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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from the Court of Appeals

Appellate Case No: 2020-001531

Alvetta L. Massenberg,

Petitioner,

v.

Clarendon County Treasurer, Clarendon County
Delinquent Tax Collector, Blacktop Ventures, LLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. A. Did the Court of Appeals err in issuing a Per Curiam opinion, made without oral argument, affirming the Clarendon County Master in Equity's order that did not set aside a delinquent tax sale where the only evidence presented to the Master in Equity was the required Notice of Levy was not posted in a conspicuous place.

- B. The issue at hand presents a novel question of statutory interpretation of South Carolina Code of Laws, Section 12-51-40 (C) (1976 As Amended) in defining the term "conspicuous places" in strict compliance of the posting of a notice of levy.

STATEMENT OF THE CASE

The Petitioner, Alvetta L. Massenberg is a delinquent taxpayer who filed on May 30, 2019, her complaint seeking to set aside a tax sale of her 2.5 acre tract of land in Clarendon County. The property taken has frontage on two public right-of-ways. One is on S.C. State Highway 49 and the other is a county maintained dirt farm road. The required statutory "Notice of Levy" posting on the property was allegedly posted on this less traveled one lane dirt farm road and not on the paved public highway on which the property fronts.

Following a hearing before the Clarendon County Master in Equity on October 18, 2019, the Master in Equity an order denying the Petitioner's relief holding that Clarendon County conducted the 2017 tax sale in compliance with Section 12-51-40 and that the tax sale bidder is the rightful owner of the subject property.

The Petitioner timely filed her Notice of Intent to Appeal and the parties submitted their respective briefs. By an Unpublished Opinion filed November 16, 2022 the Court of Appeals

affirmed the Order of the Master in Equity. The Petitioner timely filed her Motion for Rehearing which was denied by order filed December 22, 2022.

The Court of Appeals Order affirmed that the Clarendon County Treasurer was fully compliant with the requirements of S.C. Code § 12-51-40 (c) in posting of the notice of levy at a conspicuous is an absurd disregard of the well stated law in South Carolina that a posting in tax sale levy on property must be in strict compliance with the law.

STATEMENT OF THE FACTS

Petitioner Massenberg's property is an undeveloped tract of land and is located in the village of Alcolu in Clarendon County. It is a triangle shaped lot which fronts on Plowden Mill Road, a state maintained highway known as SC Highway 49. The back of the property faces Robert Rees Durant Road, a county maintained unpaved one lane utility farm road. The intersection of Plowden Mill Road and Robert Rees Durant Road forms the tip of the triangle shaped property. The County, through a private vendor, had placed the notice of levy on a tree located on the unpaved farm road side of the property on July 26, 2017. The notice of levy was placed advising that the Respondent Blacktop Ventures, LLC, the successful tax sale bidder and the general public that the Petitioner's property was going to be sold for the nonpayment of \$221.27 in 2016 delinquent county taxes and costs.

The notice of levy posting report to Respondent County Treasurer is the Field Report of Palmetto Posting, Inc. (R. p. 94). This report shows an aerial view of Petitioner's 2.54 acre lot delineated by red lines. The apparent verification of the posting on the property is marked by a "yellow star" reflected on an exhibit on the unpaved Durant Road (R. p. 94). A further

description of the Petitioners tract can be found on the 1968 recorded plat (R. p. 94). Depicted on this exhibit is a portion of the southeast boundary line which is marked as a "branch," a source of water that flows to or from or over the dirt Durant Road.

The Petitioner testified at the October 2021 hearing that she is a resident of Charlotte, North Carolina. She did not deny that the Clarendon County delinquent tax notices were mailed, but that she testified that she did not receive them. All notices except one were returned as "undelivered" to the County. One notice was signed for by the Petitioner, however as to this notice she testified she did not recall the letter (R. p.23 L. 1-6).The Petitioner stated in 2019 she had "two strokes" and shortly thereafter was declared disabled (R. p. 22 L. 12-25). Further she testified she looked online and thought her taxes were shown as paid. Her first notice of a problem with her property was a January 2019 telephone call from her uncle Frank Frierson who told her that trees were being cut on her property. (R. p. 23 L.19-25, R. p. 24 L. 1-8)

Frank Frierson testified he is the elderly uncle of the Petitioner and he was raised on Plowden Mill Road. He stated at the hearing that he maintains a home and garden on some farm property on Plowden Mill Road near his niece's property. Several other witnesses called by the Petitioner confirmed that they are familiar with the subject property as they lived within close proximity to this tract and would take their daily walk around its perimeter. They denied ever seeing any such notice placed on the property, especially on the state paved road.

