Heard October 4, 2000 - Filed July 17, 2001

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**AFFIRMED**

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Robert C. Childs, III and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellant.

Attorney General Charles M. Condon, Senior Assistant Attorney General Nathan Kaminski, Jr., and Assistant Attorney General Christie Newman Barrett, all of Columbia, for respondents.

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**CHIEF JUSTICE TOAL**: Kenneth E. Curtis ("Curtis") appeals the trial court's denial of a temporary injunction concerning the enforcement of S.C. Code Ann. § 16-13-470 (Supp. 2000), which prohibits the selling of urine with the intent to defraud a drug screening test. We affirm.

## FACTS/PROCEDURAL HISTORY

In 1996, Curtis started an internet business known as Privacy Protection Services.[1] Through this business, Curtis sells his own urine, which is certified as drug and adulterant free, along with a "urine test substitution kit." Each urine test substitution kit comes with Curtis' urine, a pouch, a tube, and a chemical hand warmer device. Because proper temperature is critical for acceptance at any urine testing site, each kit comes with "chemically reactive supplemental heat sources" and a temperature monitoring system that insures proper acceptance temperature. Furthermore, the kit can be easily concealed on the body and can be used in a natural urinating position, which means it cannot be

[1]Privacy Protection Services can be found at www.privacypro.com.

detected even if directly observed.[2] According to Privacy Protection Services' website: "Our complete urine test substitution kits allow anyone, regardless of substance intake, to pass any urinalysis within minutes."[3]

Based on his website and his June 17, 1999, affidavit, Curtis maintains his primary objection to urine testing by employers is they do not merely test for drugs, they also test for pregnancy, diabetes, cigarette smoking, hypertension, and other diseases or genetic traits. He believes this type of testing by employers constitutes an infringement on the privacy rights of prospective employees and leads to access of private information.

On June 11, 1999, the Governor of South Carolina signed Senate Bill 277, which amended S.C. Code Ann. § 16-13-470 "to provide that selling urine with the intent to defraud a drug screening is a felony." Under section 16-13-470, the penalty for the first offense is a fine of not more than five thousand dollars and imprisonment of not more than three years, or both. The penalty for a second or subsequent offense is a fine of not more than ten thousand dollars or imprisonment of not more than five years, or both. S.C. Code Ann. § 16-13-470 (Supp. 2000). Pursuant to the statute, intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale. *Id.*

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[2]According to the website, each kit contains a small reservoir pouch (about the size of a pack of cigarettes) that has a small diameter tube that can be routed to the genital area. The tube has a flow/stop clip that makes dispensing easy and natural. The kit can be stored indefinitely or kept on hand in case of random testing. These complete kits provide everything needed for two urine testing procedures.

[3]In Curtis' Brief he maintains "he does not tout the product as a means to avoid detection of drug or alcohol abuse." However, the website describes how one can conceal the kit in any drug test. The website also includes a cartoon depicting a man urinating on a law enforcement officer. The cartoon is accompanied by the following quotation: "South Carolina law makers are pinching the weenie but can't stop the flow!"

On June 18, 1999, Curtis filed a Motion for an *Ex Parte* Temporary Restraining Order and a Motion for a Temporary Injunction. The trial judge granted the *Ex Parte* Temporary Restraining Order on June 18, 1999. On June 30, 1999, the trial court denied the Motion for a Temporary Injunction and issued a formal Order. Curtis' Motion for Reconsideration was denied and this appeal followed.

On September 20, 2000, the Attorney General filed a Motion to Dismiss Appeal as Moot and a Motion to Supplement Record on Appeal with Memorandum in Support Thereof. On August 18, 2000, the trial judge entered an order ruling on the merits of this case, holding section 16-13-470 constitutional and a legitimate exercise of the State's police powers. The Attorney General moves this Court to dismiss the appeal of the denial of a temporary injunction because the appeal is moot. According to the Attorney General's Motion, any order issued by this Court will be advisory and will have no practical effect on an existing controversy.

The following issues are before this Court on appeal:

I. Since the trial court has issued an order on the merits of this case, should this Court dismiss the appeal of the denial of a temporary injunction because the trial court's order renders the appeal moot?

II. Did the trial court err by holding Curtis is not entitled to a temporary injunction against the enforcement of section 16-13-470 when Curtis failed to establish that he will suffer irreparable harm or that he has no adequate remedy at law?

III. Did the trial court err in holding Curtis is not likely to succeed on the merits?

    A. Does section 16-13-470 create an impermissible presumption of guilt?

An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. *See* Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *See generally Byrd v. Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996); *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc.*, 406 S.E.2d 65 (W. Va. Ct. App. 1991) (holding an appellate court could consider newspaper's appeal from trial court's injunction compelling newspaper to publish political action advertisement even though case was moot because issue was capable of repetition yet evaded review). Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. *See generally Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (the court recognized that questions of public interest originally encompassed in an action should be decided for future guidance however abstract or moot they may have become in the immediate contest). Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. *See* 5 AM. JUR. 2D *Appellate Review* § 649 (1995).

