

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Hon. Alison R. Lee, Circuit Court Judge

Appellate Case No. 2012-213669

The State,

Appellant,

v.

Alexander G. Nutt,

Respondent,

FINAL BRIEF OF APPELLANT

DANIEL E. JOHNSON
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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court correctly affirmed the Magistrate Court's decision that Rule 6 of the South Carolina Rules of Criminal Procedure does not apply to Conditional Discharge.
- II. The Circuit Court erred in reversing the Magistrate Court ruling that the Respondent violated the terms of his Conditional Discharge

STATEMENT OF THE CASE

On December 29, 2008, Respondent was charged with Simple Possession of Marijuana, in violation of S.C. Code Ann. § 44-53-370(c) and (d) (2002). On or about April 2, 2009, Respondent filed a motion to Comply with Rule 6 of the South Carolina Rule of Criminal Procedure (SCRCrimP). A trial was held on May 13, 2011, in Respondent's absence, and it was discovered that, due to administrative error, Respondent was not sent notice of the May 13, 2011 hearing. The case was reopened, and on July 21, 2011, Respondent pled to a Conditional Discharge, pursuant to S.C. Code Ann. § 44-53-450 (2002). Pursuant to the terms of the Conditional Discharge, Respondent was to undergo drug-testing in the months of September, October and November of 2011. Upon successful completion of those tests, the case was to be dismissed. Respondent chose the facility to conduct the drug test and provided a sample for testing on September 28, 2011. Respondent tested positive for Marijuana, violating the terms of the Conditional Discharge. The facility issued a one page report that contained the following information: the name and address of the facility, the type of drug test, the screener's name, the client's name, the result of the drug test and the testing methodology. The report was not signed, nor was it accompanied by an affidavit. The Magistrate Court issued a Rule to Show Cause on October 14, 2011, ordering Respondent to appear. A hearing on the Rule to Show Cause was held on November 3, 2011, and the Magistrate found sufficient evidence that Respondent violated the terms of the Conditional Discharge and ordered him to pay a fine of \$570.00. Respondent filed an appeal on November 10, 2011. On November 1, 2012, the appeal came before the Honorable Alison R. Lee, Circuit Court Judge. On appeal, the Judge affirmed the Magistrate's holding that Rule 6, SCRCrimP did not apply to conditional discharge. However, the Judge also held that the State's evidence was insufficient to support Respondent's failure of

the drug test, consequently reversing the magistrate court conviction of the Respondent. The State's appeal followed.

ARGUMENT

I. The Circuit Court correctly affirmed the Magistrate Court's decision that Rule 6 of the South Carolina Rules of Criminal Procedure does not apply to Conditional Discharge.

Respondent argued to the Magistrate that the report cannot be considered because it failed to comply with Rule 6, SCCrimP, in that it lacked a signature and affidavit. The Magistrate ruled that Rule 6 did not apply to the proceeding in question and that Respondent failed to provide proper notice that he would challenge the document as being insufficient under Rule 6 and correctly considered the report at the hearing. The Magistrate's "ruling that Rule 6 did not apply" was correct and that, on appeal, the Circuit Court properly affirmed the Magistrate's ruling that Rule 6 did not apply.

The SC Supreme Court held in State v. Hill that pre-trial rules, as outlined in the South Carolina Rules of Criminal Procedure, do not apply to post-trial matters because these proceedings are not criminal trials. State v. Hill, 368 S.C. 649, 659, 630 S.E.2d 274, 280 (2006). The violation of a Conditional Discharge, like a probation revocation, occurs after the imposition of a criminal sentence. R. p. 1 [Judgment in a Civil Case, Circuit Court Order]. The State submits that the Magistrate hearing on the Rule to Show Cause was held to specifically determine if the Respondent was in contempt for violating the terms of his Conditional Discharge, and therefore, the hearing is considered a post-trial matter and not a criminal trial.

The State submits that the Circuit Court judge properly reviewed Respondent's sole argument that had been preserved for appeal, relating to the scope of Rule 6, SCRCrimP. The Circuit Court judge correctly held that Rule 6, SCRCrimP is a pretrial requirement and therefore did not apply to a post-trial procedure such as Conditional Discharge. This ruling is now the law of the case.

II. The Circuit Court erred in reversing the Magistrate Court ruling that the Respondent violated the terms of his Conditional Discharge

The State maintains the Circuit Court erred in reversing the Magistrate Court on an issue never presented to the Magistrate Court. Specifically, the State submits the Circuit Court reversed the ruling of the Magistrate Court by finding evidence to support a violation of the conditional discharge was insufficient. The State contends that at the Rule to Show Cause hearing, the Respondent failed to raise an objection as to the sufficiency of evidence that was submitted to the court for the revocation of Respondent's Conditional Discharge. Instead, Respondent's sole argument was that the evidence submitted to the court did not comply with Rule 6, SCRCrimP. (R. p. 4, lines 22-24; p. 7, lines 2-6). The Circuit Court erred in considering an issue not properly before it on appeal and additionally erred because the sufficient evidence existed to support the finding of the magistrate that Respondent violated the conditions of his Conditional Discharge.

