The Supreme Court of South Carolina

In the Matter of James H. Abrams, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Abrams and the interests of Mr. Abrams' clients.

IT IS ORDERED that Andrew D. Grimes, Esquire, is hereby appointed to assume responsibility for Mr. Abrams' client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Abrams may have maintained. Mr. Grimes shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Abrams' clients and may make disbursements from Mr. Abrams' trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of James H.

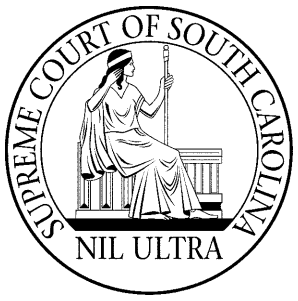
Abrams, Esquire, shall serve as notice to the bank or other financial institution that Andrew D. Grimes, Esquire, has been duly appointed by this Court.

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

This appointment shall be for a period of no longer than nine months unless application is made to this Court to extend the period of appointment. See Rule 31(c), RLDE, Rule 413, SCACR.

Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
March 31, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 7, 2003

ADVANCE SHEET NO. 12

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Peake, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 25614
Heard October 23, 2002 - Filed March 31, 2003

AFFIRMED

John David Hawkins, of Spartanburg, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, and Special Assistant Attorney General Alexander G. Shissias, all of Columbia, for Respondent.

JUSTICE PLEICONES: The circuit court granted petitioner's motion to quash an indictment charging petitioner with violating the Pollution Control Act (the Act)[1]. The State appealed, and the Court of Appeals reversed. State v. Peake, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001). We granted certiorari, and affirm the decision reinstating the indictment.

FACTS

Petitioner, a real estate developer, owned a private water treatment plant. The Department of Health and Environmental Control (DHEC) contacted petitioner in the summer of 1996 concerning the operation of this plant. In August 1996, petitioner and his attorney[2] met with DHEC representatives, including Ms. Hunter-Shaw,[3] in Columbia. As discussions continued during 1996, DHEC suggested petitioner pay a substantial monetary penalty for violating the Act.

Also in 1996, unbeknownst to petitioner, Ms. Hunter-Shaw referred the case to a DHEC committee that reviews matters and determines whether to refer the violations to the Attorney General for possible criminal prosecution. Ms. Hunter-Shaw never mentioned the potential criminal liability to petitioner, and neither he nor his attorney ever inquired. Both petitioner and his attorney testified at the hearing on petitioner's motion to quash the indictment that they had "assumed" a settlement would cover "everything." Ms. Hunter-Shaw testified at that hearing that she never discussed the possibility of criminal charges with petitioner or his attorney because, "I didn't want to put that at jeopardy, and it wouldn't – it simply wouldn't have come up." It is undisputed that Ms. Hunter-Shaw never affirmatively represented that the settlement covered criminal charges as well as civil liability issues.

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[1] S.C. Code Ann. §§48-1-10 to –350 (1986 and Supp. 2001).

[2] Petitioner's current attorney did not participate in the negotiations.

[3] We note that Ms. Hunter-Shaw is not an attorney.

Eventually DHEC and petitioner settled the civil matter by having petitioner deed the waste treatment plant to the Town of Ninety Six. No monetary penalty was exacted. Shortly thereafter, petitioner was indicted for violating S.C. Code Ann. §§48-1-90(a) and 48-1-320 of the Act.

ISSUES

(1) Can DHEC settle criminal charges arising from alleged violations of the Act?

(2) Is "fundamental fairness" violated if the State is permitted to prosecute petitioner under the facts of this case?

ANALYSIS

Petitioner first contends that the State was forbidden to criminally prosecute him because of Ms. Hunter-Shaw's actions. He relies on several theories to support this contention, including estoppel, apparent authority, and actual authority, all premised on the alleged "special nature" of the Act. We agree with the Court of Appeals that the circuit court erred in granting petitioner's motion to quash the indictment.

The declared purpose of the Act is "to maintain reasonable standards of purity of the air and water resources of the State . . . . " S.C. Code Ann. §48-1-20 (1986). Further, "to secure these purposes and the enforcement of these provisions of this chapter [DHEC] shall have authority to abate, control, and prevent pollution." Id. The Act contemplates that persons or entities that violate the Act may be subject to both civil and criminal liability. See S. C. Code Ann. §§48-1-300; 48-1-320; and 48-1-330. A civil violation can result in the imposition of a **penalty** while a criminal violation may result in a **fine** and/or imprisonment. Compare §48-1-320 (criminal) with §48-1-330 (civil). The most critical statute provides:

§48-1-210. Duties of Attorney General and solicitors.

> The Attorney General shall be the legal advisor of the Department and shall upon request of the Department institute injunction proceedings or any other court action to accomplish the purpose of this chapter. In the prosecution of any criminal action by the Attorney General and in any proceeding before a grand jury in connection therewith the Attorney General may exercise all the powers and perform all the duties which the solicitor would otherwise be authorized or required to exercise or perform and in such a proceeding the solicitor shall exercise such powers and perform such duties as are requested of him by the Attorney General.

Petitioner contends this statute, read with the other provisions of the Act, vest prosecutorial authority in DHEC. Petitioner also relies on the fact that the attorney who would prosecute petitioner's criminal case is a DHEC employee, who has been appointed an acting Attorney General, rather than an Attorney General's employee. We disagree.

The first sentence of §48-1-210 envisions that DHEC will be responsible for the administration and prosecution of civil matters and penalties, unless it requests the involvement of the Attorney General. See also S. C. Code Ann. §48-1-50(7) (DHEC may "[s]ettle or comprise any action or cause of action for the recovery of a penalty or damages under this chapter…"); §48-1-50(11) (DHEC may "[a]dminister penalties…."). On the other hand, the second sentence of §48-1-210 provides unequivocally that the Attorney General, or the solicitor acting pursuant to the Attorney General's instructions, will bring any criminal charges.

We agree with the Court of Appeals that § 48-1-220 could be read to affect this distribution of authority. This one sentence statute provides: "Prosecutions for the violation of a final determination or order shall be instituted only by [DHEC] or as otherwise provided for in this chapter."[4]

[4] We note this statute does not apply to petitioner's situation since, according to the indictment, the criminal charges arise out of the violation of a permit and a statute, rather than from a violation of a "final determination or order."

Petitioner would read this statute to grant DHEC the authority to determine whether to pursue a criminal prosecution, while acknowledging the Attorney General's sole authority to control the process once the decision to prosecute is made. We agree with the Court of Appeals that reading the statute in this way would cause it to run afoul of S.C. Const. art. V, §24. This constitutional provision vests sole discretion to prosecute criminal matters in the hands of the Attorney General. In State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994), this Court held that a statute purporting to require an executive agency to refer a case before a criminal violation could be prosecuted was violative of this provision. If §48-1-220 were read to make DHEC the gatekeeper for criminal prosecutions arising under the Act, the statute would be unconstitutional.

The Court of Appeals properly construed §48-1-220. It read the first clause of §48-1-220 to give DHEC authority over civil prosecutions, and read the second clause, "or as otherwise provided for in this chapter," to refer to criminal prosecutions brought by the Attorney General pursuant to the second sentence of §48-1-210. The decision whether to pursue criminal charges for an alleged violation of the Act is vested solely in the Attorney General. The corollary of this proposition is that the authority to grant immunity from criminal prosecution also resides exclusively in the Attorney General. Cf., Ex parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000) (prosecutor's discretion whether to try, to plea, or not to prosecute at all).

Further, the fact that the Attorney General has the authority to "deputize" an attorney employed by a state agency to act as an Attorney General for purposes of prosecuting a criminal case does not convert Ms. Hunter-Shaw or DHEC itself into an Attorney General. As the Court of Appeals pointed out, the deputization here occurred after the civil settlement, and the DHEC attorney so deputized played no part in that settlement.

The Attorney General, not DHEC, determines whether to pursue criminal charges for a violation of the Act. To construe the Act in a manner that involves DHEC in the decision to initiate or pursue criminal charges would create a constitutional infirmity where none need exist. E.g., Curtis v.

State, 345 S.C. 557, 549 S.E.2d 591 (2001) (statutes to be given a constitutional construction when possible).

Petitioner next argues that because he and his attorney "reasonably" assumed Ms. Hunter-Shaw to be settling both civil and criminal liability issues, she was possessed of either actual or apparent authority to do so. Alternatively, he contends that because of these reasonable beliefs, the State should be estopped to now pursue these criminal charges. The Court of Appeals consolidated these claims, and held that because Ms. Hunter-Shaw lacked actual authority to grant criminal immunity, the State could not be estopped. We agree. E.g., Heyward v. South Carolina Tax Comm'n, 240 S.C. 347, 352, 126 S.E.2d 15, 18 (1962) ("The question is not one of intention, but of power; and, if the officer has not power to act, his action is not state action, and so affords no basis upon which to predicate estoppel against the state").

The Court of Appeals properly held that the Act did not and could not authorize a DHEC employee to extend criminal immunity to petitioner.

Finally, petitioner argues that it is fundamentally unfair and a violation of his due process rights to allow the State to criminally prosecute him under these circumstances. He asserts a number of different bases for this proposition:

1) He was compelled to deed away his property with the false inducement that the whole matter would be resolved;

2) If and when he is tried, the fact that he deeded the plant makes him appear guilty; and

3) The same woman who falsely induced him to deed the property secretly reported him to the Attorney General for criminal prosecution.

It may well have been unfair of Ms. Hunter-Shaw not to reveal the fact that she had referred the matter for criminal consideration. We nevertheless do

not find that her conduct rose to a level that would cause us to question the constitutionality of petitioner's criminal prosecution.

