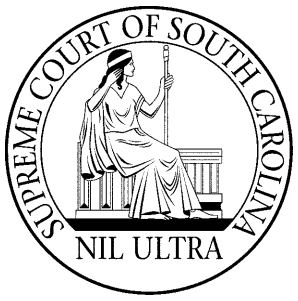

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 22, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Corrections, Respondent,

v.

Billy Joe Cartrette, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Jasper County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 27094
Submitted January 26, 2012 – Filed February 22, 2012

DISMISSED AS IMPROVIDENTLY GRANTED

Billy Joe Cartrette, of Ridgeland, Pro-se Petitioner.

Lake Eric Summers and Katherine Phillips, both of Malone, Thompson, Summers & Ott, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: We granted a writ of certiorari to review the court of appeals' decision in *South Carolina Department of Corrections v. Cartrette*, 387 S.C. 640, 694 S.E.2d 18 (Ct. App. 2010). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert L. Knight, Appellant,

v.

Charles P. Austin, Sr., in his capacity as Columbia City Manager, City of Columbia, and Board of Trustees of Firemen's Retirement and Pension Fund of the Columbia Fire Department, Respondents.

Appeal from Richland County
J. Thomas Cooper, Circuit Court Judge

Opinion No. 27095
Heard November 30, 2011 – Filed February 22, 2012

AFFIRMED

Donald E. Jonas, of Lexington, for Appellant.

W. Allen Nickles, III and Matthew A. Nickles, both of Columbia, for Respondents.

JUSTICE KITTREDGE: Retired City of Columbia firefighter Robert L. Knight (Appellant) appeals the trial court's grant of a motion for summary judgment. We affirm.

A series of court orders from the 1970s required the Firemen's Pension Fund to tender "past due benefits" to Appellant. He now seeks a reimbursement of health insurance benefits as part of those past due benefits through mandamus and contempt. Because the underlying order and this Court's 1977 opinion do not unambiguously state Appellant is entitled to health insurance benefits, Appellant's mandamus and contempt claims must be dismissed.

I.

In 1974 Appellant was employed by the City of Columbia (Respondent)[1] as a firefighter when he fell through the roof of a burning building. Appellant was ultimately awarded disability benefits. The circuit court issued an order finding Appellant was disabled and requiring Respondents to make "an immediate accounting and tender of past due benefits." On appeal, this court affirmed that order.[2] Thereafter, a dispute arose regarding the accounting of benefits, and the parties again sought relief in the circuit court. The matter was ultimately resolved by the circuit court in 1978, and no appeal was taken.[3]

More than thirty years later, Appellant filed this action in circuit court seeking reimbursement for health insurance benefits to which he was

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[1] In addition to the City, Respondents in this matter are Charles Austin, in his capacity as city manager, and the Board of Trustees of the Firemen's Retirement and Pension Fund of the Columbia Fire Department.

[2] Knight v. Bd. of Tr. of Firemen's Ret. & Pension Fund of the Cola. Fire Dep't, 269 S.C. 671, 239 S.E.2d 720 (1977).

[3] The issue of health insurance benefits was never raised or addressed in any of the above-referenced proceedings. According to the record before us, health insurance was not available through the Firemen's Pension Fund at the time of Appellant's work-related injury; rather, it was apparently available only through the City. Appellant never sought health insurance benefits until 2005, when he was enrolled under the City's group plan upon his application.

purportedly entitled for a period of time beginning September 10, 1975.[4] By way of relief, Appellant sought a writ of mandamus to compel payment as part of the aforementioned "past due benefits" and requested the trial court hold Respondents in contempt for failure to comply with the 1977 order. Respondents successfully moved for summary judgment on the basis that Appellant could not establish Respondents willfully and intentionally disregarded this Court's order requiring past due benefits to be tendered.[5] We find the circuit court properly granted summary judgment.

II.

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id.; Rule 56(c), SCRCP. "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002) (internal citations omitted).

Whether to issue both a writ of mandamus and an order of contempt lies within the sound discretion of the trial court, and an appellate court will only overturn that decision upon an abuse of discretion. Wilson v. Preston, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008). An abuse of discretion occurs when the trial court's decision is based upon an error of law. Ex parte

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[4] September 10, 1975 was the date of the Firemen's Pension Fund's second denial of Appellant's application for disability benefits.

