The Supreme Court of South Carolina

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CLERK OF COURT

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N O T I C E

IN THE MATTER OF W. BENJAMIN McCLAIN, PETITIONER

On December 19, 2011, Petitioner was definitely suspended from the practice of law for two years, retroactive to March 13, 2007. In the Matter of McClain, 395 S.C. 536, 719S.E.2d 675 (2011). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than June 18, 2012.

Columbia, South Carolina

April 18, 2012

The Supreme Court of South Carolina

In the Matter of Trisha Anne Zeller, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 1984, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk, South Carolina Supreme Court, dated April 3, 2012, 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 Trisha Anne

Zeller 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

April 19, 2012

The Supreme Court of South Carolina

In the Matter of P. Michael DuPree, Respondent.

ORDER

By order dated April 18, 2012, the Court placed respondent on interim suspension. The Court hereby appoints an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Jack D. Cordray, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Cordray shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Cordray may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

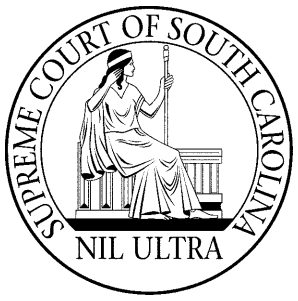
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Jack D. Cordray, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Cordray's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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT
Pleicones, J., not participating

Columbia, South Carolina

April 18, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
April 25, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth Gary Cooper, Respondent.

Opinion No. 27116
Heard February 9, 2012 – Filed April 25, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Kenneth Gary Cooper, of Summerville, *pro se* Respondent.

PER CURIAM: In this attorney disciplinary action, the Commission on Lawyer Conduct ("the Commission") considered Formal Charges filed against attorney Kenneth Gary Cooper ("Respondent") alleging misconduct in four matters. A Hearing Panel of the Commission found Respondent had admitted all of the factual allegations in his Answer to the Formal Charges and that the sanctionable misconduct was the result of Respondent's alcoholism and addiction to prescription drugs.

The Hearing Panel recommends that Respondent receive an Admonition, be ordered to pay the costs of the disciplinary proceedings, and be required to enter into a contract with Lawyers' Helping Lawyers ("LHL") and to file quarterly treatment compliance reports with the Commission for a period of three years. Neither Respondent nor the Office of Disciplinary Counsel ("the ODC") has filed a brief taking exception to the Panel Report.

We suspend Respondent from the practice of law for a period of six (6) months with conditions as recommended by the Panel.

I. Factual/Procedural History

A. Background

Respondent was admitted to the practice of law in South Carolina on November 18, 1997. The ODC filed Formal Charges against Respondent on September 21, 2010, alleging misconduct in the following four matters:

1. Connor Matter (03-1280)

On May 31, 2003, Client was arrested and charged with an open container and simple possession of marijuana. On June 16, 2003, Client appeared in court and requested a jury trial. Although Client identified his attorney as "Milton Stratoes," Client did not provide an address for Stratoes. It was later discovered that Client had never retained Stratoes as his attorney. Subsequently, the court forwarded two copies of all documents to Client's address so that one copy could be provided to Client's counsel. Client did not appear for his scheduled trial and was ultimately tried in his absence and found guilty.

Shortly thereafter, Client hired Respondent to represent him. In turn, Respondent requested a new trial on Client's behalf. After this motion was denied, Respondent faxed a Notice of Intent to Appeal to the court. Respondent, however, never filed the Notice of Appeal with the clerk's office and never notified the court that he would not pursue the appeal. The presiding magistrate reported the incident to the ODC.

In explaining his actions, Respondent testified the Client "never came back and he never retained me after I went ahead and notified the judge that I wanted to reopen the case." Respondent further stated that he "just kind of forgot about not notifying the court to withdraw the stuff that I had done to reopen the case."

2. Self-Report Matter (04-379)

On March 23, 2004, Respondent was arrested for Criminal Domestic Violence of a High and Aggravated Nature ("CDVHAN")[1] based on an altercation between Respondent and his girlfriend. At the time of the incident, Respondent and his girlfriend began living together on and off for several months after separating from their respective spouses. Respondent testified the charge arose out of his girlfriend's claim that Respondent "touched her [and] threw her down" during an argument. Although Respondent admitted that he argued with his girlfriend, he denied ever "touching" her. Respondent, however, took "full responsibility" for the situation. Respondent attributed his actions to his addiction to alcohol and prescription drugs.

On November 5, 2004, Respondent was accepted into the Pre-Trial Intervention ("PTI") program. He successfully completed this program on August 9, 2005.

In another criminal matter, Respondent pled guilty on April 9, 2010 to possession of unlawful prescription drugs, first offense.[2] The offense, which occurred between May 8, 2008 and August 15, 2008, stemmed from Respondent knowingly obtaining a quantity of Oxycodone (a schedule II controlled substance) from two separate practitioners. Respondent failed to inform the practitioners that he had received prescriptions for drugs of like therapeutic use in a concurrent time period from another practitioner.

As a result of his conviction, Respondent was sentenced to a term of six months' imprisonment, which was suspended without the imposition of probation. Respondent, however, was assessed costs and ordered to complete substance abuse counseling and consent to random drug testing.

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[1] S.C. Code Ann. § 16-25-65 (Supp. 2005).

[2] S.C. Code § 44-53-395(A)(3) (2002).

3. Self-Report Matter (05-1490)

On November 9, 2005, Respondent was charged with one count of trespassing,[3] two counts of simple assault,[4] and one count of pointing and presenting a firearm.[5]

The charges arose out of Respondent's attempted intervention into the relationship between his fifteen-year-old son and his son's girlfriend. According to Respondent, his son ran away from home to stay at his girlfriend's home. When Respondent went to the girlfriend's home in search of his son, an argument ensued that resulted in the girlfriend's parents initiating a charge of trespassing against Respondent. A few days later, while still looking for his son, Respondent got into an argument with the girlfriend's parents, which resulted in the simple assault charges. Following this incident, the girlfriend alleged that Respondent pointed a gun at her when he was inquiring about his son's whereabouts.

On June 2, 2008, Respondent pled guilty to a charge of trespass and disorderly conduct. The remaining charges were *nolle prossed*.

4. Wolfe Matter (08-809)

In April 2008, Respondent was appointed to represent Complainant through his contract with the Dorchester County Public Defender's office. During the case, Respondent received discovery materials from the solicitor's office. While in court on another matter, Respondent was approached by Complainant's cellmate. The cellmate informed Respondent that Complainant wanted Respondent to send the discovery materials via the cellmate. Respondent complied with the request and gave the discovery materials to the cellmate. Respondent did not have written permission from Complainant

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[3] S.C. Code Ann. § 16-11-610 (2003).

[4] S.C. Code Ann. § 22-5-150 (2007).

[5] S.C. Code Ann. § 16-23-410 (2003).

instructing him to give the discovery materials to the cellmate and had not spoken directly with Complainant regarding this transmission. After Respondent's contract with the Public Defender's office expired on June 30, 2008, new counsel was appointed to represent Complainant. Respondent admitted that his actions were improper.

B. Hearing Panel's Report

After conducting a hearing on July 14, 2011, the Panel issued its report on October 25, 2011. The Hearing Panel found Respondent "basically admitted all of the allegations in the Formal Charges" in his Answer to the Formal Charges.

1. Findings of Misconduct

The Hearing Panel found that Respondent's admitted acts constituted misconduct and that he had violated the following Rules of Professional Conduct ("RPC") contained in Rule 407, SCACR: Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Rule 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."); Rule 8.4(a) ("It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."); Rule 8.4(b) ("It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."); Rule 8.4(e) ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.").

Additionally, the Hearing Panel concluded Respondent's conduct constituted grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement ("RLDE") contained in Rule 413, SCACR: Rule 7(a)(1) ("It shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct

of lawyers."); Rule 7(a)(5) ("It shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law.").

2. Aggravating and Mitigating Factors

In aggravation, the Hearing Panel considered that Respondent had committed several criminal offenses over an extended period of time. Specifically, the Panel noted that Respondent: (1) was charged with CDVHAN in 2004; (2) pled guilty to trespass and disorderly conduct in June 2008; and (3) pled guilty to possession of unlawful prescription drugs in April 2010.

In mitigation, the Panel noted that Respondent had no prior disciplinary history and had a "cooperative attitude" throughout the proceedings. Additionally, the Panel took into consideration that Respondent admitted he is an alcoholic and prescription drug addict and that Respondent attributed his misconduct to that addiction. The Panel also recognized that Respondent was sober from January 1991 through July 2001, but thereafter experienced a relapse that lasted for several years, during which time this misconduct occurred.

The Panel further found that Respondent's addiction to alcohol and drugs was the causative factor in his misconduct. Accordingly, the Panel considered Respondent's subsequent rehabilitation as a factor in mitigation. In support of this finding, the Panel referenced the testimony of William B. Waters and J. Robert Turnbull, Jr.

Waters stated that he had known Respondent for approximately forty years. He testified that in June 2009 he received a telephone call from Respondent during which Respondent confided that he was addicted to prescription drugs. Waters further testified that he has remained close with Respondent throughout his recovery period and is confident that Respondent is currently sober.

Turnbull, who is the Director of LHL, testified that Respondent has been in frequent contact with him since June 2009 when Respondent called and admitted his prescription drug problem. Turnbull testified he believed Respondent is sober and that his rehabilitation is going well. He further testified that Respondent is willing to enter into a contract with LHL so that his continued rehabilitation can be monitored.

3. Recommended Sanction

The Hearing Panel recommended that Respondent: (1) receive an Admonition; (2) be ordered to pay the costs of the proceedings; and (3) be required to enter into a contract with LHL and to file quarterly treatment compliance reports with the Commission for a period of three years.

