RECEIVED
Apr 20 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002006
Case No. 2019-CP-33-0675

John Pendarvis and Lawton Drew, ……. Respondents,

v.

South Carolina Law Enforcement Division and
South Carolina Department of Agriculture, ……. Defendants,

Of which, South Carolina Law Enforcement Division is…… Appellant.

PETITION FOR REHEARING

The Appellant South Carolina Law Enforcement Division petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Pendarvis v. South Carolina Law Enforcement Division*, Op. No. 2023-UP-143 (S.C. Ct. App. filed April 5, 2023).

The grounds for the Appellant 's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *Pendarvis v. South Carolina Law Enforcement Division*, Op. No. 2023-UP-143 (S.C. Ct. App. filed April 5, 2023); the Letter dated April 5, 2023 from Patrick McLaughlin to the Chief Deputy Clerk as filed with the Court of Appeals; the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Respondent South Carolina Law Enforcement Division

April 20, 2023

RECEIVED
Apr 20 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002006
Case No. 2019-CP-33-0675

John Pendarvis and Lawton Drew, ……. Respondents,

v.

South Carolina Law Enforcement Division and
South Carolina Department of Agriculture, ……. Defendants,

Of which, South Carolina Law Enforcement Division is…… Appellant.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant South Carolina Law Enforcement Division ("SLED") has petitioned this Court for a rehearing of the recent decision in *Pendarvis v. South Carolina Law Enforcement Division*, Op. No. 2023-UP-143 (S.C. Ct. App. filed April 5, 2023). SLED respectfully submits that the following points were

overlooked or misapprehended by this Court is dismissing the appeal on the basis of mootness:

The Circuit Court granted a preliminary injunction "prohibiting the Defendants from entering onto the property under cultivation issued by the Plaintiff for the purpose of destroying the hemp crop planted thereon be left in place pending resolution of the pending litigation." (R. 12). That ruling, while inartfully stated, permitted the Respondents to *complete* the cultivation, harvest, and sale of the hemp crop. That is evident from the Circuit Court's other directives as follows:

> The Court is also aware that the hemp crop has almost reached maturation and will imminently be ready for harvest. As such, the Court orders the Plaintiffs to continue to exercise reasonable and necessary farming practices to harvest the hemp crop. Upon harvest, the Plaintiffs are directed to deposit in to [sic] trust all sale proceeds from the harvest and hold those funds until such time as this litigation is resolved.

(R. 12). Thus, the Circuit Court permitted the Respondents to harvest *and sell* the hemp crop.

The Appellant SLED filed an interlocutory appeal challenging the preliminary injunction issued by the Circuit Court citing a number of legal errors. There should be no dispute that the Court of Appeals has appellate jurisdiction to review a preliminary injunction. The Supreme Court has explained that "[a]n order or decree in a court of common pleas granting, continuing, modifying, or refusing

an injunction is immediately appealable." *Curtis v. State*, 345 S.C. 556, 549 S.E.2d 591, 596 (2001). *See also*, S.C. Code Ann. § 14-3-330(4). Thus, this Court has jurisdiction to review the preliminary injunction that was issued in this case and which remains in place.

In adjudicating SLED's appeal of that preliminary injunction, this Court ruled as follows:

> Respondents have harvested and sold the crop, and the sales proceeds have been deposited in trust pending the litigation's resolution. Therefore, a ruling on the issues pending before this court will have no practical effect on the controversy.

Slip Op. at 2. The Court accordingly dismissed the appeal as moot. In so ruling, the Court erred in three key respects, each of which respectfully merit rehearing.

First, the Court found that the preliminary injunction is moot despite no evidence or stipulation that the preliminary injunction at issue has expired or otherwise been lifted or vacated by the Circuit Court. The Supreme Court has held that "temporary injunctions remain in force only until, and expire upon, the entry of the final judgment and are not enforceable after the final judgment has been entered." *Curtis*, 549 S.E.2d at 597. In that instance, the appeal of a preliminary injunction becomes moot. *Id*. ("an appeal of a temporary injunction is moot where a trial court renders final judgment while the appeal is pending"). That has not occurred in this case. There has been no trial or other adjudication on the merits,

and certainly no final judgment has been issued by the Circuit Court. In fact, the parties have consented to an ongoing continuance -- essentially a stay of the case -- pending this appeal. By Consent Order of Continuance filed July 8, 2022,[1] Judge D. Craig Brown, with the parties' consent, directed "the Marion County Clerk of Court to not place this matter back on the jury roster pending the appeal." That same Consent Order of Continuance includes the parties' belief and representation that "the results of any finding by the Court of Appeals could potentially resolve and/or narrow the current pending issues in dispute and before the circuit court." In short, without evidence that the preliminary injunction has expired or been lifted because of the issuance of a final judgment, this Court respectfully erred in concluding that the appeal of that preliminary injunction is moot. It should also be noted that neither party argued that the preliminary injunction is moot. That is an issue raised *sua sponte* by this Court.

