The Supreme Court of South Carolina

In the Matter of Nita O. Ledford, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 1995, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated December 29, 2006, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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 Nita

Ophelia Ledford 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/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 18, 2007

The Supreme Court of South Carolina

In the Matter of Kirsten Andrea Salchow, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 2005, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated December 15, 2006, 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 Kristen Andrea Salchow 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/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 18, 2007

The Supreme Court of South Carolina

In the Matter of Daniel R. Swafford, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 16, 1988, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter dated November 24, 2006, submitted to the South Carolina Bar, Petitioner submitted his 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 his 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 his 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 he has fully complied with the provisions of this order. The resignation of Daniel R. Swafford shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 18, 2008

The Supreme Court of South Carolina

In the Matter of Robert J. Parmley, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 11, 1975, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court, dated January 5, 2007, Petitioner submitted his 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 his 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 his 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 he has fully complied with the provisions of this order. The resignation of Robert J. Parmley shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 18, 2007

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3

January 22, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26248 – Responsible Eco v. SCDHEC 24

26249 – Creuncle D. Suber v. State 31

26250 – William R. Talley v. State 37

26251 – Franklin et al v. Chavis 47

26252 – State v. John New 55

26253 – David Arnal v. Laura Fraser 59

Order – In the Matter of David Harold Hanna 70

Order – State v. Kwasi Roosevelt Tuffour 73

UNPUBLISHED OPINIONS

2007-MO-004 – Michael F. Bailey v. State
(Anderson County, Judges Alexander S. Maccaulay and James W. Johnson)

2007-MO-005 – Barry K. Runyans v. State
(Cherokee County, Judges Roger L. Couch and Gary E. Clary)

PETITIONS – UNITED STATES SUPREME COURT

26185 – The State v. Tyree Roberts Pending

PETITIONS FOR REHEARING

26219 – In the Interest of Amir X.S. Denied 1/18/07

26242 – Sloan v. Hardee Pending

26245 – In the Matter of Sally G. Calhoun Pending

2007-MO-001 – Eartha Mae Williams v. CSX Transportation Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

2007-UP-021-Stuart v. Stuart
(Greenville County, Judge R. Kinard Johnson, Jr.)

2007-UP-022-State v. Anthony J. Smith
(Greenville County, Judge Larry R. Patterson)

2007-UP-023-Pinckney v. Robert Salamon Lowcountry Chiropractic
(Charleston County, Master-In-Equity Mikell R. Scarborough)

2007-UP-024-State v. Samuel Simmons
(Horry County, Judge Steven H. John)

2007-UP-025-State v. Corey Moss
(Greenville County, Judge C. Victor Pyle Jr.)

2007-UP-026-State v. Avis T. Jackson
(Greenville County, Judge Larry R. Patterson)

2007-UP-027-State v. Billy A. Robinson
(Greenville County, Judge Edward W. Miller)

2007-UP-028-State v. Jay K. Sneed
(Charleston County, Judge Daniel F. Pieper)

2007-UP-029-State v. Tiffany Jawanna Jeffcoat
(Richland County, Judge L. Casey Manning)

2007-UP-030-State v. Stacey Wendell Pringle
(Sumter County, Judge Howard P. King)

2007-UP-031-State v. Stacy Howard
(Georgetown County, Judge J. Michael Baxley)

2007-UP-032-State v. Bernard Huggins
(Darlington County, Judge John M. Milling)

2007-UP-033-State v. Ralph West, Jr.
(Union County, Judge John C. Hayes, III)

2007-UP-034-State v. Cazario Marshall
(Allendale County, Judge Paul M. Burch)

2007-UP-035-State v. Ricky Dean Harvey
(Pickens County, Judge G. Edward Welmaker)

2007-UP-036-State v. Anthony L. Glover
(Sumter County, Judge Thomas W. Cooper, Jr.

2007-UP-037-State v. Timothy Dwayne Inman
(Dorchester County, Judge Diane Schafer Goodstein)

2007-UP-038-State v. Charlie Edward McClinton
(Richland County, Judge G. Thomas Cooper, Jr.)

2007-UP-039-State v. Christopher D. Williamson
(Horry County, Judge Paula H. Thomas)

PETITIONS FOR REHEARING

4159-State v. T. Curry	Pending
4168-C.W. Huggins v. Sheriff J.R. Metts	Pending
4170-Ligon, John v. Norris, Jeff et.al	Pending
4178-O. Grady Query v. Carmen Burgess	Pending
4179-Wilkinson v. Palmetto State	Pending
4180-Holcombe v. Bank of America	Pending
4181-Danny Wright v. Ralph Craft et.al	Pending
4182-James et. al v. Blue Cross et. al	Pending

4183-State v. C. Davis	Denied 01/18/07
4184-Annie Jones v. John or Jane Doe	Pending
4186-Comm. of Public Works v. SCDHEC	Denied 01/23/07
4187-Kimmer v. Murata of America	Pending
4188-Davis, Deborah v. Davis, James	Pending
2006-UP-301-State v. C. Keith	Pending
2006-UP-326-State v. K. Earnest Lee	Pending
2006-UP-329-Washington Mutual v. Hiott	Pending
2006-UP-333-Robinson v. Bon Secours	Pending
2006-UP-350-State v. M. Harrison	Pending
2006-UP-364-State v. Leroy A. Matthews	Pending
2006-UP-372-State v. Bobby Gibson	Denied 01/18/07
2006-UP-375-State v. Randy W. Joye	Denied 1/18/07
2006-UP-377-Curry v. Manigault	Denied 01/18/07
2006-UP-378-Ziegenfus v. Fairfield Electric	Pending
2006-UP-379-Wanda Phillips v. Martin Bayless	Pending
2006-UP-382-SCDSS v. Valerie B.	Pending
2006-UP-383-Murray v. Avondale Mills	Pending
2006-UP-385-York Printing v. Springs Ind.	Pending
2006-UP-387-State v. Dorian Cain	Pending
2006-UP-389-Sladek v. Sladek	Denied 01/19/07

2006-UP-390-State v. S. Robinson	Denied 01/19/07
2006-UP-393-M. Graves v. W. Graves	Denied 01/18/07
2006-UP-395-S. James v. E. James	Denied 01/18/07
2006-UP-399-Cooksey v. Wachovia Bank	Pending
2006-UP-400-State v. J. Derek	Denied 01/18/07
2006-UP-401-SCDSS v. B. Moore	Pending
2006-UP-405-J. Floyd v. SC Budget and Control Board	Pending
2006-UP-407-Richardson v. Colliers Keenan et. al	Pending
2006-UP-411-SCDSS v. Maurrasse	Pending
2006-UP-412-K&K v. E&C Williams Mechanical	Pending
2006-UP-413-S. Rhodes v. M. Eadon	Pending
2006-UP-416-State v. K. Mayzes and C. Manley	Pending
2006-UP-417-D. Mitchell v. Florence City School	Pending
2006-UP-419-State v. T. Finley	Pending
2006-UP-420-B. Ables v. M. Gladden	Pending
2006-UP-421-J. Holliday v. T. Holliday (2)	Pending
2006-UP-423-SC Farm Bureau v. H. Kennedy	Pending
2006-UP-426-J. Byrd v. D. Byrd	Pending
2006-UP-427-R. Collins v. B. Griffin	Pending
2006-UP-430-SCDSS v. E. Owens	Pending
2006-UP-431-B. Lancaster v. L. Sanders	Pending

2007-UP-015-Village West v. Arata Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3949-Liberty Mutual v. S.C. Second Injury Fund Pending

3956-State v. Michael Light Pending

3963-McMillan v. SC Dep't of Agriculture Pending

3967-State v. A. Zeigler Pending

3968-Abu-Shawareb v. S.C. State University Pending

3982-LoPresti v. Burry Pending

3983-State v. D. Young Pending

3994-Huffines Co. v. Lockhart Pending

3998-Anderson v. Buonforte Pending

4004-Historic Charleston v. Mallon Pending

4006-State v. B. Pinkard Pending

4011-State v. W. Nicholson Pending

4014-State v. D. Wharton Pending

4022-Widdicombe v. Tucker-Cales Pending

4025-Blind Tiger v. City of Charleston Pending

4026-Wogan v. Kunze Pending

4027-Mishoe v. QHG of Lake City Pending

4033-State v. C. Washington Pending

4034-Brown v. Greenwood Mills Inc. Pending

4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending
4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4060-State v. Compton	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4068-McDill v. Mark’s Auto Sales	Pending
4069-State v. Patterson	Pending
4070-Tomlinson v. Mixon	Pending