[5] Appellant contends Respondents' motion for summary judgment failed to comply with Rule 7(b), SCRCP, which requires that motions "shall state with particularity the grounds therefor." Respondents' motion stated only "The testimony and evidence . . . cannot establish the essential elements of the claims presented." Although the motion by itself gave neither Appellant nor the court notice of the grounds for their motion, Respondents filed a detailed memorandum in support of their motion nine days before the summary judgment hearing, which stated with particularity the grounds upon which they sought summary judgment. Accordingly, Respondents' memorandum in support of its motion cured any alleged defect in the motion itself and satisfied the requirements of Rule 7(b).

Bland, 380 S.C. 1, 13, 667 S.E.2d 540, 546 (2008) (internal citations omitted).

The writ of mandamus is the "highest judicial writ known to the law." Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 493, 85 S.E.2d 600, 605 (2009) (internal citations omitted). Mandamus is utilized only to compel ministerial duties and then only if the "asserted right is clear and certain." Godwin v. Carrigan, 227 S.C. 216, 222, 87 S.E.2d 471, 473 (1955). "The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created and or imposed by law." Porter v. Jedziniak, 334 S.C. 16, 18, 512 S.E.2d 497, 497 (1999); see also Sanford, 385 S.C. at 493, 685 S.E.2d at 605-06 (holding the principal function of mandamus is "to command and execute, and not to inquire and adjudicate").

Similarly, contempt results from the willful disobedience of a court order. Bigham v. Bigham, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975). Willful disobedience requires an act to be done "voluntarily and intentionally" with specific intent not to do something the law requires to be done. Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988). Moreover, in order to find willful disobedience, contempt requires the court order to be unequivocal. See Welchel v. Boyter, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973) (holding that, in order for contempt to lie, the language of a court order's commands must be clear and certain).

Appellant claims that a question of fact exists as to whether the order requiring "past due benefits" to be tendered included health insurance benefits, and therefore, summary judgment is not appropriate. Appellant admits that the language of the underlying court order and our 1977 opinion requiring payment of "past due benefits" does not, by its terms, unequivocally include health insurance benefits. Ambiguity in the court orders, in essence, negates any claim of a clear and certain right. Accordingly, in the absence of language indicating a clear right or unmistakable duty, Appellant was entitled

to neither mandamus nor contempt relief as a matter of law. Therefore, summary judgment was properly granted.

AFFIRMED.

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

The Supreme Court of South Carolina

In the Matter of Frederick James Newton, Respondent.

ORDER

The Office of Disciplinary Counsel petitions the Court to either place respondent on interim suspension or to transfer him to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Peter Brandt Shelbourne, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Shelbourne shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Shelbourne 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 Peter Brandt Shelbourne, 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 Peter Brandt Shelbourne, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Shelbourne's office.

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

s/ Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

February 14, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Consumer Advocate for the State of South Carolina, Appellant,

v.

South Carolina Department of Insurance and National Council on Compensation Insurance, Inc., Respondents.

Appeal From The Administrative Law Court
Ralph K. Anderson, III, Administrative Law Judge

Opinion No. 4944
Heard January 10, 2012 – Filed February 22, 2012

REVERSED

Elliott F. Elam, Jr., and Hana P. Williamson, both of Columbia, for Appellant.

Mitchell Willoughby, Benjamin Parker Mustian, and Tracey Green, all of Columbia, for Respondent National Council on Compensation Insurance, Inc.,

and John O'Neal, of North Augusta, and Gwendolyn Fuller McGriff, of Columbia, for Respondent South Carolina Department of Insurance.

KONDUROS, J.: The Consumer Advocate for the State of South Carolina appeals the Administrative Law Court's (ALC's) ruling that the South Carolina Department of Insurance (DOI) was not required to publish notice of a proposed change in loss costs rates for workers' compensation insurance because the overall change was a decrease. We reverse.

FACTS

Workers' compensation rates are composed of two components: loss costs and loss-costs multipliers. Loss costs are the medical expenses and lost wages component of the rate. The loss-costs multiplier represents the insurer's expenses and profit. Each insurer files its own loss-costs multiplier for approval with the DOI. A ratings organization for workers' compensation insurers, National Council on Compensation Insurance, Inc. (NCCI), files loss costs on behalf of all insurers with the DOI for approval. The filing by the NCCI contains an overall increase or decrease. In November 2008, the NCCI presented a loss costs filing with a -0.3% change in the overall loss costs figure—an overall decrease. However, that overall figure contains approximately 700 job classifications—roofers, attorneys, and teachers, for example—and the increases and decreases among the various classifications averaged out to an overall decrease. The DOI did not publish notice of this filing, and the Consumer Advocate sued contending that section 38-73-910(A) of the South Carolina Code (Supp. 2010) mandated the filing.

