The Supreme Court of South Carolina

In the Matter of Jean Pilgrim, Petitioner

Appellate Case No. 2015-000383

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 12, 1980, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Supreme Court of South Carolina, dated March 3, 2015, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

In addition, Petitioner 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 her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Jean Pilgrim shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

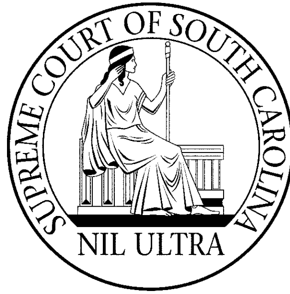
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 5, 2015



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 18, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

27506 - William C. Mitchell v. City of Greenville 12

27507 - Ann Dreher v. SCDHEC 15

27508 - The Spriggs Group, P.C. v. Gene R. Slivka 25

27509 - LeAndra Lewis v. L.B. Dynasty 27

Order - Amendment to the South Carolina Appellate Court Rules 36

UNPUBLISHED OPINIONS

2015-MO-011 The State v. Gregory Wright

2015-MO-012 The State v. Demetrius Goodwin

PETITIONS – UNITED STATES SUPREME COURT

27408 - The State v. Anthony Nation Denied 3/9/2015

2010-173586 - Bayan Aleksey v. State Pending

2014-001128 - The State v. Derringer Young
Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27502 - State of South Carolina ex. rel. Alan Wilson
v. Ortho-McNeil-Janssen Pharmaceuticals Granted until 3/27/2015

PETITIONS FOR REHEARING

27475 - North American Rescue v. P. J. Richardson Pending

27478 - Carolyn M. Nicholson v. SCDSS	Denied 3/4/2015
27484 - Columbia/CSA-HS Greater Columbia Healthcare System, et al. v. The South Carolina Medical Malpractice Liability Joint Underwriting Association, et al.	Pending
27486 - Carolina First Bank v. Badd	Pending
27488 - The State v. Kenneth D. Morris, II	Pending
27491 - The State v. George L. Chavis	Pending
27497 - The State v. Mark Baker	Pending
2015-MO-005 - The State v. Henry Haygood	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

5303-The State v. Conrad Lamont Slocumb 38

5304-The State v. Kenneth Andrew Lynch 43

UNPUBLISHED OPINIONS

2015-UP-140-SCBT, NA v. Shelton Hoffman a/k/a Shelton L. Hoffman

2015-UP-141-Gregory R. Ulbrich v. Richard Ulbrich

2015-UP-142-State v. Steve F. Grayson

2015-UP-143-State v. Dyeshawn Foster

2015-UP-144-SCDSS v. Fiona Brown, Terry Chambers, and John Doe

2015-UP-145-State v. Derrick Ladon Clark

2015-UP-146-Joseph C. Sun v. Olesya Matyushevsky

2015-UP-147-State v. Tammy Smathers

2015-UP-148-State v. David Boyd

2015-UP-149-State v. Thomas Marett

2015-UP-150-State v. Jabarrie Brown

2015-UP-151-State v. Michael Erwin Moon

2015-UP-152-Capital Bank, N.A. v. Charles A. Moore

2015-UP-153-Christopher Drye v. Mike Gault

2015-UP-154-State v. Daniel Owens, Jr.

2015-UP-155-Ashley Outing v. Velmetria Chante Weeks

2015-UP-156-State v. Thomas Randall Edge

2015-UP-157-State v. Dayton Carando Frinks, Jr.

2015-UP-158-State v. Lavern Anderson

2015-UP-159-State v. Wallace Eugene Evatt, Jr.

2015-UP-160-State v. Roderick Jerome Sellers

2015-UP-161-Jennifer Salter v. SCDMV

PETITIONS FOR REHEARING

5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc.	Pending	
5270-56 Leinbach Investors, LLC v. Magnolia Paradigm	Pending	
5294-State v. Darryl L. Drayton	Pending	
5295-Edward Freiburger v. State	Pending	
5297-Trident Medical Center v. SCDHEC	Pending	
5298-George Thomas v. 5 Star Transportation	Pending	
2014-UP-430-Cashman Properties v. WNL Properties	Denied	3/10/15
2015-UP-014-State v. Melvin P. Stukes	Pending	
2015-UP-029-HSBC Mortgage v. Otterbein	Pending	
2015-UP-031-Blue Ridge Electric Cooperative, Inc. v. Gresham	Pending	
2015-UP-036-Alison Morrett v. Capital City Ambulance	Pending	
2015-UP-041-Nathalie I. Davaut v. USC	Pending	
2015-UP-042-Yancey Environmental v. Richardson Plowden	Denied	03/12/15
2015-UP-059-In the matter of the estate of Willie Rogers Deas	Pending	

2015-UP-065-Glenda R. Couram v. Lula N. Davis	Pending
2015-UP-066-State v. James Roscoe Scofield	Pending
2015-UP-067-Ex parte: Tony Megna	Pending
2015-UP-068-Joseph Mickle v. Boyd Brothers	Denied 03/13/15
2015-UP-069-Gitter v. Gitter	Pending
2015-UP-071-Michael A. Hough v. State	Pending
2015-UP-072-Silvester v. Spring Valley Country Club	Pending
2015-UP-074-State v. Akeem O. Smith	Pending
2015-UP-077-Derick Ward v. Margaret Ashbaugh	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5209-State v. Tyrone Whatley	Pending
5229-Coleen Mick-Skaggs v. William Skaggs	Pending
5231-Centennial Casualty v. Western Surety	Pending
5237-Lee C. Palms v. The School District of Greenville Cty.	Pending
5241-Richard A. Fisher v. Shipyard Village Council	Pending
5245-Allegro, Inc. v. Emmett Scully	Pending
5247-State v. Henry Haygood	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5259-State v. Victor A. White	Pending

5263-Milton P. Demetre Family Ltd. Partnership v. Beckmann	Pending
5265-State v. Wayne McCombs	Pending
5268-Julie Tuten v. David C. Joel	Pending
5271-Richard Stogsdill v. SCDHHS	Pending
5272-Cindy Dozier v. American Red Cross	Pending
5274-Duke Energy v. SCDOR	Pending
5275-Mitul Enterprises v. Beaufort Cty. Assessor	Pending
5276-State v. Dwayne Eddie Starks	Pending
5278-State v. Daniel D'Angelo Jackson	Pending
5279-Stephen Brock v. Town of Mt. Pleasant	Pending
5281-Greens of Rock Hill v. Rizon Commercial	Pending
5283-State v. Arthur Smith	Pending
5284-Fayrell Furr v. Horry County	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending
2014-UP-228-State v. Taurus L. Thompson	Pending
2014-UP-273-Gregory Feldman v. William Casey	Pending
2014-UP-304-State v. Tawanda Allen	Pending

2014-UP-346-State v. Jason Bauman	Pending
2014-UP-348-State v. Anthony Jackson	Pending
2014-UP-361-Russell W. Rice, Jr. v. State	Pending
2014-UP-365-Fatima Karriem v. Sumter Cty. Disabilities	Pending
2014-UP-367-State v. Shondre L. Williams	Pending
2014-UP-381-State v. Alexander L. Hunsberger	Pending
2014-UP-382-State v. Julio A. Hunsberger	Pending
2014-UP-385-State v. Ralph B. Hayes	Pending
2014-UP-387-Alan Sheppard v. William O. Higgins	Pending
2014-UP-389-James Plemmons v. State Farm Mutual	Pending
2014-UP-393-Patrick Bowie v. Woodbine Estates	Pending
2014-UP-399-State v. Matthew B. Fullbright	Pending
2014-UP-400-John Doe v. City of Duncan	Pending
2014-UP-409-State v. Antonio Miller	Pending
2014-UP-411-State v. Theodore Manning	Pending
2014-UP-422-Johnson Koola v. Cambridge Two	Pending
2014-UP-435-SCBT, N.A. v. Sand Dollar 31 (Meisner)	Pending
2014-UP-438-CACH, LLC v. Hoffman	Pending
2014-UP-444-State v. Eric VanCleave	Pending
2014-UP-446-State v. Ubaldo Garcia, Jr.	Pending
2014-UP-463-State v. Victor Weldon	Pending

2014-UP-464-Phillip T. Young v. Joy A. Young	Dismissed 03/13/15
2014-UP-470-State v. Jon Wynn Jarrard, Sr.	Pending
2015-UP-039-State v. Brad A. Day	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William C. Mitchell, Petitioner,

v.

City of Greenville, Respondent.

Appellate Case No. 2015-000270

Opinion No. 27506
Submitted March 3, 2015 – Filed March 12, 2015

JUDGMENT FOR RESPONDENT

Samuel Darryl Harms, III, of Harms Law Firm, P.A., of Greenville, for Petitioner.

Michael Stuart Pitts, of Greenville, for Respondent.

PER CURIAM: Petitioner asks this Court to hear this matter seeking declaratory and injunctive relief in our original jurisdiction. Respondent opposes the request. We grant the petition for original jurisdiction, dispense with further briefing, and grant declaratory relief to respondent.

Petitioner argues respondent has adopted an ordinance that improperly provides for two methods of nomination for municipal elections. Petitioner asks this Court to declare the ordinance is null and void, and that the method of election will continue to be partisan in the City of Greenville.

South Carolina Code Ann. § 5-15-60 (2004) allows one of the following methods for nominating candidates and determining the results of nonpartisan elections: (1)

the nonpartisan plurality method; (2) the nonpartisan election and run-off method; and (3) the nonpartisan primary and general election method.

The ordinance challenged by petitioner states:

> . . . [t]he city of Greenville shall cease operating under the partisan method of nominating and electing candidates in municipal elections. The City of Greenville adopts the nonpartisan plurality method as authorized by S.C. Code § 5-15-612 (2004). . . . To achieve this purpose, Chapter 14, "Nominations and elections," of the City of Greenville Code of Ordinances shall be amended to conform with the amended language as set forth on the attached exhibit, which is incorporated herein, with strikes indicating words which are deleted and double underlining indicating added language.

Greenville, SC Code of Ordinances, Ordinance No. 2014-25 (May 12, 2014). The attachment contains the following in Section 14-2: "The ~~methods~~ method of nomination for municipal elections shall be ~~partisan~~ [nonpartisan plurality / nonpartisan run off,] as provided in this chapter and in S.C. Code 1976, § 5-15-10 et seq. and S.C. Code 1976, tit. 7." *Id.*

Petitioner argues that, because the attachment to the ordinance indicates the method to be used is "nonpartisan plurality / nonpartisan run off," and does not choose between the two methods, the ordinance is invalid, and the City must conduct partisan elections. We disagree.

Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 666 S.E.2d 892 (2008). The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. *Charleston Cnty. Parks and Recreation Comm'n v. Somers,* 319 S.C. 65, 459 S.E.2d 841 (1995). An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Id.* While the preamble is not a part of the effective portion of a statute, it may supply the guide to the meaning of an act. *State v. Alls*, 330 S.C. 528, 500 S.E.2d 781 (1998), *citing City of Spartanburg v. Leonard*, 180 S.C. 491, 186 S.E. 395

(1936).

Although the attachment appears to avoid selecting a particular method for nonpartisan elections, the body of the ordinance clearly indicates the City intended to adopt the nonpartisan plurality method. Apparently, the "nonpartisan plurality / nonpartisan run off" set forth the options presented to City Council when it was deciding which method to adopt, and was not corrected when the ordinance was finally adopted. Because the clear legislative intent of the ordinance was to adopt a nonpartisan plurality method of elections, the "nonpartisan run off" option is deleted from the attachment to the ordinance. Accordingly, we enter

JUDGMENT FOR RESPONDENT.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ann Dreher, Respondent,

v.

South Carolina Department of Health and Environmental Control, Petitioner.

Appellate Case No. 2013-000364

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From The Administrative Law Court
Ralph King Anderson III, Administrative Law Judge

Opinion No. 27507
Heard November 18, 2014 – Filed March 18, 2015

AFFIRMED AS MODIFIED

Bradley David Churdar, of N. Charleston, for Petitioner.

Christopher McG. Holmes, of Mt. Pleasant, for Respondent.

CHIEF JUSTICE TOAL: We granted the South Carolina Department of Health and Environmental Control's (DHEC) petition for a writ of certiorari to review the court of appeals' decision in *Dreher v. South Carolina Department of*

Health and Environmental Control, 399 S.C. 259, 730 S.E.2d 922 (Ct. App. 2012), reversing the Administrative Law Court's (ALC) denial of Ann Dreher's (Respondent) bridge construction permit application. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

In January 1994, Respondent purchased two parcels of property located on Folly Island, South Carolina: 806 East Cooper Avenue, and Tract D. These lots were previously a contiguous tract of high ground property in which the Tract D portion abutted the ocean, and the Cooper Avenue portion abutted the roadway. However, at some point prior to Respondent's property purchase, two man-made canals were constructed, after which Tract D became completely surrounded by coastal tidelands and waters. At present, 806 East Cooper Avenue is approximately 0.24 acres in size, and Tract D is approximately 0.84 acres in size.

On April 2, 2009, Respondent filed a permit application with DHEC requesting permission to construct a vehicular bridge from 806 East Cooper Avenue to Tract D. DHEC denied the application because Regulation 30-12(N)(2)(c) prohibits the agency from issuing a bridge construction permit to a "coastal island" less than two acres in size, and the parties agreed that—if Tract D was, in fact, a "coastal island"—it did not meet the regulation's minimum size requirement. *See* S.C. Code Ann. Regs. 30-12(N)(2)(c) (2011).[1]

[1] Regulation 30-12(N)(2) specifically states:

> (a) The decision on whether to issue or deny a permit for a bridge to a coastal island must be made with due consideration of the impacts to the public trust lands, critical area, coastal tidelands and coastal waters, weighed against the reasonable expectations of the owner of the coastal island. Giving due consideration to these factors, [DHEC] has determined that some islands are too small or too far from upland to warrant the impacts on public resources of bridges to these islands, and thus no permit for a bridge shall be issued.
>
> . . . .
>
> (c) [DHEC] will not consider applications for bridge access to islands less than two acres in size.

Respondent requested a contested case hearing before the ALC. At the hearing, the parties focused on whether Tract D met the definition of a "coastal island" as described in the Coastal Zone Management Act (CZMA) and the regulations promulgated pursuant to the CZMA. *See generally* S.C. Code Ann. §§ 48-39-10 to -360 (2008 & Supp. 2014); S.C. Code Ann. Regs. 30-1 to -21 (2011 & Supp. 2014). A "coastal island" is defined as:

> an area of high ground above the critical area delineation that is separated from other high ground areas by coastal tidelands or waters. An island connected to the mainland or other island only by a causeway is also considered a coastal island. The purpose of this definition is to include all islands except those that are essentially mainland, i.e., those that already have publicly accessible bridges and/or causeways. ***The following islands shall not be deemed a coastal island subject to this section due to their large size and developed nature***: Waites Island in Horry County; Pawleys Island in Georgetown County; Isle of Palms, Sullivans Island, ***Folly Island***, Kiawah Island, Seabrook Island, Edisto Island, Johns Island, James Island, Woodville Island, Slannn Island and Wadmalaw Island in Charleston County; Daniel Island in Berkeley County; Edisto Beach in Colleton County; Harbor Island, Hunting Island, Fripp Island, Hilton Head Island, St. Helena Island, Port Royal Island, Ladies Island, Spring Island and Parris Island in Beaufort County.

S.C. Code Ann. Regs. 30-1(D)(11) (emphasis added). Because the listed islands are not considered "coastal islands," properties on these islands are exempt from the minimum acreage requirement found in Regulation 30-12(N)(2)(c). *See* S.C. Code Ann. Regs. 30-12(N)(2)(a), (c) (restricting eligibility for a bridge-building permit to those coastal islands that are large enough to warrant the impact on public resources).

Ultimately, the ALC found Tract D "geologically, geographically and by legal description, is on and within the boundaries of Folly Island."[2] Nonetheless, the ALC concluded that Tract D constituted a "coastal island" separate and apart

[2] Similarly, the ALC found that "[t]he proposed bridge was the least environmentally damaging alternative for access to Tract D and, in fact, would have de minimus environmental impact."

from Folly Island.[3] Therefore, the ALC upheld DHEC's denial of Respondent's bridge permit application, finding that "Tract D is less than one acre in size," and that "the legislative intent, as evidenced by the language of Regulation 30-1(D)(11) and the policies of the CZMA, was to include islands like Tract D in Regulation 30-1(D)(11)'s definition of 'coastal island.'"[4]

Respondent appealed to the court of appeals, and the court of appeals reversed the ALC's decision. *See Dreher*, 399 S.C. at 261, 730 S.E.2d at 923. Specifically, the court of appeals found that because DHEC "failed to challenge" the ALC's finding that Tract D was part of Folly Island, that finding became the law of the case. *Id.* at 263, 730 S.E.2d at 924. The court of appeals considered this fact dispositive, as Folly Island—and thus Tract D—were specifically exempt from the minimum acreage requirement for a bridge-building permit. *See id.* at 264–65, 730 S.E.2d at 925. In the alternative, the court of appeals ruled that on the merits, substantial evidence in the record demonstrated that Tract D was part of Folly Island, and thus was exempt from the minimum acreage requirement found in Regulation 30-12(N)(2)(c). *Id.* at 263–64, 730 S.E.2d at 924–25. Finally, the court of appeals held that because Respondent was not prohibited from building a

[3] The ALC based this conclusion on four reasons. First, the ALC found that Tract D was "an area of high ground about the critical area that is separated from other high ground areas by coastal tidelands or waters," and thus technically met the definition of a "coastal island." Second, the ALC determined that unlike the other exempt islands listed in Regulation 30-1(D)(11), Tract D was not "essentially mainland," and thus the General Assembly did not intend to exempt Tract D from the minimum acreage requirement found in Regulation 30-12(N)(2)(c). Third, the ALC similarly concluded that the General Assembly did not intend to include parcels such as Tract D in the list of exempt coastal islands because unlike the other named islands, Tract D was not "large [in] size and developed [in] nature." Finally, the ALC found that building the bridge to Tract D would require building in a tidelands area, which the CZMA specifically sought to protect.

[4] Both parties filed timely motions to reconsider. Of note, DHEC requested the ALC reconsider its finding that Tract D "geologically, geographically and by legal description, is on and within the boundaries of Folly Island," arguing that the finding was inconsistent with the remainder of the ALC's conclusions. Because the ALC did not rule on either party's motion within thirty days, the motions were deemed denied.

bridge due to Tract D's small size, she was entitled to construct the bridge by virtue of Regulation 30-12(F). *Id.* at 266, 730 S.E.2d at 925–26; *see also* S.C. Code Ann. Regs. 30-12(F) (requiring DHEC to weigh the environmental impact of proposed bridges against public safety considerations, and to approve projects that have a minimal environmental impact).

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

ISSUES

I. Whether the court of appeals misapplied the law of the case doctrine?

II. Whether Tract D is exempt from the minimum acreage requirement found in Regulation 30-12(N)(2)(c)?

STANDARD OF REVIEW

Appellate courts review cases decided by the ALC in accordance with the Administrative Procedures Act. *Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 341, 755 S.E.2d 444, 448 (2014) (citing S.C. Code Ann. § 1-23-610(B) (Supp. 2012)). Thus we are limited "to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law." *Id.* An appellate court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B). "In determining whether the [ALC's] decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the [ALC] reached." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ANALYSIS

I. Law of the Case Doctrine

"An unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Thus, should the appealing party fail to raise all of the grounds upon

which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case. *Cf. Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating . . . , [*inter alia*,] matters that were [] not raised on appeal, but should have been . . . .").[5]

Moreover, because an appellate court may affirm the lower court's decision for any reason appearing in the record, the prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court's decision. *See* Rule 220(c), SCACR; *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 420, 526 S.E.2d 716, 722, 723 (2000) ("In raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court."). Thus, "it is not necessary for the party who prevailed below to object to or appeal from the trial court's ruling in order to raise such grounds." *I'On*, 338 S.C. at 418, 526 S.E.2d at 722.

Here, the court of appeals found that DHEC—the prevailing party before the ALC—should have secured a ruling from the ALC reversing its finding that Tract D was "geologically, geographically and by legal description, [] on and within the boundaries of Folly Island," and that because DHEC failed to do so, this finding became the law of the case. However, the court of appeals misapprehended the law of the case doctrine. Specifically, the court of appeals erred in applying the doctrine so as to bar the prevailing party below from raising an additional sustaining ground. DHEC properly raised its challenge to the ALC's finding in its brief to the court of appeals, and thus did not concede or abandon the argument. *See id.* at 420, 526 S.E.2d at 723. Therefore, rather than find the argument procedurally barred, the court of appeals should have considered whether Tract D is a "coastal island" as defined in the regulations.

II. Coastal Island Exemption

DHEC asserts that because Tract D is surrounded by coastal tidelands and waters, it is a "coastal island" under Regulation 30-1(D)(11). Further, DHEC

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[5] To the extent an appellate court relies on the law of the case doctrine, the appellate decision affirms the lower court's decision procedurally, rather than on the merits.

argues that Tract D essentially ceased to be a part of Folly Island as a result of the creation of the man-made canals that separate Tract D from 806 East Cooper Avenue. In contrast, Respondent does not dispute that Tract D is surrounded by coastal tidelands and waters, but rather contends that because Tract D remains within the geographical and legal boundaries of Folly Island, it is expressly exempt from being considered a "coastal island." As the ALC aptly expressed, "This decision [] centers on whether the legislature intended that its declaration of Folly Island as [exempt from the general definition of a 'coastal island'] overrides its declaration that a coastal island is simply high ground which is 'separated from other high ground areas by coastal tidelands or waters.'" In other words, the issue here is purely an issue of regulatory interpretation.