CONCLUSION

The decision of the Court of Appeals reversing the circuit court order quashing the indictment is

AFFIRMED.

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

JUSTICE BURNETT: While I agree with this Court's ultimate legal conclusion, I write separately to address the conduct of DHEC in this matter for fear that it is emblematic of the agency and the manner in which it manages our State's citizens.[1]

To demonstrate the impropriety of DHEC's actions a fuller recitation of the facts is necessary. Mr. Peake and his attorney met with DHEC officials, including Ms. Hunter-Shaw, in August of 1996, to discuss the operation of the private water treatment plant. At that time, Ms. Hunter-Shaw suggested Mr. Peake deed the sewer system to the Town of Ninety-Six. Mr. Peake, on the advice of his attorney, initially declined to do so for two obvious reasons. First, deeding the sewer system would result in the loss of a $325,000 investment in the property. Second, Mr. Peake was concerned such a transfer could be considered as evidence of guilt in any subsequent criminal prosecution.

Ms. Hunter-Shaw did not inform Mr. Peake or his attorney that she had recommended investigation for possible criminal violations. At the time Ms. Hunter-Shaw sought to persuade Mr. Peake to deed the plant to the city, she began the process for Mr. Peake's subsequent indictment on criminal charges.

Despite several subsequent personal and telephone conferences, Ms. Hunter-Shaw never informed Mr. Peake's attorney

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[1] This case brings to mind these insights concerning governments. In moments of content we are apt to invoke Henry Clay's words that "Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people." John Bartlett, "Henry Clay Speech at Ashland, KY, in March 1829, Familiar Quotations, (10th ed. 1919), available at http://www.bartleby.com/100/ 348.2.html. Yet the facts of this case bring out the harsher inclination to exclaim "[t]he nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'" James B. Simpson, "President Ronald W. Reagan Press Conference on Aug. 12, 1986," Simpson's Contemporary Quotations (1988), available at http://www.bartleby.com/63/56/356.html.

that DHEC was recommending criminal prosecution because she "didn't think it was anything that he needed to know." Mr. Peake's attorney, now a Master-In-Equity in Spartanburg County, testified that he would not have advised his client to deed over the plant if the concern of criminal prosecution had not been resolved. Further, the attorney testified of his telephone conversations with Ms. Hunter-Shaw, which included repeated assurances that if Mr. Peake deeded the plant to the Town of Ninety Six then the "entire matter" would go away.

Of no solace to Mr. Peake is the observation that had the Attorney General's Office criminally charged him earlier than it had, or even if DHEC ever directly notified him they recommended he be criminally charged, this case would not have been resolved as it was. Mr. Peake under criminal indictment would be afforded substantial rights against what could only be deemed prosecutorial misconduct. In keeping the details of a criminal prosecution secret while maintaining the prospect of settlement which could "make the whole thing go away" DHEC sought to gain control of Mr. Peake's property while keeping alive the option of criminal prosecution.

To Mr. Peake the settlement offer by DHEC must be accepted to conclude civil and potential criminal proceedings. In exchange for surrendering the $325,000 investment in the property, Mr. Peake reasonably concluded the threats of prosecution by the State would be ended. Instead the "settlement" effected the surrender of the opportunity to obtain any return on his investment while still being held accountable for possible criminal charges. The settlement was all the more troublesome because the act of surrendering the land could be viewed as an acknowledgement of guilt.

At best this case illustrates the problems which can occur when a governmental organization entrusts the enforcement of complicated statutes to those not trained to understand the import of telling a citizen "do this and all your trouble will go away."

At worst the facts here demonstrate a cultural environment at a State agency to abuse those the agency is entrusted to serve in

order to obtain their idea of maximum results. It must be remembered, however, that government is not business and DHEC does not exist to defeat competitors. Instead, it is a State agency entrusted with the stewardship of the people's environment. This stewardship means they must not only zealously guard the environment, but must also be zealously on guard against a tendency to abuse its powers for what it considers to be the greater good.

Although the Attorney General retains prosecutorial authority, agency responsibilities must be completed with openness, candor and integrity. The matter was not something removed from Ms. Hunter-Shaw's control or on the periphery of her responsibilities. The decision to proceed criminally against Mr. Peake came directly from a referral by Ms. Hunter-Shaw. This calculated conduct may have allowed DHEC to effect transfer of the plant to a town and allow the State to seek a criminal indictment, but Mr. Peake was inequitably treated.

While Ms. Hunter-Shaw is not a prosecutor, she should be aware of the spirit and Rules of Professional Conduct governing prosecutors. See Rule 407, SCACR. Importantly, a prosecutor is charged with the responsibility of being "a minister of justice and not simply that of an advocate. . . . [t]his responsibility carries with it specific obligations to see that the defendant is accorded procedural justice." Id., hist. n.

It is the rule of a prosecuting attorney, and those in government whose actions ultimately determine whether someone will be deprived of liberty or property, to:

> avoid the role of a partisan, eager to convict . . . [to] deal fairly with the accused as well as the other participants . . . . to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.

State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The United States Supreme Court in addressing the prosecutor's role provided a caution all government officials would do well to heed:

> [He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935).

Although this result will be of little assistance to Mr. Peake, perhaps State agency personnel will be constantly cognizant of the duty to, not only zealously fulfill their responsibility, but do so with equity and integrity.

TOAL, C.J., and WALLER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William F. Hendrix, III, Appellant,

v.

Gene Taylor, Sheriff of
Anderson County, Respondent.

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

Opinion No. 25615
Heard October 8, 2002 - Filed April 7, 2003

AFFIRMED

Charles W. Whiten, Jr., of Anderson, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Tracey Colton Green, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: William Hendrix ("Appellant") appeals from the trial judge's refusal to grant injunctive relief to prevent Appellant from being listed in the South Carolina Sex Offender Registry.

Factual/Procedural Background

William Hendrix pled guilty to sexual assault in the third degree; assault in the third degree; and trespass in the first degree in Gunniston County, Colorado on August 25, 2000. The sexual assault charge stemmed from an incident in which Appellant grabbed the breasts and buttocks of a woman several times in a bar without her consent. The Colorado court sentenced Appellant to 62 days in jail, four years probation, and a fine of nearly $19,000. Appellant was also required by Colorado statute to register as a sex offender,[1] but could petition to be removed from the registry five years after the date of his guilty plea.[2]

On November 15, 2000, Appellant and his spouse moved to Anderson, South Carolina, which triggered the requirements of the South Carolina Sex Offender Registry Act ("Act"). S.C. Code Ann. §§ 23-3-400 through –520. The Act mandates that Appellant register as a sex offender in South Carolina for life. S.C. Code Ann. § 23-3-460; *See* South Carolina Sex Offenders Registry at http://www.sled.state.sc.us. The online registry provides information like sex, age, height and weight to help identify the offender. It also includes the offender's last reported address and the sex offense that he committed. Originally, Appellant was registered as having committed Assault and Battery of a High and Aggravated Nature ("ABHAN"), but sometime between March 22, 2002, and October 8, 2002, the offense was

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[1] At the time that Appellant pled guilty, the relevant Colorado statute was Colo. Rev. Stat. Ann. § 18-3-412.5 (West 1999 & Supp. 2000). The provision of this statute defining which persons who are required to register can now be found in Colo. Rev. Stat. Ann. § 16-22-103 (West Supp. 2002), which was effective July 1, 2002.

[2] At the time that Appellant pled guilty, the relevant Colorado statute that addressed the petition to be removed from the registry was Colo. Rev. Stat. Ann. § 18-3-412.5(7) (West 1999 and Supp. 2000). The statute that presently covers the petition is Colo. Rev. Stat. Ann. § 16-22-113 (West Supp. 2002), which was effective July 1, 2002.

changed to Assault with Intent to Commit Criminal Sexual Conduct in the Third Degree.[3]

On November 22, 2000, Appellant filed this action seeking a declaratory judgment that the Act does not apply to his Colorado conviction for third degree sexual assault, and that his mandatory listing on the Sex Offender Registry of South Carolina violated his constitutional right to equal protection and due process. Appellant also moved to permanently enjoin the Sheriff of Anderson County from requiring that he register under the Act.

The trial court denied Appellant's request for injunctive relief, rejected his constitutional claims, and required him to register under the Act.

Appellant raises the following issue on appeal:

> Did the trial court err when it concluded that requiring Appellant to register under the Sex Offender Registry Act did not violate his right to Equal Protection or Due Process when the equivalent offense, if committed in South Carolina, would not have required registry?

Law/Analysis

Appellant argues that the state has violated his right to equal protection by forcing him to register on the South Carolina Sex Offender Registry for an offense he committed in Colorado when the equivalent offense, if committed in South Carolina, would not have triggered the requirement that he register. [4] We disagree.

The movement to enact sex offender registration statutes arose after Megan Kanka, a seven-year old child, was raped and murdered in New Jersey

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[3]The March 22, 2002, document was provided in the Record On Appeal, and October 8, 2002, was the date of oral arguments for this case.

[4]*See* S.C. Code Ann. § 23-3-430(C) (sexual assault in the third degree is not an enumerated offense that requires registry).

by a convicted sex offender who had moved in across the street from her family.[5] The killer enticed the girl to come over to his house in order to see his new puppy.[6] The New Jersey legislature responded to this highly publicized event by declaring a legislative emergency to immediately debate and enact a sexual crimes bill.[7] On October 31, 1994, Governor Whitman signed the bill, which became known as Megan's Law.[8] N.J. Stat. Ann. 2C:7-1 *et seq.* The law requires sexual criminals to register with local law enforcement.

