THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(Georgetown, Judge Paula H. Thomas)

2001-UP-540 State v. Robert Wesley Crum
(Orangeburg, Judge L. Henry McKellar)

2001-UP-541 State v. Antonio Simpson
(Berkeley, Judge R. Markley Dennis, Jr.)

2001-UP-542 State v. Samuel Cooper
(Williamsburg, Judge M. Duane Shuler)

2001-UP-543 Benton v. Manker
(Beaufort, Thomas Kemmerlin, Jr., Master-in-Equity)

2001-UP-544 State v. Christopher Sanders
(Barnwell, Judge Thomas W. Cooper, Jr.)

PETITIONS FOR REHEARING

3382 - Cox v. Woodmen	Pending
3393 - Vick v. SCDOT	Pending
3402 - State v. Donald Ray Wimbush	Pending
3403 - Christy v. Christy	(2) Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
3405 - State v. Jerry Martin	(2) Pending
3406 - State v. Yukoto Cherry	Pending
3408 - Brown v. Stewart	Pending
3411 - Lopresti v. Burry	(2) Pending
3418 - Hedgepath v. AT&T	Pending
2001-UP-419 - Moak v. Cloud	Pending

2001-UP-424 - Boan v. Boan Pending

2001-UP-430 - State v. Dale Johnson Pending

2001-UP-435 - State v. Ronald J. Huell Pending

2001-UP-452 - Bowen v. Modern Classic Mtrs. Pending

2001-UP-454 - Greenville National v. Simmons Pending

2001-UP-455 - Stone v. Roadway Express Pending

2001-UP-456 - Ray v. SC State University Pending

2001-UP-460 - City of Aiken v. Cannon Pending

2001-UP-461 - Storage Trailers, Inc. v. Proctor Pending

2001-UP-465 - Town of Yemassee v. Yisrael Pending

2001-UP-468 - Shealy v. Hare Pending

2001-UP-469 - James Schneider v. State Pending

2001-UP-470 - SCDSS v. Hickson Pending

2001-UP-476 - State v. Jeffery Walls Pending

2001-UP-477 - State v. Alfonso Staton Pending

2001-UP-478 - State v. Leroy Staton Pending

2001-UP-479 - State v. Martin McIntosh (2) Pending

2001-UP-493 - State v. Marcus Griffin Pending

2001-UP-507 - Adams v. Greaves Pending

2001-UP-513 - Industrial Tractor Co., Inc. v. Poovey Pending

2001-UP-518 - Abbott Sign Co. v. SCDOT Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3271 - Gaskins v. Southern Farm Bureau	Pending
3314 - State v. Minyard Lee Woody	Pending
3321 - Andrade v. Johnson	Pending
3333 - State v. Dennis Zulfer	Pending
3344 - Henkel v. Winn	Pending
3346 - State v. Thomas Ray Ballington	Pending
3348 - Thomas v. Thomas	Pending
3351 - Chewning v. Ford Motor Co.	Pending
3352 - Ex Parte Moore v. Fairfield	Pending
3353 - Green v. Cottrell	Pending
3354 - Murphy v. Owens-Corning	Pending
3355 - State v. Leroy Wilkes	Pending
3356 - Keeney’s Metal v. Palmieri	Pending
3358 - SC Coastal Conservation v. SCDHEC	Pending
3360 - Beaufort Realty v. Beaufort County	Pending
3364 - SCDSS v. Mrs. H and Mr. H	Pending
3365 - State v. Laterrance Ramon Dunlap	Pending
3369 - State v. Don L. Hughes	Pending
3370 - Bailey v. Segars	Pending
3371 - State v. Curtis Gibbs #2	Pending
3372 - Dukes v. Rural Metro	Pending

3376 - State v. Roy Johnson #2	Pending
3380 - State v. Claude and Phil Humphries	Pending
3381 - Bragg v. Bragg	Pending
3383 - State v. Jon Pierre LaCoste	Pending
3386 - Bray v. Marathon Corporation	(2) Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-123 - SC Farm Bureau v. Rabon	Pending
2001-UP-156 - Employer's Insurance of Wausau v. Whitaker's Inc., of Sumter	Pending
2001-UP-159 - State v. Darnell Hunter	Pending
2001-UP-160 - State v. Elijah Price, Jr.	Pending
2001-UP-192 - State v. Mark Turner Snipes	Denied 12-13-01
2001-UP-232 - State v. Robert Darrell Watson, Jr.	Pending
2001-UP-235 - State v. Robert McCrorey, III & Robert Dimitry McCrorey	Pending
2001-UP-238 - State v. Michael Preston	Denied 12-13-01
2001-UP-248 - Thomason v. Barrett	Pending
2001-UP-249 - Hinkle v. National Casualty	Pending
2001-UP-261 - San Souci Owners Association v. Miller	Pending
2001-UP-292 - Franzello v. Bankhead	Pending
2001-UP-298 - State v. Charles Henry Bennett	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. State	Pending
2001-UP-304 - Jack McIntyre v. State	Pending
2001-UP-321 - State v. Randall Scott Foster	Pending
2001-UP-322 - Edisto Island v. Gregory	Pending