Generally, "[a] specific statutory provision prevails over a more general one." *Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999); *see also Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47–48, 564 S.E.2d 341, 346 (Ct. App. 2002) (employing the rules of statutory construction to discern the meaning of a regulation). Here, Regulation 30-1(D)(11) broadly defines "coastal islands," but then specifically exempts certain islands, including Folly Island, from the general definition. *See* S.C. Code Ann. Regs. 30-1(D)(11). Further, the ALC found that Tract D was "on and within" Folly Island, and as detailed in the court of appeals' opinion, that finding is supported by substantial evidence in the record. *See Dreher*, 399 S.C. at 263–64, 730 S.E.2d at 924–25 (outlining the facts in the record demonstrating that Tract D is part of Folly Island). As such, we agree with Respondent that Tract D is not a "coastal island" in and of itself; rather, it is part of Folly Island, which is specifically exempted in the regulation.

Accordingly, the specific regulatory exemption for Folly Island controls over the more general regulatory definition of "coastal island." As a result, Tract D cannot be considered a "coastal island," and the minimum acreage requirement found in Regulation 30-12(N)(2)(c) does not bar Respondent's bridge construction permit application. In conjunction with Regulation 30-12(F) and the ALC's finding that "[t]he proposed bridge was the least environmentally damaging alternative for access to Tract D and, in fact, would have de minimus environmental impact," we find that DHEC and the ALC erred in denying Respondent's permit application. *Cf.* S.C. Code Ann. Regs. 30-12(F) (outlining the environmental impact standards DHEC should consider prior to granting a bridge-building permit).

CONCLUSION

For the foregoing reasons, we affirm the result reached by the court of appeals, albeit through different reasoning.

AFFIRMED AS MODIFIED.

KITTREDGE and BEATTY, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which HEARN, J., concurs.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority that the Court of Appeals misapplied the law of the case doctrine. I disagree, however, with the majority's decision to uphold the Court of Appeals' reversal of the ALC's denial of respondent's permit request.

The majority acknowledges that whether Tract D is entitled to share Folly Island's coastal island exemption found in S.C. Code Ann. Regs. 30-1(D)(11) (2011) is a question of fact, which is reviewed under the substantial evidence standard. While the majority views the factual issue as whether Tract D is a "part" of Folly Island or "on and within" that island, in my view the question is whether there is substantial evidence to support the ALC's finding that the tract is itself a coastal island. Whether a parcel located within the geographic boundaries of a named island is itself a separate coastal island within the meaning of Reg. 30-1(D)(11), or whether it is not and therefore shares the named island's exemption, is a question of fact. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) ("whether or not the Lot is part of Fripp Island is not a legal question that is determined under the rubric of a regulation; instead, it is a finding of fact properly left within the purview of the fact finding body, and only reversible if unsupported by substantial evidence").

In *Risher*, we found substantial evidence supported the ALC's findings that the lot located within the geographic boundaries of Fripp Island did not meet the definition of coastal island under the regulation, and that it was therefore within Fripp's exemption. Here, as all parties admit, Tract D is entirely surrounded by "coastal tidelands or waters" and is therefore a coastal island as defined by Reg. 30-1(D)(11). The ALC's finding that Tract D is not within Folly Island's exemption is supported by substantial evidence. *Risher*, *supra*. In my opinion, the Court of Appeals erred in reversing the ALC, and the majority also errs by focusing on Tract D's location rather than on its topography. *Id*.

Even if the majority's view prevails, and the ALC's decision finding Tract D to be a coastal island is reversed, it does not follow that respondent is automatically entitled to the bridge permit she seeks. Instead, the matter should be remanded to DHEC for consideration of the permit request in light of the requirements of S.C. Code Ann. Regs. 30-12(F) (2011), an issue which has not yet been litigated.

For the reasons given above, I concur in part and dissent in part.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Spriggs Group, P.C., Respondent,

v.

Gene R. Slivka, Petitioner.

Appellate Case No. 2013-000800

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Colleton County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 27508
Heard February 3, 2015 – Filed March 18, 2015

DEPUBLISH THE OPINION OF THE COURT OF APPEALS AND DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

Robert T. Lyles, Jr., of Lyles & Lyles, L.L.C., of Charleston, for Petitioner.

James Atkinson Bruorton, IV and Timothy James Wood Muller, of Rosen Rosen & Hagood, L.L.C., of Charleston, for Respondent.

PER CURIAM: We granted the petition for a writ of certiorari to review the Court of Appeals' decision in *The Spriggs Group, P.C. v. Slivka*, 402 S.C. 42, 738 S.E.2d 495 (Ct. App. 2013). We first direct the Court of Appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect. Next, we dismiss as improvidently granted the writ of certiorari.

Accordingly, we

DEPUBLISH THE OPINION OF THE COURT OF APPEALS AND DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

LeAndra Lewis, Petitioner,

v.

L.B. Dynasty, d/b/a Boom Boom Room Studio 54 and S.C. Uninsured Employers' Fund, Defendants,

Of Whom S.C. Uninsured Employers' Fund is, Respondent.

Appellate Case No. 2012-213376

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Workers' Compensation Commission

Opinion No. 27509
Heard January 14, 2015 – Filed March 18, 2015

REVERSED AND REMANDED

Charles B. Burnette, III, of Burnette & Payne, PA, of Rock Hill; John S. Nichols and Blake A. Hewitt, both of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, for Petitioner.

Lisa C. Glover, of Columbia, for Respondent.

JUSTICE HEARN: LeAndra Lewis was injured by an errant bullet at Studio 54 Boom Boom Room (the Club) while she was working as an exotic dancer. The question before the Court is whether she is an employee of the Club and thus eligible for workers' compensation. Considering the relationship in toto, we find the Club exercised control over the manner in which she performed her

work and therefore conclude she was an employee.

FACTUAL/PROCEDURAL BACKGROUND

Lewis worked as an exotic dancer, performing five to seven days a week. Lewis traveled throughout North and South Carolina to dance at different establishments, and performed at the Club on three separate occasions. Upon arrival at the Club, Lewis presented identification demonstrating she was old enough to perform, reviewed the Club's rule sheet, and paid a tip-out fee. The tip-out fee, which was determined based on when her shift started, was $70.

The types of dances Lewis performed at the Club included V.I.P. dances, table dances, and dances on the stage. Lewis was required to perform V.I.P. dances whenever a patron requested one. The Club set the minimum price of these dances, which were to be performed in a specific area, and Lewis had to give a portion of that payment to the Club. Lewis's rotation on stage was determined by the Club and it chose the music for those performances.

The Club required the performers to follow specific guidelines or risk being fined or immediately discharged. Because this Club was topless only, the dancers were subject to fines for removing their panties. Although the Club did not set times when the dancers were required to work, it did devise a dancing schedule once the women arrived and they were not allowed to leave prior to the end of their shift without paying a fine. Furthermore, if a dancer did not perform on stage during the assigned time, she had to pay a fine. Failure to pay any fine or repeated violations of the rules could result in termination. Additionally, the dancers could be dismissed for fighting or having sex in the Club.

During Lewis's shift at the Club, a fight broke out and Lewis was struck in the abdomen by a stray bullet, which caused severe damage to her internal organs and resulted in the loss of a kidney. She also sustained substantial scarring. Lewis filed a claim for workers' compensation requesting temporary total disability benefits and medical treatment from the date of the accident. The putative employer was not represented at the hearing, but the South Carolina Uninsured Employer's Fund appeared to dispute Lewis's claim, arguing Lewis was an independent contractor and not an employee.

At the hearing, Lewis argued the Club exercised control over the manner in

which her work was performed, and she was therefore an employee of the Club. She testified she earned $357 the night she was shot, and made a total of $1,357 at the Club over the course of her shifts. Lewis did not state what her income was at the other establishments where she danced, but stated she made approximately $250 to $350 a night. She had never filed a tax return and produced no documentation indicating where she worked or what her total income was.

The single commissioner found that Lewis was an independent contractor and denied compensation. Additionally, the commissioner stated that had Lewis established she was an employee, her compensation rate would be $75 per week based on Lewis's failure to produce evidence of the income she earned at other establishments. The appellate panel of the Workers' Compensation Commission affirmed, adopting the single commissioner's order.

On appeal, the court of appeals affirmed in a split decision. *Lewis v. L.B. Dynasty, Inc.*, 400 S.C. 129, 732 S.E.2d 662 (Ct. App. 2012). The majority found that Lewis was an independent contractor, and thus the court did not have to reach the question of whether the commissioner erred in setting her compensation rate at $75 per week. *Id.* at 137, 732 S.E.2d at 666. Judge Short dissented, concluding that examining the relationship as a whole, the Club exercised sufficient control to evince an employment relationship. *Id.* at 139, 732 S.E.2d at 667 (Short, J., dissenting). We granted certiorari.

ISSUE PRESENTED

Did the court of appeals err in finding Lewis was an independent contractor, not an employee of the Club?

LAW/ANALYSIS

Lewis argues the details of her professional relationship preponderate in favor of finding she was an employee of the Club and the court of appeals erred in concluding otherwise. We agree.

We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act; accordingly, only exceptions and restrictions to coverage are strictly construed. *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). The burden of proving the relationship of employer and employee is upon the claimant, and this proof must

be made by the greater weight of the evidence. *Marlow v. E. L. Jones & Son, Inc.*, 248 S.C. 568, 570, 151 S.E.2d 747, 748 (1966). Whether a claimant is an employee or independent contractor is a jurisdictional question and therefore the Court may take its own view of the preponderance of the evidence. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). The crux of this determination is the purported employer's right to control the claimant in the performance of his work. *Id.* In analyzing the nature of a work relationship the Court examines four factors: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475–76, 753 S.E.2d 416, 419 (2013). Each factor is considered with equal force and the mere presence of one factor indicating an employment relationship is not dispositive of the inquiry. *Id.*

At the outset, we agree with Lewis that the majority of the court of appeals allowed its analysis to be influenced by the initial conclusion that Lewis was an "itinerant artistic performer." *Lewis*, 400 S.C. at 134, 732 S.E.2d at 664. While we recognize the unique details of the arrangement between the Club and Lewis, we emphasize our inquiry is a balance of factors based on the totality of the circumstances. Attempting to broadly characterize the nature of her profession prior to engagement in the analysis foretells a single result. The question before the Court is a simple, fact-based consideration—did the Club exercise sufficient control over Lewis to create an employee relationship—further commentary on the nature of her profession is unnecessary. We therefore now proceed to the right to control test.