The United States Congress also reacted to the national outrage over sexual crimes by passing the Jacob Wetterling Crimes Against Children and Sexually Violent Predator Act ("Jacob Wetterling Act"), which President Clinton signed on September 13, 1994. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C.A. § 14071 (West 1994). The Jacob Wetterling Act gives states incentives to enact laws that protect the public from sexual criminals by conditioning federal funding under the Public Health and Welfare Code to state enactment of a sex crimes law. 42 U.S.C.A. § 14071(g)(1) and (g)(2). The Jacob Wetterling Act also creates a national sexual offender database, in which the states are required to participate. 42 U.S.C.A. § 14071(b)(2)(B).

By the time that the New Jersey legislature and Congress passed these laws, the South Carolina General Assembly had enacted its own Act, which

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[5] Two other youths, Amanda Wengert and Divina Genao, were murdered in New Jersey by sexual criminals around the same time.

[6] See Bill Alden, *"Megan's Law" Notification Provisions Enjoined*, 215 N.Y.L.J. 1 (col.3), (March 22, 1986); *State v. Williams*, 728 N.E. 2d 342, 348 (Ohio 2000).

[7] *See* Sheila A. Campbell, *Battling Sex Offenders: Is Megan's Law an Effective Means of Achieving Public Safety?*, 19 Seton Hall Legis. J. 519, 535 (1995).

[8] *See id.*

became effective on July 1, 1994. S.C. Code Ann. §§ 23-3-400 *et seq*. The following types of sex criminals are placed on the registry:

> (1) A South Carolina resident who has pled guilty or nolo contendere, or been convicted of a sex offense in this state;[9] in any other state; or in federal court; or
>
> (2) A South Carolina resident who is registered on another state's sex offender registry; or
>
> (3) A judge may order that a criminal be registered if good cause is shown.

S.C. Code Ann. § 23-3-430(A) and (D).

Appellant pled guilty to the Colorado crime of sexual assault in the third degree, which is not listed as a sex offense in S.C. Code Ann. § 23-3-430. Instead, Appellant was registered in South Carolina as committing Assault and Battery of a High and Aggravated Nature ("ABHAN"). The Act provides that the sentencing judge *may* order registration for this offense. [10] Appellant argues that registering him as committing ABHAN – a crime he technically did not commit - is "misleading" and deprives him of his right to equal protection.

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[9] For a list of enumerated sex offenses in South Carolina, *see* S.C. Code Ann. § 23-3-430(C)(1).

[10] S.C. Code Ann. § 23-3-430(D) provides, "Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor."

Equal Protection

The equal protection clause of United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also* S.C. Const. art. I, § 3. If a statutory provision "does not involve a suspect classification or a fundamental right, … the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose." *Curtis v. State, 345 S.C.* 557, 574, 549 S.E.2d 591, 600 (2001).[11]

Appellant argues that the state has deprived him of his fundamental right to privacy,[12] and therefore that the court should apply the strict scrutiny analysis. *See Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465, 471 (1988) (recognizing that strict scrutiny is applied to "classifications based on race or national origin, and classifications affecting fundamental rights"). Although the U.S. Supreme Court has recognized a right to privacy in limited circumstances, the privacy protections do not extend to information about a sexual offense Appellant committed in another state, which became a matter of public record when Appellant registered as a sex offender in Colorado. Accordingly, the Court need not apply a strict scrutiny analysis to this matter.

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[11] Appellant is not part of a suspect class. *See e.g.*, *Cutshall v. Sundquist*, 193 F.3d 466, 483 (6th Cir. 1999) (holding that convicted sex offenders are not a suspect class).

[12] The Constitution of South Carolina specifically recognizes a right to privacy. S.C. Const. art. I § 10. The United States Supreme Court has recognized a constitutional right to privacy in various situations. *See Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147, 176-177 (1973) (finding that the constitutional right to privacy protects personal decisions "relating to marriage, procreation, contraception, family relationships, and child rearing and education").

Since the classification did not affect a fundamental right, this Court applies the "rational relationship" test in determining that the statute did not violate Appellant's right to equal protection. The scope of review should be limited "in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis*, 345 S.C. at 569, 549 S.E.2d at 597. Under this analysis, Appellant's classification as a sex offender in South Carolina is justified if

> (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis.

Id. at 574, 549 S.E.2d at 599-600. The Act complies with the first prong of the test, as the legislative purpose is clearly defined:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400. Thus classifying Appellant as a sex offender is reasonably related to the legitimate state purpose of protecting the public and aiding law enforcement in limiting the risk that sex offenders pose to

communities. *See Cutshall*, 199 F.3d at 482-483. Appellant's classification as a sex offender in South Carolina also comports with the second prong of the test because *all* persons who must register under the Act are subject to uniform administrative and legal procedures regardless of which sexual offense they commit. *See* S.C. Code Ann § 23-3-450 through –490.

Appellant argues that his classification as a sex offender in South Carolina fails the third prong of the *Curtis* test because the state has no reasonable basis for asserting that he committed an ABHAN in South Carolina when the actual crime he pled guilty to was sexual assault in the third degree in Colorado. In our opinion, the state's action is reasonable because the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal. Registering persons who committed crimes in another state when they move to South Carolina is a reasonable method of achieving this goal.[13] The state's classification of Appellant as a sex offender satisfies rational scrutiny and the *Curtis* test because Colorado deemed him a sex offender, and South Carolina gives comity to Colorado's adjudication. Therefore, the statute reasonably protects South Carolinians because the registry notifies them of Appellant's sex offense.

While we find that the state's registration of Hendrix as committing an ABHAN to be constitutional, we are troubled that the state incorrectly registered Hendrix as committing an ABHAN when in actuality, he pled guilty to sexual assault in the third degree as defined by statute.

We hold that when the South Carolina Law Enforcement Division ("SLED") registers a sex criminal due to his conviction of a sexual offense in

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[13] S.C. Code Ann. § 23-4-430(A) provides: "Any person, regardless of age, residing in the state of South Carolina who … has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense for which the person was *required to register in the state where the conviction or the plea occurred*, shall be required to register pursuant to the provisions of this article." (emphasis added).

another state, the agency must correctly state the offense the criminal committed in that jurisdiction. Accordingly, under the "Offense" heading on the registry, SLED should provide (1) the state where the offense was committed; (2) the citation of that state's statute that was violated; (3) the name of the crime committed; and (4) the date of conviction. For example, in this case, Appellant's offense would appear under the "Offense" heading as follows:

> Colorado
> § 18-3-404: Third Degree Sexual Assault
> 2000-03-08[14]

We reserve for another day the question of whether Appellant's right of equal protection would be offended if his petition to be removed from the Colorado registry is granted, yet he remains on the South Carolina registry for life.

Due Process

Appellant argues that the state violated his due process right because it deprived him of a liberty interest without a hearing. Appellant must first "show that he has a constitutionally protected liberty or property interest, and that he has been deprived of that protected interest by some form of state action." *Fleming v. Rose*, 338 S.C. 524, 539-540, 526 S.E.2d 732, 740 (Ct. App. 2000), *rev'd on diff. grounds*, 350 S.C. 488, 567 S.E.2d 857 (2002).

Appellant asserted in his complaint that South Carolina enhanced his punishment because once a person is registered as a sex offender in this state, he must register annually for life. In Colorado, he can appeal to have his

[14]At the time of Appellant's conviction, the crime was entitled sexual assault in the third degree. Colo. Rev. Stat. Ann. § 18-3-404 (West 1999). The statute was amended and effective July 1, 2000, the offense is called unlawful sexual contact. Colo. Rev. Stat. Ann. § 18-3-404 (West Supp. 2001).

name removed from the registry after five years.[15] Appellant's argument fails because this Court has ruled that registering as a sex offender is a non-punitive imposition. *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Therefore, the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest. As such, Appellant has not shown a due process violation.

Conclusion

The state's listing of Appellant on the Sex Offender Registry has not violated his right to equal protection or due process. Accordingly, we **AFFIRM** the trial court's denial of injunctive relief.

We also hold that when SLED registers a sex offender who committed a sex crime in another state, it must list under the "Offense" heading: (1) the state where the offense was committed; (2) the citation of that state's statute that was violated; (3) the name of the crime committed; and (4) the date of conviction.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[15]Colo. Rev. Stat. Ann. § 16-22-113 (West Supp. 2002).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Laterrance Ramone Dunlap, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Henry F. Floyd, Circuit Court Judge

Opinion No. 25616
Heard March 6, 2003 - Filed April 7, 2003

AFFIRMED AS MODIFIED

Stephen D. Schusterman, of Rock Hill, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Thomas E. Pope, of York, for Respondent.

JUSTICE PLEICONES: We granted certiorari to consider whether the Court of Appeals erred in holding that evidence of petitioner's prior drug convictions were properly admitted at trial. State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001). We affirm as modified, finding that Judge Shuler's concurring opinion properly analyzed this case as one involving 'door opening' or 'invited response.'

FACTS

Petitioner was convicted of distributing crack cocaine in 1999 and received a nineteen-year sentence and was ordered to pay a $100,000 fine. His prior record included the following convictions:

1997: conspiracy to possess crack cocaine with intent to distribute
1994: distribution of an imitation drug
1994: simple possession of marijuana
1991: shoplifting

During petitioner's attorney's opening statement, counsel acknowledged that petitioner "had been in trouble with the law from the time he was fifteen years old," was "a young man addicted to drugs," and "we could convict him right now because he is a young man who was hooked on crack and had a problem with it. He never sold it, but he used it."

ISSUE

Whether petitioner's prior drug convictions were properly admitted?

ANALYSIS

While it is technically accurate that petitioner had never been convicted of distributing crack cocaine, an examination of his record demonstrates that he had attempted, albeit unsuccessfully, to position himself as a drug dealer. The 1994 conviction for distributing an imitation substance came about when

petitioner sold a chunk of white chocolate for $800, representing it to be crack cocaine. In 1997, petitioner was convicted of conspiracy to possess crack cocaine with intent to distribute.

