, of Greenville; and H. Wayne Floyd, of West Columbia, for appellants.

Harry A. Swagart, III and Robert L. Reibold, both of Swagart, Walker & Reibold, of Columbia, for respondent.

ANDERSON, J: Augustus "Pete" Hall was arrested in his home by Detective Larry Harrison of the Lexington County Sheriff's Department based on an informant's tip about a drug purchase involving Hall. Hall brought a civil suit against Detective Harrison, seeking recovery for activities surrounding the arrest. David Fedor was co-counsel for Hall. Following resolution of the suit, Hall filed a legal malpractice claim against Fedor. Fedor moved for summary judgment, which the Circuit Court granted. Hall appeals the Circuit Court's grant of summary judgment. We affirm.

FACTS/PROCEDURAL BACKGROUND

Police arrested Hall and seized $40,000 from his home based on information provided by an informant about a potential drug purchase transaction involving Hall. Hall retained Fedor to defend him on the criminal charges arising from the arrest. Fedor persuaded the solicitor to drop the criminal charges pending against Hall and secured the return of the $40,000 seized in the arrest.

Hall asked Fedor to handle a subsequent civil suit he wished to file against Detective Harrison, the law enforcement officer who arrested Hall and searched his home. Fedor refused to accept the case, but referred Hall to another attorney, Gaston Fairey. Fairey also refused to represent Hall. Hall retained Gary White to handle the case. Hall sued Harrison in federal district court, alleging abuse of process, malicious prosecution, and violation of civil rights. After the suit had progressed for nearly a year, Fedor agreed to represent Hall as co-counsel in the case.

The Insurance Reserve Fund offered a $10,000 settlement to Hall on behalf of Harrison a few days before trial. Hall refused this offer. The settlement offer then rose to $30,000, which Hall accepted. After he had accepted the settlement, Hall contended Fedor made misrepresentations to him: (1) that Fedor urged Hall to accept the settlement by stating the Insurance Reserve Fund was either not liable or would refuse to pay; and (2) that attorney Jim Anders said to Hall that as much as $250,000 was available for a settlement

amount and Fedor knew about the higher amount. Hall heard that Fedor had told Fairey that Detective Harrison was "trying to put Hall out of the drug business." Fedor allegedly stated to others that "Hall was dealing drugs" and "Hall was guilty and lucky to avoid jail."

Hall filed a legal malpractice claim against Fedor based upon Fedor's alleged misconduct and negligence in his actions regarding the settlement agreement and Fedor's comment about Hall's guilt to third parties. Fedor moved for summary judgment. The Circuit Court granted the motion. Hall appeals.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), cert. granted; Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (stating that a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law).

In determining whether any triable issue of fact exists, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000). All ambiguities,

conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Id.

On appeal, this Court reviews the grant of summary judgment using the same standard applied by the trial court. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001), cert. pending; see also Estate of Cantrell, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990) ("On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.") (citations omitted).

LAW/ANALYSIS

I. Legal Malpractice Based on the Settlement Agreement Claim

In South Carolina, the plaintiff in a legal malpractice suit must prove several elements:

(1) the existence of an attorney-client relationship;

(2) a breach of duty by the attorney;

(3) damage to the client; and

(4) proximate cause of the plaintiff's damages by the breach.

McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996); Henkel v. Winn, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001), cert. denied.

Additionally, the plaintiff must generally establish the standard of care by

expert testimony. Smith, 322 S.C. at 435, 472 S.E.2d at 613; see also Mali v. Odom, 295 S.C. 78, 80-81, 367 S.E.2d 166, 168 (Ct. App. 1988) ("A plaintiff in a legal malpractice case must ordinarily establish by expert testimony the standard of care, unless the subject matter is of common knowledge to laypersons.") (citations omitted).

Moreover, the plaintiff must show he or she "**most probably**" would have been successful in the underlying suit if the attorney had not committed the alleged malpractice. Brown v. Theos, 345 S.C. 626, 550 S.E.2d 304 (2001); Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988); Floyd v. Kosko, 285 S.C. 390, 329 S.E.2d 459 (Ct. App. 1985).

In the case sub judice, Hall could satisfy the "most probably" requirement and defeat Fedor's summary judgment motion by establishing he "most probably" would have received a larger settlement than $30,000 or that he "most probably" would have prevailed on the underlying claim at trial.

To defeat Fedor's summary judgment motion, Hall offered: (1) his deposition testimony; (2) his wife's deposition testimony; and (3) deposition testimony and affidavit of Professor Gregory B. Adams, an expert witness, to establish the standard of care.

Use and admissibility of affidavit and deposition testimony to rebut a motion for summary judgment is governed by Rule 56(e), SCRCP and reads in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be **admissible in evidence** …. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

(emphasis added).

Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence. See Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); Moon v. Jordan, 301 S.C. 161, 390 S.E.2d 488 (Ct. App. 1990); Moss v. Porter Bros., Inc., 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987); see also Hansen v. DHL Labs., Inc., 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), aff'd, 319 S.C. 79, 459 S.E.2d 850 (1995) ("A genuine issue of fact … can be created only by evidence which would be admissible at trial.") (citing, inter alia, Rule 56(e), SCRCP).

Hall states in his deposition Anders told him that as much as $250,000 was "on the table" to settle the case and that Fedor was aware of the higher amount. This statement is clearly hearsay and does not fall under any of the hearsay exceptions enumerated in the Rules of Evidence. Therefore, it would be inadmissible evidence at trial and is inadmissible to refute a motion for summary judgment.

Hall additionally alleges Fedor lied when he told Hall the Insurance Reserve Fund was either not liable or would refuse to cover Harrison. During his deposition, Professor Adams testified that in order for a statement to constitute malpractice, it must result in damage to the client. Even if Hall were correct in his assertion that Fedor lied to him about the Insurance Reserve Fund's obligation or willingness to pay, he was not damaged because there is no evidence showing that he would have recovered more than $30,000 in a settlement with the insurer.

Once these two statements are eliminated from consideration, there is no evidence in the record to show that Hall "most probably" would have received in excess of $30,000 but for Fedor's alleged malpractice.

In contrariety, the evidentiary record demonstrates with remarkable clarity that the $30,000 amount was a good settlement, even to the point of reaching a windfall for Hall.

Richard Jerome Briebart, Detective Harrison's attorney, was asked:

"Given your opinion as to the strength or lack of strength in [Hall's] case, would you characterize the $30,000 settlement as an average result, poor result, good result; how would you characterize it?" Briebart responded: "Being that this was a case which, in my professional opinion, I never would have brought, I think it was manna from heaven; that is, I think that they probably got $29,999.00 more than was deserved in the case. That is my particular opinion. I think it was an excellent result." Briebart testified he was not aware of any amount in excess of $30,000 being available to settle Hall's case.

When asked about the adequacy of the $30,000 settlement amount, Gary White, Hall's lead counsel, stated: "[C]onsidering the risk, I thought that was a pretty good settlement."

John Delgado, one of Fedor's expert witnesses, averred: "A $30,000 settlement, under the terms of what I understand the facts of this case to be, was a monumental victory. It seemed to me that that was a marvelous, unheard of victory that any plaintiff's attorney would have been proud of, under the circumstances."

Indubitably, considering the absence of any admissible evidence presented by Hall, and in light of the evidence presented by Fedor, Hall failed to show he "most probably" would have received a settlement amount greater than $30,000.

Hall presents one argument to show he would have prevailed at trial. Hall states the willingness of the defendant to settle the case is evidence he would have prevailed at trial. Parties choose to settle cases for a plethora of reasons having nothing to do with the fear of the plaintiff succeeding at trial. In fact, the testimony in this case shows the settlement was offered as a cost saving measure on the part of the Insurance Reserve Fund. Briebart testified:

> [The Insurance Reserve Fund's attorney] indicated that the Insurance Reserve Fund thought [Hall's case] would be — that all these cases were expensive cases to defend in federal court. We were at the point where there was still additional discovery work to be done, important discovery work, and we thought that this case

> would take several days or a week or longer to try …. [The Insurance Reserve Fund's attorney] told me that he thought [Hall] could get a very, very small amount of money, kind of like a nuisance value, for want of a better word $5,000 or $10,000…. Finally, the case was able to be settled by the Insurance Reserve Fund paying $30,000, a sum … which was less than anticipated for the costs and things that they faced.

Briebart stated he felt "looking at all the factors, the insurance company made an economic decision and a social one because pressure was being placed on them by the plaintiff to settle the case … but also by their own insured."

Moreover, there was abundant testimony regarding the inadequacy of Hall's case and concerns over winning at trial.

Briebart testified he felt Hall was fortunate for his cause of action to survive summary judgment: "I think there was substantial questions about them being able to prevail, first, in summary judgment. I think they were fortunate to prevail in any portion there. In prevailing — for the record what I mean — if the case was to have gone to trial, whether or not the judge would have permitted the jury to consider those issues, whether to go to a non-suited or directed verdict."

White testified: "It was known from the time the suit was filed that we were going to have an uphill battle with a jury." White recalled that Fedor had told him he was not happy with the jury after jury selection had been completed.

In his affidavit, Delgado stated: "It is my opinion based upon my knowledge, training, and experience, that there was virtually no possibility that [Hall] would prevail in [his] case against [Detective] Harrison." Once again, Hall presented no evidence to show he "most probably" would have prevailed in the suit at trial, while evidence exists in the record to show he faced serious problems if the case went to trial.