4071-State v. K. Covert	Pending
4071-McDill v. Nationwide	Pending
4074-Schnellmann v. Roettger	Pending
4075-State v. Douglas	Pending
4078-Stokes v. Spartanburg Regional	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4082-State v. Elmore	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4089-S. Taylor v. SCDMV	Pending
4091-West v. Alliance Capital	Pending
4092-Cedar Cove v. DiPietro	Pending
4093-State v. J. Rogers	Pending
4095-Garnett v. WRP Enterprises	Pending
4096-Auto-Owners v. Hamin	Pending
4100-Menne v. Keowee Key	Pending
4102-Cody Discount Inc. v. Merritt	Pending
4104-Hambrick v. GMAC	Pending
4107-The State v. Russell W. Rice, Jr.	Pending
4109-Thompson v. SC Steel Erector	Pending
4111-LandBank Fund VII v. Dickerson	Pending

4112-Douan v. Charleston County	Pending
4118-Richardson v. Donald Hawkins Const.	Pending
4119-Doe v. Roe	Pending
4120-Hancock v. Mid-South Mgmt.	Pending
4121-State v. D. Lockamy	Pending
4122-Grant v. Mount Vernon Mills	Pending
4126-Wright v. Dickey	Pending
4127-State v. C. Santiago	Pending
4128-Shealy v. Doe	Pending
4130-SCDSS v. Mangle	Pending
4136-Ardis v. Sessions	Pending
4139-Temple v. Tec-Fab	Pending
4140-Est. of J. Haley v. Brown	Pending
4143-State v. K. Navy	Pending
4144-Myatt v. RHBT Financial	Pending
4145-Windham v. Riddle	Pending
4148-Metts v. Mims	Pending
4162-Reed-Richards v. Clemson	Pending
4165-ExParte:Johnson (Bank of America)	Pending
4172-State v. Clinton Roberson	Pending
4175-Brannon v. Palmetto Bank	Pending

4176-SC Farm Bureau v. Dawsey	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending

2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-590-Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-006-Martin v. State	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-025-State v. K. Blackwell	Pending
2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-038-Baldwin v. Peoples	Pending

2006-UP-043-State v. Hagood	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-051-S. Taylor v. SCDMV	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v. Ffrench	Pending
2006-UP-084-McKee v. Brown	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-115-Brunson v. Brunson	Pending
2006-UP-122-Young v. Greene	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending
2006-UP-151-Moyers v. SCDLLR	Pending
2006-UP-158-State v. R. Edmonds	Pending
2006-UP-172-State v. L. McKenzie	Pending
2006-UP-180-In the matter of Bennington	Pending

2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex parte Van Osdell (Babb v. Graham)	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending
2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-243-Sun Trust Mortgage v. Gobbi	Pending
2006-UP-245-Gobbi v. People's Federal	Pending
2006-UP-246-Gobbi v. Simerman	Pending
2006-UP-247-State v. Hastings	Pending
2006-UP-256-Fulmer v. Cain	Pending
2006-UP-262-Norton v. Wellman	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-281-Johnson v. Sonoco Products	Pending
2006-UP-286-SCDSS v. McKinley	Pending
2006-UP-287-Geiger v. Funderburk	Pending
2006-UP-299-Kelley v. Herman	Pending
2006-UP-303-State v. T. Dinkins	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-309-Southard v. Pye	Pending

2006-UP-313-Uzenda v. Pittman	Pending
2006-UP-314-Williams et. al v. Weaver et. al	Pending
2006-UP-316-State v. Tyrelle Davis	Pending
2006-UP-317-Wells Fargo Home Mortgage v. Thomasena J. Holloway and Albert Holloway	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-323-Roger Hucks v. County of Union	Pending
2006-UP-324-Pastene v. Beaufort Co. School	Dismissed 01/17/07
2006-UP-332-McCullar v. Est. of Campbell	Pending
2006-UP-359-Pfeil et. al v. Walker et. al	Pending
2006-UP-360-SCDOT v. Buckles	Pending
2006-UP-367-Coon v. Renaissance	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Responsible Economic Development, Angela Ketchum, Carolyn Jebaily, Peggy Brown, Rachell Hyman, Bobby Griffin, Walter Sallenger, its Members and Directors, Appellants,

v.

South Carolina Department of Health and Environmental Control and Wal-Mart Stores East, LP, Respondents.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26248
Heard December 5, 2006 – Filed January 22, 2007

AFFIRMED AS MODIFIED

Robert Guild, of Columbia, for Appellants.

Etta R. Williams, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

James D. Myrick, of Buist, Moore, Smythe & McGee, PA, of Charleston, for Respondent Wal-Mart Stores East, LP.

JUSTICE BURNETT: This appeal concerns the issuance of a stormwater management and sediment control permit (stormwater permit) to Respondent Wal-Mart Stores East, LP (Wal-Mart). We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR, and affirm as modified the circuit court's decision to uphold the issuance of the stormwater permit.

FACTUAL/PROCEDURAL BACKGROUND

In 2003, Wal-Mart applied for a stormwater permit in connection with a proposed development in Florence, South Carolina. Wal-Mart's proposed development includes the construction of a Wal-Mart Supercenter, an accompanying parking lot, and a central stormwater detention pond. The stormwater would flow across the paved and landscaped areas to inlets, which would lead to the detention pond. The detention pond would accommodate 2, 10, 25, 50, and 100-year frequency storm events. From the detention pond, the stormwater would flow into an unnamed tributary and continue in the unnamed tributary for approximately one-half mile at which point the unnamed tributary converges with Jeffries Creek.

Respondent South Carolina Department of Health and Environment Control (DHEC) granted the stormwater permit. Responsible Economic Development, Angela Ketchum, Carolyn Jebaily, Peggy Brown, Rachell Hyman, Bobby Griffin, and Walter Sallenger, its Members and Directors, (Appellants) objected to the issuance of the stormwater permit and brought this contested case before an Administrative Law Judge (ALJ). At the hearing, Appellants argued 26 S.C. Code Ann. Reg. 72-305(B)(4) (Supp. 2005) required denial of the stormwater permit because Wal-Mart's proposed development violated the antidegradation rules set forth in 25 S.C. Code Ann. Regs. 61-68 and -69 (Supp. 2005). The ALJ issued a Final Order and Decision upholding DHEC's grant of a stormwater permit.

Appellants appealed to the Board of Health and Environment Control (Board), which affirmed the ALJ's decision. On further appeal, the circuit court upheld the Board's decision. This appeal followed.

ISSUE

Did the circuit court err in affirming the Board's decision to uphold the grant of a stormwater permit to Wal-Mart?

STANDARD OF REVIEW

This case involves appearances before four tribunals. The ALJ presided as the finder of fact at the contested hearing. S.C. Code Ann. § 1-23-600(B) (2005). The Board sat in an appellate capacity, and its review was governed by S.C. Code Ann. § 1-23-610(D). The circuit court also sat in an appellate capacity, and its review was governed by S.C. Code Ann. § 1-23-380(A)(6).

This Court determines whether the circuit court properly applied its standard of review and applies the same standard of review established for the circuit court. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). A reviewing court may reverse or modify the decision of any agency if substantial rights of the appellant have been prejudiced because the findings, conclusions, or decisions of the agency are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(5) (Act. No. 387, 2006 S.C. Acts 387, eff. July 1, 2006).

LAW/ANALYSIS

Appellants contend the circuit court erroneously affirmed the issuance of a stormwater permit in this case. Appellants allege Regulation 72-305(B)(4) requires the denial of the stormwater permit because stormwater runoff from Wal-Mart's proposed development will further depress oxygen levels in the unnamed tributary and Jeffries Creek and thus violates the antidegradation rules set forth in Regulations 61-68(D)(1) and -69. Appellants also contend Regulation 72-305(B)(4) requires the denial of the stormwater permit because Wal-Mart has failed to employ adequate measures to handle pollutants discharged from the development as required by Regulation 61-68(D)(2) and DHEC's written policy regarding antidegradation. See S.C. Dep't of Health & Envtl. Control, Bureau of Water, Antidegradation for Activities Contributing Nonpoint Source Pollution to Impaired Waters (Nov. 1999). We disagree.

The Stormwater Management and Sediment Reduction Act (Stormwater Act)[1] requires a person who intends to engage in a land disturbing activity[2] to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity, unless an exemption applies. S.C. Code Ann. § 48-14-30 (Supp. 2005). The Stormwater Act further requires DHEC to promulgate regulations for the "types of activities that require a stormwater . . . permit" and for

[1] S.C. Code Ann. §§ 48-14-10 to -170 (Supp. 2005).

[2] "'Land disturbing activity' means any use of the land by any person that results in a change in the natural cover or topography that may cause erosion and contribute to sediment and alter the quality and quantity of the stormwater runoff." S.C. Code Ann. § 48-14-20(8).

"permit application and approval requirements." *Id.* § 48-14-50(C)(3) & (9). DHEC fulfilled that duty by promulgating, in relevant part, Regulations 72-305 and -307. Regulation 72-305 outlines the permit application and approval procedure, and Regulation 72-307 sets forth the minimum standards and specifications and the specific design criteria for projects requiring a stormwater management and sediment control plan.