The ALC determined the plain language of the statute indicated publication of the loss costs filing was only required when there was an overall increase to the loss costs and the fact that the DOI may have previously interpreted the statute differently was not persuasive because its interpretation had been an error of law. This appeal followed.

STANDARD OF REVIEW

"Statutory interpretation is a question of law." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). This court is free to decide matters of law with no particular deference to the lower court. Pressley v. REA Constr. Co., 374 S.C. 283, 287, 648 S.E.2d 301, 303 (Ct. App. 2007).

LAW/ANALYSIS

The Consumer Advocate contends the ALC erred in finding section 38-73-910(A) did not require publication of notice of the loss costs filing because the filing contained an overall decrease. We agree.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). "The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." Kinard v. Moore, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951) (internal quotation marks omitted).

Language in a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010).

Section 38-73-910(A) provides:

> (A) An increase in the premium rates may not be granted for workers' compensation insurance, nor for any other line or type of insurance with respect to which the director or his designee has, by order, made a finding that (a) legal or other compulsion upon the part of the insured to purchase the insurance interferes with competition, or (b) under prevailing circumstances there does not exist substantial competition, unless notice is given in all newspapers of general, statewide circulation at least thirty days in advance of the insurer's proposed effective date of the increase in premium rates. The notice must state the amount of increase, the type and line of coverage, and the proposed effective date and must allow any insured or affected party to request within fifteen days a public hearing upon the propriety of the rate increase request before the Administrative Law Judge Division. A copy of the notice must be sent to the Consumer Advocate.

(emphasis added).

Section 38-73-910(A) states notice is to be given when there is "an increase" in rates. In this case, the NCCI's filing contains increases in many classifications. Had the legislature intended to make publication a requirement only for overall increases, it could have amended section 38-73-910 to specify it is only concerned with "overall" increases as it did in other paragraphs of section 38-73-910.

Furthermore, the overarching purpose of the statute is to give any "insured or affected party" the opportunity to protest rate increases before they become effective. We acknowledge that 38-73-910(A) does not specifically recognize some of the restructuring of the workers' compensation ratemaking process. The notice of NCCI's filing only serves to put insureds on inquiry notice that their rate may ultimately be affected by a loss costs

increase. Nevertheless, to interpret section 38-73-910(A) as applying only to overall increases is contrary to the statute's purpose. Under the DOI's interpretation, an insured might get notice of the filing one year and might not get notice the following year even though that insured's loss costs increased in both years. Such an arbitrary result cannot have been intended.

Based on the language and intent of the statute, we conclude the ALC's determination was in error. Because we conclude section 38-73-910(A) mandates publication of the notice of the NCCI's loss costs filing, we need not address the Consumer Advocate's remaining argument regarding whether the failure to publish the notice constitutes a due process violation. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

Therefore the order of the ALC is

REVERSED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Phillip Coker, Appellant.

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 4945
Heard January 25, 2012 – Filed February 22, 2012

REVERSED

Appellate Defender Elizabeth A. Franklin-Best and Assistant Appellate Defender Breen Stevens, both of Columbia, for Appellant.

John Benjamin Aplin, of Columbia, for Respondent.

FEW, C.J.: The circuit court revoked Phillip Coker's probation based solely on the failure to pay money and imposed a portion of the prison sentence originally suspended. Coker appeals arguing the circuit court failed to make the necessary findings of fact as to whether the violation was willful. We agree and reverse.

In Bearden v. Georgia, 461 U.S. 660, 672 (1983), the Supreme Court of the United States held that a court may not revoke probation solely on the basis of the failure to pay money unless the court makes certain findings of fact regarding the willfulness of the failure to pay. In Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), our supreme court stated: "Probation may not be revoked solely on the ground the probationer failed to pay fines or to make restitution. The judge must determine on the record that the probationer failed to make a bona fide effort to pay." 288 S.C. at 483, 343 S.E.2d at 622 (citing Bearden, 461 U.S. at 672).

In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007), we provided the trial bench a roadmap for making the findings required under Bearden and Barlet. We held the circuit court may not revoke probation solely on the basis of a failure to pay money unless the record reflects the court made the following findings:

(1) "[T]he State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." 374 S.C. at 268, 647 S.E.2d at 708 (internal quotation marks omitted).