The opening statement created the impression that petitioner had no prior connection to the sale of narcotics. In reality, petitioner was not a mere drug user, but an individual who sought to 'elevate' his status to that of a drug dealer. That he was unsuccessful in actually selling anyone illegal drugs does not alter the fact that he tried. We therefore agree with Judge Shuler that petitioner's counsel opened the door to the introduction of evidence rebutting the contention that petitioner was merely an addict. Compare Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000) fn. 3 (noting counsel can open door to evidence of post-arrest silence by asserting government never gave defendant opportunity to tell his story); cf. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (statement at pretrial hearing that defendant may offer evidence of mental illness at trial opened door to court-ordered psychiatric exam and to issue of defendant's mental health).

Because we find that counsel opened the door to the admission of petitioner's prior drug record, we need not reach the issue whether these convictions were admissible to impeach petitioner's credibility under Rule 609, SCACR. We take this opportunity, however, to remind the bench and bar that violations of narcotics laws are generally not probative of truthfulness. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (applying Rule 608, SCRE). This relative lack of probative value should figure prominently in the weighing of prejudice, pursuant to Rule 609 (a) (1), when determining whether to permit a criminal defendant's impeachment by such conduct. See Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000)(factors to be considered in allowing impeachment with prior convictions for crimes not involving dishonesty or falsehood). Further, we agree with Judge Shuler that when the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission. See e.g., State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000)(similarity of prior crimes increases prejudice, not probative value).

CONCLUSION

The decision of the Court of Appeals affirming petitioner's appeal is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Farmer and Harry Bell,
on behalf of themselves and all
others similarly situated, Respondents,

v.

Monsanto Corporation, Delta
and Pine Land Company, Helena
Chemical Company, Mixon Seed
Company, UAP/GA Ag Chem.,
Inc., and Paymaster Seed
Company, Appellants.

Appeal from Hampton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 25617
Heard February 6, 2003 - Filed April 7, 2003

REVERSED IN PART; AFFIRMED IN PART

Carl B. Epps, III, Christopher J. Daniels,
Rachel A. Hedley, and C. Mitchell Brown, of
Nelson Mullins Riley & Scarborough, L.L.P.,
of Columbia, for appellants Monsanto
Company and UAP/Ag Chem., Inc.

M. Dawes Cooke, Jr., of Barnwell Whaley
Patterson & Helms, L.L.C., of Charleston; and

Stephen L. Thomas, of Bradley, Arant, Rose & White, L.L.P., of Jackson, Mississippi, for appellants Delta and Pine Land Co., Paymaster Seed Co., Helena Chemical Co., and Mixon Seed Co.

Daniel A. Speights, Marion C. Fairey, Jr., and Robert N. Hill, of Speights & Runyan, of Hampton; and John E. Parker, Mark D. Ball, Ronnie L. Crosby, of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Hampton, for respondents.

Robert D. Moseley, Jr., of Leatherwood Walker Todd & Mann, P.C., of Greenville, for amicus curiae S.C. Chamber of Commerce.

Ronald R. Norton, of Conway, for amicus curiae Washington Legal Foundation.

Chilton Davis Varner and Michelle Jerusalem Cole, of King & Spalding, of Atlanta, Georgia; Hugh F. Young, Jr., of Reston, Virginia; and Henry B. Smythe, Jr. and Julius H. Hines, of Buist, Moore, Smythe & McGee, P.A., of Charleston, for amicus curiae Product Liability Advisory Council, Inc.

JUSTICE MOORE: Appellants (Corporations) appeal an order striking their affirmative defenses based on the "door-closing" statute, S.C. Code Ann. § 15-5-150 (1976), and the statute of limitations. We reverse in part and affirm in part.

FACTS

Respondents (Plaintiffs), who are South Carolina residents, commenced this action for actual and punitive damages allegedly resulting from the purchase of defective cotton seed. Plaintiffs alleged they represented a class of "all cotton growers" who purchased the defective seed from Corporations.

Corporations, except Mixon Seed Company, are foreign corporations. They pled as an affirmative defense § 15-5-150 which provides:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court:
>
> (1) By any resident of this State for any cause of action; or
> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

Corporations claimed that under this section Plaintiffs' assertion of a potential nationwide class could not include nonresidents whose causes of action did not arise in South Carolina. Corporations also pled the statute of limitations as an affirmative defense.

Plaintiffs moved to strike these two defenses. They claimed the door-closing statute does not apply so long as the class representatives are South Carolina residents; further, they argued no statute of limitations barred the action. The trial judge granted Plaintiffs' motion and struck these two defenses from Corporations' answers. Corporations appeal.

ISSUE

Does § 15-5-150 limit a class action against a foreign corporation in state court?

DISCUSSION

As an initial matter, we note the parties and the trial judge have framed the issue of the door-closing statute as one of subject matter jurisdiction as held previously by this Court. *See* Parsons v. Uniroyal-Goodrich Tire Corp., 313 S.C. 394, 438 S.E.2d 238 (1993); Olson v. Lockwood Greene Engineers, Inc., 278 S.C. 67, 292 S.E.2d 186 (1982) *overruled in part by* Parsons, *supra*; Cox v. Lunsford, 272 S.C. 527, 252 S.E.2d 918 (1979); Nix v. Mercury Motor Exp., Inc., 270 S.C. 477, 242 S.E.2d 683 (1978); *see also* Builder Mart of America, Inc. v. First Union Corp., 349 S.C. 500, 563 S.E.2d 352 (Ct. App. 2002); Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2002); Eagle v. Global Assoc., 292 S.C. 354, 356 S.E.2d 417 (Ct. App. 1987). Because § 15-5-150 does not involve subject matter jurisdiction but rather determines the capacity of a party to sue, we overrule these cases to the extent they hold otherwise.

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 237-238, 442 S.E.2d 598, 600 (1994). Section 15-5-150 does not affect the circuit court's power to hear any general class of proceedings. We have specifically held that another door-closing statute, S.C. Code Ann. § 33-15-102 (1990),[1] affects only a party's capacity to sue and not the subject matter jurisdiction of the circuit court. Chet Adams Co. v. James F. Pedersen Co., 307 S.C. 33, 413 S.E.2d 827 (1992). Similarly, § 15-5-150 does not affect subject matter jurisdiction.

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[1]This section restricts the right of a foreign corporation to sue in the courts of this State until the corporation has obtained a certificate of authority.

On the merits, the trial judge held the door-closing statute does not apply as a matter of law because the representatives of the class are South Carolina residents. Corporations contend this was error because the class itself cannot include members who would not be able to bring the action in their individual capacities under the door-closing statute. We agree.

Whether the door-closing statute limits the members of a class action is a novel question.[2] The federal case relied upon by the trial judge and Plaintiffs, Central Weslyan College v. Kaiser Gypsum Co., 6 F.3d 177 (4th Cir. 1993), is not controlling. In that case, the plaintiff, a South Carolina college, commenced an action in federal court seeking compensation for asbestos removal. The district court conditionally certified a nationwide class of all colleges and universities that had suffered property damage from asbestos removal. On appeal, the Fourth Circuit summarily held that federal policy in favor of consolidating asbestos litigation pre-empted our State door-closing statute and § 15-5-150 was not a bar to class certification. 6 F.3d at 186. By its terms, however, § 15-5-150 applies only to actions brought in the circuit court. The statute clearly does not apply to federal suits and the Fourth Circuit's ruling on its non-application in that case is irrelevant.

Section 15-5-150 was enacted in 1870. Historically, cases involving early class actions held that a class was proper only if composed of plaintiffs who could properly be joined as parties to the action. *See* Faber v. Faber, 76 S.C. 156, 56 S.E. 677 (1907). This early joinder rule would have limited class members to those who had the capacity to sue individually, supporting the conclusion the legislature

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[2]We find the wrongful death cases cited by Corporations inapposite. In a wrongful death action, the representative plaintiff's capacity is derived from the decedent's; in a class action, the representative's capacity does not derive from the class members but rather is representational capacity based on commonality. *See* Rule 23(a), SCRCP (class action rule).

intended § 15-5-150 to limit class membership to those who had capacity under its terms.

Public policy supports this view of legislative intent. We have previously recognized three important objectives of the door-closing statute: 1) it favors resident plaintiffs over nonresident plaintiffs; 2) it provides a forum for wrongs connected with the State while avoiding the resolution of wrongs in which the State has little interest; and 3) it encourages activity and investment within the State by foreign corporations without subjecting them to litigation unrelated to their activity within the State. Rosenthal v. Unarco Ind., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982). These policy objectives are equally applicable in the context of class actions.

From the State's perspective, the rationale for allowing a class action is "to manage litigation involving numerous class members *who would otherwise all have access to court via individual lawsuits.*" Worth v. City of Rogers, 86 S.W.3d 875, 879 (Ark. 2002) (emphasis added). Limiting the class to members who qualify under § 15-5-150 simply excludes class members who would otherwise have no access to our courts via individual lawsuits. Further, the State's interest in limiting suits against foreign corporations outweighs the interest of the few South Carolina plaintiffs seeking to represent nationwide classes.

In conclusion, we hold § 15-5-150 controls the eligibility of class members in a class action where the defendant is a foreign corporation. Accordingly, we reverse the trial court's order striking this affirmative defense.

In light of our conclusion that the class may include only those eligible under § 15-5-150, the applicable statute of limitations is under South Carolina law. Counsel for Corporations conceded during argument on the motion to strike that our statute of limitations does not bar the suit. The trial court's ruling striking the statute of limitations as a defense is therefore affirmed.