2001-UP-323 - Goodwin v. Johnson	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-325 - Hessenthaler v. Tri-County	Granted 12-12-01
2001-UP-335 - State v. Andchine Vance	Pending
2001-UP-344 - NBSC v. Renaissance Enterprises	Pending
2001-UP-355 - State v. Gavin V. Jones	Pending
2001-UP-360 - Davis v. Davis	Pending
2001-UP-364 - Clark v. Greenville County	Pending
2001-UP-368 - Collins Entertainment v. Vereen	Pending
2001-UP-374 - Boudreaux v. Marina Villas Association	Pending
2001-UP-377 - Doe v. The Ward Law Firm	Pending
2001-UP-383 - Rivera v. Columbia OB/GYN	Denied 12-13-01
2001-UP-384 - Taylor v. Wil Lou Gray	Pending
2001-UP-385 - Kyle & Associates v. Mahan	Pending
2001-UP-389 - Clemson v. Clemson	Pending
2001-UP-391 - State v. Jerome Hallman	Pending
2001-UP-393 - Southeast Professional v. Companion Property & Casualty	Pending
2001-UP-397 - State v. Brian Douglas Panther	Pending
2001-UP-398 - Parish v. Wal-Mart Stores, Inc.	Pending
2001-UP-399 - M.B. Kahn Construction v. Three Rivers Bank	Pending
2001-UP-401 - State v. Keith D. Bratcher	Pending
2001-UP-403 - State v. Eva Mae Moss Johnson	Pending
2001-UP-425 - State v. Eric Pinckney	Pending

PETITIONS - U. S. SUPREME COURT

2000-UP-738 - State v. Mikell Anthony Pinckney Pending

S.C. 50, 502 S.E.2d 63 (1998). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997). Although the trial court should not refuse to grant the motion where the evidence merely raises a suspicion of the accused's guilt, the case must be submitted to the jury if substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt can be fairly and logically deduced, exists. Id.

This Court has previously recognized that a person has a right to resist an unlawful arrest even to the extent of taking the life of the aggressor if it be necessary in order to regain his liberty. State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967); State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919); State v. Robertson, 191 S.C. 509, 5 S.E.2d 285 (1939). However, the cases do not stand for the blanket proposition that one may, in every instance, resist an unlawful arrest to the point of deadly force without fear of repercussion. To the contrary, the cases clearly reveal that only such force as is reasonably necessary under the circumstances may be invoked.

In State v. Bethune, supra, we upheld the following charge concerning the right to resist an unlawful arrest:

> I charge you that a man has the right to defend himself from an unlawful arrest, and for the purpose of so protecting himself he has the right to use whatever force is necessary, even to the taking of life, the life of him who is seeking to make the unlawful arrest, if that be apparently necessary, and if it would have been apparently necessary to a man of ordinary courage in the circumstances. I charge you that, **where one is defending his person from an unlawful arrest, he had the right to use just so much force as is apparently necessary to accomplish his deliverance and no more. He has not the right to use excessive force unless excessive force not only be apparently necessary to him, but would have been to a man of ordinary courage so situated**.

112 S.C. at 101, 99 S.E. at 753. (Emphasis supplied). Thereafter, in State v. Francis, 152 S.C. 17, ___, 149 S.E. 348, 355-356 (1929), this Court stated:

> An unlawful arrest, or an attempt to make an unlawful arrest, stands upon the same footing as any other nonfelonious assault, or as a common assault and battery. The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and **may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault,** or he in turn becomes a wrongdoer. . . .
>
> A mere trespass on one's person or liberty is no reason for the taking of life, and if one commits a homicide while resisting an arrest, even though it is unlawful, he cannot justify on the ground of self-defense unless he can show that the killing was apparently necessary to protect himself from death or great bodily harm. . . .
>
> **But such person should use no more force than is necessary to resist the unlawful arrest, and is justified in using or offering to use a deadly weapon only where he has reason to apprehend an injury greater than the mere unlawful arrest**, as danger of death or great bodily harm. . . .
>
> **It not infrequently has been reasoned that an unlawful attempt to restrain a person's liberty is such an aggression as to furnish a complete excuse for slaying the aggressor. The contention, however, has met with little or no favor in the eyes of the courts. On the contrary, it is generally held that the slayer is not excused unless he can show that the homicidal act was done in his necessary defense. While there can be no doubt of the right of the citizen to resist an attempt illegally to restrain his freedom, yet his resistance must not be in enormous disproportion to the injury threatened. He has no right, according to the better view, to take human life to prevent a**

> exposed to the public, and where the public gather together or pass to and for. Lewis v. Commonwealth, 197 Ky. 449, 247 S.W. 749, 750.[6]

Emphasis supplied.