(2) "[T]he probationer made a willful choice not to pay" in that the probationer had the funds to pay and chose not to do so or lacked the funds to pay and did not make a bona fide effort to acquire the funds. 374 S.C. at 268-69, 268 n.2, 647 S.E.2d at 708-09, 708 n.2 (internal quotation marks omitted).

(3) "[I]f the court finds the probationer 'could not pay despite sufficient bona fide efforts to acquire the resources to do so,'" the court may not imprison the probationer unless it also finds that "'alternate measures are not adequate to meet the State's interests in punishment and deterrence.'" 374 S.C. at 268 n.2, 270, 647 S.E.2d at 708 n.2, 709 (quoting Bearden, 461 U.S. at 672, 673).

The circuit court did not make any of the required findings in this case. We therefore reverse and remand to the circuit court with instructions to make the findings required by Spare, along with findings of fact to support each.

REVERSED AND REMANDED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Walker, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4946
Heard October 5, 2011 – Filed February 22, 2012

REVERSED

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mary S. Williams, all of Columbia, for Petitioner.

Appellate Defender Kathrine H. Hudgins, of Columbia, for Respondent.

FEW, C.J.: This is a post-conviction relief (PCR) action arising out of Joseph Walker's convictions for kidnapping and first-degree criminal sexual conduct. The circuit court granted Walker's PCR application based on trial counsel's failure to investigate a potential alibi witness and the cumulative prejudicial effect of three other alleged instances of deficient performance. We agree with the PCR court that trial counsel's performance regarding the alibi witness was deficient under the Sixth Amendment. However, we find the witness's testimony presented at the PCR hearing did not meet the legal definition of an alibi, and thus Walker failed to prove prejudice. We also find the PCR court erred in granting relief based on the cumulative effect of counsel's deficient performance. We reverse.

I. Facts and Procedural History

The victim testified that on March 2, 2002, she sought a man's help in fixing her broken-down car at a BP gas station in Denmark, South Carolina. The man fixed her car with a wire he purchased nearby for $30. The victim did not have enough money with her, so she told the man to follow her home so she could pay him. She said the man came into her house uninvited, blindfolded her, drove her to his house, and raped her throughout the night. Early the next morning the man blindfolded her again, drove her home, and threatened to kill her if she told anyone. The victim testified that a few hours after she got home, she drank a rum and coke to calm her nerves.

The victim identified a man in the surveillance videotape from the BP station as her assailant. The BP store manager then identified the man as Joseph Walker. Prior to this incident, the victim had never met Walker or been to his house. However, the police were able to match precisely the detailed descriptions the victim gave of her assailant's truck and house with Walker's truck and house. Walker was arrested on March 22, 2002, twenty days after the alleged crime. He submitted to a video interview with the police in which he claimed he was with his girlfriend, Robina Reed, on the night of the crime. Walker was convicted of first-degree criminal sexual conduct and kidnapping. The trial court sentenced him to concurrent terms of twenty-four years in prison. This court affirmed the convictions and sentences. State v. Walker, Op. No. 2004-UP-618 (S.C. Ct. App. filed Dec. 9, 2004).

In January 2005, Walker filed a PCR application alleging ineffective assistance of counsel. Walker argued trial counsel was ineffective because she did not (1) investigate Reed as an alibi witness, (2) ask for a continuance to await the written results of a DNA test, (3) cross-examine the victim about her alcohol use, and (4) cross-examine the victim and call other witnesses about the victim's conflicting statements as to the time of the incident.

Trial counsel testified at the PCR hearing that she watched the DVD of Walker's interview. In the interview, Walker referred to Reed numerous times and claimed he could not have committed the crimes because he spent the night with her on March 2, 2002. Specifically, Walker admitted he was at the BP station on March 2, but denied helping the victim fix her car. He said he left the BP station and went to see Reed at Hardee's, where she worked as a manager. Walker said he then stayed at a friend's house until about 10:00 p.m., when he drove to Reed's house to spend the night.

Despite watching the DVD of the interview, trial counsel did not investigate Reed as a potential witness. At the PCR hearing, she claimed she thought her investigator was following up on Reed. Walker testified he told the investigator about Reed, and the investigator wrote Reed's name in the case file. Trial counsel said she did not know what, if anything, her investigator did to investigate Reed. She also testified she "was not aware of any claim that [Walker] was with anyone on" the night of the crime. The PCR court summed up trial counsel's knowledge of Reed as a potential alibi witness in the following question:

> The court: So, there is an interview tape of the defendant that says he was with . . . Ms. Reed on the night of the incident. That name appears in the file, but we don't know what was done as far as finding out what Ms. Reed would or would not have said; is that correct?
> [Trial counsel]: Yes, your honor.