Regulation 72-305(B)(3) requires Regulations 72-305 and -307 to apply to land disturbing activities disturbing more than five acres. DHEC can modify the regulatory requirements of Regulations 72-305 and -307 "on a case-by-case basis to address specific stormwater quantity or quality problems or to meet S.C. Coastal Council or other regulatory requirements."[3] 26 S.C. Code Ann. Reg. 72-305(B)(4).

The ALJ determined the requirements of Regulations 72-305 and -307 applied to this case because Wal-Mart's proposed development involves a land disturbing activity covering approximately 43 acres. He found the stormwater runoff from Wal-Mart's development would not flow directly into Jeffries Creek, an impaired water body, but would flow directly into an unnamed tributary, which is an unimpaired water body. Then the stormwater would flow for one-half mile before converging with Jeffries Creek, and he determined the stormwater runoff would obtain re-aeration properties before converging with Jeffries Creek. The ALJ found stormwater runoff from three other commercial developments flowed into the unnamed tributary before converging with Jeffries Creek without negatively affecting the water quality of Jeffries Creek. He also found there was no significant evidence that quantified the inadequate measures alleged by Appellants. Based on the totality of the circumstances, the ALJ determined Regulation 72-305(B)(4)

[3] See generally S.C. Code Ann. § 48-14-20(11) (defining "[s]tormwater management" to mean for: "(a) quantitative control, a system of vegetative or structural measures, or both, that control the increased volume and rate of stormwater runoff caused by manmade changes to the land; (b) qualitative control, a system of vegetative, structural, or other measures that reduce or eliminate pollutants that might otherwise be carried by stormwater runoff").

was not applicable to Wal-Mart's application for a stormwater permit and upheld the issuance of the stormwater permit to Wal-Mart.

The Board affirmed the ALJ's decision. The circuit court found the Board's view of the antidegradation rules conformed to the framework set forth in Regulations 61-68 and -69 and found there was substantial evidence to support the ALJ's and the Board's findings.

Appellants allege Wal-Mart's proposed development violates regulations promulgated pursuant to the Pollution Control Act.[4] The purpose of the Pollution Control Act is "to maintain reasonable standards of purity of the air and water resources of the State. . . ." S.C. Code Ann. § 48-1-20 (1987). DHEC has the "authority to abate, control and prevent pollution" in order to enforce the provisions of the Pollution Control Act. *Id.* DHEC is also authorized to issue permits pursuant to the Pollution Control Act for discharge of wastes or air contaminants and for construction or alteration of disposal systems. *Id.* §§ 48-1-100 & -110 (Supp. 2005).

Although stormwater runoff is a source of pollution,[5] the legislature enacted the Stormwater Act to specifically deal with stormwater management and sediment reduction. The purpose of the Stormwater Act is "to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program." Act No. 51, 1991 Acts 167. The Stormwater Act requires DHEC to issue permits for persons engaging in a land disturbing activity, unless an exemption applies. S.C. Code Ann. § 48-14-30(A).

As a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature. Med. Soc'y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 275, 513 S.E.2d 352, 355 (1999); City of Columbia v.

---

[4] S.C. Code Ann. §§ 48-1-10 to -350 (1987 & Supp. 2005).

[5] See generally 26 S.C. Code Ann. Reg. 72-300(A) (Supp. 2005) ("Stormwater runoff is a source of pollution of waters of the State.").

Bd. of Health & Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987). Any action taken by DHEC outside of its statutory and regulatory authority is null and void. Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987).

Relevant to this appeal, the regulations of the Pollution Control Act—Regulations 61-68 and -69[6]—and the regulations of the Stormwater Act—Regulations 72-305 and -307[7]—do not reference each other and are authorized by different enabling acts. In the absence of statutory authorization to apply the two acts and their corresponding regulations to each other, the regulations of the Pollution Control Act do not apply to the Stormwater Act or its regulations. Accordingly, we conclude, as a matter of law, the case-by-case modification of regulatory requirements under the Stormwater Act cannot be invoked because of an alleged violation of the Pollution Control Act's regulations. Furthermore, a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act. Therefore, Regulation 72-305(B)(4) does not require the denial of a stormwater permit on the ground that the antidegradation rules have been violated because the regulations of the Pollution Control Act do not apply to the Stormwater Act.

CONCLUSION

Based on the foregoing analysis, we affirm as modified the decision to grant a stormwater permit to Wal-Mart.

AFFIRMED AS MODIFIED.

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

---

[6] See S.C. Code Ann. §§ 48-1-10 to -350.

[7] See S.C. Code Ann. §§ 48-14-10 to -170.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Creuncle D. Suber, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Newberry County
William P. Keesley, Circuit Court Judge

Opinion No. 26249
Submitted December 7, 2006 – Filed January 22, 2007

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, all of Columbia, for Petitioner.

Robert M. Pachak, of South Carolina Offense of Appellate Defense, of Columbia, for Respondent.

JUSTICE BURNETT: We granted the State's petition for a writ of certiorari to review the grant of post-conviction relief (PCR) to Creuncle D. Suber (Respondent). We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On October 9, 2002, Respondent drove away from a convenience store in Newberry, South Carolina without paying for gasoline. The store clerk reported the incident, including a description of the car and of Respondent, to the county sheriff's department. Lieutenant Wesley Boland responded to the call. When he saw Respondent driving a car matching the store clerk's description, he activated his blue lights and siren, but Respondent did not stop. Respondent continued driving until he entered a dead-end dirt road. At the dead end, Respondent turned around in a driveway, and Lieutenant Boland attempted to block Respondent from exiting the driveway. According to Lieutenant Boland, Respondent collided with the officer's vehicle, and this collision provided Respondent enough space to maneuver out of the driveway and continue his escape. Respondent subsequently wrecked his car and continued his flight on foot. Lieutenant Boland pursued Respondent, a struggle ensued, and Respondent was eventually apprehended.

Respondent pled guilty to failure to stop for a blue light and no contest to assault and battery with intent to kill (ABWIK) and to resisting arrest with a deadly weapon. He was sentenced to fourteen years' imprisonment for ABWIK, ten years for resisting arrest with a deadly weapon, and three years for failing to stop, to be served concurrently.

Respondent filed this application for PCR, alleging plea counsel was ineffective for failing to advise him that assault with intent to kill (AWIK) was a lesser-included offense of ABWIK. At the PCR hearing, Respondent testified Lieutenant Boland hit his car in an attempt to stop Respondent from fleeing, and he testified he never attempted to hit the officer with his car. Respondent also submitted into evidence pictures of his car after the incident, which Respondent alleged showed the officer hit his car. He further testified plea counsel advised him there were no lesser-included offenses to any of his

charges, but if he had known a jury could consider AWIK, he would have insisted on proceeding to trial rather than pleading guilty.

Also at the PCR hearing, plea counsel testified although there were extensive plea negotiations, the negotiations failed and he proceeded to prepare for trial. Plea counsel testified he was prepared for trial, but on the day of trial, Respondent chose to plead guilty and no contest to the charges. He also testified he was likely surprised by Respondent's decision to plead guilty on the day of trial because he had told the plea judge he had stayed up late preparing for trial. Plea counsel conceded he did not discuss AWIK as a lesser-included offense of ABWIK with Respondent. Plea counsel denied he told Respondent there were no lesser-included offenses for any of the charges because plea counsel alleged they never discussed lesser-included offenses. He also testified if Respondent had gone to trial and the evidence presented at trial required the jury to be instructed on a lesser-included offense, he would have requested such a charge.

The PCR judge found plea counsel was deficient for failing to advise Respondent of lesser-included offenses including AWIK. The PCR judge also found Respondent was prejudiced by this deficiency and granted Respondent a new trial.

ISSUE

Did the PCR judge err in granting Respondent a new trial based on ineffective assistance of counsel?

STANDARD OF REVIEW

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539,

541, 402 S.E.2d 484, 485 (1991). Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. Caprood, 338 S.C. at 109-10, 525 S.E.2d at 517. This Court will reverse the PCR judge's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004).

LAW/ANALYSIS

The State argues the PCR judge erred in finding plea counsel's performance was deficient. The State contends plea counsel rendered reasonably effective assistance to Respondent despite the fact plea counsel did not advise Respondent that AWIK was a lesser-included offense of ABWIK because AWIK was not a viable lesser-included offense under these facts and circumstances. We agree.

ABWIK is an unlawful act of violent nature to the person of another with malice aforethought, either express or implied. ABWIK is commonly described as the following: if the victim had died from the injury, the defendant would have been guilty of murder. State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000). In comparison, the elements of AWIK are: (1) an unlawful attempt; (2) to commit a violent injury; (3) to the person of another; (4) with malicious intent; and (5) accompanied by the present ability

to complete the act. State v. Burton, 356 S.C 259, 264, 589 S.E.2d 6, 8 (2003).