I. RIGHT TO OR EXERCISE OF CONTROL

Turning to the first prong of the test, we find the facts preponderate in favor of an employment relationship. In considering this question, the court of appeals focused on whether the Club dictated *how* she danced and concluded that because Lewis could choreograph her own routine, the Club did not control her work. We find this a myopic view in light of the facts presented. Certainly, the Club did not specify all the details of her movements, but it is unfaithful to the record to claim it did not control her performance in her capacity as an entertainer. Prior to working her shift, Lewis was required to pay a tip-out fee, undergo a search, and review the Club's rule sheet. The Club could decline her entry if her appearance was undesirable. Once Lewis began her shift, the Club chose the music for all her

performances. It also dictated when in the rotation of dancers she must appear on stage. The Club set the minimum for a V.I.P. dance—which she was required to perform if asked—and specified an area for those to take place. Although Lewis technically performed routines of her own direction, the Club specified her degree of nudity—she was required to be topless, but would be fined for removing more. Additionally, she was not permitted to leave her shift early without paying a fine.

We recognize that Lewis had no set schedule, and came when she chose with no other repercussion than the loss of income. Nevertheless, once the Club engaged her for the evening, it exercised significant control over the performance of her work. Accordingly, we find this factor weighs in favor of a finding of an employment relationship.

II. FURNISHING OF EQUIPMENT

We further agree with Lewis that the Club furnished equipment so as to preponderate this factor in favor of her having an employee relationship.

When considering this prong, the court of appeals concluded the Club did "nothing more than allow [Lewis] on the premises" because there was no practical way she could have supplied the poles, stage, furniture, or bar items. Instead, it stated, "From the standpoint of both the [Club] and its customers, Lewis brought her own 'equipment' for her work." *Lewis*, 400 S.C. at 135, 732 S.E.2d at 665.

Initially, we disagree with the court of appeals that an individual's body can be considered equipment for the purpose of this analysis. *See Matter of Hanson*, 754 P.2d 444, 447 (Idaho 1988) ("The worker's body is not a major item of equipment within the meaning of the third element of the 'right to control' test. Major items of equipment include such things as tools, machinery, special clothing, parts, and other similar items necessary for the worker to accomplish the task to be performed. For example, a plumber, hired to perform plumbing repairs on a building, usually brings the tools, the parts, and often special equipment in the form of augers, pipe cutters and threaders, etc., in order to perform the service. Those are the sorts of items which constitute the 'major items of equipment' under the third element of the right to control test. The fact that the plumber also supplies the body doing the work is true whether he is acting as an employee or as an independent contractor.").

Furthermore, assuming her body is equipment is inconsistent with the rationale underlying the Court's consideration of this factor. As Professor Larson has written:

> When it is the employer who furnishes the equipment, the inference of the right to control is a matter of common sense and business. The owner of a $100,000 truck who entrusts it to a driver is naturally going to dictate details such as speed, maintenance, and the like in order to protect his or her investment . . . .
>
> This being the rationale, the rule should not be applied to items of equipment whose size and value are not so large as to provide this incentive for control and for efficient employment of capital.

3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 61.01 (2013). The genesis of this consideration is that whomever bears the risk of the capital in any investment would logically exert the most control over how that investment is used.

We observe that other than her costume, Lewis brought no other equipment to the Club. The Club, however, supplied her necessary performance space—including an area for V.I.P. dances, a stage with a pole, tables, and a sound system. It therefore had a more significant interest in ensuring the dancers effectively utilized the equipment provided to ensure the advertised experience was available to the patrons. *See Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 959 (Nev. 2014) ("With regard to the relative investment of the parties, we note that Sapphire provides all the risk capital, funds advertising, and covers facility expenses. The performers' financial contributions are limited to . . . their costume and appearance-related expenses and house fees. Thus, the performers are far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments." (internal quotation omitted)). Because the Club, and not Lewis, bore the risk of the capital investment in the equipment used by Lewis to perform her work, we find this factor weighs in favor of an employee relationship.

III. METHOD OF PAYMENT

Lewis argues this prong of the analysis provides little assistance in analyzing

the nature of her professional relationship. We recognize at the outset the facts of this case are distinct in that the Club did not directly pay her any of her earnings; instead, it facilitated the payment she received from the customers. Nevertheless, we do not agree this factor is irrelevant to our inquiry.

When considering this prong, typically a court looks to whether the claimant was paid by the job or by the hour and how the claimant filed her taxes. Here, Lewis never filed her taxes and does not appear to have ever been given a Form 1099 or a W-2. We therefore again find it helpful to turn to Professor Larson's discussion of the rationale underlying this consideration:

> A moment's reflection will show the realistic connection between payment and control. If an employer in a regular business or industry purchases personal labor by the hour, day, or week, it is almost certain to insist on the right to see that the time is well and efficiently spent. It if pays by the hour, the employer wants to see that it gets a full hours work, and that the hour is applied where it is most needed. . . .
>
> By contrast, if the employer makes an agreement to pay a man one hundred dollars to clean out a well, it has no reason to care whether the worker is slow or fast, clumsy or efficient.

3 *Larson's*, § 61.06. Accordingly, the payment prong reflects the putative employer's interest in a worker's productivity and efficiency and whether it would indicate the retention of control over the manner in which the job is performed.

We note the Club exerted some control over her payment; it set the price of the tip-out fee and the minimum for V.I.P. dances, providing Lewis no discretion to alter these amounts. Additionally, it required Lewis to perform these V.I.P. dances upon request from a customer. Nevertheless, on the balance we agree with the court of appeals' conclusion that this factor does not does not suggest the exercise of control of the Club; therefore, we find this factor preponderates in favor of an independent contractor relationship.

IV. RIGHT TO FIRE

In considering the right to fire, we are aware that in any relationship there exists some right to terminate the arrangement. However, as this Court has

previously noted, "[t]he power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project." *Shatto*, 406 S.C. at 481, 753 S.E.2d at 422 (quoting 3 *Larson's* § 61.08[1]). In essence, examining this factor requires the Court to look to whether liability exists if the work is prematurely interrupted. We find the Club ultimately had the right to terminate Lewis without risk of repercussions. Accordingly, we find this factor weighs in favor of an employment relationship.

The testimony at the hearing indicates Lewis would be fined for a failure to comply with the rules—including not staying for her rotation in stage performances, leaving before her shift was over, and declining to perform a V.I.P. dance. Failure to pay any fine would result in her termination. She could also be fired for continuously breaking the rules, fighting, or improper hygiene. The Club could even decline to let her in for not having the desired appearance. We acknowledge she had the right not to show up at all because she had no set schedule, but once she was hired for the night, the Club could end that relationship prior to her shift ending and leave Lewis with no recourse for that firing.

On balance, we find this prong indicates an employee relationship. Lewis could be terminated for violations of the company rules and could be prevented from working at the Club's discretion. Additionally, there is no indication Lewis would possess any right to relief if she was terminated.

CONCLUSION

We emphasize our analysis is necessarily driven by the particular facts of this case. Examining the totality of the circumstances, we hold the weight of the evidence weighs in favor of finding Lewis was an employee of the Club and is entitled to workers' compensation benefits. We therefore reverse the court of appeals' opinion holding the contrary. Additionally, because it declined to address the question of Lewis's compensation rate, we remand that issue to the court of appeals for consideration.

TOAL, C.J., BEATTY and KITTREDGE JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent as I agree with the analysis and holding of the Court of Appeals and thus, would dismiss the writ of certiorari as improvidently granted.

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended to add the attached rule. This amendment shall be effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
March 11, 2015

RULE 610
BULK DISTRIBUTION OF AND COMPILED INFORMATION FROM JUDICIAL RECORDS

(a) For the purpose of this rule:

(1) Bulk distribution is defined as a distribution of all, or a significant subset, of the information in judicial records, as is and without modification or compilation.

(2) Compiled information is defined as information that is derived from the selection, aggregation or reformulation of the information from more than one individual judicial record.

(3) Judicial records shall include all records maintained by any court, commission, board, committee, office or other entity within the South Carolina Judicial Department, regardless of whether that entity is funded in whole or part by state or local funds.

(b) Unless authorized by the Supreme Court of South Carolina, a bulk distribution of judicial records will not be made.

(c) Unless authorized by the Supreme Court of South Carolina, compiled information from judicial records will not be provided. This restriction shall not apply to:

(1) Compiled information that may be contained in statistical or other reports that have been previously released to the general public.

(2) Compiled information that can be obtained by a person using the search functions available to the public on websites maintained by the South Carolina Judicial Department.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Conrad Lamont Slocumb, Appellant.

Appellate Case No. 2013-000933

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5303
Heard January 6, 2015 – Filed March 18, 2015

AFFIRMED

Appellate Defender Laura Ruth Baer, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Assistant Attorney General Mark R. Farthing, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

SHORT, J.: Conrad Lamont Slocumb appeals his aggregate sentence of one hundred thirty years for offenses he committed when he was a juvenile, arguing it

is the functional equivalent of a life sentence without parole and violates the Eighth Amendment prohibition against cruel and unusual punishment. We affirm.

FACTS

For offenses committed in 1996, Slocumb was convicted of first-degree burglary, first-degree criminal sexual conduct (CSC 1st), kidnapping, escape, and robbery. At the time the crimes were committed, Slocumb was sixteen years old.

The Honorable James W. Johnson, Jr., sentenced Slocumb to three terms of life imprisonment without parole for burglary, CSC 1st, and kidnapping based on a prior 1993 conviction for CSC 1st. Judge Johnson also sentenced Slocumb to consecutive terms of fifteen years for robbery and five years for escape. Slocumb appealed and in *State v. Slocumb*, 336 S.C. 619, 521 S.E.2d 507 (Ct. App. 1999), this court affirmed his convictions. Our supreme court denied Slocumb's petition for certiorari on June 7, 2000.

While his direct appeal was pending, Slocumb filed post-conviction relief (PCR) actions challenging his 1993 convictions. On November 8, 1999, our supreme court granted relief and found the trial court was without jurisdiction to accept Slocumb's 1993 plea. *Slocumb v. State*, 337 S.C. 46, 50, 522 S.E.2d 809, 811 (1999). In granting PCR, the court found a criminal sexual conduct charge committed by a juvenile under the age of fourteen was not transferrable to general sessions under the statute prevailing at the time. *Id.* That plea was the basis for the life sentences Slocumb received under South Carolina's recidivist statute. *See* S.C. Code Ann. § 17-25-45 (2014) (providing for the imposition of a life sentence on an offender convicted of certain prior crimes).

