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.

RETURN TO PETITION FOR REHEARING

Respondents make the following Return to Appellant's Petition for Rehearing.

No rehearing is necessary as the decision in Pendarvis v. South Carolina Law Enforcement Division, Op. No. 2023-UP-143 (S.C. Ct. App. Filed April 5, 2023) did not overlook or misapprehend any fact of significance in dismissing the appeal on the basis of mootness. The only

fact the was misapprehended concerned whether the harvested hemp had been sold. The issue of whether the harvested hemp is in storage or has been sold and converted to money sitting in a trust account should have no effect on this Court's analysis and decision. As the Court noted during Appellant's rebuttal at oral argument, even if the injunction was removed, the parties would still have to argue the merits of the case below to resolve the matter. Whether the hemp crop has been sold or sits in storage does not change that reality.

The preliminary injunction prevented the destruction of Respondents' hemp crop by Appellant and allowed for the harvesting of the hemp crop, in order to protect the Respondent's right to due process and maintain the status quo as reasonably as possible given the facts and circumstances of the case. Once the crop was harvested, the preliminary injunction became moot. The Appellant's argument to the trial court, argument on appeal and continued argument in its petition is that the hemp crop itself is contraband per se and that mere possession by the Respondent, let alone any attempt to to sell that crop, is a criminal act. Whether right or wrong, such a position being taken by the Appellant, the State of South Carolina's statewide law enforcement agency, has an inherent chilling effect on the Respondent's willingness and ability to sell the hemp crop, irrespective of the trial court's injunctive order.

As Respondent noted to this Court during oral argument, Appellant took a bright line position before the trial court that the Respondent could not **harvest** the hemp crop at all. The sale of the hemp crop was irrelevant to the necessity of the injunctive relief provided by the trial court. Appellant refused to accept any resolution of the controversy other than being allowed to seize and destroy the Respondent's hemp crop without any due process. R.p.83-84.

That the harvested hemp has not been sold does not change the underlying rationale for this Court's decision, which is that once the hemp was harvested, the argument over the injunction

became moot. That is what this Court recognized. The status quo the injunction sought to maintain has been preserved, and the trial court can now proceed to address the issue of whether the alleged violations were willful or negligent, ultimately deciding the fate of the hemp crop in question.

Appellant's appeal is still moot as it relies on arguments that the hemp in question is "contraband per se" and that the Respondents consented to the unilateral seizure and destruction of the hemp crop. Those arguments remain fatally flawed and even if they were persuasive, may be argued below to the trial court in the still pending merits litigation.

Appellant continues to argue in the Petition an issue they waived before the trial court: that the THC level of the hemp crop made it "contraband per se." The trial court was presented with three challenges to the Appellant's THC argument at the October 8, 2019 hearing on the preliminary injunction: (1) Appellant failed to properly test the THC level in the hemp in question; (2) Respondent had testing that showed that the THC level in the hemp was in compliance with legal levels; and (3) even if the hemp level was higher than the legal level, it was well within levels that the statute and participation agreement provided could be "cured" to bring the crop within acceptable levels. *See* South Carolina Hemp Farming Program Participation Agreement Section VIII (b) (R.p.52) and S.C. Code §46-55-40(A)(1)(c).

As previously noted, when confronted with those arguments below, the Appellant **waived the THC issue**:

> MR. BARTH: **I'm not going to get into the weight issue because Patrick's right**. I learned yesterday via talking to the investigator that yeah, I might test these four plants and they may be out of compliance bit [*sic*] these two plants might be in compliance. Our readings do show the samples that were tested were too hot. They had too much THC in it to be legal. Patrick had another one tested and it came within the bound and I understand all that. **That's one of the ways they could probably challenge all of this is on the samples and whether the THC is too high or too low**.

R. p.91, l.8-17, emphasis added.

Near the conclusion of the October 8, 2019 hearing, the trial court confirmed with Appellant they were waiving the THC argument and the Appellant confirmed on the record that issue was being waived:

THE COURT: So, the whole key is the location?