The Circuit Court did not err when it granted Fedor's summary judgment

motion concerning Fedor's alleged legal malpractice connected with the settlement agreement.

II. Legal Malpractice Claim Based on Breach of Confidentiality

Hall claims Fedor committed legal malpractice by allegedly making statements to third parties. Fedor allegedly told Fairey that Detective Harrison was "trying to put Hall out of the drug business." Fedor also allegedly commented in front of others that Hall was "dealing drugs" and that "Hall was guilty and lucky to avoid jail."

Professor Adams testified in his deposition that if Fedor made the alleged statements, he would have breached his duty of confidentiality to Hall and thus would have committed malpractice. The Circuit Court noted these statements did not constitute legal malpractice; instead the court stated they were the basis of a defamation claim: "[S]ince Hall … denied that he was a [drug] dealer, the statements allegedly made by Fedor would have been false. An attorney's duty, however, is not to disclose information learned during the course of the representation. RPC 1.6. Since false information is fabricated, not learned, the remedy for dissemination of such information is defamation, not malpractice." We do not reach the question of whether a defamation claim should have been brought because the statements were **inadmissible hearsay** and **cannot** be used to support a motion for summary judgment.

The testimony about Fedor's statement to Fairey comes from Hall's deposition where Hall avers Fairey told him Fedor said Detective Harrison was trying to put Hall out of the "drug business." This statement was not made within Hall's personal knowledge as is clearly required by Rule 56(e) and is inadmissible hearsay. The other statements Fedor allegedly made to third parties about Hall also came from Hall's deposition testimony and are what the third parties told Hall Fedor had said to them. These statements are also not within Hall's personal knowledge and are inadmissible hearsay. Concomitantly, there is no admissible evidence in the record that shows Fedor breached his duty of confidentiality to Hall by allegedly making statements about Hall's guilt to third parties.

CONCLUSION

In South Carolina, a plaintiff in a legal malpractice claim is required to prove he "**most probably**" would have been successful in the underlying litigation if the attorney had not committed the alleged malpractice. In regard to Hall's legal malpractice case based on the settlement agreement claim, there is **no** admissible evidence in the record to support Hall's burden of proof.

The breach of confidentiality claim fails because the evidence submitted is violative of the hearsay rule and is inadmissible.

Based on the foregoing, the order of the circuit judge is

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Joseph Golson,

Appellant.

Appeal From Lexington County
Gary E. Clary, Circuit Court Judge

Opinion No. 3465
Heard March 6, 2002 - Filed March 25, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General William Edgar Salter, III,

all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

PER CURIAM: The Lexington County Grand Jury indicted Joseph Golson for murder in connection with the death of Alice McIver. The jury returned a verdict of guilty and the trial judge sentenced Golson to life imprisonment. Golson appeals. We affirm.

Facts/Procedural History

In October 1998, Golson was living with his wife in Wagner, South Carolina, but had been involved in a relationship with the victim, Alice McIver, for several years. McIver and her fifteen-year-old daughter lived in a mobile home in Lexington County.

Billie Jean Elmore, McIver's friend, testified Golson visited McIver on the weekends at her mobile home. McIver would also sometimes accompany Golson, a truck driver, on his trips. McIver gave Golson two guns, including the murder weapon. Elmore claimed, however, that McIver did not like guns and did not keep them in her home.

Shortly after 8:00 p.m on October 3, 1998, Elmore and McIver went to dinner. They left the restaurant at approximately 10:30 p.m. and went to Elmore's house. McIver left Elmore's house at 11:30 p.m. and called her at 12:00 a.m. to let Elmore know she had arrived home. During that telephone conversation, McIver asked Elmore to tell Golson they had been out to dinner together. According to Elmore, Golson was always jealous and often accused McIver of being unfaithful. Elmore testified she heard Golson in the background refusing to talk to Elmore and stating she would lie for McIver. Elmore, who was not alarmed by Golson's behavior, hung up the telephone, and went to sleep.

Eddie Ryan Hayden, who lived less than one mile from McIver's house, testified someone knocked on his door between 11:30 p.m. on October 3 and

12:30 a.m. on October 4. Hayden did not answer the door, but looked out of his window. He saw someone wearing a white T-shirt and jeans running up his driveway. He "didn't think too much of it and went back to sleep." Approximately one hour later, Golson telephoned Hayden and asked whether he could park his truck in Hayden's yard. Hayden agreed and, although he could "pretty much tell by [Golson's] voice there was something wrong," he went back to sleep.