REVERSED IN PART; AFFIRMED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Christopher Dale Tench, Appellant.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25618
Heard March 4, 2003 - Filed April 7, 2003

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Druanne Dykes White, of Anderson, for Respondent.

JUSTICE WALLER: Christopher Dale Tench was convicted of murder, first degree burglary, and attempted armed robbery. He was sentenced

to death for murder, life imprisonment for burglary, and ten years for attempted armed robbery. We affirm.

FACTS

In the early morning hours of January 12, 1999, police were called to a home in Anderson, SC, where they found Appellant, Christopher Dale Tench, bleeding from the torso, left hand, and both legs, the apparent victim of a shooting. Tench told police he had been shot by three men at Broadway Lake; however, he could not describe either his assailants or the exact location of the shooting. In the hopes of obtaining further information leading to the individuals who shot Tench, police sought a search warrant for his vehicle. The affidavit supporting the warrant sought "blood, fibers, weapons, projectiles, casings or papers or receipts which would indicate the manner, method, motive, cause or perpetrators involved in the shooting . . ."

The search warrant was executed at approximately 2:00 p.m. on January 12, 1999, by Investigator Clamp, one of the officers who had been called to Tench's home in the early morning hours. As Clamp was executing the warrant, he was advised by another officer that police were investigating the murder of a man named James Michael McBride, who had been found shot to death at his home the same morning. Clamp was advised that some peanut shells had been found outside McBride's residence. Accordingly, Clamp began looking for any evidence which might link the two crimes together. Clamp seized the following items from Tench's vehicle:

> 1 Pillow, Sample of Dirt, Peanuts, Light Switch, 1 Dime, Box of Ammo. (partial box)- Reloads, assorted cans and bottles, assorted papers, 1 pair of black gloves, paint scraping, 8 trace evidence lifts, 2 blood swabs, yellow handled pliers, green colored ball cap, small black flashlight, insurance papers, 3 sheets of latent fingerprint lifts and inked impressions of the tires. Also collected was small blood stained portion of the driver's seat, 1 small blue ball bat, 1 set of booster cables.

Three days later, while in the hospital being treated for his injuries,

Tench confessed to shooting McBride. However, Tench claimed he had intended only to burglarize the home but was confronted by McBride when he entered the home. According to Tench, McBride started shooting at him; Tench pleaded with McBride to be allowed to leave but McBride kept shooting. Tench shot him, killing him.

Tench was subsequently indicted for murder, first-degree burglary, and armed robbery; the state sought the death penalty for murder. At trial, Tench moved to suppress all evidence seized during the search of his car on the basis that the affidavit and search warrant did not set forth sufficient probable cause for police to search for evidence linking him to McBride's murder. The court denied the motion to suppress. The jury convicted Tench on all counts and recommended a sentence of death. The trial court sentenced him to death for murder, life imprisonment for burglary, and ten years for attempted armed robbery.

ISSUE

Did the court err in denying the motion to suppress the evidence seized in the search of Tench's automobile?

DISCUSSION

Tench asserts the search warrant was unsupported by probable cause that evidence of any crime could be found in his car; accordingly, he contends the trial court erred in refusing to suppress the evidence seized therein. We disagree.

A search warrant may issue only upon a finding of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched. Id.; State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct.App.1995). A reviewing

court should give great deference to a magistrate's determination of probable cause. State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988).

The affidavit prepared by Investigator Major provides:

> That on or about 12:39 a.m. on January 12, 1999, deputies from the Anderson County Sheriff's Office responded to shooting call at 150 Cedar Road in Anderson, S.C. On their arrival, they found Christopher Dale Tench sitting in a chair at the kitchen table bleeding from his torso, his left hand and both legs, an apparent victim of multiple gunshot wounds. Tench was able to inform the officers that he was shot near Broadway Lake. He could not, however, describe his assailant(s) nor provide a specific location of the incident. His mother, who was at the house, stated that Tench arrived home driving his white with a burgundy half top 1977 Cadillac 2-Door Coupe de Ville. He exited the vehicle wounded and bleeding. There is smeared blood on the outside handle of the driver's door. The driver's seat is blood soaked and blood can been [sic] seen on the instrument panel and steering wheel. An Anderson County deputy sheriff located and recovered an apparent projectile from the outside of the trousers worn by Tench. It is the Affiant's belief that based on these facts, items will be on or within the vehicle which will indicate the manner, method, motive, cause, or perpetrators involved in the shooting of Christopher Dale Tench.

We find the affidavit sufficiently establishes probable cause. The affidavit specifically notes that police recovered an "apparent projectile from the outside of Tench's trousers." Police were aware that Tench had driven the car home from the scene of the shooting and there was blood both in and on the car. Given that a projectile was recovered from Tench's trousers, we find police had a legitimate basis to believe that further projectiles could feasibly be found in the car. Further, in light of the fact that Tench did not give police the precise location of the shooting, the police could feasibly have believed he may have been shot at as he attempted to enter or exit the vehicle, which would have provided a sufficient basis to search for projectiles or shell casings in the vehicle. Moreover, since Tench could not pinpoint for police the exact location

of the shooting, we find police had sufficient cause to obtain tire impressions, to enable them to investigate matching impressions at the alleged scene of the crime.

Finally, the affidavit authorized police to search for evidence which would indicate the "manner, method, motive, cause or perpetrators involved in the shooting of Christopher Dale Tench." Although Tench asserts police were, in reality, attempting to search for evidence linking him to the McBride murder, the simple fact of the matter is that any evidence which did link Tench to that murder also tended to indicate the manner, method, motive and perpetrator involved in shooting Tench. Accordingly, we find the affidavit established probable cause, and the trial court properly denied the motion to suppress.

In any event, even were we to find the affidavit insufficient to establish probable cause, we would find any error in admission of the seized evidence harmless beyond a reasonable doubt. See State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (erroneous admission of evidence may constitute harmless error if the evidence did not affect the outcome of the trial), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Bernotas, 277 S.C. 106, 283 S.E.2d 580 (1981) (for an error in the erroneous admission of unlawfully seized evidence to require reversal, the appellant must be sufficiently prejudiced).

Independent of the items Tench sought to have suppressed at trial,[1] the state presented overwhelming evidence of Tench's guilt, to wit: 1) Tench's confession to police in which he admitted to breaking into McBride's house and to shooting him, 2) blood found at the victim's house which matched Tench's DNA,[2] 3) the bullet from Tench's leg was consistent with the spent rounds found at the scene, 4) a shoe print found at the scene was consistent with prints of Tench's tennis shoes, and 5) some unfired .44 cartridges which

[1] The specific items seized from the car which Tench objected to at trial were a sample of dirt, peanuts, a dime, a pair of black gloves, paint scraping, three sheets of latent fingerprints, and ink impressions of the tires. At oral argument before this Court, counsel for Tench conceded that, if the warrant to search was valid, then the items seized but not specifically enumerated therein were not objectionable.

[2] The investigator testified the probability of selecting an unrelated individual from a DNA match from the Caucasian population was one in 1.4 trillion and that there were only six billion people on the face of the earth.

police obtained from Darvin Davis, the man from whom Tench purchased a .44 caliber pistol several hours prior to the shooting.

Given the abundant evidence of Tench's guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt. State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997)(failure to suppress evidence is harmless where record contains overwhelming evidence of guilt).

As this is the direct appeal of Tench's death sentence, we must conduct a proportionality review pursuant to S.C. Code Ann. § 16-3-25(C) (1985). We find the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000); State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997), cert. denied, 523 U.S. 1097 (1998); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. 853 (1997); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. 1277 (1996); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52, cert. denied, 520 U.S. 1268 (1996). Tench's convictions and sentences are affirmed.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Angela J. Thomas, Petitioner,

v.

Kevin M. Thomas, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 25619
Heard March 5, 2003 - Filed April 7, 2003

AFFIRMED AS MODIFIED

James T. McLaren and C. Dixon Lee, III, of Columbia; and Timothy S. Mirshak, of Augusta, Georgia, for Petitioner.

Robert L. Widener, of McNair Law Firm, P.A., Columbia; for Respondent.

JUSTICE WALLER: In this divorce case, we granted certiorari to review the Court of Appeals' decision in Thomas v. Thomas, 346 S.C. 20, 550 S.E.2d 580 (Ct. App. 2001). We affirm as modified.

FACTS

Angela Thomas (Wife) and Kevin M. Thomas (Husband) were married on May 2, 1992. Both parties had previously been married, and they each have two children from their prior respective marriages. No children were born to this marriage, however.

In early August 1995, Wife bought a Georgia lottery ticket. One of the "quick-picks" on the ticket turned out to be the winning numbers for the $9 million grand prize, paid in annual installments over 20 years.[1] The lottery prize was claimed in Wife's name only. Although Wife testified that she always purchased the lottery tickets with her "pocket money," Husband stated that both he and Wife bought lottery tickets during the marriage. Husband also testified that he and Wife agreed to put the prize in her name so his former wife would not "come after" him for more child support.

Wife, who worked as a clerk at the Veterans Administration Hospital, immediately terminated her employment upon winning the lottery. Approximately one year later, Husband left his employment at D.S.M. Chemical. When they left their employment, Wife earned almost $20,000 per year, and Husband earned between $40,000 and $50,000 per year depending on overtime.

From the time Wife won the lottery until the parties' separation, the lottery money clearly was used by both of them as marital income. For example, they made significant improvements to the marital home, opened joint investment accounts, and also purchased a $225,000 lake house.

[1] The pre-tax payments are $447,000 each, with the final payment in the amount of $485,000.