II. Discussion

A. Standard of Review

This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. In re Welch, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." In re Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses." In re Marshall, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998); see In re Longtin, 393 S.C. 368, 376, 713 S.E.2d 297, 301 (2011) ("[T]he findings and conclusions of the Panel are entitled much respect and consideration.").

B. Imposition of Sanction

The parties, by not filing briefs, have accepted the findings of fact, conclusions of law, and recommendations of the Hearing Panel. Rule 27(a), RLDE, of Rule 413, SCACR. Thus, this Court must determine whether the recommended sanction is appropriate.

We recognize that, throughout these proceedings, Respondent has been cooperative, admitted to his misconduct, and taken "full responsibility" for his actions. Respondent self-reported two of the four allegations of misconduct and has actively sought treatment for his alcohol and prescription drug addiction. He also offered evidence that he completed an intensive outpatient drug treatment program and is now sober.

However, because Respondent's misconduct involved multiple criminal offenses, the disclosure of confidential client information, and the failure to diligently pursue an appeal, we find a six (6) month definite suspension from the practice of law is warranted. See In re Ervin, 387 S.C. 551, 694 S.E.2d 6 (2010) (finding attorney's involvement in a "road rage" incident resulting in his arrest for pointing and presenting a firearm warranted a six-month suspension retroactive to the date of his interim suspension); In re Brown, 387 S.C. 305, 692 S.E.2d 536 (2010) (concluding that six-month suspension was appropriate where attorney's admitted misconduct arose out of his abuse of alcohol); In re Green, 371 S.C. 506, 640 S.E.2d 463 (2007) (imposing a six-month suspension, which was retroactive to the date of attorney's interim suspension, where attorney: (1) pled guilty to DUI of methamphetamine; (2) was arrested for possession of methamphetamine, but pled guilty to disorderly conduct; (3) was arrested for DUI of drugs and possession of methamphetamine but completed PTI).

In addition to the suspension, we order Respondent to pay the costs of these disciplinary proceedings and to enter into a contract with LHL and to file quarterly treatment compliance reports with the Commission for a period of three years. See In re Atwater, 385 S.C. 257, 262, 684 S.E.2d 557, 559 (2009) ("The imposition of costs and the determination of their amount are within this Court's discretion."); Rule 27(e)(3), RLDE, Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct."); Rule 7(b)(6), RLDE, Rule 413, SCACR (stating sanctions for misconduct may include the "assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services"); see also In re Newton, 366 S.C. 276, 621 S.E.2d 657 (2005) (adding a two-year monitoring

contract with LHL and the taking of the new attorney oath as conditions of attorney's reinstatement).

III. Conclusion

We find that Respondent's misconduct warrants a suspension from the practice of law for a period of six (6) months from the date of this opinion. Additionally, within thirty (30) days of the date of this opinion, Respondent shall (1) pay the costs of these disciplinary proceedings in the amount of $895.71, and (2) enter into a contract with LHL and file quarterly treatment compliance reports with the Commission for a period of three years.

Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with the requirements of Rule 30, RLDE, Rule 413, SCACR (regarding an attorney's duties following suspension or disbarment).

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael E. Atwater, Respondent.

Opinion No. 27117
Heard January 26, 2012 – Filed April 25, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Michael E. Atwater, of Rock Hill, pro se.

PER CURIAM: After receiving a complaint from Edward Boulware that his case went nearly ten years without resolution, the Office of Disciplinary Counsel (ODC) conducted an investigation and filed formal charges against his attorney, Michael Atwater. Following a hearing, a Panel from the Commission on Lawyer Conduct found Atwater violated various Rules of Professional Conduct and recommended Atwater receive an admonition and pay the costs of the proceedings. ODC took exception to the Panel's report, arguing it should have found Atwater violated additional Rules of Professional Conduct. Additionally, ODC argues a sanction harsher than an admonition is warranted. We agree.

FACTUAL/PROCEDURAL BACKGROUND

I. BOULWARE MATTER

Shortly after a water main adjacent to Boulware's property ruptured in January 2000, Boulware retained Atwater to bring a suit against the City of Rock Hill. At their initial meeting and in the following months, Boulware provided Atwater with several documents related to this matter, including estimates of the damage, pictures of the flooding, Boulware's recent tax returns, and the City's letter rejecting Boulware's claim. With this information in hand, Atwater filed a complaint against the City in May 2000. In February 2001, the water main broke again and flooded Boulware's property a second time. Atwater accordingly filed an amended complaint reflecting this additional damage.

At this stage, it is undisputed that Atwater engaged in at least some discovery. For example, he responded to interrogatories and requests for production from opposing counsel, and he deposed and interviewed various witnesses. By the time the case was called for trial in June 2003, Atwater believed he had enough evidence to move forward and try the case. However, just as the case was called for trial, it was removed from the circuit court docket and set for binding arbitration. The matter was scheduled to be arbitrated in 2003, and Atwater met with Boulware to prepare an arbitration packet in anticipation of the proceeding.

This arbitration ultimately fell through. Atwater's work on the matter subsequently diminished precipitously, and he never resolved the case. Atwater's main contention as to why he was unable to proceed was a lack of evidence to support Boulware's claims. However, in the six and a half years after the case was to be arbitrated, Atwater interviewed at most only a handful of witnesses, took just a few depositions, and only visited the property three times. Rather than actively investigating Boulware's claims himself, Atwater instead primarily relied on Boulware to come forward with evidence on his own initiative.

As a prime example, Atwater's chief evidentiary concern was a lack of proof as to the damages Boulware incurred.[1] However, he never asked Boulware for copies of the cancelled checks he wrote for repairs to substantiate his claim of damages. It was not until opposing counsel requested them in 2005, five years after the flooding, that Atwater received them. Only then did Atwater ask Boulware for more information about his expenditures. Unfortunately, Boulware was unable to provide anything more specific to Atwater because so much time had passed since he wrote the checks; had Atwater told him to keep better records from the start, Boulware testified he would have done so. Furthermore, Atwater never had his own estimate of Boulware's damages performed despite his reservations about the estimate Boulware provided.[2]

Also during these six and a half years, the evidence before us shows Atwater sent only a few letters and e-mails, and made only a few telephone calls, to Boulware. Atwater testified, however, that he was routinely in contact with Boulware and many of his meetings also were in person. On the other hand, Boulware offered copies of his telephone records to show the numerous calls he made to Atwater, the vast majority of which Boulware claims went unanswered or unreturned.[3] In fact, Boulware wrote multiple e-mails and letters to Atwater expressing his frustration in reaching his attorney and the slow progress of his case.[4]

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[1] Boulware spent approximately $14,000 out of pocket to perform some repairs to the building. He testified further repairs were needed, but he could not afford them. Atwater's concern was that Boulware's damages estimate was inflated and that his actual expenses included payments for items other than flooding damage. He was also concerned that the estimate Boulware tendered was performed by an old friend of Boulware's, not an independent contractor.

[2] Atwater claimed that Boulware would not let him get his own estimate. The Panel found this assertion "entirely lacking in credibility."

[3] These records were used only to show the telephone calls Boulware made to Atwater, not whether Atwater returned any telephone calls.

[4] For example, Boulware wrote a letter to Atwater in 2005 expressing his desire to just get the matter behind him given how long it had taken to resolve. In 2007, he wrote, "Let's just proceed with what we have." By

Over the years, the settlement offers tendered by the City ranged from $15,000 to $22,000, with an assurance that the City could go up to $25,000 if necessary. Boulware rejected each of these, claiming he needed at least $30,000 to adequately cover the necessary repairs. Also during this time period, the matter was set to be arbitrated on at least three different occasions, each of which fell through.[5] Unsatisfied with Atwater's progress on his case after eight years, Boulware requested his file from Atwater in 2008. He made a second request a few months later and copied ODC in his letter. In the fall of 2009, when Atwater was suspended by this Court in another matter,[6] Boulware retained a different attorney to handle his case. He settled the case seven months later for $22,000, claiming this sum was now acceptable only because the age of the case had diminished its value. ODC subsequently filed formal charges against Atwater.

II. PANEL REPORT

Based on the foregoing, the Panel concluded Atwater violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence and promptness); and Rule 3.2 (duty to expedite litigation). However, the Panel found ODC had not set forth clear and convincing evidence that Atwater violated Rule 1.2 (scope of representation and allocation of authority), Rule 1.4 (communication), Rule 3.1 (meritorious claims and contentions), and 8.4(e) (conduct prejudicial to the administration of justice), RPC, Rule 407, SCACR.

2008, his frustration had grown: "I cannot phantom [sic] any civil case of this nature taking over eight years to reach settlement. I do not understand why I have been unable to obtain basic information concerning this matter, or why the case has not and is not being settled."

[5] There is evidence to suggest Atwater was not at fault in these cancellations. However, Boulware testified Atwater failed to keep him fully apprised of them. Additionally, Atwater points to these cancellations as being a contributing factor for why Boulware's case took ten years to resolve.

[6] *In re Atwater*, 385 S.C. 257, 262, 684 S.E.2d 557, 559-60 (2009) (*Atwater II*).

In particular, the Panel found Atwater violated Rule 1.1 by exhibiting a lack of thoroughness and preparation. While the Panel did note that Atwater possesses the necessary legal skill and knowledge to practice law, it nevertheless found his lack of investigation and preparation constituted a violation of Rule 1.1.

As to Rules 1.3 and 3.2, the Panel similarly found that Atwater failed to diligently prosecute the claims he brought on Boulware's behalf. While the Panel agreed that some delays are inevitable and outside of an attorney's control, it was extremely concerned with Atwater's refusal to accept any responsibility for the numerous delays that caused a case "uncomplicated both factually and legally" to drag on for nearly ten years. As the Panel found, there was much Atwater could have done to advance the matter even if there were obstacles to his progress along the way. Although Atwater maintained he thoroughly investigated the case, the Panel found no evidence to support this contention and resolved this credibility issue in favor of Boulware.