At approximately 2:00 a.m. on October 4, Officer Johnny Bryant of the Lexington County Sheriff's Department was dispatched to McIver's residence concerning a shooting. He arrived at the home at approximately 2:16 a.m. Three other deputies were already at the scene. Shortly thereafter, Golson drove up to McIver's home in the cab of his truck. Golson, who was wearing a white T-shirt and jeans, exited the vehicle. Bryant approached Golson. After a brief conversation, Bryant placed Golson under arrest, read him his Miranda[1] rights, and placed him in Officer Terry Snead's patrol car.

The other officers entered the mobile home and discovered McIver's body on a bed, covered with a comforter. McIver had been shot in the chest above her left breast. She had no pulse. The officers found an open-levered rifle on the floor in the bedroom with one spent round next to it. There were also six live shell casings on the bedroom floor. The bedroom door had sustained what appeared to be fresh damage.

Golson remained in the patrol car for over an hour while the officers were in the residence. Golson talked to himself while sitting in the car. Unbeknownst to Golson, a video camera operated while he sat in the vehicle. At approximately 4:00 a.m., Snead transported Golson to the Lexington County Detention Center in his patrol car.

The trial court held a pre-trial hearing on the admissibility of Golson's

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

statements to the police on the night of the incident. At the hearing, Bryant testified that on the night of the shooting, Golson drove to McIver's home, got out of his truck, and approached Bryant. Bryant inquired as to whether he could help Golson, and Golson responded "I did it. I did it. I did it." On cross-examination, the following occurred:

> Q. When he got out, what he actually said was, "I did it. We were tussling over the gun and it went off."
>
> A. As he approached me, his exact words were, "I did it. I did it. I did it." I asked him, "Did what?"
>
> "I shot her. I think she may be dead." While I was handcuffing him, he may have said something to that effect.
>
> Q. I will let you look at your statement because you say in your statement that you gave or you signed off on, J. Bryant, it says, "Did what?" He said, "We were tussling over the gun and it went off."
>
> A. It says here, "Did what?" Subject stated, "I shot her. I think she may be dead." R.O., that being myself.
>
> Q. Right.
>
> A. "Began placing the subject in investigative detention," which is handcuffing, "and that's when he stated, 'We were tussling over the gun.'"
>
> Q. "And it went off?"
>
> A. Yes, sir.
>
> Q. So what he actually said to you was, "I did it." And when he got more definitive, what he said he did was tussle over the

gun and it went off; correct?

A. That was after he was being placed in handcuffs, yes, sir.

Q. But it was within a minute or two of the same conversation, within a couple of minutes or two?

A. Yes, sir.

Q. In fact, it was all part of the same conversation?

A. Yes, sir.

Officer Yvonne Lofton, the receiving officer at the Detention Center, testified at the hearing that she observed blood on Golson's hand and shirt and asked him whether he needed medical attention. According to Lofton, Golson said "It's not my blood. It's hers. I was aiming at her shoulder - -." Lofton admitted, however, that she memorialized Golson's statements on the night in question, but her initial written account did not mention Golson's use of the word "aim." Lofton stated she added that fact when she rewrote the statement.

Officer Cave, who took Golson for a shower at the detention center, testified at the hearing and related Golson's statement that he "thought it was going to hit her in the shoulder, not in the middle of the chest; that he loved her." Cave also stated that "[a]t one point, [Golson] did say it was an accident." Cave memorialized Golson's statement as soon as Golson finished his shower and was secured. On cross-examination, Cave acknowledged Golson's speech was unclear and he had difficulty understanding him. Cave also admitted Golson made conflicting statements and at one point said the whole thing was an accident.

The solicitor maintained the State intended to introduce only those statements Golson made while at the Detention Center, because any statements made to Bryant at the scene of the shooting were "basically self-serving hearsay" and not admissible under State v. Terry, 339 S.C. 352, 529 S.E.2d 274

(2000). Defense counsel argued Terry does not stand for the proposition that all self-serving hearsay statements are inadmissible. Defense counsel also argued that statements Golson made at the Detention Center should not be admitted into evidence because: (1) Lofton failed to include part of Golson's statement in her initial memorialization, (2) the written statement was not provided to the defense in violation of Rule 5, SCRCrimP, and (3) Cave admitted Golson's speech was unclear at the time the statements were made.

The trial court ruled the statements Golson made to Bryant were inadmissible under Terry, and that the statements Golson made to Lofton and Cave were admissible. The court specifically noted that any inconsistencies between writings Lofton and Cave made immediately following Golson's statements at the Detention Center and their testimony about the statements at trial would be subject to cross-examination and would affect the credibility of the officers' testimony, not the admissibility of the statements.

The case proceeded to trial. During cross-examination of Bryant, defense counsel attempted to elicit testimony regarding statements Golson made to Bryant at the crime scene. The solicitor objected, and the trial court refused to allow the statements.

