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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. re-filed May 24, 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. re-filed May 24, 2023); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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South Carolina Law Enforcement Division and
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**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 re-filed decision in *Pendarvis v. South Carolina Law Enforcement Division*, Op. No. 2023-UP-143 (S.C. Ct. App. re-filed May 24, 2023). The Appellant SLED respectfully submits that the

following points were overlooked or misapprehended by this Court in affirming the grant of a preliminary injunction:

I.

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. Specifically, 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. The Court has respectfully overlooked or misapprehended that the preliminary injunction went far beyond preserving the status quo by allowing for the harvest and sale of the hemp crop.

As this Court correctly states, “[t]he purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it.” *Compton v. South Carolina Department of Corrections*, 392 S.C. 361, 709 S.E.2d 639, 642 (2011). “The sole object of a temporary injunction is to preserve the subject of the controversy in its condition at the time of the order until opportunity is offered for full and deliberate trial investigation.” *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 597 (2001).

However, contrary to this Court’s presumed ruling pursuant to Rule 220(b), SCACR, the preliminary injunction issued by the Circuit Court does not fulfill that basic purpose. The Circuit Court’s order *did not maintain the status quo*. Instead, the Circuit Court allowed the Respondents to *complete* the cultivation as well as harvest and sell the hemp crop. SLED presented evidence that the hemp crop at issue exceeded the “federally defined THC level for hemp” which thereby qualified the hemp crop as 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), 44-53-190.¹ In effect, the Circuit Court authorized and allowed for the Respondents to cultivate, harvest, and sell marijuana -- all of which is illegal under South Carolina law. The Circuit Court only required the sale proceeds of the marijuana to be placed in trust, but that does not serve the State's interests in enforcing the criminal laws that prohibit the cultivation and sale of marijuana. That did not protect the interests of the State and its citizens to prevent the distribution of a controlled substance. In effect, the Circuit Court, as affirmed by this Court, has allowed *and continues to allow* for a controlled substance to be cultivated, harvested, and distributed. By no fair reading of this record did the preliminary injunction preserve the status quo, and for that reason, the preliminary injunction should be reversed on rehearing.

II.

Additionally, this Court has overlooked or misapprehended that the preliminary injunction entered by the Circuit Court improperly interferes with enforcement of criminal laws in contravention of normal powers of equity. *See*,

¹ 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). Notably, the Respondents concede that "[t]he trial court was actually presented with conflicting evidence about whether the hemp crop at issue exceeded the 'federally defined THC level for hemp.'" *See*, Respondents' Brief, p. 5. Thus, as SLED argues, the Respondents, who had the burden of proof, did not prove, nor did the Circuit Court find, that the hemp crop was not a controlled substance; yet, the Circuit Court allowed the crop to be harvested *and sold*. Given that concession, certainly, this Court overlooked or misapprehended that the preliminary injunction maintains the status quo.

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”). The Circuit Court, as affirmed by this Court, exercised its equitable powers to enjoin SLED from enforcing the Hemp Farming Act and the Controlled Substances Act. That constitutes reversible error.

III.

Next, this Court overlooked, misapprehended, or otherwise failed to consider that, in issuing the preliminary injunction, the Circuit Court erred in refusing to enforce Section VIII of the South Carolina Hemp Farming Program Participation Agreement and erred in refusing to allow for the destruction of the Respondents’ illegal hemp crop to proceed, a remedy to which John Pendarvis had expressly consented. This Court’s opinion includes no discussion of this issue.

As the record fully demonstrates, 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, and as discussed further below, 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.² He did submit an amendment

² 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). Quite clearly, on this basis alone, the preliminary injunction should not have been entered in Drew’s favor.

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 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).³ Thus, it is undisputed in this record 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,

³ Section II is in compliance with Section 46-55-20(B)(1) of the Hemp Farming Act, which states in mandatory language that “[a] person applying for a license to cultivate hemp shall provide to the department a legal description and global positioning coordinates sufficient to locate the fields or greenhouses used to cultivate hemp.” S.C. Code Ann. § 46-55-20(B)(1).

which is another undisputed fact, and which presents an additional issue that this Court overlooked or did not address in its opinion.

Importantly, Pendarvis expressly consented 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.