With respect to Rules 1.2 and 1.4, the Panel noted there was a factual dispute as to the extent Atwater maintained contact with Boulware. In the end, the Panel found credible Atwater's testimony that he routinely discussed the case with Boulware in person and over the telephone. Atwater's "shortcoming," according to the Panel, was instead with "his failure to adequately document his client file to reflect those discussions and meetings." The Panel therefore found ODC failed to meet its burden in proving Atwater violated Rules 1.2 and 1.4.

As to Rule 3.1 regarding meritorious claims and contentions, the Panel summarily found ODC presented no evidence as to any violation of this rule. In a similarly summary fashion, the Panel also concluded that Atwater's conduct did not violate Rule 8.4(e) and therefore was not prejudicial to the administration of justice.

In aggravation, the Panel considered Atwater's failure to acknowledge any wrongdoing, his prior disciplinary history, and his pattern of misconduct. First, as noted previously, Atwater failed to take any responsibility for the delays in prosecuting Boulware's case, instead laying the blame primarily on

Boulware for not coming forward with evidence on his own and other individuals for cancelling the scheduled arbitrations.

With respect to Atwater's prior history, he has been sanctioned twice in the past for misconduct. In 2003, he received a public reprimand for violating Rules 1.1; 1.3; 1.4(b); 1.5(b)-(c) (fee agreements); 3.2; 3.3(a) (making false statements of material fact); 3.7 (lawyer acting as a witness at trial); 8.1 (making false statements of material fact in connection with disciplinary proceedings); 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 8.4(e), RPC, Rule 407, SCACR. *In re Atwater*, 355 S.C. 620, 625-27, 586 S.E.2d 589, 592 (2003) (*Atwater I*). Additionally, Atwater received a six-month definite suspension in 2009 for multiple violations of Rule 8.1(b), RPC, Rule 407, SCACR (failing to cooperate with ODC).[7] *Atwater II*, 385 S.C. at 262, 684 S.E.2d at 559-60.

Of particular concern to the Panel were Atwater's actions in *Atwater I*. In that case, among other things, Atwater failed to respond to the opposing party's motion for summary judgment. *Atwater I*, 355 S.C. at 623, 586 S.E.2d at 591. As a result, his client's claims were dismissed. *See id.* The Panel accordingly viewed his prior dilatory representation as demonstrating a pattern of misconduct. Furthermore, Atwater received this public reprimand in *Atwater I* during his representation of Boulware, and more specifically, at the very time when he essentially ceased working on Boulware's case.

In mitigation, the Panel considered Atwater's lack of dishonest or selfish motive. The Panel found that Atwater did not personally benefit in any way from his misconduct as he took this case on contingency and received no fees for his work.

[7] In *Atwater II*, Atwater was charged with five complaints of misconduct. 385 S.C. at 258, 684 S.E.2d at 558. The Panel found he committed misconduct in three of the complaints but his conduct was not sanctionable. *Id* The remaining two complaints were dismissed. *Id.* However, the Panel found Atwater failed to cooperate with ODC during its investigation of these complaints and this alone was sanctionable. *Id.* at 258-59, 684 S.E.2d at 558.

Ultimately, the Panel recommended that we give Atwater an admonition and order that he pay the costs of the proceedings.

LAW/ANALYSIS

ODC takes exception to the Panel's report and requests that we find Atwater violated both Rules 1.4 and 8.4(e). In addition, ODC asks us to impose a more severe sanction than an admonition regardless of whether Atwater also violated Rules 1.4 and 8.4(e).

"The findings of the panel are entitled to great weight, particularly when the inferences drawn from the testimony in the record depend largely on the credibility of the witnesses." *In re Johnson*, 380 S.C. 76, 80, 668 S.E.2d 416, 418 (2008). In the end, however, we have the sole authority to discipline attorneys for misconduct. *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006). Thus, we are not bound by the Panel's findings and recommendations, and we make our own findings of fact and conclusions of law. *Id*. Furthermore, we are to impose the sanction we deem appropriate. *Id.* ODC bears the burden of proving any allegation of misconduct by clear and convincing evidence. *Id.*

Atwater has not filed a brief taking exception to the Panel's findings and recommendations, and he is therefore bound by them. *See* Rule 27(a), RLDE, Rule 413, SCACR. Furthermore, we concur in the Panel's findings that Atwater violated Rules 1.1, 1.3, and 3.2. ODC has not taken exception to the Panel's findings that Atwater did not violate Rules 1.2 and 3.1. We agree with the Panel that ODC presented no evidence Atwater violated Rule 3.1. However, we believe the Panel's analysis of Rule 1.2 is subsumed within ODC's challenge to the Panel's findings regarding Rule 1.4 and discuss it below.[8]

[8] The Panel discussed Rules 1.2 and 1.4 in tandem, noting they impose similar ethical obligations. ODC, however, only challenges the Panel's conclusion with respect to Rule 1.4. Because these obligations are similar in this case, we will discuss them both under our de novo standard of review.

I. COMMUNICATION

ODC contends the Panel erred in finding Atwater did not fail to adequately communicate with Boulware. Because the Panel based this holding on a finding that Atwater's testimony was credible, we defer to the Panel.

Rule 1.4(a) states, in pertinent part,

> A lawyer shall
>
> . . . .
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter; [and]
>
> (4) promptly comply with reasonable requests for information.

Rule 1.2(a) similarly requires that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

In our opinion, ODC has set forth a colorable claim that Atwater violated these rules. Throughout the hearing, Boulware detailed his attempts to reach Atwater to discuss the case and his frequent inability to actually do so. Boulware bolstered his claims by providing phone records demonstrating his efforts to contact Atwater and various letters he wrote complaining of Atwater's failure to respond. Additionally, Boulware specifically instructed Atwater to proceed with the evidence he already had, which Atwater clearly did not do. In sum, these claims reveal a complete breakdown of communication between Boulware and Atwater, even with Boulware's instructions to proceed despite the perceived evidentiary deficiencies.

Atwater, on the other hand, maintained he was frequently in contact with Boulware either over the telephone or in person. The Panel agreed, finding his testimony credible and noting that Atwater's problem really was just a failure to adequately document these communications. While we are troubled by ODC's allegations and the lack of a documentary record supporting Atwater's contentions, we nevertheless give deference to the Panel's finding that Atwater's testimony was credible. Accordingly, we find ODC has not submitted clear and convincing evidence to show Atwater violated Rules 1.2 and 1.4. In the future, though, it would greatly behoove Atwater and other members of the Bar to adequately document their communications with clients to avoid similar problems.

II. CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

ODC next argues the Panel erred in finding Atwater did not violate Rule 8.4(e), which prohibits engaging in conduct prejudicial to the administration of justice. We agree.

Our Rules of Professional Conduct do not provide any specific guidance as to what constitutes conduct prejudicial to the administration of justice. While our previous cases citing Rule 8.4(e) cover a wide range of conduct, they do include instances where an attorney has neglected a case he was hired to prosecute. *E.g.*, *In re Brannon*, 383 S.C. 374, 377, 680 S.E.2d 776, 777 (2009); *In re Sims*, 380 S.C. 61, 64, 668 S.E.2d 408, 409 (2008); *In re Allen*, 366 S.C. 174, 177, 621 S.E.2d 356, 358 (2005); *In re Ruff*, 366 S.C. 1, 5, 620 S.E.2d 323, 326 (2005); *In re Rast*, 360 S.C. 96, 99, 600 S.E.2d 534, 536 (2004); *In re Starks*, 344 S.C. 29, 30-31, 542 S.E.2d 726, 727 (2001); *see also In re Johnson*, 329 S.C. 363, 366, 495 S.E.2d 777, 779 (1998) ("Respondent has neglected legal matters entrusted to him and has engaged in conduct which brings the legal profession into disrepute. His conduct has been prejudicial to the administration of justice and adversely reflects on his fitness to practice law.").

In this matter, the Panel, despite concluding Atwater did not violate Rule 8.4(e), found "there is no evidence to suggest any meaningful effort on [Atwater's] part to resolve this case" after consenting to mediation in 2003.

The Panel also concluded that "[i]t is difficult to imagine any circumstances in which such a matter would take nearly a decade to resolve." We completely agree and believe this finding is at odds with the Panel's summary conclusion that Atwater did not violate Rule 8.4(e). To use an oft-quoted phrase, justice delayed is justice denied. Although this saying is often invoked in the criminal context, it is no less applicable to civil cases. The evidence before us demonstrates that Boulware was unable to provide some of the evidence Atwater claimed was necessary for the case as a result of Atwater's dilatory practices. Moreover, the evidence Boulware could have procured may have increased his eventual recovery. Thus, the delays Atwater occasioned prejudiced Boulware's case and potentially reduced the damages to which he was entitled.

Furthermore, "[p]erhaps no professional shortcoming is more widely resented than procrastination." Rule 1.3 cmt.3, RPC, Rule 407, SCACR. "Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." *Id.* Thus, even without prejudice and accepting that Boulware ultimately settled the case for the same amount Atwater could have, the amount of time Atwater spent on a relatively simple matter itself casts a shadow over the profession. Atwater even continued to delay the case despite Boulware's obvious frustration with Atwater's slow progress. It is also particularly disconcerting to us that Atwater claimed he was ready to proceed to trial in June 2003, while at the same time premising his defense now on a lack of evidence to support Boulware's claims.

In our opinion, this evidence readily demonstrates conduct prejudicial to the administration of justice. We therefore find ODC met its burden in proving Atwater violated Rule 8.4(e).

III. SANCTION

In sum, we find there is clear and convincing evidence that Atwater violated the following Rules of Professional Conduct: Rule 1.1, Rule 1.3, Rule 3.2, and Rule 8.4(e). Accordingly, Atwater is subject to discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct) and Rule 7(a)(5)

(engaging in conduct tending to pollute the administration of justice and bringing the profession into disrepute).