Reed testified at the PCR hearing that Walker was her boyfriend on March 2, 2002. She said Walker had a key to her house and spent most

weekend nights with her. When asked if she and Walker spent the night together on March 2, 2002, Reed answered: "I guess I did." The judge asked Reed: "You're telling me that you spent – [Walker] was staying with you that first weekend in March of 2002." Reed answered "Yes." On cross-examination, however, she changed her answer as follows:

> Q: 2002 is when y'all broke up?
> A: Yea.
> Q: You know the exact date?
> A: No, sir.
> Q: But you knew he was with you that night?
> A: Huh?
> Q: You knew he was with you on March 2?
> A: Well, I know he was with me, but I can't say a particular date. No, I don't know what date y'all want.
> Q: But you can't remember the date y'all broke up?
> A: Right.
> Q: Do you know what you were doing the night of March 1, 2002?
> A: No, I can't go back that far.
> Q: Well, that's just the day before when you said Mr. Walker was with you?
> A: You said he was with me, but that's all I can say.
> Q: So, you don't know what you were doing March 1, 2002?
> A: We could have been together in 2002. I don't even know what day that was.
> Q: But you don't know specifically?
> A: Right, that's what I'm saying.
> Q: But you know specifically right now what you were doing March 2, 2002?
> A: No, I ain't said that.
> Q: So, you don't know what you were doing March 2, 2002 that night?
> The Court: Ma'am, do you know whether or not you were with this man over here Mr. Walker?

> The Witness: I know we spent a lot of days together. I can't tell you no particular day.
> Q: So you can't tell –
> A: A particular day; right.
> Q: You can't tell us you were with him March 2, 2002?
> A: Right.

As to Reed's testimony, the PCR court found:

> [Walker] and Reed had an intimate relationship that was ongoing at the time of the alleged incident . . . . [Reed] further testified that [Walker] was usually with her during the time frame of [the] incident. [Walker] testified that he had been spending many nights, and most, if not all, weekends with Reed prior to, and including, the date of the alleged incident . . . . While Reed's memory of specific dates is not perfect since it has been approximately five years since the incident, and approximately four years since the trial, her testimony corroborated that of [Walker].
>
> . . . [T]he Court finds that the testimony of Reed at the PCR hearing was credible.
>
> The jury would have weighed the credibility of the testimony of the witness, and it is reasonable to assume that the outcome of the deliberations may have been different had this witness testified in light of the facts of this case.

The PCR court granted Walker's application on two grounds. First, the court found the failure to investigate the alibi witness was deficient and prejudiced the defense. Second, the court found Walker

> independently established a second ground for prejudice with the cumulative effect of Trial Counsel's error in her failure to investigate [the

> victim's] alcohol use, her failure to move to continue the hearing to await the written results of the forensic testing, her failure to cross-examine the witnesses as to the discrepancy of the conflicting times of the incident, and her failure to investigate or interview Reed, the combination of which prejudiced [Walker].

The judge explained that, standing alone, none of the first three instances of deficient performance established prejudice, but when they were added together with the failure to investigate Reed as an alibi witness, "[these] failures cumulatively prejudiced" Walker. The State appeals both grounds upon which the PCR judge granted the application.[1]

II. Applicable Law and Standard of Review

To obtain post-conviction relief based on the alleged denial of effective assistance of counsel under the Sixth Amendment, the applicant must satisfy the two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the applicant must show that trial counsel's performance was deficient based on a standard of "'reasonableness under prevailing professional norms.'" Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 688). Second, the applicant "must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable." Id. To satisfy this second prong, the applicant "must demonstrate that his attorney's errors had an effect on the judgment against him." 392 S.C. at 458-59, 710 S.E.2d at 65. An error will be found to affect the judgment if the applicant proves "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" 392 S.C. at 459, 710 S.E.2d at 66 (quoting Strickland, 466 U.S. at 694). "In other words, [the

[1] The State also contends the PCR court applied an incorrect standard by requiring counsel to articulate a trial strategy for each alleged instance of deficient performance. However, we do not read the PCR court's order to include such a requirement. We read the order as merely noting that trial counsel did not articulate a strategy in defense of her performance.

applicant] must show that 'the factfinder would have had a reasonable doubt respecting guilt.'" Id. (quoting Strickland, 466 U.S. at 695).