Wife and Husband separated on November 3, 1997, after a physical altercation occurred between them.[2] Wife filed for divorce on the ground of physical abuse. Husband also filed for divorce on the ground of one year's continuous separation. In 1999, the family court granted Husband a divorce on the ground of one year's separation. The parties agreed to the division of almost all of the property in the marital estate; therefore, the main issue at the divorce hearing was the division of the lottery proceeds. Noting that the issue was a novel one in South Carolina, the family court found the lottery proceeds were marital property, applied the New York case of Ullah v. Ullah, 555 N.Y.S.2d 834 (N.Y. App. Div. 1990), and awarded 50 per cent of the remaining lottery proceeds to Husband. The family court also stated in its order that it had considered the fifteen statutory factors for the equitable apportionment of marital property. See S.C. Code Ann. § 20-7-472 (Supp. 2002).

Wife appealed, arguing, *inter alia*, that the family court failed to apply the relevant statutory factors in determining equitable division of the lottery proceeds. The Court of Appeals affirmed.

ISSUE

Did the Court of Appeals err in affirming the family court's 50% award of the lottery proceeds to Husband?

DISCUSSION

Wife argues the Court of Appeals erred by failing to reverse the family court's application of the "fortuitous circumstances" rule of Ullah v. Ullah. She further argues the Court of Appeals erred by applying the statutory factors but not adopting this as the legal rule to be used for the division of lottery proceeds. Finally, Wife contends the family court erred in evenly

[2] The parties had several problems throughout their marriage. According to Wife, Husband abused alcohol and acted inappropriately when intoxicated. They also had problems during the marriage arising from their respective children. Attempts at marriage counseling were unsuccessful.

splitting the lottery prize and that this Court should award her a greater share in the winnings.[3]

Although in the instant case the Court of Appeals clearly applied the statutory factors to affirm the family court's 50% award to Husband, the Court of Appeals' decision is arguably ambiguous on the novel issue of how the family court should properly divide lottery winnings in a divorce action. As noted by the Court of Appeals, a review of the relevant case law reveals that two approaches have evolved -- the so-called "fortuitous circumstances" rule or the statutory factor analysis.

The fortuitous circumstances rule can be traced to Ullah v. Ullah, a New York case. In that case, Mr. Ullah purchased a New York State "Lotto" ticket and won $8 million, payable in 21 annual installments. Within months after winning, Mr. and Mrs. Ullah resigned from their jobs. Ullah v. Ullah, 555 N.Y.S.2d at 835. In their divorce action, Mr. Ullah appealed from a judgment that awarded his wife an equal share of the winnings. The Ullah court affirmed, stating as follows:

> While a guiding principle of equitable distribution is that parties are entitled to receive equitable awards which are proportionate to their contributions to the marriage, … in the instant case **the contributions each spouse made prior to winning the prize have little relevance to the manner in which the lottery jackpot should be distributed**. This award was won through **sheer luck**, against odds of 12,913,583 to one. As [the trial court] aptly recognized, this enormous return required "little effort or investment". **As it was predominately the result of fortuitous circumstances and not the result of either spouse's toil or labor, we find that an equal division of this jackpot was entirely appropriate**.

Id. (emphasis added, citations omitted).

[3] We note that the family court correctly found the lottery proceeds to be marital property, and neither party has appealed this finding.

An alternative view is found in Alston v. Alston, 629 A.2d 70 (Md. 1993). The Alston court applied Maryland's equitable distribution statute on the issue of how to divide Mr. Alston's lottery prize of over $1 million. Mr. Alston purchased the winning lottery ticket **after** the parties had separated, and **after** Mrs. Alston had filed for divorce. Mrs. Alston initially sought divorce based on the couple's voluntary separation for over one year; she did not seek alimony or a monetary award. However, after she learned that her husband had won the lottery, Mrs. Alston immediately dismissed the initial divorce complaint. She filed a second complaint approximately six months later for divorce on the ground of adultery and for a monetary award based on the lottery annuity. The trial court granted Mrs. Alston a divorce because of Mr. Alston's adultery and granted her 50% of the lottery proceeds. The intermediate appellate court affirmed, but that decision was reversed by the Alston court.

The Alston court discussed in depth the history and purpose of the equitable distribution statute, commenting that "the General Assembly was primarily concerned with achieving equity by reflecting non-monetary contributions of the acquisition of marital assets." Id. at 75. The court stated that "no hard and fast rule can be laid down" regarding the division of lottery winnings and that "each case must depend upon its own circumstances to insure that equity be accomplished." Id.

Nonetheless, the Alston court noted that the eighth factor in the statute, regarding "how and when specific marital property" was acquired and the contribution that each party made toward its acquisition, "should be given considerable weight." Id. In addition, the Alston court stated the following:

> Where one party, wholly through his or her own efforts, and without any direct or indirect contribution by the other, acquires a specific item of marital property **after the parties have separated and after the marital family has, as a practical matter, ceased to exist**, a monetary award representing an equal division of that particular property would not ordinarily be consonant with the history and purpose of the statute.

Id. at 76 (emphasis added). Thus, finding that the record contained "no evidence which would justify awarding any portion of the annuity to Mrs. Alston," the court reversed Mrs. Alston's 50% award and remanded for the trial court to revisit the issue of alimony. Id. at 77.

The court in DeVane v. DeVane, 655 A.2d 970 (N.J. Super. 1995), succinctly summarized the two approaches as follows:

> Two distinct rules have emerged concerning the manner in which lottery winnings should be disbursed between the parties on the dissolution of the marriage and distribution of marital assets. One rule, represented by Ullah, emphasizes that the asset is a windfall and was not created due to the efforts of either party; therefore, it should be divided equally.… The other rule is represented by [Alston], which holds that the court should apply the factors guiding equitable distribution … to arrive at an appropriate distribution decision.

Id. at 971 (citations omitted). The DeVane court concluded that the trial judge should apply all the factors set forth in the New Jersey equitable distribution statute and "distribute the marital assets consistent with the unique needs of the parties." Id. at 972.

In South Carolina, the law of equitable distribution "is premised on providing the family court the flexibility to view each case based on the individual circumstances peculiar to the parties involved and to fashion a division of the parties' assets in a manner that is uniquely fair to the parties concerned." Marsh v. Marsh, 313 S.C. 42, 46, 437 S.E.2d 34, 36 (1993). Because we can foresee numerous scenarios where a mechanistic, 50-50 split would be inequitable, we reject the fortuitous circumstances rule.[4] Instead,

[4] For example, if a spouse buys a winning lottery ticket after the parties have separated, but before they have divorced, the family court should be able to take that into consideration. See Alston, supra (where, in reversing a 50-50 award, the court seemed to place heavy emphasis on the fact that at the time

we hold that the statutory factor analysis is the proper method for determining the equitable apportionment of lottery proceeds. Equity will best be served if the family court has at its disposal all the factors enumerated in the statute thereby allowing the court to take into consideration "the unique needs of the parties." DeVane, 655 A.2d at 972; see also Marsh, supra. Accordingly, when the family court is faced with this issue in the future, the 15 statutory factors found in the equitable apportionment statute should be the family court's guide. See S.C. Code Ann. § 20-7-472 (Supp. 2002).

Nevertheless, we note that the third and fifteenth statutory factors likely will be given particular attention in a case such as this. See Alston, supra. The third factor requires the family court to take into consideration "the value of the marital property" and "the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; provided, that the court shall consider the quality of the contribution as well as its factual existence." The fifteenth factor is a "catchall" which provides that the family court consider "such other relevant factors as the trial court shall expressly enumerate in its order." Clearly, the family court should take into consideration the fact that winning the lottery is a lucky occurrence producing what is, in essence, a windfall to the marriage.

Turning to the facts of the instant case, the Court of Appeals applied the statutory factors to affirm the family court's 50% award to Husband. Wife asserts that because she purchased the lottery ticket, her contribution should be considered greater thereby entitling her to more than a 50% share of the lottery proceeds. However, we agree with the Court of Appeals' conclusion that "an equal distribution was fair and equitable under the facts and circumstances of this case." Thomas, 346 S.C. at 27, 550 S.E.2d at 583. Although Wife bought the ticket, the facts of this case plainly show that prior to their separation, the parties jointly shared the winnings. Wife cannot escape the fact that this was a windfall to the marriage resulting from the luck of the draw. We find a 50-50 split to be the appropriate, equitable apportionment of the lottery proceeds.

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the husband purchased the lottery ticket, "the marital family ha[d], as a practical matter, ceased to exist").

Furthermore, we agree with the Court of Appeals that the family court's order indicated that the statutory factors indeed were considered. The family court did more than merely state in its order that it had considered the factors. Instead, the family court made numerous findings of fact which clearly evidence its consideration of the statutory factors.[5] Therefore, the Court of Appeals properly affirmed. E.g., Jenkins v. Jenkins, 345 S.C. 88, 545 S.E.2d 531 (Ct. App. 2001) (if it can be determined that the family court addressed the factors under section 20-7-472 sufficiently for the appellate court to conclude the court was cognizant of the statutory factors, then the family court's decision will be affirmed).

CONCLUSION

In sum, we adopt the statutory factor analysis as the appropriate method for the equitable division of lottery proceeds in a divorce action. We affirm the decision to evenly split the lottery winnings between Husband and Wife.

AFFIRMED AS MODIFIED.

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

[5] For example, the family court detailed the duration of the marriage, the parties' respective situations regarding the children from their previous marriages, and their health. The family court also noted that Husband and Wife both: have a high school education, provided income to the marriage as well as other non-economic contributions, and are the same age.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

Dennis Zulfer, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 25620
Heard March 19, 2003 - Filed April 7, 2003

DISMISSED AS IMPROVIDENTLY GRANTED

Assistant Appellate Defender Aileen P. Clare, of Columbia; for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., and Solicitor Warren B. Giese, of Columbia for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' opinion in State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001). After careful consideration, we dismiss certiorari as improvidently granted.

DISMISSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Horry
County Magistrate Charles
B. Johnson, Respondent.

Opinion No. 25621
Submitted March 11, 2003 - Filed April 7, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Warren C. Powell, Jr., of Columbia, for Respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a six month suspension, retroactive to July 11, 2002, the date he was placed on interim suspension. We accept the agreement and impose a six month suspension, retroactive to the date of his interim suspension. The facts as set forth in the agreement are as follows.

FACTS

Respondent was subpoenaed as a potential witness in a case tried before Horry County Magistrate Marjorie B. Livingston.[1] Before adjourning for lunch, Judge Livingston directed the witnesses, including respondent, not to discuss the case during the lunch break.

Prior to resuming the trial, Judge Livingston was informed by defense counsel that several witnesses reported respondent had spoken to them about the case during the lunch break. During an in camera hearing, several people reported that they had seen respondent sitting and talking with one of the defense witnesses.

One witness testified, during the in camera hearing, that she overheard respondent state to the witness he was sitting with, "remember now, don't answer anything they don't ask you." The witness respondent had been seen sitting with and talking to confirmed he had had such a conversation with respondent.[2] Another witness stated respondent had also attempted to talk to her about the trial, but she told him the conversation was improper.

Respondent denied having any conversations with the witnesses regarding the merits of the case and denied sitting with any of the witnesses. Respondent admitted he had asked one of the witnesses what the witness thought about the situation. Respondent testified the witness stated, "it's just

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[1] This case involved a charge of simple assault and battery against the Interim Chief of Police for Atlantic Beach. The charge arose from an altercation between the Interim Chief and respondent's brother at an Atlantic Beach Town Council meeting. Respondent was not present at the meeting and, therefore, did not witness the events giving rise to the charge; however, he was subpoenaed as a witness by the defense.

[2] The witness testified he felt compelled to sit with respondent, although he knew it was a violation of Judge's Livingston's instructions, because respondent was the judge at J. Reuben Long Detention Center where the witness had previously been detained on a public intoxication charge and other minor offenses. The witness also testified respondent asked him what he thought of the situation that gave rise to the charges against the Interim Chief and stated he did not like Atlantic Beach and that he did not have anything to do with the municipality.

two adults with [a] misunderstanding," and respondent stated, "well, fine, I agree with that, fine." Respondent also maintained the witness initiated a conversation about whether respondent liked Atlantic Beach and about respondent's relationship with Atlantic Beach police. Respondent stated he told the witness, "remember, I didn't discuss anything with you about this case period. I did not discuss anything with you about this case because you have not testified and I was instructed not to discuss anything and I did not." Based on respondent's communications with witnesses during the lunch break, Judge Livingston granted the defendant's motion to dismiss the case.

Respondent now acknowledges that portions of his testimony during the in camera hearing were incorrect, particularly his testimony that he did not sit with one of the witnesses and had not discussed the case with any of the witnesses. Respondent agrees that the circumstances of the events during the lunch break were substantially as set forth in the testimony of the other witnesses given during the in camera hearing.

Law

By his conduct, respondent has violated the following Canons of the Code of Judicial Conduct: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A) (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3 (a judge shall perform the duties of judicial office impartially and diligently); Canon 3(A) (the judicial duties of a judge take precedence over all the judge's other activities); Canon 3(B)(2) (a judge shall be faithful to the law and maintain professional competence in it; a judge shall not be swayed by partisan interests, public clamor or fear of criticism); Canon 3(B)(9) (a judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make an nonpublic comment that might substantially interfere with a fair trial or hearing); Canon 4 (a judge shall conduct extra-judicial activities so as to minimize the risk of conflict with judicial obligations); Canon 4(A)(1) (a judge shall conduct all of the

judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge); Canon 4(A)(2) (a judge shall conduct all of the judge's extra-judicial activities so that they do not demean the judicial office); and Canon 4(A)(3) (a judge shall conduct all of the judge's extra-judicial activities so that they do no interfere with the proper performance of judicial duties).

By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. He also violated Rule 7(a)(7), RJDE, by willfully violating a valid court order issued by a court of this state.

CONCLUSION

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent for six months, retroactive to July 11, 2002, the date of his interim suspension.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Jon Pierre Lacoste, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Wyatt T. Saunders, Jr, Circuit Court Judge

Opinion No. 25622
Heard March 18, 2003 - Filed April 7, 2003

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Thomas E. Pope, of York, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

PER CURIAM: After full review of the Appendix and briefs, we dismiss the writ of certiorari as improvidently granted.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe and Jane Doe, Petitioners,

v.

The Ward Law Firm, P.A.,

In Re: S. Doe (10-28-83), Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 25623
Heard November 7, 2002 - Filed April 7, 2003

REVERSED AND REMANDED

James Fletcher Thompson, of Spartanburg; for Petitioners.

Robert Eric Davis, of Ward Law Firm ,of Spartanburg; for Respondent.

Elizabeth A. Sumner, of Charleston; for Guardian Ad Litem

JUSTICE BURNETT: John and Jane Doe (collectively "Does") appeal the Court of Appeals' Order denying them access to their child's ("Child") adoption records maintained by the Ward Law Firm ("Law Firm") and the Spartanburg County Clerk of Court ("Clerk of Court"). Doe v. The Ward Law Firm, P.A., Op. No. 2001-UP-377 (S.C. Ct. App. Filed July 26, 2001). We reverse and remand.

FACTS

The Does adopted Child by Order of the Spartanburg County family court on December 23, 1983. Child has experienced a host of medical ailments including both physical and mental problems. Within the first months of Child's life he began experiencing respiratory difficulties which persist to this day. Doctors have diagnosed Child with a cyst located on his brain. He has also experienced delayed puberty.

At about six years of age, Child began to experience separation anxiety after father Doe suffered a heart attack. Child's mental health worsened when, at age thirteen, he began experiencing severe and violent mood swings. Child's violent tendencies culminated with physical confrontations with both parents. In one incident Child threatened mother Doe with a knife. In another, he destroyed the tendons and cartilage in her finger. Those violent tendencies have also been directed at himself resulting in self-mutilation and expressions of a desire to commit suicide.

The Does have attempted to help Child through medical and psychiatric care, including commitment to mental institutions on three separate occasions. A variety of psychiatrists, psychologists and neurologists examined him. In spite of such treatment, Child has failed to respond to therapy and has suffered severe reaction to some forms of medicinal treatment.

At the family court hearing, Does submitted letters of several doctors suggesting knowledge of child's biological family's medical history would be important in diagnosing and treating Child. One psychologist stated he "suspect[ed] that certain inherited predispositions, genetic

weaknesses, possible congenital and/or birth delivery toxicity or trauma may have been factors in [Child's] present academic, personality and behavioral deficits."

For this reason, the Does petitioned the family court to permit the Does to view Child's adoption file held by the Ward Law Firm.[1] In the alternative, Does petitioned for access to the Clerk of Court's adoption records. In both instances, Does requested the family court appoint an intermediary to review the files and only divulge non-identifying information of the biological parents.

The family court declined to require Law Firm to allow Does to review its adoption file. The court found it lacked subject matter jurisdiction to address the issue because it was "a contract matter between the attorney and plaintiffs and not an issue incident to the adoption." Addressing the merits, the court found Law Firm was not an agency or category of persons contemplated by S.C. Code Ann. § 20-7-1780(C) (Supp. 2001) (allowing a family court to grant access to an authorized agency's adoption records). Further, the family court found the Does had not shown "good cause" required by S.C. Code Ann. § 20-7-1780(B) (Supp. 2001). The Court of Appeals affirmed.

ISSUES

I. Did the Court of Appeals err in holding the Does did not show "good cause" to obtain the Clerk of Court's adoption file?

II. Did the Court of Appeals err in holding the Does could not review Child's adoption files housed by the Ward Law Firm?

[1] The attorney who handled Child's adoption is deceased. The Ward Law Firm has possession of his files.

III. Did the Court of Appeals err in holding the family court should not appoint an intermediary to review Child's adoption files and to contact the biological parents to obtain necessary information?

DISCUSSION

I

Clerk of Court's Adoption Files

Both the family court and the Court of Appeals relied upon our ruling in Bradey v. Children's Bureau of South Carolina, 275 S.C. 622, 274 S.E.2d 418 (1981), to deny the Does an opportunity to review the adoption record filed with the Clerk of Court. In Bradey, Bradey sought to compel release of identifying information about his biological parents. As in the present case, the statute at issue prevented the dissemination of adoption information absent "good cause" shown. [2]

We began our analysis in Bradey by discussing the privacy interests of the parties to the adoption. We held a party could not show the required good cause absent a compelling need for identifying information about the biological parents. Absent a compelling need, the veil of privacy surrounding the biological parents could not be lifted.

Although the Bradey decision did not specifically define

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[2] The Bradey statute read:

> All files and records pertaining to the adoption proceedings in the Children's Bureau in the State of South Carolina, or in the Department of Social Services of the State of South Carolina, or in any authorized agency, shall be confidential and withheld from inspection except upon order of court for good cause shown.

S.C. Code Ann. § 15-45-140(c) (1976) repealed 1981 Act No. 71 § 3, eff. May 19, 1981.

'compelling need', we noted Bradey did not fall into "the relatively small group of adoptees whose psychological needs are compelling[]" sufficiently to warrant violating the biological parents' privacy. Id. at 628, 274 S.E.2d at 422 (quoting Application of Maples, 563 S.W.2d 760, 763-64 (Mo. 1978)). We further noted that Bradey's insecurities in not knowing the identity of his biological parents did not interfere with his ability to maintain steady employment and have a stable family life of his own. Bradey, 275 at 629, 274 S.E.2d at 422.