ODC takes exception to the Panel's recommendation that we give Atwater an admonition, and we agree based on the aggravating circumstances found by the Panel. In particular, we share the Panel's grave concern with respect to Atwater's failure to acknowledge any responsibility for the delays in Boulware's case. *See In re Hendricks*, 319 S.C. 465, 468, 462 S.E.2d 286, 287 (1995) (noting that failure to accept personal responsibility for conduct is an aggravating factor). Without a doubt, delays arise in litigation, and the fact that a case may take longer than initially expected is simply a reality all clients must face. In the case before us, unquestionably there were delays and setbacks beyond Atwater's control. Nevertheless, these do not account for failing to resolve a relatively simple case for nearly ten years. There were myriad other things Atwater could have done to advance Boulware's case despite any roadblocks he may have encountered. Alternatively, he could have withdrawn from the representation if the case became too problematic. In other words, he should have fished or cut bait.

Instead of doing so, Atwater sporadically worked on and investigated Boulware's claims, unnecessarily prolonging the case. Before this Court, just as he did before the Panel, Atwater refused to accept any responsibility for these delays, instead finding someone else to blame for the case's slow progress at almost every turn. Furthermore, Atwater feigned surprise at Boulware's complaint, claiming he never had any prior problems with Boulware despite Boulware's numerous communications expressing his concerns. In fact, Atwater callously told us Boulware's complaint to ODC was just Boulware taking his frustrations regarding the weaknesses of his case out on Atwater.[9] This inability to recognize that he bears at least some responsibility for failing to advance this case and letting it languish for

[9] Atwater's one statement that he believes there was more he should have done and perhaps he should have withdrawn is utterly unconvincing. Immediately after he made this statement, he backtracked by pointing out Boulware did not receive a better result after retaining a new attorney and mentioning once again that Boulware was just aggravated because he had a weak case.

almost a decade is cause for great concern. We also find it spurious for Atwater to complain of a lack of evidence to support Boulware's case when Atwater himself never sought to fill these gaps.

Additionally, not only does Atwater have a prior disciplinary history, but that history reflects a pattern of similar misconduct. *See In re Sturkey*, 376 S.C. 286, 290, 675 S.E.2d 465, 467 (2008) (stating panel considered prior disciplinary history and pattern of misconduct in aggravation). As previously noted, Atwater received a public reprimand in 2003 for violating the rules regarding competence, diligence and promptness, expediting litigation, and conduct prejudicial to the administration of justice. *Atwater I*, 355 S.C. at 625-27, 586 S.E.2d at 592. These are the exact same rules he violated in this case. More troubling is the fact that he received this public reprimand during his representation of Boulware. Even more troubling is the fact that his work on Boulware's case began to dwindle right after he was sanctioned for doing just that in *Atwater I*.

In mitigation, we do agree with the Panel that Atwater's lack of personal gain and dishonest motive is a relevant mitigating factor. *See In re Larkin*, 336 S.C. 366, 371, 520 S.E.2d 804, 806 (1999). Nevertheless, while Atwater may not have been malintentioned, the delays occasioned by his actions potentially prevented the discovery of relevant evidence supporting Boulware's case. In our opinion, this prejudice to Boulware's case, coupled with Atwater's pattern of misconduct and inability to accept responsibility for his actions, warrants a sanction harsher than an admonition.

Under these facts, we find a six-month definite suspension is appropriate. *See Sims*, 380 S.C. at 64-65, 668 S.E.2d at 409-10 (imposing a ninety-day suspension for violating the rules regarding diligence and promptness, communication, expediting litigation, not responding to ODC, and engaging in conduct prejudicial to the administration of justice); *In re Sturkey*, 376 S.C. 286, 291, 657 S.E.2d 465, 467-68 (2008) (finding a nine-month suspension was warranted for failing to communicate with clients, comply with disciplinary proceedings, and pursue litigation); *In re Cabaniss*, 369 S.C. 216, 218, 632 S.E.2d 280, 281 (2006) (imposing a twelve-month suspension for violating the rules regarding competence, diligence and expediting litigation, communication, responding to ODC investigation, and

conduct prejudicial to the administration of justice); *In re Davis*, 352 S.C. 29, 31-32, 572 S.E.2d 285, 287 (2002) (finding a sixty-day suspension appropriate for not providing competent representation, failing to diligently and expeditiously pursue litigation, failing to communicate with client, and engaging in conduct prejudicial to the administration of justice); *In re Smith*, 337 S.C. 582, 586-87, 524 S.E.2d 616, 618 (1999) (ordering attorney be suspended for twelve months when his neglect of a client matter prejudiced client, he did not cooperate with ODC, and he had a prior disciplinary record); *cf. Hendricks*, 319 S.C. at 468, 462 S.E.2d at 287 ("We decline to accept the assertions of impairment as mitigation in view of the serious misconduct committed and in light of respondent's failure to accept personal responsibility for his conduct."). We also order Atwater pay the costs of these proceedings.

CONCLUSION

We hold Atwater has violated Rules 1.1, 1.3, 3.2, and 8.4 of the Rules of Professional Conduct. Accordingly, Atwater is subject to discipline under Rules 7(a)(1) and 7(a)(5) of the Rules for Lawyer Disciplinary Enforcement. Based on the facts of this case and particularly in light of Atwater's prior history and failure to accept responsibility for his conduct, we order Atwater be definitely suspended for a period of six months and pay the costs of these proceedings. Within fifteen days of the filing of this opinion, Atwater shall file an affidavit demonstrating he has complied with the requirements of Rule 30, RLDE, Rule 413, SCACR.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of Thaddaeus T. Viers, Respondent.

ORDER

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. Respondent opposes the petition. The petition is granted.

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

IT IS FURTHER ORDERED that respondent is hereby enjoined from access to any trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain.

s/ Costa M. Pleicones A.C.J.
FOR THE COURT

Columbia, South Carolina

April 11, 2012

The Supreme Court of South Carolina

In the Matter of P. Michael DuPree, Respondent.

ORDER

By order dated April13, 2012, the request to place petitioner on interim suspension and to appoint an attorney to protect clients' interests was denied. After further consideration by the Court, the order of April 13, 2012, is rescinded, and the respondent is hereby placed on interim suspension. An attorney to protect clients' interests will be appointed by separate order.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Pleicones, J., not participating.

I would not rescind the order of April 13, 2012.

s/ Donald W. Beatty J.

Columbia, South Carolina
April 18, 2012

cc: Lesley M. Coggiola, Disciplinary Counsel
Julie M. Thames, Assistant Disciplinary Counsel
J. Steedley Bogan, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alfred Adams, Appellant.

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

Opinion No. 4964
Heard February 14, 2012 – Filed April 25, 2012

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

THOMAS, J.: Alfred Adams appeals his conviction for trafficking cocaine. He argues the trial court erred in refusing to suppress drugs found on his person during a traffic stop. We affirm.

FACTS AND PROCEDURAL HISTORY

In July 2008, the North Charleston Police Department (the Department) learned that Adams was involved in a shooting and attempted robbery associated with a drug deal. Based on further investigation, the Department believed Adams was a drug dealer whose source of supply was in Atlanta, Georgia. The Department consequently installed a tracking device[1] on Adams's vehicle while the vehicle was parked in a public parking garage. The Department did not seek a warrant or judicial order before installing the device.

Five days later, the Department learned from the device that Adams's vehicle traveled to Atlanta, remained in that area for less than an hour, and began returning toward Charleston on Interstate 26.[2] Around 11:55 p.m., the Department contacted Sergeant Timothy Blair, who was accompanied by his drug dog and sitting in his cruiser at a rest area off of the interstate. The Department instructed Sergeant Blair to "be on the lookout" for the vehicle and stop it if it violated any traffic laws. As Sergeant Blair entered the interstate, he spotted the vehicle and observed it change lanes twice without using a turn signal. Sergeant Blair initiated a traffic stop at 11:57 p.m., and the vehicle pulled into a gas station.

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[1] The tracking device was the size of a pack of cigarettes, ran on its own battery, and sent information detailing its position to the Department via satellite. The Department installed the device by magnetically attaching it to the vehicle's undercarriage. The device did not provide any information other than the vehicle's location.

[2] The Department did not learn this information from any other source.

Sergeant Blair approached the driver's side of the vehicle without his drug dog. Adams was driving, and Sergeant Blair advised him of the violations. At that time, Adams "was acting very nervous. He had his hands down below where [Sergeant Blair] couldn't see them." Sergeant Blair asked Adams to keep his hands visible and noticed another vehicle turn into the gas station as he initiated the stop. Sergeant Blair was worried the second vehicle was a "trail vehicle" because the driver was watching the traffic stop, acting "kind of panicky, looking back and forth," and "fidgeting with his jacket." Sergeant Blair requested backup out of concern for his safety.

Officer James Greenawalt arrived approximately three minutes later. He removed Adams from the vehicle and began a license check. Meanwhile, Sergeant Blair used his dog to conduct a perimeter sniff of the vehicle. During this period, Adams repeatedly attempted to talk to the officers, and his eyes "were looking in other directions like trying to make a way for escape." The dog alerted at the driver's door and then on the driver's seat and center console.[3]

After the dog alerted, Officer Greenawalt began to pat down Adams for weapons. In doing so, he felt a "jagged, round object" in Adams's groin area that his training and experience led him to believe was drugs. He placed Adams in handcuffs and retrieved the item, which was 141.62 grams of packaged cocaine. The license check was not complete when the dog alerted and ensuing pat-down occurred. The drugs were found a little less than 8 minutes after Adams was pulled over. Adams was never issued a citation for the traffic violations.