An appellate court must affirm the factual findings of the PCR court if they are supported by any probative evidence in the record. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). This court "will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards, 392 S.C. at 455, 710 S.E.2d at 64.

III. Ineffective Assistance of Counsel—Alibi Witness

A. First Prong of Strickland

We agree with the PCR court's finding that trial counsel's failure to investigate Reed as an alibi witness was deficient performance. Counsel admitted she watched the DVD of Walker's interview. Therefore, she was aware of Walker's claim that he was with Reed on the night of the crime.[2] "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards, 392 S.C. at 456, 710 S.E.2d at 64. The duty to investigate a potential witness is even more critical when the witness might provide an alibi. Accordingly, the Sixth Amendment requires that criminal defense attorneys thoroughly investigate potential alibi witnesses.

Trial counsel did nothing personally to investigate Reed as a witness. Her claim that her investigator was exploring Reed's role in the case also does not satisfy her obligations under the Sixth Amendment. The duty to represent the client belongs to the lawyer. While it may be reasonable to allow investigators and paralegals to do some or all of the investigatory work, trial counsel has a duty to supervise the investigation, make sure it is completed, and familiarize herself with the results. Trial counsel's failure to adequately

[2] Walker never personally told trial counsel about Reed. However, trial counsel could not have watched the interview without knowing Reed was a potential alibi witness.

investigate Reed as an alibi witness under the circumstances presented in this case was unreasonable under prevailing professional norms, and therefore deficient performance under the Sixth Amendment.

The State points out, however, that the defense presented a theory that Walker and the victim had consensual intercourse and there was no rape. The State argues this was "a far better theory" than an alibi defense because an alibi would not have explained the victim's detailed and accurate description of Walker's house and truck. The State thus argues that trial counsel's failure to investigate Reed as an alibi witness is justified as a valid strategic decision. This argument mischaracterizes the role of strategy in the analysis of trial counsel's performance. If counsel had properly investigated the alibi defense, and then made an informed strategic decision not to pursue it, the State's argument would be persuasive. However, because trial counsel did not conduct an adequate investigation of the alibi defense, she could not have made an informed strategic choice.

In Strickland, the Supreme Court stated that

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

466 U.S. at 690-91; see Council v. State, 380 S.C. 159, 175, 670 S.E.2d 356, 364 (2008). Here, trial counsel articulated no reasonable basis for her decision not to investigate Reed as an alibi witness. Therefore, reasonable professional judgment does not support the limitation on the investigation. Moreover, such a decision could not have been reasonable professional judgment. Because an alibi is a complete defense to a criminal charge,[3] there

[3] See State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980).

is no conception of sound judgment that will permit trial counsel to choose not to investigate the testimony of a witness whom counsel has reason to believe could provide an alibi.

We find, therefore, that there is evidence to support the PCR court's ruling that Walker met the first prong of the Strickland test. We agree with the court's conclusion that trial counsel's performance was deficient because we find "'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" Edwards, 392 S.C. at 456, 710 S.E.2d at 64 (quoting Strickland, 466 U.S. at 687).

B. Second Prong of Strickland

As to the second prong of Strickland, however, we find the PCR court's ruling that trial counsel's deficient performance prejudiced Walker was controlled by an error of law. To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Reed's testimony at the PCR hearing did not meet the definition of alibi. Therefore, trial counsel's failure to present the testimony cannot form the basis of a finding of prejudice under Strickland. Glover, 318 S.C. at 498, 458 S.E.2d at 539-40.

This case is similar to Glover. There, the PCR applicant "argued trial counsel was ineffective for failing to contact several witnesses who could have testified [the applicant] was in Florida when the crimes were committed." 318 S.C. at 497, 458 S.E.2d at 539. One witness initially said he "believed" the applicant was in Florida, but then said he could not remember and "knew 'nothing.'" Id. The second witness testified the applicant was in Florida eleven hours before the crime was committed at a location only approximately six-and-a-half hours away. 318 S.C. at 497-98, 498 n.1, 458 S.E.2d at 539-40, 540 n.1. The testimony of either witness would have made it less likely the applicant committed the crime. Nevertheless, the supreme court found "no evidence to support the PCR judge's finding of prejudice" because "neither witness's PCR testimony

established an alibi defense." 318 S.C. at 498, 458 S.E.2d at 539-40. In support of its finding, the supreme court cited State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) for the following proposition: "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Glover, 318 S.C. at 498, 458 S.E.2d at 540.