The trial court is required to charge a jury on a lesser-included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996). However, the trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense. State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

Respondent testified he did not attempt to nor did he hit Lieutenant Boland's vehicle. Further, Respondent testified he did not intend to harm or kill Lieutenant Boland, but he intended to flee from the officer. Given Respondent's testimony, he did not have the requisite intent to satisfy the offense of AWIK. Instead, Respondent's testimony indicates a jury may have found him not guilty of ABWIK. Furthermore, the evidence indicates there was a collision, and although there may have been a jury issue as to which person struck the other's vehicle, there was no dispute that a battery occurred. This evidence is insufficient to suggest Respondent was only guilty of AWIK. See generally State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976) ("[I]t is not error to refuse to submit a lesser included offense unless there is testimony tending to show that the defendant is only guilty of the lesser offense."). Therefore, plea counsel was not deficient for failing to advise Respondent of AWIK because Respondent failed to present any evidence that would have entitled him to a charge for AWIK under these facts. Compare Kerrigan v. State, 304 S.C. 561, 563-64, 406 S.E.2d 160, 161-62 (1991) (finding there was evidence in the record that PCR applicant was only guilty of lesser-included offense and holding PCR counsel was ineffective in failing to advise applicant of lesser offense before pleading guilty); see generally Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005) (reversing grant of relief where PCR judge found ineffective assistance of counsel for failure to request jury charges on lesser-included offenses because there was no evidence in the record to support jury charges for lesser-included offenses); Magazine v. State, 361 S.C. 610, 606 S.E.2d 761

(2004) (reversing PCR judge's grant of relief where the record was devoid of any evidence warranting a jury charge on the lesser offense).

CONCLUSION

No evidence of probative value supports the PCR judge's finding that plea counsel was deficient under these facts. Accordingly, we reverse the PCR judge's grant of a new trial.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William R. Talley, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26250
Submitted September 20, 2006 – Filed January 22, 2007

REVERSED

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Salley W. Elliott; Assistant Attorney General Christopher L. Newton, all of Columbia, for Petitioner.

Walter H. Hinton, II, of Nelson Mullins Riley & Scarborough, LLP, of Greenville; and Aisha S. Lusk, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent.

JUSTICE BURNETT: This is a post-conviction relief (PCR) case. The PCR judge granted relief to William R. Talley (Respondent). We granted the State's petition for writ of certiorari and reverse.

FACTUAL/PROCEDURAL BACKGROUND

In 1995, Respondent pled guilty to possession of drug paraphernalia in magistrate's court and paid a $200 fine. In 1996, he pled guilty to criminal domestic violence also in magistrate's court. Respondent received a $940 fine and was sentenced to thirty days' imprisonment, immediately suspended on the condition of six months' good behavior. In 2003, Respondent filed this PCR application to set aside the two misdemeanor convictions alleging his federal constitutional right to counsel had been violated because he was not represented by counsel in either conviction.

Respondent is currently serving a 97-month federal sentence for conspiracy to possess with intent to distribute and distribution of cocaine and cocaine base. He was assessed two criminal history points for the two state convictions under the United States Sentencing Guidelines. Respondent contends his federal sentence was enhanced by approximately ten months because of these criminal history points.

The State moved to summarily dismiss Respondent's PCR application for failure to file within the statute of limitations pursuant to S.C. Code Ann. § 17-27-45(A) (2003).[1] Respondent argued his PCR application was timely

[1] Section 17-27-45(A) provides:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

filed under S.C. Code Ann. § 17-27-45(B)[2] because it was filed within one year of Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002).

The PCR judge denied the motion to dismiss and held Respondent had timely filed his PCR application under § 17-27-45(B) because Shelton created a new rule that must be applied retroactively on collateral review. The PCR judge determined, under Shelton, the constitutional right to counsel applied to Respondent's convictions and Respondent had not waived the right. The PCR judge concluded Respondent's right to counsel had been violated in both convictions and vacated Respondent's convictions.

ISSUE

Did the PCR judge err in applying Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), retroactively on collateral review to Respondent's convictions?

In Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996), the Court held that all defendants convicted prior to July 1, 1995, the effective date of § 17-27-45, must be allowed until July 1, 1996, to file a PCR application.

[2] Section 17-27-45(B) provides:

> When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

STANDARD OF REVIEW

A PCR applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. *Id.* at 109-10, 525 S.E.2d at 517. The Court will reverse the PCR judge's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

The State argues the PCR judge erred in applying Shelton retroactively on collateral review to Respondent's convictions. We conclude the PCR judge correctly determined Shelton must be applied retroactively on collateral review, but erroneously applied Shelton to Respondent's convictions.

The State urges us to apply both Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994), to determine whether Shelton should be applied retroactively on collateral review. We disagree. In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 178, 110 S.Ct. 2323, 2330, 110 L.Ed.2d 148, 159 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions."); see also, *e.g.*, State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006) (applying Jones in determining State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), should be applied retroactively); State v. Hill, 361 S.C. 297, 604 S.E.2d 696 (2004) (applying Jones in determining State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), should be applied retroactively); Gibson v. State, 355 S.C. 429, 586 S.E.2d 119 (2003) (applying Teague to

determine whether Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), should be applied retroactively on collateral review).

In general, the question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision. Teague, 489 U.S. at 300, 109 S.Ct. at 1070, 103 L.Ed.2d at 349. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301, 109 S.Ct. at 1070, 103 L.Ed.2d at 349 (internal citations omitted) (emphasis in original).

In Shelton, the Supreme Court held the constitutional right to counsel extends to a defendant who receives a "suspended sentence that may 'end up in the actual deprivation of a person's liberty.'" 535 U.S. at 658, 122 S.Ct. at 1767, 152 L.Ed.2d at 895 (citing Argersinger v. Hamlin, 407 U.S. 25, 40, 92 S.Ct. 2006, 2014, 32 L.Ed.2d 530, 540 (1972)).[3] The Supreme Court explained:

> A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point "result[s] in imprisonment. . .;" it "ends up in the actual deprivation of a person's liberty."

Shelton, 535 U.S. at 662, 122 S.Ct. at 1770, 152 L.Ed.2d at 898 (citing Nichols v. United States, 511 U.S. 738, 746, 114 S.Ct. 1921, 1927, 128 L.Ed.2d 745, 754 (1994) and Argersinger, 407 U.S. at 40, 92 S.Ct. at 2014, 32 L.Ed.2d at 540).

[3] The defendant in Shelton was convicted of a misdemeanor; was sentenced to thirty days' imprisonment, which was immediately suspended; and was placed on unsupervised probation for two years.

The Supreme Court asserted that two prior decisions, Argersinger and Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), controlled its decision in Shelton. 535 U.S. at 657, 122 S.Ct. at 1767, 152 L.Ed.2d at 895. In Argersinger the Supreme Court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." 407 U.S. at 37, 92 S.Ct. at 2012, 32 L.Ed.2d at 538 (clarifying the scope of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), in which the Supreme Court held that the Sixth Amendment's guarantee of the right of an indigent defendant to appointed counsel applies to state criminal prosecutions through the Fourteenth Amendment). Then in Scott, the Supreme Court noted "the central premise of Argersinger – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." 440 U.S. at 373, 99 S.Ct. at 1162, 59 L.Ed.2d at 389. The Supreme Court found the constitutional right to counsel does not apply when a prison term is an authorized punishment but not actually imposed. *Id.* at 369, 99 S.Ct. at 1160, 59 L.Ed.2d at 386.

Although the Supreme Court in Shelton found the Argersinger-Scott "actual imprisonment" rule controlling, "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under Teague." Butler v. McKellar, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347, 356 (1990). Precedent prior to Shelton established that a defendant was entitled to the constitutional right to counsel when the defendant received a sentence "that end[s] up in the actual deprivation of a person's liberty." Argersinger, 407 U.S. at 40, 92 S.Ct. at 2014, 32 L.Ed.2d at 540. However, the Shelton decision required counsel to be appointed when an indigent defendant received a sentence that "*may* end up in the actual deprivation of a person's liberty." Shelton, 535 U.S. at 658, 122 S.Ct. at 1767, 152 L.Ed.2d 895 (internal quotation omitted) (emphasis added). Shelton's extension of the right to counsel was a new rule under Teague because it was not dictated by precedent existing at the time of Respondent's convictions. See also Howard

v. United States, 374 F.3d 1068, 1074-77 (11th Cir. 2004) (finding Shelton announced a new rule under Teague).

Generally, new procedural rules should be not applied retroactively to cases on collateral review, unless the new rule falls within one of two exceptions to the general rule. Teague, 489 U.S. at 305, 310, 109 S.Ct. at 1072, 103 L.Ed.2d at 352, 356. The first exception is when the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311, 109 S.Ct. at 1075, 103 L.Ed.2d at 356 (internal quotation omitted). The second exception is when the rule "requires the observance of those procedures that…are implicit in the concept of ordered liberty." *Id.* at 311, 109 S.Ct. at 1076, 103 L.Ed.2d at 356 (internal quotations omitted). The second exception is "reserved for watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding. *Id.*

The first exception is not applicable to the present situation. The Supreme Court has repeatedly cited Gideon as illustrative of the type of new rule which falls within the second exception in Teague. See, *e.g.*, Beard v. Banks, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (recognizing the right to counsel announced in Gideon as an example of the second Teague exception); Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (same); Teague, 489 U.S. at 311-312, 109 S.Ct. at 1075-76, 103 L.Ed.2d at 357 (same). The Supreme Court also has applied each extension of the constitutional right to counsel retroactively to collateral proceedings. We conclude the new rule announced by Shelton is a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding. See Howard, 374 F.3d at 1077-80 (collecting authority which supports retroactive application of every extension of right to counsel on collateral review but noting these decisions were decided prior to Teague and concluding Shelton fell within the second Teague exception because of "the sheer importance of the right to counsel").