This Court has overlooked or misapprehended that hemp grown at an unlicensed location qualifies as contraband *per se*. See, S.C. Atty. Gen. Op., 2019 WL 3855186 (August 8, 2019) (“possession and handling of unprocessed or raw hemp material without a license is contraband *per se* and subject to seizure”). That presents a purely legal question. In fact, the South Carolina Supreme Court has explained that contraband *per se* includes “things that may be forfeited because they are illegal to possess and not susceptible of ownership.” *Mims Amusement Co. v. South Carolina Law Enforcement Division*, 365 S.C. 141, 621 S.E.2d 344, 348 (2005) (describing illegal drugs as contraband *per se*).

Importantly, if contraband *per se* cannot be possessed or owned, then it does not constitute “property” entitled to any protection or safeguards under the Due Process Clauses of the South Carolina and United States Constitutions. See, *United States v. Farrell*, 606 F.2d 1341, 1344 (D.C. Cir. 1979) (per se contraband

may be summarily forfeited without any due process protections); *Cooper v. City of Greenwood*, 904 F.2d 302, 305 (5th Cir. 1990) (“[c]ourts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession”). *See also, United States v. Jeffers*, 342 U.S. 48, 54 (1951); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). Consequently, the Respondents cannot claim “property rights” with respect to the hemp crop for which they admittedly did not have a license to grow at the Marion County site.

In sum, 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.

IV.

Lastly, this Court has overlooked or misapprehended that the preliminary injunction as entered by the Circuit Court was unsupported by the facts as pled by the Respondents in their Complaint, and accordingly, there was no factual basis for the preliminary injunction.

The proof requirements for obtaining a preliminary injunction are well established. Under South Carolina law, “[a] plaintiff’s entitlement to an injunction

requires the complaint to allege facts sufficient to constitute a cause of action for an injunction while establishing that an injunction is reasonably necessary to protect the legal rights of the plaintiff during the litigation.” *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228, 232 (Ct. App. 2002). (Emphasis added). The Complaint filed by the Respondents, however, alleges only as follows:

7. On May 1, 2019, Plaintiff John Pendarvis was issued a Hemp Grower License from Defendant SCDA. See Exhibit A.
8. On August 10, 2019, Plaintiff John Pendarvis filed a Hemp Farming Program Acreage Amendment Application with Defendant SCDA to add two acres of crop in Marion County.
9. That the Plaintiff Pendarvis did plant two (2) acres of hemp crop in Marion County on property which is owned by Plaintiff Drew.
10. That the crop has been grown and cultivated and is nearing maturing for harvest.
11. That the crop grown on the property of Plaintiff Drew by Plaintiff Pendarvis has great value and that a loss of the crop at this time would cause enormous financial loss to the Plaintiffs.
12. On September 25, 2019, Plaintiffs were informed by Defendant SLED that the two (2) acres of crop located in Marion County would be destroyed in the next few days.

(R. 18). That is the extent of the “facts” as pled and verified by the Respondents in

their Complaint. There were no other “facts” presented as evidence by the Respondents in support of their motion for a preliminary injunction. The Respondents did not file any supporting affidavits.

Importantly, the Complaint does not allege that the hemp crop was less than the “federally defined THC level for hemp.” Also, the Complaint fails to plead facts to show that the Respondents complied with the terms of the Participation Agreement entered between Pendarvis and the SCDA. Specifically, the Complaint does not allege that the Respondents received authorization from the SCDA to grow hemp at the Marion County site as required by the Participation Agreement and state law. Moreover, while the Respondents allege that Pendarvis did file an application to grow hemp at the Marion County site with the SCDA, the Respondents do not allege that the application was granted *before* the hemp crop was planted in Marion County as is also required under the terms of the Participation Agreement. In fact, it is undisputed that the Respondents never received authorization from the SCDA to plant hemp in Marion County. *That is contradicted in the record.* Thus, the facts as alleged by the Respondents, even if proven true, do not provide the evidentiary support for the preliminary injunction that was issued. For this additional reason, the issuance of the preliminary injunction was in error and should be reversed upon rehearing.

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 reverse the Order issued by Circuit Court Judge William H. Seals, Jr. and dissolve the preliminary injunction as entered.

Respectfully submitted,

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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 (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 8th day of June 2023 as follows:

Patrick J. McLaughlin, Esquire
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SC Court of Appeals

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

Enclosures

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