A Charleston County grand jury indicted Adams for trafficking cocaine. During pretrial motions, Adams moved to suppress the drugs, alleging the Department failed to obtain a warrant or court order before installing the tracking device pursuant to the Fourth Amendment and section 17-30-140 of the South Carolina Code (Supp. 2011). The trial court agreed

[3] The first alert occurred five to six minutes after Adams was pulled over.

that the Department violated the statute. However, the court held the violation did not warrant suppression of the evidence without a corresponding constitutional violation. Relying on United States v. Knotts, 460 U.S. 276 (1983), the court held that the use of the tracking device was not a search. Moreover, the court held the traffic stop, pat-down, and retrieval of the drugs did not violate Adams's Fourth Amendment rights. Thus, the court found no constitutional violation occurred, and the motion to suppress was denied.

Adams was found guilty and sentenced to twenty-five years' imprisonment and a $50,000 fine. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in denying Adams's motion to suppress?

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citation and internal quotation marks omitted). In Fourth Amendment search and seizure cases, "an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error." Id. (citation and internal quotation marks omitted).

ANALYSIS

Adams argues the trial court erred in denying his motion to suppress because the drugs were obtained in violation of his Fourth Amendment rights.[4] Specifically, he maintains the Department's use of the tracking

[4] Adams also argues the drugs should be suppressed because the Department failed to obtain a prior judicial order pursuant to section 17-30-140 in

device constituted an unlawful search because the Department did not obtain a prior warrant.[5] We agree that the Department conducted an unlawful search by installing the tracking device on Adams's vehicle and monitoring the vehicle's movements without obtaining a prior warrant. However, this unlawful search did not require suppression of the drugs.

I. The Fourth Amendment and Tracking Device

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" United States v. Jones, 132 S.Ct. 945, 949 (2012) (alteration in quotation). "[S]earches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (internal quotation marks omitted).

In United States v. Jones, the United States Supreme Court held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" 132 S.Ct. at 949. The Court characterized the government's conduct as the "physical[] occup[ation of] private property for the purpose of obtaining information." Id. The Court reasoned, "such a physical intrusion would have

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installing the tracking device and monitoring Adams's vehicle. In light of our finding that the Department failed to obtain a warrant necessitated by the Fourth Amendment, however, we do not address this argument. See State v. Bostick, 392 S.C. 134, 139 n.4, 708 S.E.2d 774, 776 n.4 (2011) (holding that if one issue is dispositive of another, the court need not address the other issue).

[5] The State contends Adams does not raise a Fourth Amendment argument on appeal. However, a review of Adams's appellate materials makes clear that he does.

been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." Id.

Here, the tracking device was installed while Adams's vehicle was parked in a public parking garage, and the device was used to monitor the vehicle's movements while it was on public streets and highways. Under Jones, the Department's installation of the device on Adams's vehicle and use of that device to monitor the vehicle's movements constituted a "search."[6] Therefore, the Department's failure to obtain a warrant made that search unreasonable and resulted in a violation of Adams's constitutional rights.[7] Nevertheless, we must still determine whether that violation required suppression of the drugs seized from Adams's person. For the reasons below, we find it did not.

II. The Exclusionary Rule and Adams's Traffic Violations

Although the installation of the tracking device on Adams's vehicle and monitoring of the vehicle's movements without a prior warrant constituted an unlawful search, the State argues as an additional sustaining ground that the exclusionary rule does not require suppression of the drugs found on Adams's person. The State maintains Adams's traffic violations were intervening criminal acts sufficient to cure the taint arising from unlawfully installing the device and monitoring the vehicle.[8] We agree.

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[6] The device in this appeal operated identically to the device in Jones. See Jones, 132 S.Ct. at 948 (stating that its device was installed on the vehicle's undercarriage, used batteries, and transmitted information via satellite).

[7] The State does not contend an exigency existed to foreclose the need to obtain a warrant while placing the device on the vehicle and monitoring the vehicle's movements.

[8] As a second additional sustaining ground, the State claims suppression is not required because the Department used the tracking device in good-faith reliance upon United States v. Knotts, which the State contends Jones later overruled. See Davis v. United States, 131 S.Ct. 2419, 2434 (2011)

The exclusionary rule prohibits the admission of evidence that is the fruit of an unlawful search. Specifically, it prohibits the admission of evidence (1) directly acquired during an unlawful search and (2) later discovered and derivative of the unlawful search.[9] Murray v. United States, 487 U.S. 533, 536-37 (1988); see also Wong Sun v. United States, 371 U.S. 471, 488 (1963). However, under our case law the exclusionary rule does not apply to evidence obtained during a search or seizure conducted pursuant to an "intervening illegal act." State v. Nelson, 336 S.C. 186, 194, 519 S.E.2d 786, 790 (1999); see also In re Jeremiah W., 361 S.C. 620, 624-25, 606 S.E.2d 766, 768 (2004).

In State v. Nelson, a police officer driving behind the defendant flashed his high beams to get the defendant's attention without intending to initiate a traffic stop. 336 S.C. at 189, 519 S.E.2d at 787. The defendant then ran a stop sign and sped through a neighborhood, and the officer initiated a traffic stop, with which the defendant complied. Id. When the officer approached the defendant's vehicle, he smelled alcohol and the defendant refused to participate in a field sobriety test. Id. The defendant was arrested for driving under the influence. Id. Our supreme court held that even if the officer acted unlawfully in initially attempting to get the defendant's attention, the evidence seized as a result of the subsequent traffic stop was admissible

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(providing that the exclusionary rule does not apply "when the police conduct a search in objectively reasonable reliance on binding appellate precedent" that was later overruled). We need not address this argument because we find the drugs were obtained after intervening illegal acts and during a lawful traffic stop and pat-down search. See Bostick, 392 S.C. at 139 n.4, 708 S.E.2d at 776 n.4 (holding that if one issue is dispositive of another, the court need not address the other issue).

[9] Here, the movement of Adams's vehicle was the "direct evidence" obtained as a result of the unlawful search—the Department's installation of the device and monitoring of the vehicle. In contrast, the drugs subsequently seized from Adams's person constitute evidence derivative of the unlawful search.

because the intervening traffic violations "constituted new and distinct crimes for which [the officer] had probable cause to stop [the d]efendant." Id. at 194-95, 519 S.E.2d at 790.

In this case, Sergeant Blair witnessed Adams commit two traffic violations before initiating the traffic stop. See S.C. Code Ann. § 56-5-2150(a)-(b) (2006) (providing that a driver must use his turn signal to indicate the lane change he intends to make); S.C. Code Ann. § 56-5-6190 (2006) ("It is a misdemeanor for any person to violate any of the provisions of this chapter unless such violation is by this chapter or other law of this State declared to be a felony."). Thus, the trail of taint arising from the Department's unlawful search was broken, and the intervening illegal act exception permitted admission of the drugs so long as they were lawfully obtained during the stop.

III. The Resulting Search and Seizure

Adams contends the traffic stop and pat-down were unlawful because they were a mere pretext for a drug search. We disagree.

A traffic stop initiated pursuant to a traffic violation creating probable cause is not "rendered invalid by the fact that it was a mere pretext for a narcotics search." State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 191-92 (Ct. App. 2009) (internal quotation marks omitted), affirmed as modified by 392 S.C. 125, 708 S.E.2d 217 (2011); see also Whren v. United States, 517 U.S. 806, 813 (1996). A police officer's "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Corley, 383 S.C. at 241, 679 S.E.2d at 192 (internal quotation marks omitted); see also Whren, 517 U.S. at 813. Therefore, Sergeant Blair's and Officer Greenawalt's prior intentions and knowledge of Adams's involvement with drugs did not prevent the officers from conducting a lawful traffic stop and pat-down. A person stopped by the police in such a situation is protected from abuse of their rights by our Fourth Amendment framework.

a. The Traffic Stop

Evidence in the record supports the trial court's finding that the traffic stop was conducted consistently with Adams's Fourth Amendment rights.

"Temporary detention of individuals by the police during an automobile stop constitutes a 'seizure' of an individual within the meaning of the Fourth Amendment." State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). However, "[t]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Id.

During a lawful traffic stop, an officer may "request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Jones, 364 S.C. 51, 57, 610 S.E.2d 846, 849 (Ct. App. 2005) (internal quotation marks omitted). The officer may also order the driver to exit the vehicle. Id.; State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002); see also Pennsylvania v. Mimms, 434 U.S. 106, 110-11 (1977).

A lawful traffic stop can become unlawful if it exceeds the scope or duration necessary to complete its mission. State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 848 (Ct. App. 2005); see also Illinois v. Caballes, 543 U.S. 405, 407 (2005). An extension is permitted only if (1) the encounter becomes consensual or (2) the officer has at least a reasonable, articulable suspicion of other illegal activity. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. If an officer uses a drug dog to sniff the exterior of a defendant's car during a lawful traffic stop, the sniff does not make the traffic stop unlawful, even without any evidence of drug activity, so long as the sniff does not extend the length of the stop beyond that time necessary to complete the stop's purpose. Caballes, 543 U.S. at 407-09.

Here, Sergeant Blair had probable cause to stop Adams's vehicle because he witnessed Adams commit two traffic violations. The officers acted reasonably in instructing Adams to step out of the vehicle while they

waited for a license and registration report. Sergeant Blair was also permitted to walk his drug dog around the vehicle while waiting for the completion of Adams's license and registration check. The first alert occurred a mere five to six minutes after the traffic stop began, and no evidence in the record indicates the drug sniff extended the duration of the stop.[10] Consequently, the officers' conduct up to that point was within constitutional bounds. Whether the drugs were admissible depends upon whether the resulting pat-down complied with Adams's Fourth Amendment rights.

b. The Pat-down

Evidence in the record supports the trial court's finding that the pat-down of Adams and retrieval of the drugs complied with his Fourth Amendment rights.

An officer conducting a lawful traffic stop may conduct a pat-down search for weapons if the officer "has reason to believe the person is armed and dangerous." State v. Smith, 329 S.C. 550, 556, 495 S.E.2d 798, 801 (Ct. App. 1998). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry v. Ohio, 392 U.S. 1, 27 (1968).