The condition of the Robert Rees Durant Road was a central issue at trial. Mr. Frierson describes it as only wide enough for one vehicle. "If you meet another car, you have to pull over to the side and let one car pass." (R. p. 32 L. 5-7). He identified a photograph of the Robert Rees Durant Road sign and a Google photo of the intersection of Plowden Mill Road and Robert Rees

Durant Road (R. p. 52, 53, 54) There are no homes on the unpaved Robert Rees Durant Road (R. p. 37 L. 7-18). When asked to compare the traffic volume on Plowden Mill Road to that on Robert Rees Durant Road Frierson answered, "Oh it would be 100 to 1, sir, or maybe more." (R. p. 36 L. 8).

The Respondent Clarendon County, through its Treasurer, Matt Evans testified he was responsible for the oversight duties of the Delinquent Tax Collector and that the County contracted with a company named Palmetto Posting, Inc. to post the notice of levy on property seized for delinquent taxes. Accordingly, the Palmetto Posting Field Report (R. p. 94) is the only notice the County has of the actual posting. The County did not physically inspect the postings as it relied exclusively on Palmetto Posting. Mr. Evans further testified there is no stipulation in the state law (§ 12-51-40 (c)) requiring the exact location as to where the tax levy should be posted on the property. "It just has to be physically placed within the boundary of the property." (R. p. 46 L. 20-24). He failed to testify that the posted notice must be conspicuous.

David Epperson, the Clarendon County Administrator introduced a maintenance record reflecting the 2017 work orders for Robert Rees Durant Road. Mr. Epperson testified that based on the work orders for Robert Rees Durant Road "it is indicative that it is used quite a bit" (R. p. 47 L. 6-8). Neither the maintenance record introduced nor his testimony could establish a traffic count for this dirt road. Mr. Epperson could not confirm whether it was a relatively well-traveled road because he was unable to provide a traffic count (R. p. 96) (R. p. 48 L. 20).

Furthermore the maintenance records revealed that the "grading and shaping" is a less significant portion of the work orders as the majority of such work orders were to cut water drains and twice the work orders were just for checking. Also of note was his testimony that this

road was too wet to be graded, that three times during the year "brush cutting" is performed, and on another occasion "limbs and trees" were removed. On the very day the Notice of Levy was allegedly posted the County was also cutting water drains on Durant Road.

Finally, Mr. Epperson was so unfamiliar with this road that he could not confirm whether its width to allow passage for only one vehicle (R. p. 49 L. 11).

ARGUMENT

The issue before this court is a novel question of defining the statutory requirements by South Carolina Code §12-51-40 (c) (1976 as amended). This statute requires that the posting of a notice of levy must be at one or more "conspicuous places" on the property subject to be taken by a government entity. In other words what is the legislature's intent of posting so that a county agent is aware that the notice is attached to a point on property that is "conspicuous". South Carolina case law is silent on defining the term conspicuous. Black's Law Dictionary define "conspicuous" in part as "clearly visible" and "... a term or clause is conspicuous if its is written in a way that a reasonable against whom it is to operate ought to notice it". In addition the definition of "conspicuous place" is as follows: "For purposes of posting notices, a location that is reasonably likely to be seen".

The word "conspicuous" is included in other statutory schemes, such as employee and employer relationships. For instance, in consideration of whether a disclaimer was conspicuously located in an employment handbook the Court referred to the Uniform Commercial Code in reference to that term and reiterated that "the language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color.". Hannah v. United Refrigerated Services, Inc., 430 S.E.2d 539, 541, 312 S.C. 42 (S.C. App. 1993).

Likewise , "[A] disclaimer appearing in bold, capitalized letters, in a prominent position, is conspicuous' as a matter of law." Sheppard v. LPA Group, Inc. (S.C. App. 2011).