Slocumb appeared before Judge Johnson again on March 16, 2000, and was resentenced to life imprisonment for burglary, thirty years for kidnapping, thirty years for CSC 1st, fifteen years for robbery, and five years for escape. All terms were to be consecutively served. This court vacated the sentences on March 16, 2000, for lack of jurisdiction because there remained matters pending on Slocumb's direct appeal. Slocumb again appeared before Judge Johnson on February 18, 2004, and was resentenced to life imprisonment for burglary, thirty years for kidnapping, thirty years for CSC 1st, fifteen years for robbery, and five years for escape. All terms were to be consecutively served.

On January 26, 2011, Slocumb filed a Motion for Resentencing in the South Carolina circuit court, requesting to be resentenced in accordance with *Graham v. Florida*, 560 U.S. 48, 82 (2010), which held that life without parole is unconstitutional when imposed on juvenile nonhomicide offenders.[1] At the time, Slocumb had a Petition for Writ of Habeas Corpus pending in the United States District Court. The Honorable Henry M. Herlong, Jr., Senior United States District Judge, adopted the report of the Honorable Bristow Marchant, United States Magistrate Judge, and ordered Slocumb's habeas petition be granted on the issue of whether he was entitled to have his life sentence for burglary vacated pursuant to *Graham*. The order directed Slocumb "be returned to the state sentencing court for resentencing" on the burglary sentence. The remainder of Slocumb's claims were dismissed without prejudice.

In response to the United States District Court order, Slocumb filed a "Bench Brief in Support of a Reduced Sentence in Light of *Graham v. Florida* and Implications of De Facto Life Sentences" with the circuit court. In the brief and at his resentencing hearing before the Honorable DeAndrea G. Benjamin, Slocumb argued he should be resentenced on all charges rather than just the burglary charge because his term-of-years sentence was the functional equivalent of a life sentence.

Slocumb argued his aggregate sentence of eighty years required him to serve time beyond his life expectancy of sixty-seven years. He further argued the cumulative sentence could not be reconciled with *Graham*, which requires a meaningful opportunity for release. Slocumb was thirty-three years old at the time of the hearing.

In response to Judge Benjamin's query, Slocumb's counsel acknowledged the district court's order solely addressed the burglary charge. Judge Benjamin resentenced Slocumb to fifty years on the burglary conviction, consecutive, and left the remaining sentences intact. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to

[1] Slocumb alleges no court has yet ruled on this motion.

determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

LAW/ANALYSIS

Slocumb argues the circuit court erred in failing to find his aggregate sentence of one hundred and thirty years for nonhomicide offenses is the functional equivalent of a life sentence without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime in violation of *Graham* and the Eighth Amendment. We disagree.

The general rule is the circuit court has no jurisdiction to reconsider a criminal matter once the term of court has expired. *State v. Warren*, 392 S.C. 235, 238, 708 S.E.2d 234, 235 (Ct. App. 2011). "[A] trial judge has no jurisdiction to review his own sentences and substitute sentences after adjournment of the court." *State v. Patterson*, 272 S.C. 2, 4, 249 S.E.2d 770, 770 (1978) (citing *State v. Best*, 257 S.C. 361, 186 S.E.2d 272 (1972)).

"Th[is] rule has two exceptions: a timely post-trial motion and a motion for a new trial based on after-discovered evidence." *State v. Campbell*, 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008) (distinguishing jurisdiction from subject matter jurisdiction and explaining a trial judge is without the power to act under the general rule despite the existence of subject matter jurisdiction). Furthermore, the circuit court on remand has only the jurisdiction and authority mandated by the appellate court. *Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011); *see S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 250-51, 551 S.E.2d 274, 279 (Ct. App. 2001) (stating the "trial court has no authority to exceed the mandate of the appellate court on remand").

Although review of Slocumb's burglary sentence was directed to the circuit court from the federal district court rather than one of our state appellate courts, we find the circuit court was likewise bound by the district court's directive. In this case, the directive included only reconsideration of the sentence for the burglary

conviction. The district court dismissed Slocumb's remaining issues in his habeas petition without prejudice. Slocumb informed the circuit court that an independent motion in state court to reconsider all of Slocumb's convictions remained pending. We find no error by Judge Benjamin in refusing to entertain Slocumb's request to reconsider sentencing on all of his convictions.

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kenneth Andrew Lynch, Appellant.

Appellate Case No. 2012-212547

Appeal From Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5304
Heard February 3, 2015 – Filed March 18, 2015

AFFIRMED

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

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

LOCKEMY, J.: This case arises out of the disappearance of Portia Washington and her granddaughter, Angelica Livingston (collectively, the victims). The victims were last seen on June 10, 2006. Their bodies have never been recovered.

The State indicted Kenneth Lynch with grand larceny of Portia's car and with the murder of the victims. Lynch was convicted as indicted following a bench trial before the Honorable Eugene C. Griffith, Jr. The State sought the death penalty; however, the trial court sentenced Lynch to two terms of life imprisonment without the possibility of parole for the murders and ten years' imprisonment for grand larceny. Lynch appeals his convictions, arguing the trial court erred in (1) denying his motion for a directed verdict because the State failed to present substantial circumstantial evidence of his guilt; (2) not giving a jury instruction regarding how to use and evaluate circumstantial evidence; and (3) not suppressing evidence seized during his arrest because the arrest warrant was not supported by probable cause. We affirm.

FACTS

A. The State's Case

At trial, Linda Miller, Portia's friend, testified the victims lived together and Portia was Angelica's caretaker. Miller explained Portia enjoyed her job at Bob Bennett Ford, where she worked as a custodian. Portia had recently purchased a new car, which she loved. While working at Bob Bennett Ford, Portia developed a romantic relationship with Lynch, a fellow co-worker. According to Miller, Portia and Lynch were living together in June 2006, when the victims disappeared. Miller explained that before Portia met Lynch she was happy but that began to change. Miller admitted she had never met Lynch. Miller stated the last time she saw the victims was on Friday, June 9, 2006, and on that day, Portia did not tell her she was planning to take a trip.

Shyla Andrews, the victims' hair stylist, stated she last saw the victims on Saturday, June 10, 2006, when they were scheduled for a hair appointment. Andrews testified that on that day, Portia was acting nervous and was in a hurry to leave. Andrews stated Portia developed into a nervous person when she began dating Lynch, and she advised Portia to end the relationship. According to Andrews, Portia had a close relationship with her family, and she would not disappear without telling them where she was going.

Lela Green, another friend of Portia's, stated Portia called her on Saturday, June 10, 2006, around 6:00 p.m. and told her she was going to the grocery store to buy food to cook for Sunday lunch. Green stated she planned to have lunch with Portia on

Sunday, June 11, 2006, but she never saw Portia again. According to Green, Portia enjoyed her job, and she never told her she was planning to leave South Carolina.

Carla Perry, Portia and Lynch's neighbor, testified she last saw the victims on the afternoon of Saturday, June 10, 2006. According to Perry, Portia was unloading laundry from her car, which was parked outside the apartment, and Lynch was with Portia standing outside the car. Perry further stated Angelica came by her apartment that afternoon wearing a wet bathing suit and appeared to have been swimming at the apartment complex's swimming pool. According to Perry, around 10:30 p.m. that night, she noticed Portia's car was missing and Portia's plants were outside her apartment, which Perry found strange because Portia always brought her plants inside on Saturday night.

Sallie Jones, Portia's mother, testified she had a close relationship with Portia and they talked every day. Jones claimed Portia loved Angelica, her job, and her new car. According to Jones, Portia would not allow anyone to drive her car, and Portia had given her the spare set of keys to her car and told her she did not want Lynch driving it. Jones, however, admitted that Lynch had previously driven Portia's car to drop off Angelica at her house. Jones explained that before Portia met Lynch, she was very happy and enjoyed spending time with her family; however, she became less involved with her family after meeting Lynch. Jones stated Portia had never gone more than one week without calling her. Jones stated Portia did not like to drive on the interstate and she rarely traveled outside South Carolina. Jones testified Portia planned to meet her on Sunday, June 11, 2006, but she never heard from her after Saturday, June 10, 2006.

Vernelle Bellamy, Portia's aunt, testified she last saw Portia on Saturday, June 10, 2006. After she had not heard from Portia for several days, she went to Portia's apartment and spoke with the apartment manager. Bellamy stated the apartment manager entered Portia's apartment and told her the apartment "looked like somebody was cleaning up."

Debra Hobgood, a manager at Bob Bennett Ford, testified Portia had worked as a custodian for five years and was a good employee. Hobgood described herself as Portia's friend and she helped Portia pick out her new car and loaned her money for a down payment. Hobgood stated Portia loved her car and would not let anyone drive it. Hobgood asserted that when Portia started dating Lynch, she began to have low self-esteem and was "always questioning what she did." Hobgood gave Portia $650 to find a new apartment because she wanted her to get away from

Lynch; however, at the time of the incident, Hobgood was unaware Portia was living with Lynch. Hobgood stated Angelica planned to attend summer camp in the summer of 2006 and was very excited. According to Hobgood, she last saw Portia on Friday, June 9, 2006, and the last thing Portia said to her was, "I'll see you Monday."

Nancy Hyler, the former office manager at Bob Bennett Ford, testified the last pay check issued for Portia was on June 16, 2006, but it was never picked up. Carly Coviello, an employee with T-Mobile, testified the last call made from Portia's cell phone was at 9:26 p.m. on June 10, 2006, in West Columbia. Steven Newnom, an employee at TransUnion Credit Union, testified there had been no credit inquiries for Portia's records. Julia Price, of Ford Motor Credit Company, explained that Portia purchased a 2005 Ford Focus on June 22, 2005, pursuant to a financing agreement with Ford Motor Credit, and the last payment received by Ford was on June 12, 2006. Dawn Hurley testified Portia had checking and savings accounts with Bank of America. According to Hurley, the last transaction on the savings account was on June 10, 2006, at 9:50 a.m., and the last transaction for the checking account was an automatic draft to Ford Motor Credit on June 12, 2006.

Nicky Rodgers, an employee with Lexington County 911 who had access to a national database for drivers' licenses, found one driver's license for Portia and it was in South Carolina. James Hinton, an employee of Lexington School District Two, testified Angelica last attended school on June 1, 2006, which was the end of her second grade year. The school expected Angelica to return the next year but she never returned, and the school district had received no requests from other schools for Angelica's school transcripts.

Ola Mathis, the former apartment manager of Portia and Lynch's apartment, stated that on June 13, 2006, she entered the victims' apartment and found no signs of forced entry, but that it had been cleaned in a way that looked "staged." She found a girl's church clothes laid on one of the beds. According to Mathis, "the only thing missing" from the apartment were the victims and Portia's car. Mathis explained the lease for the apartment stated Lynch and Portia were married.