"The purpose of [a pat-down] search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." Dickerson, 508 U.S. at 373. Therefore, a Terry "protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" Id. (quoting Terry, 392 U.S. at 26). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed." Id.

[10] In fact, Adams does not contend the stop's duration was unlawfully extended.

Under the plain feel doctrine, an officer may seize an item felt during a lawful pat-down search for weapons if the item's contour or mass makes its incriminating character immediately apparent. Dickerson, 508 U.S. at 375-77; State v. Abrams, 322 S.C. 286, 288-89, 471 S.E.2d 716, 717-18 (Ct. App. 1996). If that character is not immediately apparent, any manipulation of the item constitutes a further, unlawful search and the item will be suppressed. Dickerson, 508 U.S. at 375-77.

In Minnesota v. Dickerson, the United States Supreme Court held that evidence obtained during a pat-down for weapons was inadmissible. During the pat-down, a police officer testified he "felt a lump, a small lump . . . . [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." 508 U.S. at 369. The Supreme Court deferred to the state supreme court's interpretation of the record, which provided that the police's own testimony belied "any notion that [the police] immediately recognized the lump as crack cocaine. Rather, . . . the officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket—a pocket which the officer already knew contained no weapon." Id. at 378 (internal quotation marks omitted). The Supreme Court thus held that, although the police lawfully initiated the pat-down, "the officer's continued exploration of the [defendant's] pocket after having concluded that it contained no weapon" was a further search, unsupported by the concern for weapons. Id.

In State v. Abrams, this court held evidence seized during a pat-down was inadmissible. 322 S.C. at 287-89, 471 S.E.2d at 717-18. The officer testified that he felt a "hard instrument" that was "tube like" and "about the size of a shotgun shell." Id. Moreover, the officer explained that he thought the object "could have been 'an instrument used to transport contraband' when he 'found out that there were no weapons on [the defendant's] person.'" Id. Thus, the court determined the evidence's incriminating character was not immediately apparent and "[a]ny further search was impermissible" because the officer did not believe the evidence was contraband until after he concluded the defendant was unarmed. Id.

In contrast, this court in State v. Smith held evidence obtained during a pat-down was admissible. 329 S.C. at 561, 495 S.E.2d at 804. Unlike in Abrams, the officer immediately determined the evidence was drugs during the initial pat-down search; even though he did squeeze the evidence further, the officer's "testimony indicate[d] he determined the object was contraband as soon as he felt it," and the "identification of the substance did not require additional squeezing or manipulation." Id. at 560-61, 495 S.E.2d at 803-04.

Here, evidence in the record supports the finding that Officer Greenawalt had reason to believe Adams was armed and dangerous to conduct a pat-down for weapons. Adams exhibited suspicious behavior, and the dog alerted for drugs before the pat-down began. See State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) ("This Court has recognized that because of the indisputable nexus between drugs and guns, where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns." (internal quotation marks omitted)); see also Terry, 392 U.S. at 30 (holding that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous," he may conduct a pat-down for weapons).

Evidence in the record also supports the finding that Officer Greenawalt immediately recognized the identity of the item. He felt a "jagged, round object" in Adams's groin area while conducting the pat-down search, and his training and experience led him to believe the object was drugs. The record does not indicate he determined the evidence's identity because of further manipulation of the object or that he determined Adams was unarmed before concluding the evidence was drugs. In light of our standard of review, therefore, the trial court properly denied the motion to suppress.

CONCLUSION

For the aforementioned reasons, we affirm the trial court's denial of Adams's motion to suppress.

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Shawn Antonio Miller, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4965
Heard February 16, 2012 – Filed April 25, 2012

REVERSED AND REMANDED

Appellate Defender Breen Richard Stevens, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Deputy Attorney General Donald J.

Zelenka, all of Columbia; and Solicitor Barry J. Barnette, of Spartanburg, for Respondent.

CURETON, A.J.: Shawn Antonio Miller appeals his convictions and sentences for murder and the possession of a firearm during the commission of a violent crime, arguing the trial court erred in instructing the jury it could infer malice from the use of a deadly weapon, despite the presentation of evidence that would mitigate or reduce the offense. We reverse and remand for a new trial.

FACTS

On October 26, 2007, Miller and his friend, Christopher Blount, visited a crack house. At some point, Miller indicated he was ready to leave. When Blount refused to leave, Miller produced a handgun, which discharged. Blount was hit in the abdomen and later died. Miller was indicted and tried for murder and the possession of a firearm during the commission of a violent crime.[1]

At Miller's trial, the State presented Tammy Hunter, who testified she was at the house when Blount and Miller arrived together. Hunter recalled approximately seven people were at the house, talking and joking. She stated Miller brought crack cocaine and marijuana, which he shared with the group. Miller sat down at the kitchen table, and Blount sat next to Hunter on the couch. Hunter testified she, Miller, and Blount smoked the drugs Miller had brought. Approximately forty minutes after Miller and Blount arrived, Hunter watched Miller point a black revolver at Blount and tell him to "get his bitch ass up."[2] According to Hunter, Miller repeated his order, and the gun went off. She remembered Miller screaming and saying "y'all know I

[1] The indictment specified the violent crime was murder.

[2] Hunter's statement to police indicated Miller told Blount to get his "punk ass" up. At trial, Hunter testified she considered the terms to be interchangeable.

didn't mean to shoot him" before he left the home with another man. Hunter and another person fled into the woods. The police questioned Hunter the next day, and she identified Miller as the shooter.

Joseph "Chick" Hopkins, another eyewitness, testified he sat next to Miller at the kitchen table. Hopkins watched Miller playing with the revolver, removing bullets, "like somebody that got a brand new toy," and he advised Miller three or four times to put the gun away. He described Miller as "happy" but characterized his handling of the gun as careless and reckless. According to Hopkins, just after Miller announced he was ready to leave and told Blount to get up, Miller "waved" the gun in Blount's direction and it fired.[3] Hopkins believed the shooting was unintentional. He remembered Miller appeared stunned by the gunshot.

Law enforcement officials testified they identified Miller as a suspect and eventually found him hiding in a friend's apartment. One of the arresting officers testified Miller was carrying a loaded revolver in a hip holster at the time of his arrest.[4] After a brief interview, Miller signed a statement that he was not at the house where the incident occurred, did not know anyone who lived in that area, and did not shoot anyone.

After the close of evidence, Miller requested jury instructions on accident and involuntary manslaughter as a lesser included offense of murder. Miller asserted the testimony that the shooting appeared unintentional supported an accident instruction. The trial court declined to charge accident, finding the record contained no evidence that Miller was acting lawfully or handling the weapon with reasonable care. However, it found sufficient

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[3] The State capitalized on Hopkins's use of the word "pointed" in his statement to police. Hopkins explained he considered pointing and waving the gun to be "the same type of gesture."

[4] Ballistics testing could not exclude this gun as the one that killed Blount. Additional testing on the gun demonstrated that, although the firing mechanism appeared damaged, the safety block nonetheless prevented the weapon from firing unless the trigger was pulled fully.

evidence to charge the jury on involuntary manslaughter. In its closing, the State noted the jury could infer malice from the use of a deadly weapon and argued, "Ladies and gentlemen, it's right here in State's no. 17, a .38 caliber Smith and Wesson pistol, malice."

The trial court instructed the jury that murder requires malice aforethought, which may be either express or implied, and the jury could infer malice:[5]

> [F]rom conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.
>
> Now, a deadly weapon is any article or instrument or substance which is likely to cause death or great bodily harm. Now, whether an instrument has been used in any particular case as a deadly weapon will depend upon the facts and circumstances of each case. . . . [A] gun can even be a deadly weapon[], even if it's not operating, if it's used in a certain fashion.

Miller objected to this instruction, arguing it could "be construed as a comment on the facts of the case, and invade the province of the jury." The trial court declined to modify the instruction.

During deliberations, the jury requested re-instruction on the charges of murder, involuntary manslaughter, and possession of a weapon during the

[5] The trial court's charge did not include the qualifying language set forth in State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991): "this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

commission of a violent crime. The trial court furnished the jury with a written copy of the instructions. Miller objected to the recharge. The State did not object, either after the initial jury charge or after the recharge.

The jury found Miller guilty of murder and the possession of a firearm during the commission of a violent crime. He received concurrent sentences of forty years' imprisonment for murder and five years' imprisonment for possession of a firearm. This appeal followed.

STANDARD OF REVIEW

In criminal cases, appellate courts review only errors of law and will not reverse a trial court's decision concerning jury instructions unless the trial court abused its discretion. State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

LAW/ANALYSIS

Miller contends the trial court's instruction to the jury that it could infer malice from the use of a deadly weapon was reversible error in view of evidence that would mitigate or reduce the offense. We agree.

"In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). "In reviewing jury charges for error, we must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003).

South Carolina law defines "murder" as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). Historically, the use of a deadly weapon in a killing created first a presumption, and later a permissive inference, of malice aforethought. State v. Belcher, 385 S.C. 597, 602-08, 685 S.E.2d 802, 804-08 (2009). However, currently, "the 'use of a deadly weapon' implied malice instruction has no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing . . . ." Id. at 610, 685 S.E.2d at 809. Noting this decision "represent[ed] a clear break from our modern precedent," the Belcher court held it would apply to "all cases which [we]re pending on direct review or not yet final where the issue is preserved." Id. at 612, 685 S.E.2d at 810.

Initially, we note the State argues unpersuasively that this issue is unpreserved for appellate review. "For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented . . . and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). Here, Miller acknowledged the challenged language was "probably in the standard charge" but objected that the jury might construe the inferred malice instruction as a judicial commentary on the facts of the case. The trial judge indicated he understood the objection, and Miller did not elaborate further. The State argues Miller objected purely on a constitutional basis. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). The record does not support this argument: the trial court clearly charged the law, only, and Miller's objection addressed the likelihood that this charge would prejudice the jury. Accordingly, we find this issue is preserved.[6]

[6] Similarly, the Belcher court recalled that the trial court had "expressed 'concern about [the charge] rising to a charge on the facts.'" 385 S.C. at 602, 685 S.E.2d at 804. Nonetheless, the Belcher court elected to decide the matter based on common law. Id.