We interpret Glover to establish a framework for analyzing an alleged failure to investigate an alibi witness. When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under Strickland. First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant.

Analyzing Reed's testimony under the Glover framework, we conclude her testimony does not qualify as an alibi. Reed's testimony makes it less likely Walker is guilty. Taken as a whole, however, her testimony does not account for Walker's whereabouts on March 2, 2002, such that it was physically impossible that he committed the crimes. Although Reed began by saying Walker spent the weekend with her, she eventually said she could not specifically remember whether Walker spent the night with her on March 2. Even her specific testimony that Walker "was staying with [her] that . . . weekend" does not foreclose the possibility that he arrived at her house on Saturday morning after committing the crimes on Friday night. Therefore, like the testimony of the two witnesses in Glover, Reed's testimony does not establish an alibi because it leaves open the possibility that Walker is guilty.[4]

[4] Because Reed's testimony does not meet the legal definition of an alibi, it is not necessary to make the second finding.

Because Reed's testimony does not meet the legal definition of an alibi, Walker failed to show a reasonable probability the result of the trial would have been different if trial counsel investigated and presented Reed's testimony. Therefore, the PCR court committed an error of law in finding that Walker satisfied the second prong of the Strickland test.

IV. Ineffective Assistance of Counsel—Cumulative Prejudice

The PCR court found that trial counsel's performance was deficient in three additional instances. The PCR court determined that Walker had not independently met the prejudice prong of the Strickland test as to any one of these deficiencies. However, the court found that the cumulative effect of the three, combined with the failure to investigate the alibi, did satisfy the prejudice prong. We disagree. We find no evidence to support the PCR court's ruling that two of the instances were deficient performance. The other instance, which was deficient performance, and the failure to investigate Reed as an alibi witness have no cumulative prejudicial effect.[5] Therefore, the PCR court erred in granting relief.

A. Continuance to Await the Written Results of a DNA Test

The PCR court found trial counsel's performance was deficient because she did not ask for a continuance to wait for the written report from the South Carolina Law Enforcement Division showing that no DNA evidence linked Walker to the crime. We do not find evidence in the record to support this finding.

SLED tested a "bite mark" with the victim's blood and found "no DNA profile unlike the victim." SLED did not release the written results of this analysis until a month after Walker's trial. However, both the assistant

[5] "[W]hether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.'" Lorenzen v. State, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008) (quoting Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002)). As discussed below, we find it unnecessary to answer this question because Walker has failed to prove prejudice under any interpretation of the law.

solicitor and trial counsel were aware of the test results before trial. The assistant solicitor testified at the PCR hearing that the verbal SLED report generally becomes available "much earlier" than the written report. The PCR court found counsel should have sought a continuance to wait for the written SLED report because she "could have shown [the report] to the jury in order to stress that the only evidence linking the Applicant to the incident was [the victim's] identification."

First, the victim's identification of Walker is not the only evidence linking him to the crime. The victim's descriptions of Walker's truck and house were detailed and accurate. Based on these descriptions, the State was able to argue persuasively that the victim was in Walker's house.

Moreover, the trial transcript shows that counsel did stress to the jury the results of the DNA test—that no DNA evidence was found linking Walker to the crime. On direct examination of the police officer assigned to the case, the officer admitted that no DNA evidence was found in Walker's house or truck. On cross-examination, the officer admitted that the rape kit was never sent to SLED for DNA testing, he was unable to collect any samples for DNA testing from Walker's house, and hairs collected from Walker's car were not sent to SLED. Accordingly, the SLED report would have been only marginally helpful to Walker because the contents of the report were made known to the jury through the testimony of the officer. Moreover, the report would have been offered to prove the truth of what is asserted in the report. Thus, the report would likely have been inadmissible hearsay. See State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011) (finding portions of a written report constituted inadmissible hearsay). Trial counsel's decision not to seek a continuance so that a marginally helpful and probably inadmissible report containing the same information counsel could present to the jury in other forms is not deficient performance.

B. Cross-Examination of the Victim on Alcohol Use

The nurse who performed the victim's rape kit noted that the victim told her she planned to attend "ETOH treatment"[6] that week. The PCR court found trial counsel's performance deficient because she did not investigate the reference to "ETOH treatment" in the nurse's notes or the smell of alcohol noted by the police. The court found trial counsel's lack of an investigation was deficient because the "only evidence linking [Walker] to [the victim] was [her] identification of [Walker]" and counsel's failure "prevented the jury from considering [the victim]'s credibility in her identification of [Walker]." We do not find any evidence in the record to support this finding.