Takiesha Shelton, an employee of Motel 6, testified motel records showed Lynch arrived at a motel in Vicksburg, Mississippi, on June 12, 2006, and departed on June 13, 2006. Records also showed Lynch arriving on June 14, 2006, and departing on June 15, 2006, at a motel in Eloy, Arizona. One receipt listed Lynch's address as Florida, but a second receipt showed an address in Cayce.

Shane Ramirez, an officer with the Texas Highway Patrol, testified he stopped Lynch for speeding on June 14, 2006, in Fort Hancock, Texas. Lynch was driving a 2005 Ford Focus that was registered to Portia. There were no passengers in the car but there was a child's car seat in the back. Ramirez described the car as "messy" like "someone had been living out of it." Lynch informed Ramirez that he was coming from Mississippi and was traveling to Arizona to pick up his wife.

Agent Nathan Bresee, formerly a customs and border protection agent in Blaine, Washington, testified he encountered Lynch on June 17, 2006, at 10:45 p.m. at the United States/Canada border. Agent Bresee explained Lynch had "refusal paperwork" indicating he had been refused entry into Canada. Because Lynch had been refused entry into Canada, Agent Bresee performed a criminal history check on Lynch, which revealed a positive NCIC alert indicating Lynch was a missing person. Agent Bresee contacted the West Columbia Police Department (WCPD) as the reporting agency, and Detective April Bayne of WCPD informed him that Lynch was a suspect in a double homicide. Upon learning this information, Agent Bresee directed border protection agents to conduct two searches of Lynch's person and a search of his two bags.

Agent Bresee found several items in Lynch's possession that he faxed to WCPD, including a Greyhound bus ticket from Seattle, Washington, to Vancouver, Canada, dated June 17, 2006; a Motel 6 receipt dated June 14, 2006; and a second Motel 6 receipt dated June 12, 2006. Agent Bresee stated that at 3:10 a.m. on June 18, 2006, WCPD informed him that an arrest warrant had been issued for Lynch on the charge of grand larceny. Agent Bresee contacted the Whatcom County, Washington Sheriff's Department, and a sheriff's deputy came and served Lynch with an arrest warrant.

Deputy Courtney Polinder served the arrest warrant on Lynch between 4:00 a.m. and 4:30 a.m. on June 18. Deputy Polinder informed Lynch of his *Miranda*[1] rights, retrieved Lynch's property from the border protection agents, and transported Lynch and his property to a county jail in Washington. On the way to jail, Deputy Polinder stated he did not interrogate Lynch, but Lynch made several statements. Lynch denied any involvement with Portia's car, which was listed in the arrest warrant. Lynch denied driving the vehicle to the west coast and stated he had traveled with a friend and then by bus. Lynch told Deputy Polinder he was

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

planning to visit Vancouver, Canada, because he wanted "to see bears," which Deputy Polinder explained was strange because Vancouver is an urban area and bears live further north. Lynch told Deputy Polinder he lived with the victims, had recently quit his job, left to visit Canada, and planned to return to South Carolina.

Officer Bradley Richardson of the Seattle Police Department found Portia's car on June 18, 2006, near a Greyhound bus station in Seattle. According to Officer Bradley, the license plates had been removed, and the car was very clean and looked like a rental car. Thereafter, he searched the car and found nothing inside the car or in the trunk.

On June 19, 2006, Agent Brenda Wilson, of the Federal Bureau of Investigation, and Glen Hutchings, a local police officer, interviewed Lynch. During the interview, Lynch stated he quit his job at Bob Bennett Ford on Friday, June 9, 2010, but planned to return to South Carolina to attend a truck driving school. He admitted he and Portia had been in a romantic relationship but claimed their relationship had become "more like roommates" within the last year. Lynch stated he last saw Portia's car on Friday, June 10, 2006, when she drove him home from work. Lynch denied driving Portia's car outside of South Carolina. He stated he not seen Portia since June 10th because they had decided to "go their separate ways."

When Agent Wilson confronted Lynch with evidence that he had been stopped in Texas driving Portia's car, Lynch initially denied driving her car but then admitted it. He claimed Portia had allowed him to drive her car because she was in "over her head" with the payments. Lynch denied knowing the victims' whereabouts and stated it would be out of character for Portia to disappear because she "had a habit of going to the beauty salon and then church." According to Agent Wilson, Lynch acted "shocked" when he heard the victims were missing, and he stated he did not know anyone who would want to hurt them. Lynch further stated he had never seen other men at the apartment. When asked about Portia's car being found in Seattle, Lynch claimed he "just left it there and that he wanted to take the bus up to Canada." Agent Wilson then contacted WCPD with the information she learned from the interview.

Detective Glen Hutchings, formerly of the Bellingham, Washington Police Department, testified he was present during Lynch's interview with Agent Wilson. He claimed Lynch told him Portia was "head of maintenance" at Bob Bennett Ford and that Lynch "worked in the parts department." Detective Hutchings stated

Lynch told him he planned to return to South Carolina to attend a 15-day truck driver training program with Werner Trucking Company. Detective Hutchings was familiar with Werner Trucking Company because his son worked for the company; however, he stated they did not have a 15-day truck driver training program. Detective Hutchings asserted Lynch initially denied driving Portia's car outside South Carolina and stated he had traveled with a friend to Georgia, Louisiana, Mississippi, Texas, California, Oregon, and Washington. According to Detective Hutchings, when Lynch was informed the victims were missing, his response was "very flat" and he did not ask any questions or show any emotion. Detective Hutchings stated Lynch claimed he left the apartment in Portia's car on Friday, June 10. Detective Hutchings further stated Lynch eventually admitted he took Portia's car without her permission, but asserted "she wouldn't have cared anyway because she was going to lose the car."

On June 22, 2006, Rod Green, an agent with SLED, arrived in Seattle where he processed Portia's car pursuant to a search warrant. Green stated the car was empty and the glove box contained no vehicle registration, proof of insurance, or any other paperwork. Green did not find any blood, but he found three fingerprints that belonged to Lynch. Green also took a DNA swab from the steering wheel, which was later determined to belong to Lynch.

On August 3, 2006, Detective Matt Edwards of WCPD went to Washington and transported Lynch back to South Carolina. When he arrived, Detective Edwards took possession of Lynch's two pieces of luggage and transported them to WCPD. Investigator Charles Bramlett testified WCPD later obtained a search warrant for the two bags, and he conducted a search of the bags on September 25, 2006. The following items were found in Lynch's luggage: binoculars; banking documents; old receipts; a wallet; letters; a Greyhound bus ticket dated June 17, 2006; motel receipts; a raffle ticket; tax documents; torn notebook paper with phone numbers; business cards; two sets of keys; a Family Dollar receipt for toiletries dated June 13, 2006; a pay stub; an old traffic ticket; a South Carolina lottery ticket dated June 10, 2006; a car title; documentation from the Canadian border; jewelry; and clothing.

James Sullivan of WCPD conducted a photographic comparison of the key to Portia's car that Jones claimed Portia gave her, a key recovered from Lynch's luggage, and a key created using Portia's car's VIN. He concluded the keys had the same cuts. Additionally, Sullivan compared two sets of house and mailbox keys found on Lynch and concluded the keys had the same cuts as those for the victims'

apartment. Sullivan, however, was unsuccessful in his attempt to use the house key on the apartment door.

Robin Taylor, a DNA analyst from SLED, took DNA samples from Theresa Brown, Angelica's mother, and Sallie Jones, Portia's mother. Taylor confirmed the DNA taken from the steering wheel of Portia's car matched Lynch. Taylor also took DNA samples from the hall bathroom of the apartment and determined that Lynch could not be excluded as a contributor. Taylor explained that a section of the carpet seized from the apartment tested positive for blood and was a mixture of at least two individuals' DNA. The major contributor was consistent with a daughter of Brown. At the time the victims disappeared, Brown had only one daughter—Angelica. The minor contributor was a male, and Lynch could not be excluded as the contributor. Blood was also found on the bottom of a green chair in the apartment, on the master bedroom sink, and on a blue container found in the apartment. All three of these samples contained a mixture of DNA, with the major contributor being a daughter of Brown. Swabs from a different area of the green chair, carpet, and master bedroom door tested positive for blood and the DNA profiles were consistent with a daughter of Brown. Blood was also recovered on two other areas of the carpet and five sections of a sheet found near the green chair with the DNA being from a daughter of Brown.

Steven Derrick, an expert in blood stain analysis, analyzed the blood stains found in the apartment. Derrick opined the right arm of the green chair showed a "broken" droplet of blood with a transfer stain going down the arm. He concluded the three distinctive lines of blood going down the arm were made by three fingers making contact with the chair. The undercarriage of the green chair showed multiple patterns, including drops, transfers, and smears. The wood portion of the undercarriage of the green chair was broken, and Derrick found what he called a "hair transfer pattern" of blood. He opined the spatter was caused by a medium range of force based upon the size of the droplets, which was caused by a fist or other blunt object. Derrick further opined the chair was not upright when the blood spatter was distributed on the chair. In the hair transfer pattern, Derrick found a "conglomerate of blood" that indicated a wound in the hairline where bloodletting had occurred. Based upon his analysis of the blood, Derrick opined that "something other than a natural incident" occurred in the apartment, specifically an "act of violence." Derrick, however, admitted he could not determine when the incident occurred.

Detective Bayne testified WCPD conducted numerous investigations to locate the victims, with the help of SLED and the Secret Service, but they were unable to find them. Detective Bayne explained their investigation revealed that Lynch had stayed in a Motel 6 in Vicksburg, Mississippi, where he provided a false address. She contacted the Werner Trucking Company and they confirmed they did not have a truck driver training school in South Carolina. Detective Bayne explained that neither Lynch nor Portia picked up their last paychecks from Bob Bennett Ford, and no school district in the country had requested Angelica's school records.

On cross-examination, Detective Bayne testified regarding WCPD's failure to follow-up on tips indicating potential sightings of the victims. For example, a patron at a local ice cream shop claimed she saw "a black female and a little girl that matched the description . . . of [the victims]." Although WCPD followed up on the lead and inquired if the shop had video, no one spoke to the patron until six years later. WCPD also took a statement from one of Angelica's teachers who told police in 2006 that Angelica informed him in May 2006 that she was going to Texas; however, WCPD did not follow-up on this lead. In addition, a truck driver claimed he saw a "black female, possibly 50/50 of that being [Portia]" at a truck stop. The trucker said the woman approached him asking for help because she had been left at the truck stop by her boyfriend. Although the trucker was unsure of the exact date and city, he believed it was the week of June 17, 2006, at a truck stop near El Paso, Texas. Finally, Detective Bayne admitted WCPD did not follow up on six leads received from the National Center for Missing and Exploited Children even though five of the leads indicated sightings in California and one was for a sighting on an Amtrak between Seattle and Portland.