Turning to the merits, we find this appeal was pending when our supreme court decided Belcher; therefore, Belcher applies. See Belcher, 385 S.C. at 612, 685 S.E.2d at 810 (holding Belcher applies to "all cases which are pending on direct review or not yet final where the issue is preserved"). This court must evaluate the evidence adduced at trial to determine whether any of it "would reduce, mitigate, excuse or justify the killing." Id. at 610, 685 S.E.2d at 809; Adkins, 353 S.C. at 318, 577 S.E.2d at 463 ("In reviewing jury charges for error, we must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." (citations omitted)).

We note that if the trial court properly charged involuntary manslaughter, the evidence supporting that charge would "reduce [or] mitigate" the charge of murder and, thus, under Belcher the malice inference charge was improper. The State argues, however, that because Miller was acting unlawfully while waving the gun, he was not entitled to the charge on the lesser offense. See State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526 (2004) (recognizing an involuntary manslaughter instruction would have been improper because the accused was "engaged in unlawful, felonious and harmful conduct" at the time of the incident). We find it unnecessary to resolve this dispute, because we find there is evidence that mitigates the charge of murder even if Miller acted unlawfully.

We arrive at this conclusion after reviewing State v. Byrd, 72 S.C. 104, 51 S.E. 542 (1905), one of the cases specifically overruled by Belcher. Belcher, 385 S.C. at 610, 612 n.10, 685 S.E.2d at 809, 810 n.10. Byrd faced a murder charge for the killing of William J. Cox, a magistrate. Byrd, 72 S.C. at 105-06, 51 S.E. at 542. Believing covered items in Byrd's buggy to be illegal liquor, Cox and B. M. Austin attempted to arrest Byrd and his companion. Id. at 106, 51 S.E. at 542. Cox and Austin stopped the men but found them armed, and Austin drew his gun. Id. As Austin chased the other man, Cox pursued Byrd and was shot and killed. Id. While Cox never identified himself as an officer of the law, evidence existed that suggested Byrd lived in the next county and, being "not unfamiliar with the country and

its inhabitants," may have known Cox was a magistrate. Id. at 106, 51 S.E. at 542-43. The Byrd court observed an arresting officer has a duty to identify himself as an officer of the law and state the reason for the arrest. Id. at 107, 51 S.E. at 543. However, "the [officer's] failure to take these precautions does not justify homicide or even physical resistance by the party arrested, without inquiry on his part as to the authority for his arrest." Id. The Byrd court affirmed the jury instruction that "[t]he use of a deadly weapon presumes malice, but the presumption may be rebutted. So, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice, or not." Id. at 110, 51 S.E. at 544. In overruling Byrd, the Belcher court observed the Byrd court "approved of the [malice] charge even with evidence of mitigation." Belcher, 385 S.C. at 606, 685 S.E.2d at 806.

We find Miller's case is similar to Byrd's, in that evidence of mitigation exists that renders the inferred malice instruction improper. Here, the State presented evidence that there were no ill feelings between Miller and Blount and Miller exhibited surprise and panic when the gun discharged. Eyewitnesses Hopkins and Hunter testified they saw no animosity or argument between Miller and Blount.[7] Hopkins described Miller playing with the gun and showing it off like a toy shortly before deciding to leave. Although Hunter testified Miller instructed Blount to get his "bitch ass" or "punk ass" up so they could leave, Hopkins explained the phrasing was "just an expression" and did not indicate Miller was angry with Blount. Remembering Miller being as "surprised as anyone" when the gun went off, Hopkins attested he was certain Miller did not intend to shoot Blount. In addition, Hunter recalled Miller screaming "y'all know I didn't mean to shoot him, y'all know I didn't mean to shoot him" immediately after the gun discharged. Aside from Hunter's recollection of the way Miller informed Blount he was ready to leave, the State presented no evidence of discord or ill will between the men.

[7] Both witnesses had charges pending against them and testified for the State in order to have their own charges reduced. Nonetheless, both witnesses refused to concede Miller intended to shoot Blount.

We find no way to distinguish Byrd and Belcher. Belcher forbids the inferred malice charge when there is evidence of mitigation and overruled Byrd as having "evidence of mitigation" despite Byrd's illegal conduct, which was similar to Miller's conduct in this case. Accordingly, the trial court erred in instructing the jury that it could infer malice from Miller's use of a deadly weapon.

Finally, the State unpersuasively contends any error was harmless.[8] The Belcher court confronted this issue as well:

> Errors, including erroneous jury instructions, are subject to harmless error analysis. In many murder prosecutions, . . . there will be overwhelming evidence of malice apart from the use of a deadly weapon. Here, however, the error in charging that malice may be inferred by the use of a deadly weapon cannot be considered harmless. Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun. We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.

[8] The State argues the involuntary manslaughter charge was inappropriate because the evidence presented did not support it. Thus, the State reasons, any error in the inference of malice charge was harmless. The State further contends that, inasmuch as Miller was not entitled to an involuntary manslaughter charge, he could only have been convicted of murder. We note the jury might have found Miller not guilty of any crime. However, because we find the inference of malice charge was improper due to the presentation of evidence of mitigation, we need not further address the State's argument that Miller's murder charge was not subject to reduction.

Id. at 611-12, 685 S.E.2d at 809-10 (citations omitted). In the case at bar, Miller did not assert self-defense, but the State also failed to present "overwhelming evidence of malice" apart from the use of a gun. Consequently, here, as in Belcher, the instruction that the jury could infer malice from the use of a gun may have been the jury's sole basis for finding malice and convicting Miller of murder. In this circumstance, the error in giving this jury instruction was not harmless.

CONCLUSION

We find the appeal in this case was pending at the time our supreme court decided Belcher. Consequently, a Belcher analysis is appropriate.

We further find evidence Miller acted with malice in shooting Blount is either limited or nonexistent and mitigating evidence was presented at trial. Accordingly, we reverse the trial court's decision to instruct the jury it could infer malice from the use of a deadly weapon in this case, and we remand for a new trial.

REVERSED AND REMANDED.

FEW, C.J., concurs.

PIEPER, J., concurring: I concur with the majority but also write separately because I believe the involuntary manslaughter charge was warranted by the evidence presented at trial. "If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given." State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009) (citation omitted). "Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010) (citation omitted). "It is unlawful for a person to present or point at another person a loaded or

unloaded firearm." S.C. Code Ann. § 16-23-410 (2003). Presenting a weapon means "to offer to view in a threatening manner, or to show in a threatening manner." In re Spencer R., 387 S.C. 517, 522-23, 692 S.E.2d 569, 572 (Ct. App. 2010).

Evidence was presented at trial that Miller was acting lawfully with reckless disregard for the safety of others. Witness Joseph Hopkins testified that prior to shooting Blount, Miller had been sitting at the table and playing with the gun "like somebody that got a brand new toy." Hopkins also testified that when Miller was ready to leave, Miller told Blount he needed "to bring your little punk self on." Hopkins testified Miller did not sound mean and that "get your punk self on" is just an expression that means "come on, let's go." When asked whether Miller pointed the gun at Blount, Hopkins replied:

> Not really. It was just like a wave . . . . Like if I wave something this way, but you wasn't in the line of fire . . . . I'm not just putting that in your face and telling you to come on. No, it wasn't like that . . . it was just like a little wave.

Additionally, Hopkins testified that immediately prior to the shooting "[Miller] was happy," "everything was all right," and "it was . . . a social gathering, everybody sitting around kicking it." While witness Tammy Hunter testified that Miller pointed the gun at Blount and told him to get his "bitch ass up," Hunter also testified that there were no arguments, altercations, or harsh feelings amongst anyone in the room. Additionally, Hunter testified that there had been no arguments between Miller and Blount and that they seemed like they were friends.

Based on the foregoing, evidence was presented that Miller was acting lawfully because his 'waving' or 'showing' a gun at Blount was not in a threatening manner that constitutes presenting a firearm. This evidence, depending on the view of the jury, could reduce the homicide from murder to involuntary manslaughter. Since a jury question existed as to whether the

gun was pointed or presented in an unlawful manner, as opposed to merely recklessly waving it in the air in a nonthreatening manner, the trial court's implied malice instruction was error. See State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("[I]nstructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mahammed Ahamad Atieh
(a/k/a Mohammed A. Atieh), Appellant.

Appeal From Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 4966
Submitted March 1, 2012 – Filed April 25, 2012

AFFIRMED IN PART AND REVERSED IN PART

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M.

Coombs, all of Columbia; and Solicitor W. Walter Wilkins, III, of Greenville, for Respondent.

KONDUROS, J.: Mahammed Ahamad Atieh[1] appeals his conviction for assault and battery of a high and aggravated nature (ABHAN) and assault with intent to commit third-degree criminal sexual conduct (CSC). We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Mahammed Ahamad Atieh owned two Subway stores in Easley, South Carolina. One of his employees (Victim) reported to the police that Atieh had touched her inappropriately on several occasions. A Pickens County grand jury indicted Atieh for ABHAN and assault with intent to commit third-degree CSC. During pretrial motions, Atieh moved to suppress the testimonies of four former employees concerning allegations of past inappropriate touching. He argued the testimonies involved prior bad acts and were inadmissible under Rule 404(b), SCRE. Atieh further argued the testimonies would have a prejudicial effect while offering no probative value.