Lofton testified Golson told her: "It's not my blood. It's from what I did to the other person." She further testified Golson "stated that he aimed at her shoulder, but it was an accident and he should have shot her in the shoulder." On cross-examination, Lofton admitted she wrote her statement about Golson three to five times that night, but forgot to include any mention of Golson stating he aimed the rifle. She further admitted she was "rewriting real quick because [she] was getting off [from work]." Defense counsel also elicited testimony to the effect that Golson was not aware until the day of trial that she would testify he stated he aimed the rifle.

Cave testified Golson stated he "thought it was going to hit her in the shoulder, not in the center of her chest. At other times he would say that he loved her. At one point he said it was an accident. He was saying how he should have shot himself and laid down next to her, but he didn't have the guts

to."

Dr. Joel Sexton, a forensic pathologist, testified McIver bled to death after being shot in the chest with a rifle. He opined the gunshot wound was a "distant wound" which could have been caused by a shot fired from eighteen inches to three feet away from the victim. Further, Dr. Sexton testified McIver's wound and the projection of the bullet indicated McIver's arms were at her sides when she was shot. He could not, however, categorically rule out the possibility that McIver's hand slipped off the gun immediately before it was discharged.

Golson testified in his own defense. He stated he began trying to break off his relationship with McIver six months before the night of the shooting. He said that on October 3, 1998, he called McIver to tell her he was coming to her home that night to pick up his clothes. According to Golson's account, he arrived at McIver's home at approximately 12:30 a.m. on October 4, 1998, knocked on the window, and McIver opened the door to let him inside. According to Golson, McIver did not want him to return home to his wife. Golson stated McIver "went into a rage and went to the closet and got the gun. Then I went behind and we started tussling with it . . . ." Golson testified McIver threatened to kill him before she would let him leave her. Golson claimed he was ejecting shells from the gun when McIver grabbed the barrel and: "All of a sudden, I felt the pressure of the gun got light; and it was a boom and it was all over with."

After the shooting, Golson called 911. Golson testified he told the operator he and McIver were tussling with the gun when it discharged. He denied telling law enforcement officials he aimed the gun at McIver's shoulder.

On cross-examination, Golson testified he did not remember saying aloud while sitting alone in the patrol car: "Why did you take the gun, Joe? Why did you do it? Why didn't you leave the f---ing gun behind your seat?" "Why didn't you shoot her in the foot, Joe? Why didn't you shoot her in the leg?" "God please forgive me. I sinned." Regarding his inability to remember any statements he might have made while in the patrol car, Golson stated "I was out of it, sir. I don't know what I was saying in that car. All I know I was butting

my head and just looking for somebody to come and kill me with all the people that was around. . . . Like I said, I was out of my mind. I have no recollection of it, sir."

Over defense counsel's objection, the jury was allowed to view selected segments of the patrol car's video tape. The court also allowed into evidence, over the State's objection, a segment of the tape wherein Golson said "God, I am sorry. I did not mean to do it. God, it was an accident. If she hadn't grabbed the damn gun, it never would have went off."

After closing arguments, the judge charged the law of murder, involuntary manslaughter, and accident. The jury requested to view the video tape and Golson's testimony again. The court granted the jury's request and deliberations resumed. The jury convicted Golson of murder. This appeal followed.

Discussion

On appeal, Golson argues the trial judge erred in relying on State v. Terry to exclude Golson's statement to Bryant that he and McIver were tussling over the gun when it discharged. We agree the trial court erred in refusing to admit the evidence pursuant to Terry. However, we find this error harmless.

In State v. Terry, 339 S.C. 352, 355-57, 529 S.E.2d 274, 276-77 (2000), our Supreme Court held that a defendant who elected not to testify in accordance with his Fifth Amendment privilege against self-incrimination was not "unavailable" within the meaning of Rule 804(b)(3), SCRE.[2] Thus, the

[2] Rule 804(b)(3) provides:

> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal

defendant, who was charged with capital murder, could not introduce his confession, which suggested he was guilty of manslaughter rather than murder, as a statement against penal interest. The Court reasoned that the defendant was attempting to exculpate himself with a confession, and a defendant seeking to make exculpatory statements must face cross-examination unless corroborating circumstances clearly indicated the trustworthiness of the statements.

Unlike the defendant in Terry, Golson testified in his own defense. He did not render himself unavailable as a witness by virtue of the exercise of his Fifth Amendment privilege against self-incrimination. The prosecution was afforded ample opportunity to, and did in fact, cross-examine Golson. We find the holding in Terry did not control the evidentiary issue in this case, and the trial court erred in so finding.

This trial error, however, is subject to a harmless error analysis. See State v. Mouzon, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (holding trial errors are subject to a harmless error analysis).