B. Lynch's Defense

Lynch presented the testimony of Rebecca Kilbride, a teacher at Angelica's school, who stated Lynch picked up Angelica from school two or three times per week. Additionally, George Mook, an employee at Bob Bennett Ford, stated he saw Lynch driving Portia's car "once in a while." Detective Page Moore of WCPD confirmed that a witness claimed to have seen the victims at an ice cream shop in Lexington County; however, WCPD waited six years to contact her. Matt Martin, an investigator for the State, testified that a credit report for Angelica's social security number showed a collection report for an unpaid credit balance under the name of "Sandra Livingston." The collection was for an unpaid medical bill in California in October 2008.

Dr. Kimberly Collins, an expert in forensic pathology, reviewed the photographs from the apartment and found no indication of dragging down the hallway of the apartment. According to Dr. Collins, the photos indicated there was no significant volume of blood to soak through the carpet because neither the bottom of the carpet nor the padding had blood on them. She was unable to form an opinion as to the quantity of blood on the green chair, finding it medically and scientifically impossible. She was also unable to determine the type of injury that may have occurred, how the injury happened, or the severity of the injury.

Following the bench trial, Lynch was convicted of one count of grand larceny and two counts of murder. The trial court sentenced him to ten years' imprisonment for grand larceny and life imprisonment without the possibility of parole for the murders. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict

Lynch argues the trial court erred in denying his motion for a directed verdict because the State failed to present substantial circumstantial evidence that he killed the victims, that he was present at the scene of the crime, and that he stole Portia's car. We disagree.[2]

"On appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *Id.*

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Pearson*, 410 S.C. 392, 398, 764 S.E.2d 706, 710 (Ct. App. 2014), *cert granted* (internal quotation marks omitted). "The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." *Id.* (internal quotation marks omitted); *see also State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (stating the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act").

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[2] At trial, Lynch conceded that the victims were murdered by criminal means.

"If there is substantial circumstantial evidence reasonably tending to prove the defendant's guilt, an appellate court must find the trial court properly submitted the case to the jury." *Pearson*, 410 S.C. at 399, 764 S.E.2d at 710. "The [trial] court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

In *State v. Arnold*, our supreme court held fingerprint evidence placing Arnold with the victim on the day of the murder was not substantial and merely raised a suspicion of Arnold's guilt. 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004). In *Arnold*, the victim's body was discovered off a dirt road in Colleton County. *Id.* at 388, 605 S.E.2d at 530. The victim was last seen alive three days earlier, when he borrowed a friend's BMW to go to a dentist appointment. *Id.* One of the State's witnesses testified he had introduced the victim to Arnold. *Id.* The witness indicated he had received a message from Arnold to call him at a phone number belonging to Arnold's father, who lived in Gray, Tennessee. *Id.* at 389, 605 S.E.2d at 530. The borrowed BMW was later found in a parking lot in Johnson City, Tennessee, approximately ten miles away from where Arnold's father lived. *Id.* The BMW had unspecified scratches on it, and a coffee cup lid containing Arnold's fingerprint was found in the car's center console. *Id.* In concluding that the circumstantial evidence presented by the State was not sufficient to overcome a directed verdict motion, the court reasoned:

> Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed [the victim]. Further, there is no evidence [Arnold] was at the scene of the crime, which according to the State's theory was in Colleton County.

Id. at 390, 605 S.E.2d at 531 (footnote omitted).

The trial court did not err in denying the motion for a directed verdict because, viewing the evidence in the light most favorable to the State, there was substantial circumstantial evidence of Lynch's guilt. *See Odems*, 395 S.C. at 586, 720 S.E.2d

at 50 (recognizing that "[o]n appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State"); *id.* ("[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."). As to grand larceny, multiple witnesses testified Portia loved her car and would not allow anyone to drive it. In particular, Jones stated Portia gave her the spare set of keys to the car because she did not want Lynch driving it. In addition, Lynch was stopped for speeding while driving Portia's car alone in Texas, and according to Detective Hutchings, Lynch later admitted that he took Portia's car without her permission. Although Lynch presented evidence that he had previously driven Portia's car with her permission, this goes to the weight of the evidence.

As to the victims' murders, the State presented evidence that Lynch was the last person *seen* with the victims at the place where the State alleged the murders occurred. *See State v. Williams*, 303 S.C. 274, 276, 400 S.E.2d 131, 132-33 (1991) (finding "substantial evidence" to prove the defendant's guilt when the victim was employed by the defendant, was last seen alive with the defendant, and the victim's decomposed body was found); *cf. State v. Lane*, 406 S.C. 118, 120, 749 S.E.2d 165, 167 (Ct. App. 2013), *reversed by* 410 S.C. 505, 765 S.E.2d 557 (2014) (per curiam) (finding the State failed to present substantial circumstantial evidence that the defendant was guilty of burglary when papers with the defendant's name were found at the crime scene and a car similar to the defendant's was seen in the victim's driveway when the crime occurred). This is an important distinction from *Arnold* where the victim was last seen alone at his office, and although Arnold's fingerprint was found in the victim's car, there was no evidence Arnold was at the scene of the crime. Moreover, Lynch admitted to police he last saw Portia on Friday June 9, 2006—the day before the State alleged the murder occurred. In addition, the State presented forensic evidence that an assault occurred at the apartment where Lynch lived with the victims. Lynch also admitted to police that he did not know anyone that wanted to harm the victims. Other damaging evidence included the fact that a male's DNA was found in the victims' apartment, and Lynch told police that he had not seen other males in the apartment.

Importantly, the State also presented substantial evidence of flight, which further distinguishes this case from the cases Lynch relies on in his brief. *See State v. Ballenger*, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) ([F]light . . . is at least some evidence of guilt."); *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266

(2006) ("Flight evidence is relevant when there is a nexus between the flight and the offense charged."). As previously stated, when Lynch was stopped for speeding in Texas two days after the victims were last seen, he was driving Portia's car and he told the officer he was traveling to Arizona to see his wife, although he was not married. He checked into hotels in multiple states over a short period where he paid cash, once using a false address. He was stopped while trying to enter Canada a few days later, claiming he wanted to visit Vancouver to "see bears." He also repeatedly lied to police officers, initially claiming he had not driven Portia's car outside South Carolina and only admitting to it after he was confronted with evidence of his traffic stop in Texas. Finally, the State presented evidence that Lynch abandoned Portia's car in Seattle, removing the license plate and all identification. *See State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999) ("The attempted destruction of evidence is regarded as a relevant incriminating circumstance."). Viewing this evidence in a light most favorable to the State, the evidence rose above mere suspicion and constituted substantial circumstantial evidence to prove Lynch was guilty of grand larceny of Portia's car and the victims' murders. *Cf. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 (recognizing a motion for directed verdict should be granted "where the evidence merely raises a suspicion that the accused is guilty"). Accordingly, the trial court did not err in denying Lynch's motion for a directed verdict.

II. Jury Instruction

Lynch next argues the trial court erred in not giving a jury instruction regarding how to use and evaluate circumstantial evidence.[3] We disagree.

"An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) (internal quotation marks omitted). "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 270, 721 S.E.2d at 422 (internal quotation marks omitted). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).

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[3] Because Lynch received a bench trial, he did not actually request a jury instruction; rather, he requested the trial court consider the "correct" law when evaluating whether there was substantial circumstantial evidence of guilt.

At the conclusion of the case, the parties engaged in a charge conference to discuss the standards the trial court would use to evaluate the evidence. Lynch moved for a circumstantial evidence charge found in *State v. Edwards*;[4] specifically, that "in a circumstantial evidence case, if the factfinder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete."

Lynch argued that due to the nature of a capital proceeding, where the Eighth Amendment required heightened reliability, the appropriate charge would be "the old *Edwards* standard, which is any exception that would tend to disprove the case is sufficient to defeat the case." The trial court stated it would not "charge something that [was] not the law" and denied Lynch's request.

In *Edwards*, the supreme court approved the following charge as part of an appropriate circumstantial evidence charge:

> every circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and . . . all of the circumstances so proven [must] be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming then to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

298 S.C. at 85, 489 S.E.2d at 465 (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955) (alteration in original)).

In *State v. Grippon*, our supreme court found the trial court did not err when it refused to charge the phrase "to the exclusion of every other reasonable hypothesis" in its circumstantial evidence jury charge. 327 S.C. 79, 82, 489 S.E.2d 462, 463 (1997), *abrogated by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). The supreme court held that in a criminal case relying in whole or in part

[4] 298 S.C. 272, 379 S.E.2d 888 (1989), *abrogated by State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013).

on circumstantial evidence, once a proper reasonable doubt instruction is given, the jury should be instructed as follows:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Id. at 83-84, 489 S.E.2d at 464.

Justice Toal wrote a concurrence, finding no reason to adopt an entirely new circumstantial evidence charge and recommending trial courts not abandon "South Carolina's traditional charge as described in *State v. Edwards*." *Id.* at 84-85, 489 S.E.2d at 464-65 (Toal, J., concurring). Justice Toal opined juries need "detailed information about the relation of circumstantial evidence to determination of guilt" and "the *Edwards* charge clarifies the jury's responsibility to evaluate circumstantial evidence carefully." *Id.* at 88, 489 S.E.2d at 466-67.

In *State v. Cherry*, the defendant argued the trial court erred in refusing to give the *Edwards* charge. 361 S.C. at 595, 606 S.E.2d at 478-79. The supreme court disagreed, holding "*Grippon* is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence." *Id.* at 597, 606 S.E.2d at 480. Specifically, the court found,

> [T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is

> different than that for measuring direct evidence when, in fact, it is not. The standard remains whether the evidence reflects proof of the defendant's guilt beyond a reasonable doubt. Accordingly, we hold that the recommended language in *Grippon* is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction.

Id. at 601, 606 S.E.2d at 482 (footnotes omitted).

In *State v. Logan*, the supreme court held trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when requested by the defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

405 S.C. at 99, 747 S.E.2d at 452. The court further noted, "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. Nevertheless, the *Logan* court ultimately concluded any error in the trial court's jury instructions was harmless beyond a reasonable doubt because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." *Id.* at 94 n.8, 747 S.E.2d at 449 n.8 (citations omitted).

The trial court did not err in refusing to issue Lynch's requested jury charge. Initially, we note that the *State v. Logan* decision applies to this case because Lynch's direct appeal was pending when *Logan* was released. *See State v. Jenkins*, 408 S.C. 560, 572, 759 S.E.2d 759, 765 (Ct. App. 2014), *cert pending* (finding *Logan* applies to cases "pending on appeal at the time the *Logan* opinion was published"). Nevertheless, we believe Lynch's argument is without merit because his requested circumstantial charge was based on the "reasonable hypothesis" language from *Edwards*, which the supreme court found unnecessary in *Logan*. *See Logan*, 405 S.C. at 99, 747 S.E.2d at 452; *Jenkins*, 408 S.C. at 572-73, 759 S.E.2d at 766 ("Our supreme court has excluded the 'reasonable hypothesis' language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary."). Therefore, the trial court did not commit reversible error in refusing Lynch's requested charge. *See State v. Drayton*, Op. No. 5294 (S.C. Ct. App. filed Feb. 4, 2015) (Shearouse Adv. Sh. No. 5 at 48, 51) (finding no reversible error in trial court's failure to include the *Edwards* "reasonable hypothesis" language in its circumstantial evidence jury charge when the trial court's instruction "as a whole, properly conveyed the applicable law").