In considering Atieh's motion to suppress, the court heard in camera testimony from Victim and the former employees. Victim testified Atieh had touched and squeezed her rear end, put his hand down her shirt, pressed against her when she was washing dishes and in the restaurant's cooler, and that he had put his hand inside the waistband of her pants. The first former employee (Employee 1) testified Atieh pressed against her in the cooler and while she washed dishes and would try to put his hand down her shirt. The

[1] Atieh's name is spelled differently on each sentencing sheet, the record on appeal, and the briefs. The sentencing sheet for ABHAN lists his name as Mohammed A. Atieh, while the assault with intent to commit third-degree criminal sexual conduct sentencing sheet refers to him as Mahammed Ahamad Atieh. The record on appeal lists his name as Mahammed Ahamad Ateih (a/k/a Mohammed A. Atieh). Both briefs refer to him as Mahammed Ahamas Atieh.

second former employee (Employee 2) stated Atieh put his hands up her shirt near the cooler area. The third former employee (Employee 3) testified Atieh touched her rear end and placed his hand on her back, and she observed him press against another female employee as the employee washed dishes. The fourth former employee (Employee 4) testified of past inappropriate touching. She indicated Atieh had pressed against her while she washed dishes and in the cooler, put his hand down her shirt, and put his hand inside the waistband of her pants. The trial court found the testimonies relevant under Rule 404(b), SCRE, and noted the similarities in each witness's testimony as indicative of a common scheme or plan. The trial court also found the probative value of the former employees' testimonies substantially outweighed the prejudicial effect and ruled the testimonies admissible.

When the trial began, the State called Victim as its first witness. After Victim testified, the State began calling each of the four former employees to testify. Atieh did not make any contemporaneous objections to the testimony of the first three former employees. However, prior to Employee 4 being called, Atieh renewed his objection to her testimony, arguing it went beyond common scheme or plan and beyond what Victim alleged Atieh had done. The trial court ruled Employee 4's testimony admissible; however, it limited her testimony to events that fell within the common scheme or plan, and the trial court prohibited her from speculating on what Atieh's intent might have been regarding putting his hand in her pants. After the trial court ruled, Atieh renewed his objection to Employee 4's entire testimony being admitted.

After the State rested, Atieh moved for a directed verdict on the charge of assault with intent to commit third-degree CSC. He argued no testimony was introduced showing Atieh attempted a sexual battery because, under the statute, that offense requires an attempt to penetrate the victim's body. Atieh emphasized the fact that Victim testified Atieh's hand did not come near her vaginal area when he put his hand inside her waistband. The trial court denied the motion, finding the State presented "substantial circumstantial evidence which reasonably could tend to prove guilt, or from which guilt could be fairly and logically deduced . . . [and that it was] a jury question as to what the intent was." Atieh then asked the trial court, "Judge, for the

record, could I ask for a ruling on what evidence with any weight at all the court is saying there's some evidence that the jury could find?" The trial court stated, "The evidence for the intent is what is on the record of what's been testified to by [Victim]." The motion was again denied.

At the close of Atieh's case, he renewed his motion for a directed verdict on the charge of assault with intent to commit third-degree CSC. The trial court denied the motion. During the charge conference, the trial court indicated it would "charge that evidence of other bad acts is only to be used for . . . the sole issue of credibility not any proof of guilt . . . . It'd only be, if they considered it at all, it would be common scheme and plan or intent or absence of mistake." Atieh did not object. After the trial court gave the jury charge, it inquired whether either attorney had any exceptions to it. Atieh stated, "No objections to the charge, Judge."

Ultimately, the jury convicted Atieh of ABHAN and assault with intent to commit third-degree CSC. The trial court sentenced Atieh to ten years' imprisonment suspended to forty-four months' imprisonment and four years of probation for each charge, to be served concurrently. This appeal followed.

LAW/ANALYSIS

I. Prior Bad Acts

Atieh contends the trial court committed reversible error in allowing testimony from four former employees alleging prior bad acts. He further argues the prejudice of this prior bad act evidence is so pervasive it requires a reversal on both convictions. We disagree.

A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question." State v.

Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). The South Carolina Supreme Court expanded this exception in State v. Wiles, holding that even when the evidence does not immediately follow the motion in limine, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review. 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009). In Wiles, the trial court had commented to the jury about the evidence that was the subject of the motion in limine before any evidence was admitted. Id.

Any issue regarding the first three former employees' testimonies is unpreserved. The exception in Forrester regarding motions in limine is not applicable in this case because the former employees were not called as witnesses immediately after the motion in limine. As to the exception in Wiles, nothing in the record indicates the trial court commented to the jury the State would present testimony by former employees. Furthermore, the preliminary nature of the motion in limine allowed the trial court to adjust its ruling in accordance with developments in the trial. Specifically, when Employee 4 was called, the trial court heard Atieh's objection and limited her testimony, thereby demonstrating the trial court's flexibility with the earlier ruling. As to the testimony of Employee 4, Atieh made a contemporaneous objection when she was called to testify before the jury. Thus, that issue is preserved for our consideration.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

Rule 404(b), SCRE, states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." (emphasis added).

> Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

State v. Wallace, 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78 (2009) (citations omitted). After determining evidence supports a finding the defendant committed a prior bad act, the court must determine whether the evidence falls within the common scheme or plan exception. State v. Tutton, 354 S.C. 319, 326, 580 S.E.2d 186, 190 (Ct. App. 2003). This determination is a matter of law. Id. at 326-27, 580 S.E.2d at 190.

Under the factors delineated in Wallace, we agree with the trial court that Employee 4's testimony was admissible under the common scheme or plan exception. Victim and Employee 4 were both young women, aged 16 and 17 to 18 respectively, when the inappropriate touching occurred. They were both employees of Atieh and the inappropriate touching took place at the restaurant primarily around the sink or cooler. There was no direct coercion or threat in either case, although both Victim and Employee 4 were

subordinate employees. The specific instances of touching in both cases included Atieh pressing against Victim and Employee 4, touching their rear ends, putting his hand up or down their shirts, and putting his hand inside the waistband of their pants. The similarities of both women's testimonies far outweigh the differences, increasing the probative value of Employee 4's testimony.

However, even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Pagan, 369 S.C. at 211, 631 S.E.2d at 267. "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Martucci, 380 S.C. 232, 248, 669 S.E.2d 598, 606 (Ct. App. 2008).

In ruling on Atieh's objection, the trial court limited Employee 4's testimony to matters that would aid in establishing a common scheme or plan, allowing no speculation on what Atieh's intent might have been in putting his hand in the waistband of her pants. The trial court instructed the jury it could not consider evidence of bad acts for any reason other than intent, common scheme or plan, or absence of mistake. It specifically cautioned the jury against considering the testimony as proof of Atieh's guilt. The trial court took all precautions to reduce any prejudice Employee 4's testimony may have created and Atieh has shown no clear evidence Employee 4's testimony improperly influenced the jury's verdict. Therefore, we find the trial court did not abuse its discretion in admitting Employee 4's testimony.

II. Directed Verdict

Atieh argues the trial court committed reversible error in refusing to grant his motion for a directed verdict on the charge of assault with intent to commit third-degree CSC. We agree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."

State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." Id. "When reviewing a denial of a directed verdict, [the appellate court] views the evidence and all reasonable inferences in the light most favorable to the [S]tate." Id.

Section 16-3-656 of the South Carolina Code (2003) states "[a]ssault with intent to commit [CSC] . . . shall be punishable as if the criminal sexual conduct was committed." To be guilty of third-degree CSC, the defendant must have engaged in sexual battery with the victim. S.C. Code Ann. § 16-3-654 (2003). Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2003).

"Intent is a question of fact and is ordinarily for jury determination." State v. Lee-Grigg, 374 S.C. 388, 403, 649 S.E.2d 41, 49 (Ct. App. 2007) (citing State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 607 (1971)). "Intent may be shown by acts and conduct from which a jury may naturally and reasonably infer intent." Id. "In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts compromising the choate offense. In other words, the completion of such acts is the defendant's purpose." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000).

While intent can be inferred from conduct, Victim's testimony does not raise the inference that Atieh intended to commit the conduct required to establish third-degree CSC. On direct examination, Victim testified as follows:

> Q. Okay. And at any time did he ever attempt to put his hands down your pants?

A. Yes, sir.

Q. And when was that? Can you explain - -

A. While I was washing dishes.

Q. Can you explain to the jury what happened then?

A. I was standing towards the sink, I was washing dishes, and he came up behind me and kind of pressed his body up against me. And he put his hands down the front of my pants, not all the way, just at the waistline.

Q. Okay. Now, what was your response to that?

A. I was in shock. I was just standing there. I didn't know what to do.

On cross-examination she testified:

Q. How far down your pants did his hands go?

A. Just barely below the waistline?

Q. Just barely below the waistline?

A. Yes, sir.

Q. Did it come anywhere near your vaginal area?

A. No, sir.

Victim's testimony does not indicate she did anything to disrupt whatever Atieh intended to do. She stated she was in shock and just standing there. She did not testify to some outside force interrupting or prematurely halting his actions. The only evidence is that Atieh put his hand just inside the waistline of Victim's pants and then withdrew it. This action was consistent with inappropriately touching Victim but does not, under the specific circumstances and testimony in this case, give rise to an inference he intended to do more than what he did. While this conduct constitutes an assault, a jury could not "reasonably and naturally" infer that Atieh intended to penetrate any orifice of Victim's body. Consequently, the trial court erred in denying Atieh's directed verdict motion as to the charge of assault with intent to commit third-degree CSC.

CONCLUSION

Any issue regarding the admissibility of Employee 1, 2, or 3's testimonies is not preserved for our review. Further, the trial court did not abuse its discretion in admitting Employee 4's testimony under the common scheme or plan exception to admission of prior bad acts. With respect to Atieh's conviction for assault and battery with intent to commit third-degree CSC, we conclude the trial court erred in denying Atieh's motion for directed verdict as the State presented no evidence from which the jury could have reasonably and naturally inferred his intent to commit the underlying offense as specified in the statute.

AFFIRMED IN PART and REVERSED IN PART.

PIEPER and GEATHERS, JJ., concur.