> [I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). "Whether error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must

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> liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

> be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985), citing State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971).

State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998).

Admission of Golson's statement to Bryant on the night of the shooting relating that he and McIver were tussling with the gun would have advanced his claim that the shooting was accidental. We note, however, that Golson testified as to the circumstances surrounding the shooting, including his claim he was ejecting shells from the rifle when McIver grabbed the barrel of the gun and it discharged. Bryant acknowledged the dispatcher informed him Golson reported the incident to the 911 operator. Golson related his statement to the 911 operator that the shooting was accidental. Cave testified Golson claimed the incident was an accident. Also, the portion of the video tape implying the shooting was accidental was presented to the jury. Accordingly, the admission of the statements to Bryant would have been cumulative. Given that the evidence of the accidental nature of the shooting was before the jury, we find the trial court's refusal to admit Golson's statements to Bryant was harmless error. See State v. Joseph, 328 S.C. 352, 371, 491 S.E.2d 275, 284 (Ct. App. 1997) (stating where evidence is merely cumulative to other evidence admitted at trial, the exclusion of such evidence is not an abuse of discretion).

Moreover, there is overwhelming evidence in the record from which the jury could have determined Golson's guilt, including Elmore's testimony regarding Golson's jealous nature and statements on the night of the shooting, the testimony of the forensic pathologist indicating the shooting did not occur at close range as would be the case in a shooting resulting from a "tussle" with the weapon, and the testimony of law enforcement officials regarding Golson's statements on the night of the shooting. Golson's own statements while sitting alone in the police patrol vehicle on the night of the shooting belie the version of events he advanced at trial. In light of the overwhelming evidence of guilt, we hold the exclusion of Golson's statement to Bryant was harmless. State v.

Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (Error is harmless when it could not reasonably have affected the result of the trial.).

For the foregoing reasons, Golson's conviction is

AFFIRMED.

CURETON, GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Kenneth Andrew Burton,

Appellant.

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

Opinion No. 3466
Heard March 5, 2002 - Filed March 25, 2002

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Charles H.

Richardson, all of Columbia; and Solicitor W. Townes Jones, IV, of Greenwood, for respondent.

ANDERSON, J.: Kenneth Andrew Burton appeals his convictions for resisting arrest, pointing and presenting a firearm, and assault on a police officer while resisting arrest. Burton raises two issues on appeal.[1] We reverse, finding the trial court erred in denying Burton's motion for a directed verdict.

FACTS/PROCEDURAL BACKGROUND

Three Laurens city police officers and an officer from the Honea Path Police Department stopped at the Green Street Mini-Mart store in Laurens during a routine warrant team operation. They had several outstanding warrants and were attempting to find the named individuals to serve them. The officers parked their cars and began individually asking persons in the store's parking lot to produce picture identification. They did not have photographs of the individuals named in the warrants, so they relied on the cooperation of those they encountered to show their identification voluntarily.

Detective Tracey Burke, a five-year veteran of the Laurens Police Department, was in "plain-clothes" that day, but he wore a black bullet-proof vest with the word "POLICE" written on it in large, white letters. Detective Burke approached Burton, who was standing at a pay telephone booth with his right hand in his coat pocket and his left hand holding the telephone receiver to his right ear. As he approached, Detective Burke asked Burton for his identification. Burton did not comply or otherwise respond. Detective Burke repeated his request several times, but Burton remained silent. Burton's right hand remained in his pocket throughout the encounter. Detective Burke asked

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[1] Although Burton raises two issues on appeal, we reverse based upon the second issue. Accordingly, we decline to address the merits of the first issue on appeal.

Burton to remove his hand from his pocket. Burton did not comply with this request either. Detective Burke repeated the request. Burton again failed to comply.

Detective Burke moved behind Burton, reached around him, and thrust his hand into Burton's coat pocket. As soon as Burke touched Burton's hand inside the coat pocket, Burton jerked his right shoulder back against Burke and fought with him. Detective Burke grabbed Burton and the two fell to the ground in a struggle. As the two fought, Lieutenant David King of the Honea Path Police Department spotted the handle of a gun coming out of Burton's coat pocket. Lieutenant King yelled "gun" and the other officers raced to assist Detective Burke. Still on the ground, Burton raised up on his left side, pointed the gun at Detective Burke, and pulled the trigger several times. The gun, however, did not fire. A round had jammed in the chamber. The officers seized the gun, subdued Burton, and placed him in handcuffs.