MR. BARTH: **The location.**[1]

R. p.99, l.16-17, emphasis added.

Despite the waiver of this argument being raised in both the Respondent's brief and during oral argument to the Court on February 15, 2023, Appellant has never attempted to explain to this Court how an issue they waived below is preserved for appeal. Issues not raised and ruled upon in the trial court will not be considered on appeal. Humbert v. State, 345 S.C. 332 (2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404 (2001). An issue not preserved for review should not be addressed by the Court of Appeals. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218 (1995).

This is a hemp crop, and by statutory definition "hemp" is an agricultural commodity, not contraband. S.C. Code §46-55-10(8). As Respondent pointed out during oral argument to this Court, the Appellant's own cited cases defeat their argument that the hemp crop in question is "contraband per se." Traditional or Per se contraband is defined as "objects the possession of

[1] Appellant argues in their Petition that "Hemp grown at an unlicensed location is contraband *per se*." Petition, p.9. That argument is false, as the plain language of the Hemp Act itself specifically provides that corrective action plans are the **sole** remedy for negligent violations **including** violations for "failing to provide a legal description and global positioning coordinates of land on which the licensee cultivates hemp," as well as "failing to obtain…required authorization from the commissioner." S.C. Code §46-55-40(A). Thus, hemp grown on undesignated property or without authorization of the Commissioner may **not** be contraband at all, removing it from being able to be classified legally as contraband per se and instead making it derivative contraband.

which, **without more**, constitutes a crime." United States v. Farrell, 606 F.2d 1341, 1344 (D.C. 1979) (quoting United States v. Jeffers, 342 U.S. 48, 54 (1951)), emphasis added. As Respondent argued, the hemp crop in this case requires the "something more" analysis the law requires for derivative contraband, forfeitures which "are subject to scrutiny for compliance with the safeguards of procedural due process." Cooper v. Greenwood, 904 F.2d 302, 305 (5th Cir. 1990).

As Respondent argued to this Court, the fact that this case involves hemp (which has been removed by the Federal government from the controlled substances act), grown with a valid license issued by the State of South Carolina, inherently triggers the "something more" analysis of *Farrell* and *Cooper*, making it legally impossible to classify as "contraband per se." In short, the "something more" required under *Farrell* to make the hemp in this case "contraband" is the finding that there was a "willful violation." This argument is supported by the fact that both the Hemp Farming Act and the South Carolina Hemp Participation Agreement allow for a farmer, accused of **all** the alleged violations the Plaintiff was accused of (both the location issue and the THC issue), to "cure" such violations. *See* South Carolina Hemp Farming Program Participation Agreement Section II(a) (R.p.50) and S.C. Code §46-55-40(A)(1)(a), (b) and (c).

Appellant's other argument that the Respondent was not entitled to the due process safeguards the trial court's injunction was meant to preserve, is that the Respondent voluntarily relinquished his due process rights through contract, i.e., waiver. In support of the waiver argument, Appellant cited in their rebuttal argument to this Court the case of D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). Appellant's reliance on *Overmyer* is flawed, as the United States Supreme Court specifically noted in *Overmyer* the waiver in question (a cognovit note that involved failure to pay for refrigeration systems which had been the subject of much litigation and

negotiation) was negotiated between two sophisticated corporate parties, with Overmyer admitting to having been a party to "tens of thousands of contracts with contractors." Overmyer at 186.

> This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to the cognovit.

Overmyer at 186.

The *Overmyer* Court went on to specifically note their decision was **not** controlling precedent for "other facts of other cases. For example, where the **contract is one of adhesion, where there is great disparity in bargaining power**, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." Overmyer at 188, emphasis added.

Overmyer defeats Appellant's argument that the Respondent voluntarily and knowingly waived his due process rights. What greater disparity in bargaining power can there be than between a farmer and the State, where the farmer is required to enter into an agreement in order to grow a recognized agricultural crop?