An order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4) (Supp. 2000); *Appeal of Paslay*, 230 S.C. 55, 94 S.E.2d 57 (1956) (appeal lay from the restraining order or temporary injunction). However, "[t]he

instructed, "the law presumes that a person intends the ordinary consequences of his voluntary acts." According to the Supreme Court, the jury in *Sandstrom* may have interpreted the trial judge's instruction as a burden shifting presumption or a conclusive presumption. This jury instruction violates the Fifth and Fourteenth Amendment's due process requirement that the State prove every element of a crime beyond a reasonable doubt. In finding such a presumptive instruction unconstitutional, the Supreme Court found where intent is an element of the crime charged, it follows that the trial court may not withdraw or prejudge the issue by instructing the jury the law raises a presumption of intent from an act. *Sandstrom, supra.* This invades the fact finding responsibility of the jury.

A statute may be constitutional and valid in part and unconstitutional and invalid in part. *Thayer v. South Carolina Tax Comm'n*, 307 S.C. 6, 413 S.E.2d 810 (1992). We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 648-649, 528 S.E.2d 647, 654 (1999) (citations omitted). "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." *Id.* (quoting *Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959)).

We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The remainder of the statute outlines the different unlawful ways a person can attempt to defraud a drug and alcohol screening test, using general language to describe intent. The remainder of the statute is complete without the intent presumption language because it allows the jury to infer intent from the circumstantial evidence presented at trial. We presume the legislature would have passed section 16-13-470 regardless of

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of the Care
and Treatment of Donald
Lee McCracken, Appellant.

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Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

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Opinion No. 25323
Heard March 7, 2001 - Filed July 23, 2001

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**AFFIRMED**

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Kenneth W. Gaines, of Columbia, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General Treva Ashworth, Senior Assistant Attorney General Kenneth P. Woodington, and Assistant Attorney General Steven G. Heckler, all of Columbia, for respondent.

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long-term control, care and treatment.

> In this case that usually means the Department of Mental Health or the Department of Corrections, depending on the circumstances. Additionally the General Assembly has determined that the existing civil commitment process is inadequate to address the special needs of sexually violent predators and has therefore determined that a separate involuntary civil commitment process is necessary for long-term control, care and treatment of sexually violent predators.
>
> Ladies and gentlemen, the intent of the legislature in passing this law does not in any way control your decision in this case. You and you alone must decide whether or not [appellant] is, in fact, a sexually violent predator under the law.

Appellant contends the trial judge committed reversible error in omitting from this paraphrase of §44-48-20 its first sentence, "The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists which require involuntary civil commitment in a secure facility for long-term control, care and treatment." Appellant argues the language should have been charged, because it would have permitted him to argue that the legislation was targeted to a discreet group of extremely dangerous sexual predators, and that he did not fit this category. We find no error.

There was no error in the general charge, which gave the jury the background of the issue they were being asked to decide, followed by a charge defining the terms which the State must prove beyond a reasonable doubt. Despite the expression of intent in §44-48-20, the actual burden on the State to show that an individual is a SVP does not require a showing of "extreme danger." See §§44-48-100; 44-48-30(1)(b); (3); (9). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Keaton ex rel. Foster v.

due process and equal protection rights were being violated because there was no funding available for depositions. He did not specify whose deposition he would take were funds available.

On appeal, appellant argues that the lack of funds to depose the State's expert denied him his sixth amendment right to the effective assistance of counsel. We have determined that appellant has failed to show that this is a criminal proceeding, and therefore the sixth amendment is not implicated. The only right to counsel here is appellant's statutory right to the assistance of appointed counsel, a right which was honored. §44-48-90 (Supp. 2000).

Appellant has not shown any prejudice, much less a constitutional violation, in the denial of funds to depose unidentified individuals.

## Conclusion

For the reasons given above, this appeal is **AFFIRMED**.

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

Department's holding that the size of the deer population poses a definite threat to the health and safety of Sea Pines' residents.

Appellants also contend the Department has improperly issued permits for the taking of deer in Sea Pines under the auspices of statutes other than section 50-11-880. Specifically, the Appellants argue that sections 50-11-1050, 1090, and 1180 do not give the Department the authority to issue permits for the taking of deer in a wildlife sanctuary. However, wildlife sanctuaries are not specifically excluded from these statutes. Furthermore, section 50-11-880 is not a permitting statute. Once the Department makes a determination under section 50-11-880, another statute must be applied to issue the permits. Mr. Ruth, the Department's statewide deer project supervisor, was aware of the specific differences between the various sections, he explained during his testimony the basis and justification for each permit issued, and why he issued each permit pursuant to only certain code sections.

## CONCLUSION

Based on the foregoing, we **AFFIRM** the trial court's order as modified, holding the Appellants do not have standing under *Lujan,* and the Department's issuance of permits for the lethal elimination of deer on Sea Pines was in compliance with the laws of this State.

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