Here, there is testimony that McGowan was intoxicated, was acting in a loud and boisterous manner and cursing at police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul-de-sac across the street. Under our definition of "public place" as stated in Williams, we find this is sufficient evidence from which the jury could find, for purposes of the disorderly conduct statute, that McGowan was conducting himself in a grossly intoxicated and disorderly manner in a public place. Accord State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (statutory aggravating circumstance of "great risk of danger" to more than one person in public place properly submitted to jury where incident occurred on public street and in defendant's yard and several children were playing in public street when incident occurred). See also City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989)(jury could reasonably have concluded that defendant's front yard was public place where evidence revealed that bystanders nearby could have heard his profanity and threats directed toward police); Loera v. Texas, 14 S.W.3d 464 (Tex. App. 2000)(walkway to private residence could be considered a public place under certain circumstances; matter should be resolved on a case-by-case basis).

---

[6] In Town of Springdale v. Butler, 299 S.C. 276, 384 S.E.2d 697 (1989), we held the fact that the defendant was on his private property did not preclude his conviction for disorderly conduct under a town ordinance which did not require the incident occur in a public area. Although Butler could be viewed as an indication that a person's yard or driveway is not a public place, the definition of a public place was not an issue in Butler, and there was no need for this Court to determine whether or not Butler's driveway could, under any circumstances, be considered a public place. Accordingly, Butler is not dispositive.

Accordingly, as the jury could have determined McGowan's conduct was prohibited by the disorderly conduct statute, his arrest was lawful such that he was not entitled to a directed verdict on the charge of resisting arrest with deadly force.[7] Accordingly, the Court of Appeals opinion is

AFFIRMED IN RESULT.
TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

[7] McGowan also contends his disorderly conduct arrest was unlawful under State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991) (holding that raising voices to police officers, standing alone, is insufficient to convict of disorderly conduct). The Court of Appeals recently distinguished Perkins, holding such an arrest is justified where a defendant is both grossly intoxicated and uses obscene language toward arresting officers. State v. Pittman, 342 S.C. 545, 537 S.E.2d 563 (Ct. App. 2000). Accordingly, this argument is without merit.

Conduct and the Rules for Lawyer Disciplinary Enforcement. We hereby suspend respondent from the practice of law for nine months, retroactive to August 10, 2001. Upon reinstatement to the practice of law, respondent must comply with the inducements to the clients he represented or for whom respondent prepared documents as a result of the services offered by the Firm to include, but not limited to, additional consultation and updating of documents without additional charge or fee, to the extent advertised by the Firm or represented to the clients by the Firm. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

> Mr. Waymer with a hammer and he took his wallet. Those are all the elements of robbery, common law robbery. . . . [Respondent] committed a crime. He committed a felony – common law robbery. He is going to be convicted of that and he is going to be punished.

At the PCR hearing, counsel testified he was unsuccessful in his pre-trial attempts to negotiate a plea to the lesser offense of strong arm robbery. He concluded the only chance of having the charge reduced was to argue the lesser offense to a jury. Because of respondent's prior record and the fact that armed robbery was a no-parole offense, counsel believed respondent had nothing to lose by going to trial despite the strength of the State's case. Counsel made every effort to impress the jury with respondent's willingness to take responsibility for what he had done. The submission of a "not guilty" verdict would have been inconsistent with this trial tactic.

We find, under these circumstances, counsel's strategy was a reasonable one. Because we find counsel was not ineffective, we need not address the prejudice prong under Strickland.[3] The grant of relief is

REVERSED.

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

---

[3]The dissent's analysis on the ineffectiveness prong is simply that "counsel can never have a strategic justification for failing to ensure a not guilty verdict is submitted to the jury." *See* Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001) (issues on PCR must be framed as one of ineffective assistance of counsel). We think a case-by-case analysis is the better approach in determining the reasonableness of counsel's strategy since trial strategy is, by necessity, formulated in response to the particular circumstances of each case.

JUSTICE PLEICONES: I agree with the majority that under the facts of this case, trial counsel's performance was not deficient when he chose, as a matter of strategy, not to request a "not guilty" verdict option. I join the dissent, however, to the extent it would overrule State v. Somerset, 276 S.C. 220, 277 S.E.2d 593 (1981). In my opinion, it is reversible error to deny the jury this verdict form when it has been requested by counsel.

court’s ruling.