Second, the Court's finding that the appeal is moot is premised on facts not in the record and for which there has been a "misapprehension" as already pointed out by the Respondents in correspondence sent to the Court dated April 5, 2023. In its decision, this Court writes: "Respondents have harvested and sold the crop, and the sales proceeds have been deposited in trust pending the litigation's resolution."

[1] *See, Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records").

Slip Op. at 2. While the preliminary injunction authorized, albeit in error, the Respondents to harvest *and sell* the hemp crop at issue, the Respondents' counsel has advised of a "misapprehension of fact." Counsel writes: "The appealed Circuit Court order allowed the Respondents to harvest and sell the crop, holding any proceeds of such a sale in trust. The Respondents have harvested the crop; however, it has not yet been sold." *See*, April 5, 2023 Letter filed with Court of Appeals. Thus, the hemp crop has not been sold, and that fact demonstrates that there still exists a live controversy in that the Respondents continue to be authorized by the preliminary injunction issued by the Circuit Court to sell the crop. In carrying out its law enforcement duties, the Appellant SLED has been and continues to remain concerned with the sale of a hemp crop for which there is evidence that the THC levels are sufficiently elevated to make that crop marijuana, a Schedule I controlled substance that is illegal to sell and purchase under South Carolina law. *See*, S.C. Code Ann. §§ 46-55-10(7), 44-53-190.[2] As a significant part of its appeal, SLED has argued that the preliminary injunction issued by the Circuit Court does not maintain the status quo by allowing the sale and distribution of a controlled substance and that the preliminary injunction also improperly interferes with enforcement of criminal laws in contravention of normal powers of

[2] The record includes evidence presented by SLED that the hemp crop at issue exceeded the "federally defined THC level for hemp" which thereby qualified the hemp crop as marijuana. Specifically, a SLED Forensic Services Laboratory Report shows that hemp material contained a total delta-9-tetrahydrocannabinol (THC) percent dry weight of .48 with a +/- of 0.07% as of September 16, 2019. (R. 28-54).

equity. *See*, *Harvie v. Heise*, 150 S.C. 277, 148 S.E.2d 66, 69 (1929) (holding that "equity will not interpose to enjoin the enforcement of a valid criminal law, or of prosecution under such law"); *Cain v. Daly*, 74 S.C. 480, 55 S.E. 110, 112 (1906). ("[o]rdinarily a court of equity has no jurisdiction to restrain criminal proceedings").

Third, even if the preliminary injunction was now moot as this Court found, there exists certain exceptions to the mootness doctrine. Because the Court raised mootness *sua sponte*, the parties did not have the opportunity to address whether any exception to the mootness doctrine may apply here. As the Supreme Court has explained, "[o]ne exception allows courts to examine matters that are capable of repetition, yet evade review." *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861, 864 (1996). Under that exception, the Supreme Court recognized that, despite mootness, a court may proceed to hear a "controversy [which] presents a recurring dilemma which the Court will address to clarify the law." *Id*. This appeal presents such a scenario. To reiterate, the Appellant SLED is significantly concerned that a preliminary injunction was issued whereby a court of equity interfered with the enforcement of criminal laws, which was contrary to prior legal pronouncements of the Supreme Court, and which also did not maintain the status quo in that the order allows for the sale and distribution of a controlled substance in total contravention of the criminal laws of the state. This is precisely the type of case

that merits adjudication in order to address the limited equitable authority of the circuit court in addressing matters under criminal investigation or criminal enforcement by way of a temporary restraining order or preliminary injunction.

Finally, the Appellant SLED requests that the Court reconsider its dismissal of this appeal as moot where the Circuit Court, in issuing the preliminary injunction at issue, erred in refusing to enforce Section VIII of the South Carolina Hemp Farming Program Participation Agreement and refusing to allow for the destruction of the Respondents' illegal hemp crop to proceed, a remedy to which John Pendarvis had expressly consented. The Participation Agreement as entered between the Respondent Pendarvis and the South Carolina Department of Agriculture (SCDA) includes Section VIII which is titled "Plant Destruction." Section VIII states in pertinent part:

> a. Permitted Grower acknowledges and consents to the forfeiture or destruction, without compensation, of hemp material:
>
> i. Found to have a measured delta-9 THC content of more than 0.3 percent on a dry weight basis;
>
> ii. Bearing off-label pesticide residues (or believed by SCDA to have had pesticides applied off-label), regardless of the source or the cause of contamination; and
>
> iii. Growing in an area that is not licensed by SCDA.

(R. 52). The SCDA determined that Pendarvis was in violation of provision (iii), as stated above. The SCDA advised Pendarvis that he was "unlawfully growing Hemp on acreage **that is not on record with the SCDA**. This is a willful violation of the Hemp Farming Program which requires a licensed grower to provide the SCDA with a legal description and global positioning coordinates of the land on which the licensee **seeks to cultivate hemp**." (R. 47). (Emphasis in original).