Unfortunately, the Petitioner is unaware of any appellate opinion defining that term in the context of Section 12-51-40 (c). However, it is clear that for the posting of a notice of levy to be conspicuous it must be placed in a prominent location on the subject property and at least in an area highlighted or set apart from some remote location. Posting the Notice of Levy on an oft used one vehicle wide back county road is clearly not posting it in a conspicuous place. In fact it is obviously the opposite of conspicuous as that term is commonly used. The posting is more hidden from the public view and raises questions of why was it placed there. Certainly, there were no obstacles in placing in on a much more visible and traveled roadway.

The required procedure for the tax sale of a delinquent taxpayer's property is set out by South Carolina Code §12-51-40. All requirements of that statute are intended for the protection of the taxpayer against surprise and the sacrifice of the owner's property. These requirements are mandatory and must be strictly followed. F.C. Enterprises, Inc. v. Dibble, 335 S.C. 260,516 S.E.2d 459 (S.C. App. 1999), Smith v. Barr, 375 S.C. 157,650 S.E.2d 486 (Ct. App. 2007). Section 12-51- 40 (c) requires that the seized property be posted with a notice of levy "*at one or more conspicuous places on the property.*" (Emphasis added) "Additionally, the failure to give the required statutory notice renders the tax sale invalid." Smith, 375 S.C. at 164, 650 S.E.2d at 490. "Even actual notice is insufficient to uphold a tax sale absent strict compliance with statutory requirements." In re: Ryan Inv. Co., 335 S.C. 392,395,517 S.E.2d 692,693 (1999).

The key issue before the master in equity was not whether the posting was actually viewed by members of the public or the taxpayer, but whether it was in a location where it

reasonably could be viewed by her or the general public. While Section 12-51-40(c) does not specify an exact location for the placement of a notice, it must however be posted in a place that is conspicuous.

As stated above, a common sense definition of "conspicuous" as intended by the Legislature was for the posting of the notice of levy be placed so that it could be reasonably seen by others. This assertion is further boosted by the language in the statute by the requirement that the notice be posted at one "or more" places on the property. The Petitioner's property faces two public paths, one is the dirt utility farm road and the other is the paved state highway. Palmetto Posting company placed the notice at a place on the property where it was least likely to be seen. It ignored that part of the law dictating "one or more conspicuous places" in posting the property. The testimony mentioned only one posting. It was at a place which was not conspicuous, ignoring the option of a state paved road which was the well traveled major traffic artery which easily satisfied the statutory requirement.

Pennsylvania and most other states have statutes such as South Carolina that require posted notices of tax sales. In, In Re: Somerset County Tax Sale, et. al., 14 A. 3d 180 (Pa. Commw. Ct. 2011) with similar facts to this instant matter where the only issue was whether the notice was properly posted in accordance with statute. The Pennsylvania Court held: "Although there is no requirement that the notice must be the 'best' notice at a minimum "the nature and location of the property must be considered in calculating "the placement of the notice."

The Clarendon County Master-in-Equity denied the Petitioner's request for relief to set aside the tax sale by ignoring the posting of the tax levy was in violation with Section 12-51-40 (c) . Such a conclusion could only be reached if, and only if the posting was in one or more

conspicuous locations. As a matter of law the posting failed that mandatory requirement. It was not conspicuous. The notice was in fact hidden. Viewing the totality of the testimony the trial court could have reached only one conclusion, that the placement was not conspicuous and by not being conspicuous it was not in compliance with the statute.

The Court of Appeals in its denial of permitting oral argument failed to recognize the error of the lower court by relying on the Respondent's argument in its brief that the posting was on a "well-traveled road". No such evidence was presented at the trial. The Court of Appeals failed to identify both in its unpublished order and in the order denying the request for a rehearing any evidence that the posting was in fact conspicuous.

There are no guidelines established by Legislature or judicial precedent defining the meaning of a "conspicuous posting". Relying on prior decisions outlining such criteria as cited above, it is clear that conspicuous must be of a higher standard than what was allowed by the Respondent county. This Court would be warranted in settling this ambiguity, thereby guide government entities to ensure that basic procedural due process is followed. At stake is the right of peaceful enjoyment of one's property and the fundamental public policy of fairness. The Supreme Court should grant this writ to ensure that before land is ripped away from a property owner that strict compliance with S.C. Code § 12-51-40 (c) has been satisfied.