III. Search and Seizure

Lynch next argues the trial court erred in not suppressing evidence seized in connection with his arrest because his arrest warrant for grand larceny was not supported by probable cause. Relying on *Franks v. Delaware*,[5] Lynch argues the officer who obtained the arrest warrant for grand larceny failed to inform the magistrate that Lynch and Portia were in a relationship, had lived together, and that Lynch had previously driven Portia's car. He asserts that but for these omissions,

[5] 438 U.S. 154 (1978).

the arrest warrant for grand larceny would not have been supported by probable cause. We disagree.

"There is . . . a presumption of validity with respect to the affidavit supporting the search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). In *Franks*, the Supreme Court of the United States held the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed. *Id.* at 155-56.

> To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.

State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) (footnote omitted). "*Franks* addressed an act of *commission* in which false information had been included in the warrant affidavit. However, the *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit." *Id.*

"Entitlement to a *Franks* hearing is a matter of law subject to *de novo* review." *Horton v. City of Columbia*, 408 S.C. 27, 36, 757 S.E.2d 537, 541 (Ct. App. 2014), *cert granted*.

> While omissions may not be *per se* immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit. The potential for endless rounds of *Franks* hearings to contest facially sufficient warrants is readily apparent.

United States v. Colkley, 899 F.2d 297, 301 (4th Cir.1990) (citations omitted).

A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. *United States v. Tate*, 524 F.3d 449, 454 (4th Cir. 2008). "[T]he omission must be 'designed to mislead ' or must be made 'in reckless disregard of whether [it] would mislead.'" *Id.* at 455 (citation omitted) (emphasis removed) (second alteration in original). "The defendant must also show that the omitted material was necessary to the finding of probable cause, *i.e.*, that the omitted material was such that its inclusion in the affidavit would defeat probable cause." *United States v. Shorter*, 328 F.3d 167, 170 (4th Cir. 2003) (citations and internal quotation marks omitted). "Upon making this two-part preliminary showing, a defendant is entitled to a hearing, at which he bears the burden of proving the allegations by a preponderance of the evidence." *Id.* "If a *Franks* hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant 'must be voided' and evidence or testimony gathered pursuant to it must be excluded." *Colkley*, 899 F.2d at 300.

A. Border Search

During Lynch's detention at the United States/Canada border, Agent Bresee found several items in Lynch's possession, including a Greyhound bus ticket from Seattle to Vancouver dated June 17, 2006; a Motel 6 receipt dated June 14, 2006; and a second Motel 6 receipt dated June 12, 2006. Agent Bresee faxed copies of these items to WCPD, and at 3:10 a.m. on June 18, 2006, WCPD confirmed to him that an arrest warrant had been issued for Lynch on the charge of grand larceny. Agent Bresee then called the Whatcom County, Washington Sheriff's Department to take Lynch into custody, and a sheriff's deputy served Lynch with an arrest warrant for grand larceny.

Following Bresee's testimony, Lynch moved to suppress the seizure of the documents by the border patrol agents and their subsequent transfer to WCPD. Lynch, however, conceded that he did not "have a problem with the Border Patrol agent checking into [Lynch]. There's an NCIC for a missing person. He checks his bags. If he checked them at that point, that's okay, too." The trial court denied Lynch's motion to suppress, finding the documents were seized lawfully under the border exception to the Fourth Amendment and that the documents were lawfully transmitted to WCPD "because they were seized properly and lawfully under the Border Patrol's authority."

Initially, we note that the trial court did not err in refusing to suppress the items seized by the border patrol. Lynch conceded the initial search of his bags by the border patrol was valid; therefore, any argument that his initial search was unlawful is unpreserved. Even if the argument is preserved, it is without merit because the contents of Lynch's luggage were lawfully seized under the border exception to the Fourth Amendment. *See United States v. Ramsey*, 431 U.S. 606, 616 (1977) ("[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border . . . ."). Furthermore, once the items were properly seized by the border patrol agents, the agents could fax copies of those items to WCPD. *See Illinois v. Andreas*, 463 U.S. 765, 771 n.5 (1983) ("[W]here law enforcement authorities are cooperating in an investigation, . . . the knowledge of one is presumed shared by all."); *State v. Muquit*, 381 S.C. 114, 118, 671 S.E.2d 643, 645 (Ct. App. 2009) ("When an arrestee's property is already in the custody of law enforcement as an incident of the arrest, the police may seize it at a later time as evidence relating to his offense."). Therefore, the trial court did not err in refusing to suppress the items seized during Lynch's search at the border.

B. Arrest Warrant/*Franks* Hearing

Lynch next moved to suppress any evidence seized from him after his arrest for grand larceny, arguing his arrest warrant for grand larceny was invalid. Detective Matt Edwards of WCPD testified he procured Lynch's arrest warrant for grand larceny on June 18, 2006. Detective Edwards supplemented the affidavit for the warrant with sworn testimony to the magistrate. He orally "reiterated that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV," that Lynch "would not have been allowed to take the vehicle at any time" based upon conversations with coworkers and family, that Lynch lied to the trooper in Texas when he said he was going to pick up his wife in Arizona because Lynch was unmarried, and that Lynch showed up in Washington alone.

On cross-examination, Detective Edwards testified he "passed on to [the magistrate] . . . what had been openly discussed . . . by coworkers and family, that [Lynch] would not have been allowed to" drive Portia's car. He further stated that at that time, he had not talked to Portia's mother and he "had seen no documents that indicated [Lynch and Portia] were husband and wife." Detective Edwards admitted he did not tell the magistrate (1) that Lynch and Portia had lived together

in different residences for two years, (2) that they had an intimate relationship, and (3) that Portia was Lynch's live-in girlfriend.

Thereafter, Lynch argued Detective Edwards's omissions of information in the process of obtaining the warrant rendered the warrant defective. Lynch asserted the manner the warrant was presented to the magistrate implied that Lynch was a "random person" driving Portia's car when in fact he was her live-in boyfriend who had previously driven her car with permission. Specifically, Lynch argued that Detective Edwards failed to inform the magistrate that Lynch was driving a car that belonged to his live-in girlfriend of two years and that coworkers and family members informed police that Lynch would occasionally drive Portia's car.

The trial court ruled that even with the omitted information—that Lynch and the victim had been in a relationship but the relationship was troubled—the arrest warrant still was supported by probable cause. It found that "based upon the information that [WCPD] detectives had at that time," the information they presented to the magistrate was sufficient to establish probable cause. The court acknowledged that "certain facts [were] left out"; however, it denied any motion to suppress based on the allegation that the arrest warrant was not supported by probable cause.

Lynch has failed to show a *Franks* violation. First, Detective Edwards did not recklessly or intentionally omit the information that was not relayed to the magistrate. *See Missouri*, 337 S.C. at 554, 524 S.E.2d at 397 ("To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge."). Lynch asserts that Detective Edwards recklessly or intentionally failed to inform the magistrate that Jones had seen Lynch driving Portia's car; however Detective Edwards testified that at the time he obtained the warrant, he had not spoken with Jones; therefore, he could not have conveyed this information to the magistrate. In addition, Detective Edwards stated that at that time, he "had seen no documents that indicated [Lynch and Portia] were husband and wife." Thus, he could not have informed the magistrate that Lynch and Portia's apartment lease indicated they were married. Accordingly, Lynch has not shown a *Franks* violation because he failed to make a preliminary showing that Detective Edwards intentionally or recklessly omitted the alleged exculpatory information.

Even if Detective Edwards acted recklessly in omitting this information, Lynch has still failed to show a *Franks* violation because the affidavit, including the omitted information, and Detective Edwards's oral testimony before the magistrate provided probable cause that Lynch was guilty of grand larceny. *See id.* ("There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause."). The arrest warrant affidavit stated:

> [Detective Edwards] further state[s] that there is probable cause to believe that [Lynch] did commit [grand larceny] and that probable cause is based on the following facts:
>
> In that on or about June 14th, 2006, at 200 N. 12th Street, in the city of West Columbia, County and State aforesaid, [the victims] were reported missing to the West Columbia Police Department. They had not been seen by anyone since June 10, 2006. On June 14th, 2006[,] [Lynch] was ticketed in El Paso, Texas, while driving alone in a 2005 Ford Focus (VIN Number 1FAFP34N25W228072) valued at $12,000.00 which is registered to [Portia]. On June 18, 2006, [Lynch] was stopped while trying to cross the USA/Canadian [b]order on a bus. The whereabouts of the vehicle are unknown. Investigators with [WCPD] believe that [Lynch] did take, steal, and carry away the vehicle depriving the owner of its use and value. All of which constitutes the crime of grand larceny more than $5000.00 and is in violation of the South Carolina Code of Laws of 1976 as Amended.

In addition, Detective Edwards properly supplemented the affidavit with sworn oral testimony before the magistrate. *See State v. Crane*, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988) ("[A] search warrant affidavit insufficient in itself to establish probable cause may be supplemented before a magistrate by sworn oral testimony."). Specifically, he told the magistrate "that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV," that Lynch "would not have been allowed to take the vehicle at any time" based upon conversations with coworkers and family, that Lynch lied to the trooper in Texas when he said he was going to pick up his wife in Arizona because Lynch was unmarried, and that Lynch showed up in Washington alone. Even including the omitted information that

Lynch and Portia were in an intimate relationship and had been living together for several years, the information would have also revealed that the relationship was troubled. Moreover, the omitted information would not have explained or negated the fact that at the time WCPD sought the arrest warrant, Portia had been reported missing for four days, and Lynch had been stopped in Texas alone driving a car that was registered to Portia. While evidence of a prior relationship might have offered an innocent explanation for Lynch's use of Portia's car, the exculpatory impact of this evidence was greatly diminished by the fact that Lynch was seen driving the car alone in Texas, and he arrived in Washington by bus without Portia. Further, the magistrate would have still known that the vehicle had not been located, and DMV records indicated that the vehicle belonged to Portia. Accordingly, the trial court did not err in not suppressing evidence seized during Lynch's arrest because the arrest warrant was valid and supported by probable cause.

CONCLUSION

Based on the foregoing, the trial court is

AFFIRMED.

SHORT and McDONALD, JJ., concur.