The Supreme Court of South Carolina

In re Amendments to Rule 415, SCACR.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, we amend Rule 415, South Carolina Appellate Court Rules, to allow for the issuance of a limited certificate to practice to attorneys on inactive status wishing to provide pro bono representation, to eliminate the requirement that the pro bono attorney be directly supervised, and to relax the prior practice requirement. The amendments shall be effective immediately. Rule 415, as amended, is attached.

IT IS SO ORDERED.

S/Jean H. Toal C.J.

S/James E. Moore J.

S/John H. Waller, Jr. J.

S/E.C. Burnett, III J.

S/Costa M. Pleicones J.

Columbia, South Carolina
December 13, 2001

purposes.

(b) The limited certificate issued under this Rule authorizes the retired or inactive attorney to provide legal services solely to clients approved to receive services from Legal Services or the Program, or to provide other services through the Program such as Ask-A-Lawyer or educational clinics. The retired or inactive attorney issued a limited certificate may:

(1) appear in any court or before any tribunal in this State if the client consents, in writing, to that appearance and the supervising attorney has given written approval for the appearance. The written consent and approval must be filed with the court or tribunal and must be brought to the attention of the judge or presiding officer prior to the appearance;

(2) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client. Such pleadings shall also be signed by the supervising attorney; and

(3) otherwise engage in the practice of law as is necessary for the representation of the client.

(c) An attorney desiring a limited certificate shall file with the Clerk of the Supreme Court an application in duplicate on a form prescribed by the Supreme Court accompanied by:

(1) a certification by Legal Services or the Program stating that;

(A) the retired or inactive attorney is currently associated with Legal Services or the Program;

(B) an active member of the South Carolina Bar employed by, or acting as a volunteer for, Legal Services or the Program will assume the duties of the supervising attorney required by this Rule; and

(C) the retired or inactive attorney meets the requirements of section (a) of this Rule;

(2) a certificate of good standing from each jurisdiction in which the retired or inactive attorney is or was admitted to practice law; and

(3) a sworn statement by the retired or inactive attorney that the retired or inactive attorney:

(A) has read and is familiar with the South Carolina Rules of Professional Conduct and all rules relating to the practice of law in this State and will abide by the provisions thereof; and

(B) will neither ask for nor receive compensation of any kind for the legal services rendered under this Rule.

(d) Any questions concerning the fitness or qualifications of the retired or inactive attorney may be referred by the Supreme Court to the Committee on Character and Fitness for a hearing and recommendation.

(e) The limited certificate shall be revoked immediately upon:

(1) notice by Legal Services or the Program stating that the retired or inactive attorney has ceased to be associated with Legal Services or the Program. Such notice must be sent to the retired or inactive attorney and must be filed with the Clerk of the Supreme Court within five (5) days after the association has ceased. The notice need not state a reason for the cessation of the association; or

(2) a determination by the Supreme Court, in its discretion, that the limited certificate should be revoked. Notice of the revocation shall be sent to the retired or inactive attorney and Legal Services or the Program within five (5) days of the revocation.

(f) Upon the revocation of the limited certificate, the supervising attorney shall immediately file notice of the revocation in the official file of each

Gary H. Smith, III, of Braithwaite, Smith, Massey & Brodie, of Aiken; and Ladson H. Beach, Jr., of Orangeburg, for appellants.

Walter H. Sanders, Jr., of Fairfax, for respondent.

CURETON, J.: Allendale County Bank ("Bank") brought this action to establish the priority of its mortgage on real estate located in Allendale County after it mistakenly filed a satisfaction of the mortgage. The special referee cancelled the mortgage satisfaction and concluded Bank had a first lien on the property, with priority over Steffen Robertson and Kirsten (U.S.), Inc. ("SRK") and E & J Landscaping, Inc. ("E&J"). Both SRK and E&J (collectively, "Appellants") appeal. We affirm.

FACTS

This action arises out of a dispute regarding the priority of lienholders on real estate owned by George W. Cadle. The property consisted of approximately five tracts of land with a total of more than 340 acres in Allendale County. Cadle operated the Appleton Sanitary Landfill on a portion of the land that is now known as the Wastemasters of South Carolina, Inc. Landfill.

Cadle had been doing business with Bank for a number of years. He executed three mortgages on his property in favor of Bank in 1982, 1987, and 1989.

In 1993, Cadle executed a fourth mortgage on his property in favor of Bank and a 10-year promissory note for $390,000. The mortgage, dated September 17, 1993, was recorded in the Office of the Clerk of Court for Allendale County at Book 82, Page 535. According to the parties, the fourth mortgage was actually a consolidation of the three prior mortgages.