The issue at bar is a novel question of statutory interpretation involving a matter of a property owners' right of procedural due process. The South Carolina judiciary for many years has stated that the taking of a person's property without the strict compliance of the terms of a statute is unlawful. See, King v. James 388 S.C.16, 694 S.E.2d 35 (S.C App. 2010), Smith v. Barr, 375 S.C.17, 650 S.E.2d 486 (S.C. App. 2007) and Halsey v. Simmons, 429 S.C. 385, 837 S.E. 2d 919 (S. C. App. 2020).

The issue before the court is not whether the notice is posted but was it in a location to be reasonably be seen. The shape, sizes and location of land parcels would make it difficult for the Legislature to specify the exact location the posting of the Notice of Levy. But it seems reasonable that if the property is bordered by a state maintained paved road and a dirt one lane farm utility it would be logical that the posting should be on the road more traveled. Other wise the posting should be in violation of the legislative intent.

CONCLUSION

The Appellant herein seeks that this court grant the Petition for a writ of certiorari to the Court of Appeals in order for this novel issue of defining “conspicuous” as it is intended to be appalled in the forced taking of one’s property. Constitutional procedural due process dictates nothing less than ensuring not only that the taking of one’s property complies with the statutory scheme but that the public is placed on notice as to the intent of a government entity to deprive another of their peaceful right of ownership and enjoyment of their land.

Respectfully submitted,

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Charleston, SC

January 23, 2023

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Alvetta L. Massenberg, Appellant,

v.

Clarendon County Treasurer, Clarendon County
Delinquent Tax Collector, Blacktop Ventures, LLC,
Respondents.

Appellate Case No. 2020-001531

Appeal From Clarendon County
Joseph K. Coffey, Master-in-Equity

Unpublished Opinion No. 2022-UP-410
Submitted November 1, 2022 – Filed November 16, 2022

AFFIRMED

John M. Bleecker, Jr., of Law Office of John M.
Bleecker, Jr., of Charleston, and Albert Peter Shahid, Jr.,
of Shahid Law Office, LLC, of Charleston, both for
Appellant.

Scott Franklin Talley, of Talley Law Firm, P.A., of
Spartanburg, for Respondent Blacktop Ventures, LLC.

William H. Johnson, of Johnson, DuRant & Nester, LLC,
of Manning, for Respondents Clarendon County

Treasurer and Clarendon County Delinquent Tax
Collector.

PER CURIAM: Alvetta Massenberg appeals the master-in-equity's denial of her action to set aside a delinquent tax sale of real property. On appeal, she argues Clarendon County did not follow the statutory requirements because it did not post the notice of levy in a conspicuous place on the property.

A preponderance of the evidence supports the master's finding the notice was posted in a conspicuous place because it was posted on a relatively well-traveled road. Accordingly, we affirm pursuant to Rule 220(b)(2), SCACR, and the following authorities: *Smith v. Barr*, 375 S.C. 157, 160, 650 S.E.2d 486, 488 (Ct. App. 2007) ("Our scope of review for a case heard by a Master permits us to determine facts in accordance with our own view of the preponderance of the evidence."); *id.* ("However, we are mindful that this scope of review does not require us to disregard the Master's factual findings because the Master saw and heard witnesses and was in a better position to judge their credibility and demeanor."); *In re Ryan Inv. Co.*, 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999) ("Tax sales must be conducted in strict compliance with statutory requirements."); S.C. Code Ann. § 12-51-40(c) (Supp. 2022) (directing a county's delinquent tax collector to "take exclusive physical possession of the property against which the taxes . . . were assessed by posting a notice [of levy] at one or more conspicuous places on the premises" if the final notice of delinquent taxes is returned).

AFFIRMED.¹

GEATHERS, MCDONALD, and HILL, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

Alvetta L. Massenberg, Appellant,




v.

Clarendon County Treasurer, Clarendon County
Delinquent Tax Collector, Blacktop Ventures, LLC,
Respondents.

Appellate Case No. 2020-001531

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
John M. Bleecker, Jr., Esquire
Albert Peter Shahid, Jr., Esquire
William H. Johnson, Esquire

FILED
Dec 22 2022

Scott Franklin Talley, Esquire
The Honorable Joseph K. Coffey