The State submits that the issue presented on appeal was not properly preserved for appellate review because it was not raised to and ruled upon by the Magistrate Court. At the Magistrate hearing, Respondent argued that the evidence submitted to revoke Respondent's Conditional Discharge did not comply with SCRCrimP Rule 6, but did not raise any objections throughout the hearing as to the sufficiency of evidence to support the revocation of Respondent's Conditional Discharge. Therefore, the Magistrate ruling regarding the sufficiency of the evidence becomes the "law of the case." See State v. Cheeks, 400 S.C. 329, 337, 733 S.E.2d 611, 615 (Ct. App. 2012); Atl. Coast Builders and Contractors v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284-285 (2012); Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). As a result, the sufficiency of the evidence that the circuit court reversed on was not properly preserved. See Murphy v. Hagan, 275 S.C. 334, 339, 271 S.E.2d 311, 313 (1980)

(stating that issues were either not raised in the lower court and therefore may not be raised on review, or were not properly preserved by timely exception, and therefore may not be heard on appeal); See State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (stating that to properly preserve errors for direct appellate review, contemporaneous objection is necessary in all trials, even capital trials . . .). In addition, an appellant may not make one argument in support of a motion to the trial court, and then present a different argument on appeal. See Creech v. S.C. Wildlife and Marine Res. Dep't, 328 S.C. 24, 33-34, 49 S.E.2d 571, 576 (1977) (a defendant cannot argue on appeal an issue in support of a motion, when the issue was not presented to the trial court).

Alternatively, the State submits that if the Respondent did object to the sufficiency of evidence at the magistrate hearing, the Circuit Court was still barred from determining that the evidence was insufficient. See Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (1989) (in a law case tried by a judge without a jury, the standard of appellate review is limited to corrections of law in a determination if there is any evidence to support a factual finding of the trial judge).

The State submits that at the time it held the Rule to Show Cause hearing, the Magistrate had sufficient evidence to revoke Respondent's Conditional Discharge and to impose a sentence. In State v. White the South Carolina Supreme Court held that the standard for probation revocation proceedings [has] a much lower evidentiary threshold. Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts *tending to establish* a violation. State v. White, 218 S.S. 130, 136, 61 S.E.2d 754, 756 (1950). Here, the Respondent is challenging the drug testing report generated by the testing facility of his choice. The Magistrate ruled that the information contained in the report, specifically, the testing

date, the substance for which the Respondent was tested, the name of the tester, the testing methodology, and the result of the test, all *tended to establish* a violation of Respondent's Conditional Discharge. The Circuit Court, sitting in its appellate capacity, found the report was insufficient to support the Magistrate's finding and, in effect, weighed the evidence – a matter that must be left to the trial court.

Furthermore, the appellate court's scope of review of evidence submitted in the trial court is limited to instances where there are allegations of abuse of discretion. See Adamson v. Marianne Fabrics, Inc., 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990) (the admission of evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion, amounting to an error of law). The State submits that the Circuit Court judge erred in finding that Respondent did not violate the terms of his Conditional Discharge on the basis that the drug report was unsigned and was not accompanied by any other sworn documents. On appeal, this evidentiary determination is outside of the Circuit Court judge's scope of review. Furthermore, at no point throughout the proceedings did the Respondent allege abuse of discretion; as such, the Circuit Court judge erred in disregarding the Magistrate's sound discretion, in the absence of a jury, to weigh and admit the evidence.

CONCLUSION

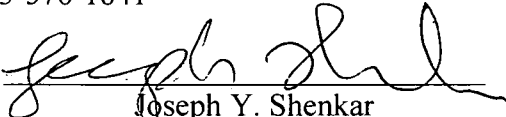
For all of the forgoing reasons, it is respectfully submitted that the Order of the Circuit Court be reversed and the Magistrate decision be affirmed.

Respectfully submitted,

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July 12, 2013

CERTIFICATE OF COUNSEL

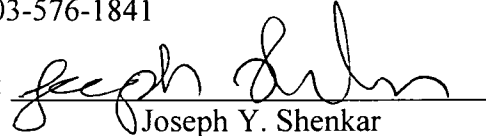
The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E2d 462(2007) (including social security numbers, names or minor children, financial account numbers, and home addresses.

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PROOF OF SERVICE

I, Angela Bennett certify that I have served the Final Brief of Appellant and Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, John A. O'Leary, Esquire, 714 Calhoun Street, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 12th day of July, 2013.



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