Because Shelton applies retroactively on collateral review, the PCR judge correctly determined S.C. Code Ann. § 17-27-45(B) is the applicable

statute of limitations. Shelton was decided on May 20, 2002, and Respondent filed his PCR application on March 6, 2003. Respondent's PCR application was timely filed under § 17-27-45(B).

Although Respondent timely filed his PCR application and Shelton applies retroactively on collateral review, we conclude the rule announced in Shelton does not apply to Respondent's convictions. Respondent only paid a fine for his conviction in 1995. A fine for an uncounseled misdemeanor conviction is valid, and Respondent did not have a constitutional right to counsel for this conviction. See Scott, 440 U.S. at 373-74, 99 S.Ct. at 1162, 59 L.Ed.2d at 389. Accordingly, the PCR judge erred in vacating the 1995 conviction.

Respondent received thirty days' imprisonment, which was immediately suspended and conditioned on six months' good behavior, and was fined $940 for his 1996 conviction. In South Carolina, a magistrate cannot lawfully place a person on probation. A magistrate can, however, lawfully suspend a sentence and impose conditions. See S.C. Code Ann. § 22-3-800 (Supp. 2005) ("Notwithstanding the limitations of Sections 17-25-100 and 24-21-410, after a conviction or plea for an offense within a magistrate's jurisdiction the magistrate at the time of sentence may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate. . . .Nothing in this section may be construed to give a magistrate the right to place a person on probation."). Although a magistrate has the statutory authorization to suspend sentences and impose conditional sentences, we note the enforcement of substantive conditions as part of a suspended sentence may implicate a defendant's right to counsel as required by Argersinger, Scott, and Shelton. In this case, the magistrate's condition of six months' good behavior was effectively probation, and accordingly, the probation was an illegal sentence. We vacate that portion of Respondent's sentence for his 1996 conviction.[4]

[4] The dissent relies on dicta in Richards v. Crump, 260 S.C. 133, 194 S.E.2d 575 (1973), to allege that a suspended sentence conditioned on good behavior is independent of probation. The issue in Richards was whether a magistrate could lawfully impose consecutive sentences, and in that context,

Therefore, Respondent lawfully received a prison sentence that was immediately suspended and a fine for his 1996 conviction. If a defendant receives only an immediately suspended sentence without probation, there is absolutely no possibility the defendant will ever be incarcerated for the underlying conviction. As such, the prison term for the underlying conviction will never be triggered, and the defendant has not received a sentence that "may 'end up in the actual deprivation of a person's liberty.'" Shelton, 535 U.S. at 658, 122 S.Ct. at 1767, 152 L.Ed.2d at 895 (citing Argersinger, 407 U.S. at 40, 92 S.Ct. at 2014, 32 L.Ed.2d at 540). Because Respondent received an immediately suspended sentence and a fine, we conclude the federal constitutional right to counsel did not apply to Respondent's conviction in 1996 and the PCR judge erroneously ruled Respondent's conviction was invalid under Shelton.

CONCLUSION

We reverse the PCR judge's decision to vacate Respondent's convictions and uphold those convictions. We need not reach the remaining issue on appeal. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

REVERSED.

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

---

the Richards Court differentiated between consecutive and suspended sentences.

JUSTICE PLEICONES: I agree with the majority that Alabama v. Shelton, 535 U.S. 654 (2002) should be applied retroactively, and I agree that decision affords Respondent no relief on his 1995 conviction. I disagree, however, with the majority's conclusion that the 1996 sentence was, at least in part, illegal and would affirm the grant of post-conviction relief (PCR) to Respondent on that conviction.

The majority holds, and I agree, that a magistrate cannot lawfully place a criminal defendant on probation. See S.C. Code Ann. § 22-3-800 (1989) ("Nothing in this section may be construed to give a magistrate the right to place a person on probation"). Here, the magistrate did not place Respondent on probation but instead suspended his sentence, conditioned on six months good behavior. Such a suspension is explicitly authorized by § 22-3-800: "[T]he magistrate at the time of sentence may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate…." A suspended sentence conditioned upon good behavior "is independent of the Probation and Parole Statutes and suspension of sentences therein provided…." Richards v. Crump, 260 S.C. 133, 194 S.E.2d 575 (1973).[5] I find nothing illegal about the 1996 sentence[6] and conclude that it was obtained in violation of the rule in Alabama v. Shelton.

I therefore concur in part and dissent in part.

---

[5] I note that in Richards the parties conceded that a magistrate could not suspend sentences and thus it does not support the majority's holding that a magistrate lacks this authority. I note as well that the opinion makes no mention of § 43-67.1, the predecessor to § 22-3-800 then in effect.

[6] I n my view, if in fact the original sentence were unlawful, then the suspension would be a nullity and Respondent would be required to serve the original thirty day sentence. As such, the 1996 conviction was obtained in violation of Argesinger v. Hamlin, 407 U.S. 25 (1972), and PCR was properly granted.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Beth Franklin and Julianne Franklin, Petitioners,

v.

Ernest B. Chavis, Respondent.

ORIGINAL JURISDICTION

Opinion No. 26251
Heard October 31, 2006 – Filed January 22, 2007

RELIEF GRANTED IN PART

Adele J. Pope, of Law Offices of Adele J. Pope, PC, of Columbia, for petitioners.

Thomas E. Lydon, of McAngus Goudelock & Courie, LLC, of Columbia, for respondent.

JUSTICE MOORE: We accepted this case in our original jurisdiction to consider whether respondent Ernest Chavis's involvement in drafting a will and other documents for decedent Annie Belle Weiss constituted the unauthorized practice of law.

FACTS

Petitioners, who are Ms. Weiss's grandnieces, commenced the underlying action[1] contesting her will on grounds of undue influence and lack of capacity. Ms. Weiss was ninety-one years old and in the hospital when she signed this will on July 31, 2004. Petitioners claim Michael Lehman, Ms. Weiss's nephew by marriage, took advantage of her condition to influence her to make this will leaving 60% of her estate[2] to Lehman and only 10% to each of Ms. Weiss's three grandnieces and their mother, Lynn Franklin.[3] Respondent, a former neighbor of Ms. Weiss, drafted this will. The will names respondent as personal representative of Ms. Weiss's estate but he is not a beneficiary.[4]

Respondent also drafted a power of attorney that Ms. Weiss signed along with the July 31 will. This document names respondent as her attorney-in-fact. Respondent used this power of attorney before Ms. Weiss's death to close a real estate transaction on her behalf. Ms. Weiss died on September 27, 2004.

The third document in question is a Renunciation of Administration regarding the estate of Ms. Weiss's daughter, Sara Crossman, who died in May 2004. Ms. Weiss signed this document on September 14, 2004, relinquishing her right to act as personal

---

[1]The action was commenced in probate court and removed by consent to circuit court.

[2]The net worth of the estate is $897,890.

[3]Lynn Franklin is the daughter of Ms. Weiss's sister.

[4]Only a month earlier, on June 25th, Ms. Weiss signed a will prepared by her lawyer that names Lynn Franklin as personal representative and Lehman as the alternate. This will was more favorable to petitioners.

representative for Sara's estate and nominating respondent to act in that capacity. Ms. Weiss also signed a waiver of bond form for Sara's estate enabling respondent to serve without posting bond.

The action before us seeks a declaration that respondent engaged in the unauthorized practice of law by drafting the July 31 will, the power of attorney, and the two probate forms; a declaration that all these documents are void; an injunction; and restitution. The record is replete with claims of misconduct that are relevant only to issues pending in the underlying action regarding undue influence and lack of capacity. We limit the facts here to those relevant to the claim that respondent engaged in the unauthorized practice of law.

ISSUES

1. Did respondent engage in the unauthorized practice of law?

2. What relief is appropriate?

DISCUSSION

1. Unauthorized practice of law

Petitioners assert respondent engaged in the practice of law by giving legal advice and preparing the above-mentioned legal documents on Ms. Weiss's behalf. Respondent contends he acted as a mere scrivener.

a. Drafting of July 31 will

Respondent testified that he visited Ms. Weiss socially at her home on July 20, 2004. Respondent is an insurance agent by trade and previously had business dealings with Ms. Weiss. During this visit, Ms. Weiss asked respondent, "Can you help me make a will?" Respondent agreed to help her with a simple will. Ms. Weiss told him she wanted "somebody objective" and she directed respondent as to how she wanted her property divided. Respondent used a "Quicken

lawyer disk" to generate a generic will on his home computer and he filled in the blanks. He brought the will to Ms. Weiss on July 31 when he went to visit her in the hospital and she signed it.