Sergeant Levester Hill and Officer Gerald Deal of the Laurens Police Department arrived on the scene to assist in the matter. Burton continued to struggle and shout obscenities at the officers while awaiting transport to the police station. Because Burton would not wait calmly, Sergeant Hill and Officer Deal placed him on his stomach on the ground. Burton, who was bleeding at the mouth, then appeared ready to spit on Sergeant Hill. Sergeant Hill warned Burton not to spit on him. Burton then turned his head and spit in Officer Deal's direction. As Burton spat, Officer Deal backed away from Burton; nevertheless, Burton's bloody spittle landed on Officer Deal's boot. Officer Deal testified at trial that Burton's actions did not result in injury or make him fearful because the spittle did not make contact with his skin.

Burke was charged with and convicted of the federal offense of unlawful possession of a firearm by a felon in federal district court. The federal district court sentenced Burton to 115 months imprisonment.

Burton was indicted in state court by the Laurens County Grand Jury for assaulting Detective Burke while resisting arrest (Count I); assault with a deadly weapon with the intent to kill Detective Burke (Count II); assaulting Officer

Deal while resisting arrest (Count III); and assault with the intent to kill Officer Deal (Count IV). At trial, Burton proceeded pro se and moved for a directed verdict on all four counts. The trial judge directed a verdict for Burton on Count IV, finding there was no evidence to support the charge. The trial judge denied Burton's directed verdict motions as to the remaining charges. The judge, however, agreed to charge the jury with the lesser offense of resisting arrest on Counts I and III and pointing and presenting a firearm for Count II.

Burton was convicted of resisting Detective Burke's arrest, pointing and presenting a firearm, and assault on Officer Deal while resisting arrest. The trial court sentenced Burton to a total of eight years imprisonment to be served concurrently with his federal imprisonment.[2]

ISSUE

Did the trial court err in denying Burton's motions for directed verdict because law enforcement did not have "reasonable suspicion" to frisk?

LAW/ANALYSIS

Burton argues the trial court should have directed a verdict on all of the charges against him because they were the product of an improper Terry[3] stop. We agree.

Detective Burke testified at trial he approached Burton because he noticed Burton speaking on the pay phone and wanted to ask Burton for identification. Detective Burke was not aware whether Burton's name was on the outstanding warrant list. Burke became suspicious of Burton because Burton did not

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[2] Burton's conviction in federal district court was reversed by the United States Court of Appeals for the Fourth Circuit. United States v. Burton, 228 F.3d 524 (4th Cir. 2000).

[3] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

respond to the officer's questions or comply with the request to remove his hand from his coat pocket. Burke testified he reached into Burton's pocket because Burton would not respond to the questions and was fearful that Burton could have had a beer, drugs, or a weapon in his pocket. When questioned at trial regarding why he believed Burton's pocket contained beer, drugs, or a gun, Burke stated:

> Yes sir. Because prior to us going to Green Street Mini-Mart, we ran up on a lot of individuals and we would ask for I.D. and each one of those individuals cooperated with us. I mean, they told us who they was. If they had an I.D. card on them, they handed us an I.D. card. We looked at it, identified them, and they went on their way. We had no problem with anybody else until we ran up on you and at that point with a hand stuck inside of your coat and no response from you, then yes, we was kind of fearful for our safety and everybody else's, too.

The Fourth Amendment of the United States Constitution — applicable to the states through the Fourteenth 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. amends. IV & XIV; State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001), cert. denied; see also Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L. Ed. 734 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

"[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen …." Florida v. Bostick, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991) (citation omitted); see also Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (recognizing that law enforcement officers may

question citizens without implicating Fourth Amendment protections); Terry v. Ohio, 392 U.S. 1, 34, 88 S. Ct. 1868, 1886, 20 L. Ed. 2d 889 (1968) (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."); State v. Foster, 269 S.C. 373, 379, 237 S.E.2d 589, 591-92 (1977) (quoting Terry, recognizing that a law enforcement officer's addressing questions to citizen on the street does not bring the Fourth Amendment into play); State v. Rodriquez, 323 S.C. 484, 491, 476 S.E.2d 161, 165 (Ct. App. 1996) ("In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates Fourth Amendment protection, the correct inquiry is whether, considering all of the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave. So long as the person approached and questioned remains free to disregard the officer's questions and walk away, no intrusion upon the person's liberty or privacy has taken place and, therefore, no constitutional justification for the encounter is necessary.") (citations omitted).

The authority of a police officer to initiate such "police-citizen encounters" is the same as, but no greater than, the authority of an ordinary citizen to approach another on the street and ask questions. Terry v. Ohio, 392 U.S. 1, 32, 88 S. Ct. 1868, 1885, 20 L. Ed. 2d 889 (1968) (Harlan, J., concurring). Notwithstanding a law enforcement officer's position of authority, a citizen approached in this manner has the right to "ignore his interrogator and walk away." Id. at 32-33, 88 S. Ct. at 1885-86.