Appellant argues that the Court's preliminary injunction interfered with the enforcement of criminal laws. No crime was committed related to this crop. No warrant was ever sought for this crop. Appellant has no basis to suggest that this case involves a criminal violation. The statute provides that a corrective action plan "is the sole remedy for negligent violations of this chapter, regulations promulgated pursuant to this chapter, or the state plan" and "shall not be subject to any criminal or civil enforcement action." S. C. Code §46-55-40(A)(3).

As noted by the Respondent during oral argument, at the time of the hearing before the trial court, the State had failed to promulgate and submit to the USDA the State Hemp Farming Plan as required by the Hemp Farming Act. The State has subsequently submitted such a State Plan, which has been approved by the USDA, and which has an entire section devoted to enforcement requiring

the precise due process safeguards the trial court cited in support of issuing the injunction in this case.

A farmer being accused of the exact same violations today as the Respondents, would be entitled to the very due process safeguards that the trial court imposed the injunction to preserve and afford: notice, an opportunity to be heard at a hearing to challenge an administrative finding of a "willful violation," and a right to appeal such a finding, pursuant to Art. I, Sec. 22 of the South Carolina Constitution. Today, those due process rights would be afforded through the State Plan. Back in October 2019, because the State had failed to submit a State Plan as explicitly required by the South Carolina General Assembly in the Hemp Farming Act, those rights were afforded through the trial court's injunction. *See* Order, R.p.9-10 and S.C. Hemp Farming State Plan, Sec. 17.[2]

Finally, Appellant asserts that Respondents did not contest the location issue and a party is not entitled to due process over uncontested facts. This argument ignores the complaint filed by the Respondent, which specifically alleged: the South Carolina Department of Agriculture (DAG) has contemplated the designation of tracts on which hemp can be grown can be changed subsequent to the initial application for license (¶22), DAG has a form for farmers such as Respondent to use to designate alternate tracts of property (¶23), that Respondent Pendarvis "attempted to follow rules for hemp production in South Carolina" (¶24), that an amendment application was filed with DAG (¶8), that the forty-acre allotment was not exceeded (¶25), and that "the only alleged issue arises from the timeliness of the amendment filed with [DAG] re-designating the tract of property on which the hemp would be cultivated (¶26). R.p.19-20.

[2] Respondent would note the fact that South Carolina now has a State Plan which requires the very due process safeguards the trial court's injunction in this case was issued to preserve, defeats the argument that repetition overcomes mootness in this matter.

CONCLUSION

The Court's finding that the appeal of the trial court's order imposing an injunction was moot remains valid. The purpose of the injunction was to preserve the status quo, a goal the injunction successfully achieved. The necessity that the underlying issues be heard by the trial court and resolved on their merits is not changed by the fact that hemp crop remains in storage, as opposed to money from a sale sitting in a trust account. As such, the Appellant's petition for rehearing should be denied.

Respectfully Submitted,

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May 2, 2023
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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 the undersigned employee of Wukela Law Firm, counsel for the Respondent, does hereby certify that service of the Return to Petition for Rehearing in the above-captioned matter was made upon to the Appellant's counsel by email only this 2nd day of May 2023 as follows:

Andrew F. Lindemann, Esquire
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Email: andrew@ldlawsc.com

s/ Patrick J. McLaughlin

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May 2, 2023

Via Email Only
The Honorable Jenny Abbott Kitchings
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Email: ctappfilings@sccourts.org

RE: John Pendarvis and Lawton Drew v South Carolina Law Enforcement Division and South Carolina Department of Agriculture
Lower Court Case Number.: 2019-CP-33-0675
Appellate Case Number: 2019-002006

Dear Ms. Kitchings:

Enclosed please find the Respondents' ***Return to Petition for Rehearing*** for filing as requested by the Court's April 25, 2023, correspondence.

By copy of the letter, I am courtesy copying the opposing counsel of record.

If anything further is needed, please let me know.

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN

PJM/rbw

Enclosure as stated

cc: Andrew F. Lindemann, Esquire *(via email only)*
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