The preparation of legal documents constitutes the practice of law when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law. State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 578 (1995). Even the preparation of standard forms that require no creative drafting may constitute the practice of law if one acts as more than a mere scrivener. *See* State v. Buyers Service Co., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). The purpose of prohibiting the unauthorized practice of law is to protect the public from incompetence in the preparation of legal documents and prevent harm resulting from inaccurate legal advice. Housing Auth. of City of Charleston v. Key, 352 S.C. 26, 572 S.E.2d 284 (2002); *see also* In re: Baker, 85 A.2d 505, 514 (N.J. 1951) ("The amateur at law is as dangerous to the community as an amateur surgeon . . . .").

The novel question here is whether respondent's actions in filling in the blanks in a computer-generated generic will constitute the practice of law. Respondent selected the will form, filled in the information given by Ms. Weiss, and arranged the execution of the will at the hospital. Although these facts are not in themselves conclusive, the omission of facts indicating Ms. Weiss's involvement is significant. There is no evidence Ms. Weiss reviewed the will once it was typed. The will was not typed in her presence and although respondent relates the details of what Ms. Weiss told him to do, there is no indication he contemporaneously recorded her instructions and then simply transferred the information to the form.

We construe the role of "scrivener" in this context to mean someone who does nothing more than record verbatim what the decedent says. We conclude respondent's actions in drafting Ms.

Weiss's will exceeded those of a mere scrivener and he engaged in the unauthorized practice of law.[5]

b. Drafting power of attorney

Respondent drafted a document entitled "General Power of Attorney" for Ms. Weiss naming respondent as her attorney-in-fact allowing him on her behalf to: 1) open, maintain, or close financial accounts including access to safe deposit boxes; 2) sell property; 3) purchase insurance; 4) collect debts and settle claims; 5) enter contracts; 6) exercise stock rights; 7) maintain or operate business; 8) employ professional and business assistance; 9) sell, lease, mortgage and other acts regarding real estate; 10) prepare, sign, and file documents.

Respondent testified at his deposition that he drafted the power of attorney around July 20 because Ms. Weiss asked him to represent her regarding the sale of some of her real estate. Ms. Weiss signed the power of attorney at the hospital on July 31. It was filed on August 4. Respondent used the power of attorney to close the sale of Ms. Weiss's real estate on August 26, about a month before her death.

---

[5]The fact that respondent received no compensation is irrelevant. Housing Auth. of City of Charleston v. Key, 352 S.C. 26, 572 S.E.2d 284 (2002). One court has noted that a lack of compensation in fact makes the situation worse.

> Indeed, the public may well be in greater need of protection from the unauthorized practice of law where it seems to be done without charge than where a charge is openly made for the services. In the former situation, the public, through natural cupidity, are the more readily attracted to something which appears to be a "giveaway" project or a chance to obtain "something for nothing."

Grievance Committee of the Bar of Fairfield County v. Dacey, 222 A.2d 339, 351 (Conn. 1966).

There are no details regarding respondent's drafting of this document. It uses legal phrasing with two pages of text and is not a simple form with filled-in blanks. The document itself confers wide-ranging legal rights and would clearly require legal advice in its preparation. We conclude respondent engaged in the practice of law in drafting this document.

c. Probate forms

The Renunciation of Right to Administration and the Statement of Agreement to Waive Bond are probate court forms with handwritten information filled in the blanks. While these forms do have legal implications, they are straight-forward and are provided to the public by the court. These simple forms are clearly distinguishable from the will and power of attorney discussed above. Respondent basically inserted names, addresses, and dates. There is no evidence respondent gave legal advice to Ms. Weiss regarding these forms. We find there is no factual support for the claim that respondent engaged in the practice of law by filling out these forms. *See* Shortz v. Farrell, 193 A. 20 (Pa. 1937) (filling in simple forms provided by tribunal not unauthorized practice of law).

2. Relief

Petitioners ask this Court to enjoin respondent from the unauthorized practice of law. Respondent states that he has no intention of assisting others in any matters related to wills or powers of attorney and therefore he does not object to an injunction.

Petitioners further assert that because respondent engaged in the unauthorized practice of law in drafting Ms. Weiss's will, he should be removed as personal representative. We decline to order petitioner's

removal based on the record before us[6] but conclude respondent should receive no fee for his services as personal representative of the Weiss estate. In Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002), we addressed the activities of public insurance adjusters and determined that those functions constituting the unauthorized practice of law should not be compensated. Here, although respondent was not compensated for drafting the will, he is entitled to a statutory amount of compensation up to 5% of the appraised value of the estate for his services as personal representative. S.C. Code Ann. § 62-3-719 (Supp. 2005). Respondent's entitlement to a fee as personal representative flows directly from his unauthorized practice of law in drafting a will naming himself as personal representative. Accordingly, respondent shall not receive any fee as personal representative of the Weiss estate and shall disgorge any fee received thus far.

Petitioners also complain that respondent is using estate funds to defend the action below which challenges the will on the ground of undue influence. This is a legitimate use of estate funds under S.C. Code Ann. § 62-3-720 (1987) which allows for the expenses of estate litigation to be paid by the estate. The lower court may determine that respondent should be liable for these expenses depending upon its findings in the underlying action.

Petitioners contend the will drafted by respondent should be declared void. We disagree. The claims of undue influence and lack of capacity, which would invalidate Ms. Weiss's will, are issues to be resolved in the underlying action. If the July 31 will was in fact drafted pursuant to Ms. Weiss's true wishes, it should not be invalidated simply because it was drafted by a nonlawyer. *Accord* In re: Peterson's Estate, 42 N.W.2d 59 (Minn. 1950) (refusing to void a will whose validity was challenged on the ground it was drafted by a nonlawyer

---

[6]Removal for cause is provided by statute under S.C. Code Ann. § 62-3-611 (1987), a remedy petitioners are free to request in the underlying action.

because testator should not be penalized by having his will declared void).[7]

Finally, petitioners ask us to order restitution for alleged financial missteps by respondent in managing the Weiss and Crossman assets. There is no private right of action in South Carolina for the unauthorized practice of law. Linder v. Ins. Claims Consultants, Inc., *supra.* Petitioners' claim for restitution is based on an alleged breach of fiduciary duty and is not appropriate relief in an action based on the unauthorized practice of law.

RELIEF GRANTED IN PART.

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

[7]Regarding the power of attorney, it is no longer valid since Ms. Weiss is deceased. Further, petitioners do not contest the real estate transaction accomplished pursuant to the power of attorney and there is nothing to be achieved by voiding the power of attorney now.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John New, Appellant.

Appeal from Lee County
Howard P. King, Circuit Court Judge

Opinion No. 26252
Heard November 15, 2006 – Filed January 22, 2007

AFFIRMED

Appellate Defender Eleanor Duffy Cleary, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor C. Kelly Jackson, of Sumter, for respondent.

JUSTICE MOORE: Appellant John New was convicted of two counts of hostage-taking and one count of unlawfully carrying a weapon while an inmate. He was sentenced consecutively to two life sentences without parole and ten years. We affirm.

FACTS

The charges stemmed from a hostage situation at Lee Correctional Institute which occurred on September 8, 1999. Employees Janie Mathis and Jane Gardner were held in an administrative office after appellant and another inmate, Wesley Floyd, burst in on them. Appellant put a knife to Ms. Mathis's throat and threatened to harm her unless the building was cleared immediately. He demanded that pizza be delivered and said he wanted to speak with the warden. After several hours, negotiators were finally able to convince the inmates to release their hostages unharmed. Both victims testified that appellant was the decision-maker and in control of the situation, and that only appellant had a weapon.

Appellant testified to the contrary that Floyd was the leader and appellant had no choice but to do as Floyd directed. Floyd, a convicted murderer, had threatened appellant's life several times because appellant was indebted to Floyd for drugs. On the day in question, Floyd came to appellant's cell and told him what they were going to do. Appellant was afraid for his life because Floyd carried a razor blade in his mouth.[1] Based on the evidence, the trial judge gave a charge on duress.

ISSUE

Did the trial judge err in charging that appellant had the burden of proving his defense of duress by a preponderance of the evidence?

---

[1]At his first trial on these charges, appellant blamed a different inmate and testified that Floyd was his friend. He claimed here that he lied because Floyd was present at the first trial.

DISCUSSION

Over appellant's objection, the trial judge charged it was appellant's burden to prove his defense of duress by a preponderance of the evidence. Appellant contends that, based on our holding in State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2001), the State should have the burden of disproving duress. In Addison we held in the context of self-defense that the defendant is entitled to a charge, if requested, that the State bears the burden of disproving self-defense beyond a reasonable doubt.[2] Appellant argues the same rule should apply here.