As explained above, there is more evidence linking Walker to the crime than the victim's identification. Additionally, the jury was not prevented from considering the victim's alcohol use on the day of the crime in assessing her credibility. The record contains several instances of trial counsel bringing the victim's alcohol use to the jury's attention. Counsel asked the victim about beer she drank while at the assailant's house. Counsel cross-examined the victim about the rum and coke she drank when she got home on the morning of March 3, 2002. Counsel cross-examined the victim's cousin about the victim bringing an alcoholic drink with her to the cousin's house on March 3. Finally, counsel mentioned the victim's alcohol use in her closing argument. Thus, the trial transcript reflects that trial counsel investigated and brought to the jury's attention, through cross-examination and in closing argument, the victim's use of alcohol during and after the incident, allowing the jury to consider how the alcohol could have affected her credibility in identifying Walker.

We recognize that the nurse's note shows more than merely that the victim drank alcohol during and after the crime. Rather, the reference to alcohol treatment paints the victim as an alcoholic. However, evidence that the victim is an alcoholic is not admissible to prove she was intoxicated at a particular time. See Rule 404(a), SCRE ("Evidence of a person's character or

[6] ETOH is an abbreviation for ethanol and refers to alcohol and alcohol abuse. Trial counsel knew this.

a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."). While "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused" is admissible under Rule 404(a)(2) in some circumstances, the victim's alcoholism is not a pertinent trait of character in this case. See State v. Mizell, 332 S.C. 273, 278, 504 S.E.2d 338, 341 (Ct. App. 1998) ("[T]he 'prevailing view is that only pertinent traits—those involved in the offense charged—are provable.'" (quoting John W. Strong, McCormick on Evidence § 191 (4th ed. 1992))).

Moreover, evidence of the victim's alcoholism is not admissible under Rule 608(a), SCRE, because it is not evidence of her character for truthfulness or untruthfulness. See Rule 608(a), SCRE ("The credibility of a witness may be attacked . . . subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness."); see also State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000) ("Narcotics offenses are generally not considered probative of truthfulness."). While evidence of a person's intoxication at a specific point in time may be admissible to show credibility, evidence that a person is an alcoholic is not.

C. Cross-Examination on Conflicting Evidence as to the Time of the Incident

The PCR court found trial counsel's performance was deficient because she did not "adequately prepare for trial through her failure to call witnesses" whose testimony would have shown the victim initially stated she was at the BP station at night and then later stated she was there in the afternoon. The nurse's report states that the victim said "on 3/2/02 at approx 7PM, she was at a gas station and her car wouldn't start back up." The PCR transcript refers to a police incident report that says the victim recounted she stopped at the BP station "at approximately 8 P.M." The videotape from the BP station shows the victim was there at approximately 3:30 in the afternoon. At trial, she testified she was at the BP station in the afternoon while it was still light outside. Counsel had both reports in her case file, but did not ask the victim about the conflicting times. The PCR court found counsel should have explored the discrepancy to place doubt in the minds of the jury as to whether the victim accurately identified Walker. We uphold the PCR court's finding

of deficient performance in this respect because there is evidence in the record to support the finding.

D. The Cumulative Effect of Counsel's Deficient Performance

We find two instances of trial counsel's deficient performance—her failure to investigate Reed as a potential alibi witness and her failure to cross-examine the victim or call witnesses to testify about conflicting evidence as to the time of the incident. To the extent the failure to investigate Reed as a potential alibi witness caused some prejudice, we have determined the prejudice did not rise to a level warranting relief under Strickland. As to the failure to bring out the victim's conflicting statements on the time of the incident, the PCR court found any prejudice resulting from that deficiency did not independently warrant relief under Strickland. Even if South Carolina did allow PCR based on the cumulative prejudicial effect of two or more instances of deficient performance,[7] Walker would still have to demonstrate "a reasonable probability that, but for [the cumulation of] counsel's unprofessional errors, the result of the proceeding would have been different." Edwards, 392 S.C. at 459, 710 S.E.2d at 66 (quoting Strickland, 466 U.S. at 694). We find he has not. These instances of deficient performance are unrelated to each other and neither one makes the other more prejudicial. Therefore, even if we could evaluate them together, there is no cumulative prejudicial effect that would warrant relief under Strickland.

V. Conclusion

The judgment of the PCR court granting a new trial is

REVERSED.

THOMAS and KONDUROS, JJ., concur.

[7] See footnote 5.