An individual's refusal to cooperate with questioning during a "police-citizen encounter," without more, does not furnish the minimal level of objective justification needed for detention or seizure. Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984); Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); cf. Illinois v. Wardlow, 528 U.S.

119, 125, 120 S. Ct. 673, 676, 145 L. Ed. 2d (2000) (ruling unprovoked flight of an individual while being questioned during a "police-citizen encounter" is not "a mere refusal to cooperate" or "going about one's business"; concomitantly, allowing officers confronted with such flight to stop individual and investigate further is "quite consistent" with the well recognized right to "go about [one's] business or to stay put and remain silent in the face of police questioning.").

A police officer may elevate a "police-citizen encounter" into an investigatory stop or detention only if the officer has a "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889 (1968)); see also Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917 (1968) ("The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so.") (citation omitted); State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999) ("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.") (citing Terry, State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977); State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996)).

Reasonable suspicion is something more than an "inchoate and unparticularized suspicion" or "hunch." Terry, 392 U.S. at 27, 88 S. Ct. at 1883. Instead, reasonable suspicion is founded upon "the specific reasonable inferences" the law enforcement officer "is entitled to draw from the facts in light of his experience." Id. (citation omitted); see also State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999) ("The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity.") (citations omitted). In determining

whether reasonable suspicion exists, the totality of the circumstances (i.e., "the whole picture") must be considered. United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989), Blassingame, 338 S.C. at 248, 525 S.E.2d at 539; State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997).

The government bears the burden to articulate facts sufficient to support reasonable suspicion. See Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

Once a basis for a lawful investigatory stop exists, a law enforcement officer may protect himself during the stop by conducting a search or frisk for weapons if he has reason to believe that the suspect is "armed and dangerous." Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968); see also Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972) ("So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.") (footnote and citation omitted); Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917 (1968) ("In the case of the self-protective search for weapons, [the law enforcement officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.") (citation omitted); State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996) ("[B]efore the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous.") (citation omitted). This search or frisk is typically achieved by way of a "pat-down" of a detainee.

In determining whether a stopped individual is armed and dangerous, "[t]he officer need not be absolutely certain that the individual is armed; the issue 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." Terry, 392 U.S. at 27, 88 S. Ct. at 1883 (citations omitted). "[I]n justifying the particular intrusion[,] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21, 88 S. Ct. at 1880 (footnote

omitted). The Terry Court's rubric for determining whether a stopped individual is armed and dangerous has been recognized by our appellate courts. E.g., State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001), cert. denied; State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (Ct. App. 1998).

The State cites State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999), for the proposition that "notwithstanding a strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new, distinct crime[,] then the police may arrest the defendant for that crime." Id. at 194, 519 S.E.2d at 790 (citation omitted). Nelson is inapposite. In the case on appeal, the evidentiary record reveals a continuous flow of action and conduct having a direct nexus to the defective Terry frisk and emanating from the initial "police-citizen encounter."

The only activity that Detective Burke pointed out as "suspicious" was Burton's refusal to answer the detective's questions and the fact that Burton's right hand remained in his coat pocket. However, Burton was certainly within his rights to ignore Detective Burke, refuse to answer his questions, and keep his hand in his coat pocket. Although Detective Burke testified that he feared for the safety of those around him, he based this fear on his speculation that Burton could have had a beer, drugs, or a gun in his pocket. Burke did not articulate anything more than his observation that Burton was not volunteering information as the others being asked for identification had done. Because Detective Burke did not articulate valid reasonable suspicion to support an investigatory stop of Burton, the detective did not have a legal basis to conduct a search of Burton's pocket. We find Detective Burke's search of Burton's pocket was unlawful, and, thus, the gun discovered as a result of the search should have been suppressed pursuant to the Exclusionary Rule of the Fourth Amendment. As the weapon should have been suppressed, we find the trial court erred in not granting Burton's motions for directed verdict.

CONCLUSION

A law enforcement officer may approach citizens and attempt to question them without implicating the Fourth Amendment. When reasonable suspicion

that crime may be afoot exists, the law enforcement officer may elevate the "police-citizen encounter" to an investigatory stop. At that point, the law enforcement officer may conduct a protective search of the stopped individual, provided the officer possesses a reasonable suspicion that the individual is armed and dangerous. Without such a belief, supported by articulable facts, the officer is precluded from making the protective search.

In the case sub judice, Detective Burke did not possess the requisite reasonable suspicion to elevate his "police-citizen encounter" with Burton to an investigatory stop. As a result, Detective Burke did not have the right to frisk Burton or search Burton's coat pocket for weapons or any other contraband. Because the search of Burton's pocket was improper, the trial court's refusal to grant a directed verdict on all the charges resulting from this improper search is

REVERSED.

CURETON and GOOLSBY, JJ., concur.