State courts differ on the issue whether the State is required to disprove duress beyond a reasonable doubt;[3] however, the United States Supreme Court has recently held that due process does not require such a charge. Dixon v. United States, ___ U.S. ___ , 126 S.Ct. 2437 (2006). In Dixon, the Court reasoned that the prosecution need not bear the burden of disproving duress beyond a reasonable doubt because "the existence of duress normally does not controvert any of the elements of the offense itself." 126 S.Ct. at 2441. The Court noted that even though the defense of duress allows the defendant to avoid criminal liability, the crime was still knowingly committed. Dixon resolved a conflict among the federal courts reflecting the widespread disagreement, as noted by one court, on the "philosophical" question regarding whether duress negates the *mens rea* of the crime or whether it simply excuses the crime because it is motivated by self-preservation. *See* United States v. Mitchell, 725 F.2d 832 (2d Cir. 1983).

---

[2]The failure to give such a charge is not cured by a general charge that the State bears the burden of proving the defendant's guilt beyond a reasonable doubt. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002).

[3]*Compare* State v. Fuller, 506 A.2d 556 (Conn. 1986); State v. B.H., 834 A.2d 1063 (N.J. 2003); State v. Culp, 900 S.W.2d 707 (Tenn. App. 1994) (State has burden of disproving duress) *and* State v. Jeffrey, 50 P.3d 861 (Ariz. 2003); State v. Riker, 869 P.2d 43 (Wash. 1994); Moes v. State, 284 N.W.2d 66 (Wis. 1979) (State does not have burden of disproving duress).

We find the rationale of Dixon persuasive. Duress excuses the crime but does not negate any element of the offense. *See* State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (duress does not negate element of malice in murder charge); State v. Robinson, 294 S.C. 120, 363 S.E.2d 104 (1987) (duress envisions a third person compelling another to commit a crime). Self-defense, on the other hand, goes to an element of the crime. *See* State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003) (the "no fault" element of self-defense opposes intent element of mutual combat); State v. Merriman, 34 S.C. 16, 12 S.E. 619, 622 (1891) (self-defense negates element of malice). Accordingly, the fact that the State has the burden of disproving self-defense beyond a reasonable doubt does not compel the conclusion that the same applies to the defense of duress.

Generally, affirmative defenses must be established by a preponderance of the evidence. State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975). We hold the trial judge properly charged the jury that appellant had the burden to prove his defense of duress by a preponderance of the evidence.

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Arnal, Appellant,

v.

Laura Lawton Fraser, Respondent.

Appeal From Beaufort County
Judy C. Bridges, Family Court Judge
Wayne M. Creech, Family Court Judge

Opinion No. 26253
Submitted December 7, 2006 – Filed January 22, 2007

AFFIRMED IN PART; REVERSED IN PART

David Emil Arnal, of Marietta, Georgia, pro se.

Donald B. Clark, Susan C. Rosen, and Robert N. Rosen, all of Rosen Law Firm, LLC, of Charleston, for Respondent.

Ralph E. Tupper, of Tupper Grimsley, Dean, PA, of Beaufort, for Guardian Ad Litem.

PER CURIAM: We certified David Arnal's (Father's) four appeals pursuant to Rule 204(b), SCACR, and consolidated them for briefing

purposes. Father raises six issues arising out of four family court orders. We affirm in part and reverse in part.

FACTS

Father and Laura Lawton Fraser (Mother) were divorced by order of the family court on October 17, 2001. The amended final order awarded custody of the parties' minor child, Samuel, to Mother, granted visitation to Father, required Father to pay child support, divided marital property, and addressed all other issues between the parties.

Father and Mother cross-appealed a total of sixteen issues arising out of the amended final order, and the Court of Appeals resolved these issues in Arnal v. Arnal, 363 S.C. 268, 609 S.E.2d 821 (Ct. App. 2005). Mother petitioned this Court, and we granted certiorari to address five issues from the Court of Appeals' decision. This Court affirmed the Court of Appeals with modification in Arnal v. Arnal, Op. No. 26215 (S.C. Sup. Ct. filed October 23, 2006) (Shearouse Adv. Sh. No. 40 at 27) ("first appeal").

While the first appeal was pending, Father filed the current action (Case No. 2003-DR-07-183) in the Beaufort County family court on February 10, 2003. In his complaint, Father requested modification of his child support obligation and asked for more control over health-care decisions for Samuel, who has Down's syndrome.

After this action was filed in February 2003, numerous hearings have been held to address emergency motions and rule to show cause actions filed by both parties. The four appealed orders stem from these hearings.

The first order suspended Father's overnight visitation upon Mother's motion. Mother alleged Father violated previous court orders[1] by failing to videotape the administration of medications to Samuel.

[1] The previous family court orders requiring videotaping were both issued while the first appeal was pending.

The second order addressed Mother's claim that Father failed to reimburse Samuel's uncovered medical expenses as required by the final divorce order. The family court found Father owed Mother for uncovered medical expenses previously incurred, and the court ordered both parents to pay in advance for language tutoring and other educational expenses.

In the third order, the family court found Father to be in contempt for (a) failing to provide proof of valid life insurance as required by the amended final order; (b) failing to comply with a prior order compelling discovery; and (c) failing to comply with prior orders requiring Father to videotape medicine administration. The court then sentenced Father to a period of incarceration not to exceed six months for each finding of contempt but allowed Father to purge these sentences by complying with the prior orders.

One of the conditions attached to Father's purging of his contempt sentence was, "If Father fails to provide the required video to Mother on any occasion within the following twelve (12) months after the issuance of this order, a warrant shall be issued for his arrest for failure to meet the conditions to purge the contempt." Father initially complied with the conditions for purging his contempt sentence and avoided incarceration.

The fourth order appealed by Father was the issuance of a bench warrant for contempt. Based upon affidavits by Mother and the guardian *ad litem* (GAL), the family court found that Father failed to comply with the provisions of the third order by not properly videotaping the medication administration within the twelve month period as required under the third order. The warrant has been stayed while this appeal was pending.

ISSUES

I. Should the current action (2003-DR-07-183) filed by Father, requesting child support modification and more control in Samuel's health-care decisions, be dismissed for lack of subject matter jurisdiction? If so, should the Court void and vacate all orders issued in this action?

II. Did the family court abuse its discretion by ordering Father to pay uncovered medical expenses as a result of Mother's rule to show cause actions to enforce the final divorce order, when Father claims such expenses were not proper, reasonable, or necessary?

III. Did the family court err by ordering Father to pay educational and other non-medical expenses?

IV. Did the family court abuse its discretion by terminating Father's overnight visitation?

V. Did the family court err in refusing to appoint a medical GAL for Samuel?

VI. Were the contempt sentence and requirements for purging in the third order, along with the subsequent order issuing a bench warrant for Father's arrest, an unconstitutional violation of Father's due process rights?

ANALYSIS

Issue I: Subject Matter Jurisdiction[2]

Both parties briefed the issue of subject matter jurisdiction by analyzing the Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §§ 20-7-782 to -830 (1985) ("UCCJA") and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2000) ("PKPA"). As discussed below, the jurisdictional issues in this case are governed by Rule 205, SCACR, and by Rule 225, SCACR.

Father contends that the UCCJA and the PKPA prohibit the Beaufort County family court from exercising subject matter jurisdiction over the current modification action. He argues that all orders should be voided and

[2] Father raises the issue of subject matter jurisdiction for the first time on appeal. Subject matter jurisdiction may be raised at any time, including on appeal. State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004).

vacated because, by the time this action was filed in February 2003, Father had moved to Georgia while Mother and Samuel lived in North Carolina. We disagree.

Both the PKPA and the UCCJA govern jurisdictional disputes between courts of different states when multiple states claim jurisdiction over a custody or child visitation dispute.[3] In this case, however, no other state is competing with South Carolina for jurisdiction, and the current action does not include a child custody dispute. Instead, both parties rely on a Court of Appeals decision which addressed subject matter jurisdiction under the PKPA and UCCJA in a situation similar to the present case, i.e. neither parents nor child resided in South Carolina and no other state was competing for jurisdiction. Widdicombe v. Tucker-Cales, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005). However, Widdicombe only addressed custody, whereas custody has never been an issue in this case or in the first appeal.

Neither the PKPA nor the UCCJA apply to the specific issues raised here. The jurisdictional issues in this case are governed by Rule 205 and by Rule 225, SCACR.

Rule 205, SCACR, provides the appellate court with exclusive jurisdiction over matters on appeal. The lower court may only proceed with matters not affected by the appeal. Rule 225(a), SCACR, in governing matters which are stayed while on appeal, provides:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters

[3] *See* 28 U.S.C. 1738A(a); S.C. Code Ann. § 20-7-788(a) ("A court of this State which is competent to decide *child custody matters* has jurisdiction to make a child custody determination by initial or modification decree if…") (emphasis added); Clay v. Burckle, 369 S.C. 651, 633 S.E.2d 173 (Ct. App. 2006) ("The PKPA and UCCJA govern the subject matter jurisdiction of state courts to rule in *interstate* custody disputes.") (emphasis added); Kirylik v. Kirylik, 292 S.C. 475, 477, 357 S.E.2d 449, 450 (1987) (stating that UCCJA was enacted to prevent conflicting custody decrees between different states).

> decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the trial judge, appellate court, or judge or justice thereof. **The lower court retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.**

(emphasis added). Under Rule 205 and the last sentence of the above-quoted portion of Rule 225, the lower court may not act or issue orders that affect an issue on appeal.[4] Under Rule 225, the lower court may act only to enforce matters not stayed by the appeal.

Because Father's payment of child support and medical expenses as required by the final divorce order were not stayed by the appeal,[5] the family court retained jurisdiction to enforce those payments. However, the family court did not have jurisdiction to *modify* matters in the final divorce order that were on appeal. Rule 205, SCACR; *See also* Wingate v. Wingate, 289 S.C. 574, 347 S.E.2d 878 (1986) (because alimony was an issue on appeal from the divorce decree, the Court had exclusive jurisdiction over the alimony issue, and the family court was without jurisdiction to change the amount of alimony during the pending appeal).

Accordingly, we cannot say that all orders in the present action are void for a lack of subject matter jurisdiction. Each contention made by Father must be analyzed to determine whether the family court's decision was affected by a matter on appeal or whether Mother simply sought to enforce the amended final order.

---

[4] A party can always seek a remand from an appellate court if the circumstances of the particular case require it.

[5] "Family court orders regarding a child or requiring payment of support for a spouse or child" are exceptions to the automatic stay. Rule 225(b)(6), SCACR.

Issue II: Uncovered Medical Expenses

In the final divorce order, Mother was given complete authority to make all decisions regarding Samuel's medical and educational needs. Father was required to pay his pro-rata share of 64.4% of the uncovered medical expenses. Because this payment was not stayed pursuant to Rule 225(b)(6), SCACR, Father was required to pay these medical expenses, and the family court retained jurisdiction to enforce this provision during the appeal.

Although the issue of apportioning medical expenses from the final divorce order was on appeal, Father did not seek to modify his obligation in the present case, and this dispute did not affect a matter on appeal. Instead, Father asked the family court to determine whether the medical expenses previously submitted by Mother were subject to the provisions of the final order. This issue could be addressed by the family court under Rule 205 and under Rule 225, SCACR.

Father contends that the order directing him to pay or reimburse Mother for uncovered medical expenses constituted an abuse of discretion. He argues that these medical expenses were not reasonable for several reasons and claims he should not have to pay for unconventional and unnecessary treatment. Father also argues that he should not have to pay medical expenses that are not submitted to insurance providers. We disagree.

After a hearing on the issue of medical expenses, the family court determined that the medical expenses were reasonable and proper under the final divorce order. Father offered numerous reasons why the expenses did not fall under the scope of the final order, and the family court disagreed and ordered Father to pay his required share. Although this Court has the authority to find facts in accordance with its own view of the preponderance of the evidence, we should not disregard the findings of the family court judge, who saw and heard the witnesses. Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999). The family court did not abuse its

discretion by finding Father's payment of the requested medical expenses to be enforceable under the final divorce order.

Issue III: Educational and Non-medical Expenses

The amended final order specifically declined to address educational expenses. Because these types of expenses were not dealt with in the final order, this matter was not affected by the appeal, and Rules 205 and 225, SCACR, would not prohibit the family court from exercising jurisdiction over this issue.

Father argues that the family court erred by requiring Father to pay his share of Samuel's educational expenses such as language and speech tutoring and early education training. We disagree.

The family court did not abuse its discretion by requiring both parents to split the costs for these expenses. The order required both parents to pay for language tutoring and therapist bills in advance, and the family court did not abuse its discretion in finding these expenses appropriate to Samuel's care.

Issue IV: Termination of Overnight Visitation

Father contends that the family court erred in terminating his overnight visitation for failing to meet the videotaping requirements mandated by the family court. We agree, due to the jurisdictional bar of Rule 205 and Rule 225, SCACR.

The final divorce order set very specific parameters for Father's visitation. Father appealed the portion of the final order to the Court of Appeals concerning summer and holiday visitation. Thus, the family court would not have jurisdiction to modify terms of visitation because the appellate court would have exclusive jurisdiction over the matter on appeal. [6]

[6] Although conditions of visitation and the grant of additional summer and holiday visitation may not appear to be the same matter being addressed on

The family court modified Father's visitation while the first appeal was pending. By first requiring Father to videotape the administration of medicine as a condition of his visitation, and then by suspending Father's overnight visitation for failure to comply with the videotaping conditions, the family court violated our appellate court rules by issuing orders that were affected by a matter on appeal. Therefore, the order that suspended overnight visitation was void for lack of jurisdiction.

Issue V: Medical GAL

Father argues the family court erred in refusing to appoint a medical GAL. We disagree.

The authority to appoint a GAL solely for medical determinations comes from S.C. Code Ann. § 20-7-1545 (Supp. 2005). That statute gives the family court absolute discretion in determining who will serve as a GAL. Furthermore, the family court may appoint a GAL without consent of both parties when "the court will likely not be fully informed about the facts of the case and there is a substantial dispute which necessitates a guardian ad litem." S.C. Code Ann. § 20-7-1545(A)(1).

Under S.C. Code Ann. § 20-7-1549 (Supp. 2005), the duties and responsibilities of a GAL already include authority to review medical records and the duty to conduct an independent, balanced, and impartial investigation of facts relevant to the situation of the child and the family. Accordingly, the failure of the family court to appoint a GAL strictly for medical advisement did not constitute an abuse of discretion.

---

appeal, the decisions both of the Court of Appeals and of this Court in the first appeal were impacted by the suspension of overnight visitation in deciding whether to award Father additional summer and Easter visitation. The Court of Appeals noted that Father had not been exercising overnight visitation in its opinion, while the suspension of overnight visitation came before this Court at oral argument during the first appeal.

Issue VI: Civil Contempt and Conditions of Purging

Father contends that the contempt sentence and purging provisions of the two orders by Judge Creech are unconstitutional violations of Father's rights. We believe the contempt sentence was improperly based on an order for which no jurisdiction existed under Rule 225, SCACR. Therefore, we reverse the finding of contempt, but we decline to address Father's constitutional arguments.

The finding of contempt against Father stems from his repeated failure to properly videotape the administration of Samuel's medicine. As previously discussed, the initial order requiring Father to videotape the giving of medicine is void for lack of jurisdiction because that order modified the terms of Father's visitation, an issue which was being appealed. Father cannot be held in contempt for violating an order which was void *ab initio* for a lack of jurisdiction. *See* Luthi v. Luthi, 297 S.C. 306, 376 S.E.2d 782 (Ct. App. 1989) (during husband's appeal of an equitable division award to former wife, the lower court's order that the monetary equitable division award to former wife was a properly enrolled money judgment was void for lack of jurisdiction; as a result, the subsequent order awarding interest on the judgment was also invalid).

Because the contempt issue can be resolved without reaching Father's due process claims, we decline to address the constitutional issues raised by Father. It is our firm policy to decline to rule on constitutional issues unless such a ruling is required. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001).

CONCLUSION

The four appealed orders in this case are not automatically void pursuant to the UCCJA and the PKPA. Our appellate court rules control whether the issues were properly before the family court while the first appeal was pending. We affirm the family court's order requiring Father to pay his share of medical expenses, and we affirm the order requiring both parents to share non-medical and educational expenses. We also affirm the

denial of Father's request for a medical GAL. Finally, we reverse the suspension of Father's overnight visitation, and we also reverse the finding of contempt for violating an order that was void for lack of jurisdiction.

AFFIRMED IN PART; REVERSED IN PART.

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

The Supreme Court of South Carolina

In the Matter of David Harold Hanna, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Donna F. Shetley, 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. Ms. Shetley shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Shetley 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 Donna F. Shetley, 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 Donna F. Shetley, 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 Ms. Shetley'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.

IT IS SO ORDERED.

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

Columbia, South Carolina

January 18, 2007

The Supreme Court of South Carolina

The State, Petitioner/Respondent,

v.

Kwasi Roosevelt Tuffour, Respondent/Petitioner.

ORDER

On October 4, 2006, we granted certiorari to review the decision of State v. Tuffour, 364 S.C. 497, 613 S.E.2d 174 (Ct. App. 2005). Subsequently, Tuffour pled guilty to a lesser-included offense and was sentenced to time served under the same indictment which was the subject of Tuffour's 2002 conviction and this appeal. Therefore, we dismiss the petitions for a writ of certiorari and vacate the Court of Appeals' opinion. Additionally, we vacate Tuffour's 2002 conviction, and vacate our prior order dated December 19, 2006.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 19, 2007