Notably, the Respondents did not present any factual allegations in their Complaint nor present any evidence to the Circuit Court to dispute this stated fact. Without dispute, Pendarvis was never authorized by the SCDA to grow hemp in Marion County.[3] He did submit an amendment application to add the acreage in Marion County, but that was not submitted until *after* the property in Marion County had already been planted. That plainly violated the terms of the Participation Agreement, specifically Section II titled "Licensed Growing Locations," which required that "Permit Holder shall Submit a Permit Amendment Application and obtain written approval from a representative of SCDA *before implementing any change to the license sites* stated on the Permitted Grower's

[3] The Respondent Lawton Drew was not authorized either. Drew was not a licensed grower under the Hemp Farming Act and, thus, has no rights to the hemp crop at issue. The Act defines "licensee" as "an individual or business entity possessing a license issued by the department under the authority of this chapter to cultivate, handle, or possess hemp." S.C. Code Ann. § 46-55-10(10). On this basis alone, the preliminary injunction should not have been entered in Drew's favor.

Application." (R. 50). (Emphasis added). Pendarvis also violated his agreement "to apply for registration of all growing, handling, and storage location[s], including GPS coordinates, *and receive SCDA approval for those locations prior to having living (non-cut) Hemp on those premises*." (R. 50). (Emphasis added). Thus, it is undisputed that Pendarvis violated these provisions by planting the Marion County site, which had not been authorized by the SCDA. His submittal of an amendment application *after* the site had been planted was untimely and did not comply with Section II requirements. In short, the Circuit Court erroneously granted a preliminary injunction where the *undisputed evidence* demonstrated that Pendarvis had failed to comply with the terms of the Participation Agreement. And, as indicated, no preliminary injunction should have been issued to Lawton Drew who was not a licensed grower of hemp, which is another undisputed fact.

Importantly, Pendarvis did expressly consent to the destruction of any hemp crop "[g]rowing in an area that is not licensed by SCDA." (R. 52). Again, the evidence shows that the hemp crop being grown in Marion County was not at a location licensed by the SCDA. The Respondents do not and cannot dispute that fact. Hemp grown at an unlicensed location is contraband *per se*. That presents a pure legal question. Nonetheless, the Circuit Court issued a preliminary injunction that disregarded that express contract terms and discarded that the hemp at issue is contraband *per se* under the law, and in fact, allowed the Respondents to complete

the cultivation, harvest, and sale of a crop that was in clear violation of the Participation Agreement. In short, the preliminary injunction bars the destruction of the crop by SLED -- the very remedy to which Pendarvis had consented. That issue is not moot. That remains a viable and existing controversy between the parties, and this Court clearly has jurisdiction to adjudicate whether the Circuit Court committed errors of law in granting the preliminary injunction.

CONCLUSION

Based on the foregoing discussion, the Appellant South Carolina Law Enforcement Division respectfully requests that the Court rehear its decision in this case and to rule on the merits of the appeal.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Respondent South Carolina Law Enforcement Division

April 20, 2023

RECEIVED
Apr 20 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002006
Case No. 2019-CP-33-0675

John Pendarvis and Lawton Drew, …… Respondents,

v.

South Carolina Law Enforcement Division and
South Carolina Department of Agriculture, ……. Defendants,

Of which, South Carolina Law Enforcement Division is…… Appellant.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon Respondents' counsel by email only this the 20th day of April 2023 as follows:

Patrick J. McLaughlin, Esquire
Wukela Law Office
Email: patrick@wukelalaw.com

C. Bradley Hutto, Esquire
Williams & Williams
Email: cbhutto@williamsattys.com

s/ Andrew F. Lindemann

LINDEMANN
Law Firm, P.A.

Telephone (803) 881-8920
Facsimile (803) 862-1181

5 Calendar Court, Suite 202 (29206)
Post Office Box 6923
Columbia, South Carolina 29260

ANDREW F. LINDEMANN*
Direct Dial: (803) 881-8921
Email: andrew@ldlawsc.com

*Also Admitted in North Carolina

April 20, 2023

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: John Pendarvis and Lawton Drew v. South Carolina Law Enforcement Division and South Carolina Department of Agriculture
Appellate Case Number: 2019-002006
Civil Action Number: 2019-CP-33-0675
Our File Number: 79.20234

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended May 6, 2022), please find enclosed for filing the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. In accordance with Section (d)(1) of this same Order, I am hereby serving copies on all counsel of record. I have not enclosed a filing fee since the Appellant South Carolina Law Enforcement Division is exempt.

If you have any questions, please advise.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb

cc: Patrick J. McLaughlin, Esquire *(Via Email Only)*
C. Bradley Hutto, Esquire *(Via Email Only)*