Good cause, therefore, required an individual show a compelling need to remove the veil of privacy from the biological parents. The compelling need itself was demonstrated by a variety of factors including the medical or mental health of the adopted child and whether not having the information impaired the child's ability to lead a stable, productive life.

Central to the analysis of both courts below is Bradey's reliance on confidentiality in the adoption process and the presumption that such confidentiality should be maintained absent an extraordinary, compelling need. While we do not disagree with such rationale nor do we overturn Bradey, it is important to note that, since the Bradey decision, the adoption code has undergone expansive revision. See 1986 Act No. 464; 1986 Act No. 525; see also 1981 Act No. 71 § 3 repealing S.C. Code Ann. § 15-45-140(c) (1976).

South Carolina adoption law continues to provide that all papers and records pertaining to an adoption are confidential and must be sealed to prevent inspection absent a showing of good cause.[3] See S.C. Code Ann. §

[3] State law currently mandates the family court require a background investigation of biological parents before allowing an adoption. See S.C. Code Ann. § 20-7-1740(A)(3) (Supp. 2001). The investigative report must include certain non-identifying information about the biological parents including "a medical history of the biological family of the adoptee, including parents, siblings, and other family members related to the adoptee including ages, sex, race, and any known genetic, psychological, metabolic, or familial disorders . . ." S.C. Code § 20-7-1740(A)(3)(a) (Supp. 2001).

20-7-1780 (Supp. 2001) ("No person may have access to the records except for good cause shown by order of the judge of the court in which the decree of adoption was entered."). However, we must now be mindful when balancing the privacy rights of each party with the interests of the child that the Legislature has determined the best interests of the child should prevail. See S.C. Code Ann. § 20-7-1647 (Supp. 2001) The Legislature's stated purpose in enacting the changes contained in the Adoption Act:

> is to establish fair and reasonable procedures for the adoption of children and to provide for the well-being of the child, with full recognition of the interdependent needs and interests of the biological parents and the adoptive parents. However, when the interests of a child and an adult are in conflict, **the conflict must be resolved in favor of the child**.

Id. (emphasis added).

Accordingly, we are presented the task of determining whether the Does presented "good cause" why releasing such information would be in Child's best interests. The Does have done so.

Apart from Child's physical difficulties with respiratory problems and a cyst on his brain, the Does have demonstrated the need to obtain the information for Child's mental health. Child's behavioral history shows him to be dangerous to himself and his immediate family. Having shown that it is in the best interests of their child to obtain these confidential records they are entitled to view "all papers and records pertaining to the adoption and filed with the [Spartanburg County] clerk of court." S.C. Code Ann. § 20-7-1780(B).

The medical history requirement did not take effect until three years after Child's adoption.

II

Law Firm's Adoption Files

The Does believe S.C. Code Ann. § 20-7-1780(D) provides access to the Law Firm's adoption files. We disagree.

The statute allows an agency to furnish "adoptive parents, biological parents, or adoptees nonidentifying information when in the sole discretion of the chief executive officer of the agency the information would serve the best interests of the persons concerned either during the period of placement or at a subsequent time . . ." Id. Under the Does' theory, the Law Firm is an agency, which is required to release their files to Does if shown to be in Child's best interests. We disagree.

Each party's argument in their respective brief and at oral argument centered upon whether a law firm is an agency based upon S.C. Code Ann. § 20-7-1780(D) and S.C. Code Ann. § 20-7-1650(E). We do not feel compelled to answer the question presently where, assuming arguendo the law firm is an agency, the statute vests the decision whether to release information to the "sole discretion of the chief executive officer of the agency." S.C. Code Ann. § 20-7-1780(D). As Law Firm consistently exercised its discretion to deny the release of Child's adoption files, the Does' reliance on §20-7-1780(D) would not aid in obtaining the files, even if Law Firm were an agency according to the statute.

This conclusion does not leave Does without a remedy. Absent any statutory limitation on this Court's ability to compel Law Firm to release its adoption file, the intent of the Legislature in such circumstances is that, in the face of competing interests, the best interests of the Child be the paramount concern.[4] See S.C. Code Ann. § 20-7-1647.

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[4] Law Firm argues as additional sustaining grounds that the release of its adoption file raises attorney work product and attorney-client privilege problems. See I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (Prevailing party at trial may raise additional

The Does have shown good cause why the release of Law Firm's adoption file is in Child's best interests. Therefore, the Does may obtain information contained within Law Firm's file if a search of the Clerk of Court's file does not reveal the necessary information.

III

Appointment of Intermediary

The opinions of both the family court and Court of Appeals have correctly stressed the need to protect the identity of parties in an adoption because privacy is vital to the success of adoption as public policy. The Does have consistently maintained their desire throughout these proceedings to receive only non-identifying information about the biological parents in order to help Child. Their attitude is consistent with the Legislature's intent to protect the privacy of all parties to an adoption by limiting the dissemination of identifying information. See, e.g., S.C. Code Ann. § 20-7-1780(A) (closing adoption hearings to the general public); § 20-7-1780(D) (allowing an agency under certain circumstances to furnish adoptive parents with "non-identifying" information); § 20-7-1780(E) (regulating the way agencies may release identifying information to adoptive child of biological parents and biological siblings; regulating the way agencies may release identifying information to biological parents and biological siblings of adoptive child); §

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sustaining grounds for appellate court to affirm as long as the grounds appear in the record on appeal). While Law Firm raised the issues of both attorney-client privilege and work product privilege at trial we do not believe they have shown the information to be privileged. See Rivers v. Rivers, 292 S.C. 21, 354 S.E.2d 784 (Ct. App. 1987) (the trial judge determines whether a communication is privileged after making a preliminary inquiry into the facts and circumstances surrounding the communication); Cf. Rule 26(b)(5), SCRCP. Further, the record does not make clear the identity of the client. If it were the Does, they may waive the attorney-client privilege. See Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.6(a); State v. Hitopoulus, 279 S.C. 549, 551, 309 S.E.2d 747, 749 (1983).

20-7-1780(F) (making it a misdemeanor to furnish adoptive child or biological parents/siblings identifying information).

However, if Does show "good cause" under § 20-7-1780 they may have access to all information included in the Clerk of Court's records on Child's adoption. The Does would also obtain identifying information when reviewing Law Firm's adoption file. The Legislature requires we defer to the best interests of the child when a conflict arises between the adopted child and privacy interests of the parties. In this case we may both promote the best interests of the child and the privacy rights of each party by the appointment of an intermediary.

It is in Child's best interests to have access to the file but it is not essential, to help Child, that Does receive identifying information about the biological parents. By appointing a trained, confidential intermediary to review the file, contact the biological parents, if necessary, and prepare a report for the family court's review, we fulfill the child's best interests while maintaining the privacy of parties to an adoption. The family court possesses the power to appoint such an intermediary. See S.C. Code Ann. § 20-7-420(3) (1976) (empowering the family court to "make any order necessary to carry out and enforce the provisions of [the Children's Code]").

Colorado law is instructive on the intermediary's status. There, courts may appoint a "trained confidential intermediary" to determine the whereabouts of an adoptee's biological relatives. See Colo. Rev. Stat. Ann. § 19-5-304 et. seq. (Supp. 1992); see also, In re Tomlinson, 851 P.2d 170 (Colo. 1993). The intermediary is considered an officer of the court and is required to guard any information received as confidential.[5] See id.

[5] The primary purpose of appointing an intermediary under the Colorado statute is to arrange for the adoptee and relative to contact each other directly. It is not to conduct an independent investigation to gather pertinent facts or medical histories while maintaining the confidentialities of all parties. As such, Colorado's "trained confidential intermediary" statute is not unique. See, e.g., Ga. Dom. Rel. Code § 19-8-23; Ala Code § 25-10A-31(h)-(j).

More relevant to the circumstances of this case, New York allows courts to appoint a guardian ad litem or "other disinterested person, who shall have access to the adoption records for the purpose of obtaining the medical information sought and consent to disclose the information from those records or, where the records are insufficient for such purpose, through contacting the biological parents." N.Y. Dom. Rel. Law § 114(4) (McKinney 1999). The intermediary "serves as a filter, obtaining the records and extracting the needed information, which is then passed on to the petitioner." N.Y. Dom. Rel. Law § 114, prac. cmt. The court, upon receiving the intermediary's report, reviews it in camera, redacts any identifying information, and discloses the balance of the report to the adoptee. See id.; see also, Chattman v. Bennett, 393 N.Y.S.2d 768, 769 (N.Y. App. Div. 1977) (allowing court to "make available to petitioner, from the file pertaining to her adoption, her medical records and those of her natural parents, as well as any other material therein relating to possible genetic or hereditary conditions, while deleting therefrom any nonpertinent information, including the names of the natural parents.").

We believe the appointment of an intermediary is appropriate under the circumstances of this case. The intermediary shall be independent of any party to the suit and be trained as a guardian ad litem or as an attorney. The intermediary will serve as a liaison between the court and the biological parents. It is the duty of the intermediary to review the adoption files and contact the biological parents, if necessary to obtain the information sought by the Does. The intermediary shall treat any information received as strictly confidential.

At the conclusion of the research, the intermediary shall issue a report detailing the information received while redacting any information which identifies the biological relatives. The family court judge shall then review the report in camera to determine whether the intermediary has furnished all pertinent information while maintaining the confidentiality of the biological parents.

CONCLUSION

We REVERSE and REMAND this matter to the family court for proceedings consistent with this opinion.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of Wade H. Jones, III, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. Respondent consents to the issuance of an order of interim suspension in this matter.

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

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina
March 25, 2003