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Jun 14 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM MARION COUNT-
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 Second 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. re-filed May 24, 2023) did not overlook or misapprehend any points of significance that should effect the Court’s finding affirming the trial court order granting a preliminary injunction.

Appellant's second petition continues to argue a flawed argument this Court has already rejected: that the hemp crop in question was "contraband per se." As argued by the Respondent in brief, at oral argument, and in opposition to the prior petition for rehearing, the hemp in question is, by legal definition, **not** contraband per se.

Appellant once again raises the issue of THC levels in support of the contraband per se argument. First, this is a hemp crop, and by statutory definition "hemp" is an agricultural commodity, not contraband. S.C. Code §46-55-10(8). Second, Appellant continues to make this argument **despite waiving the issue before the trial court.**¹

Respondent presented the trial court with three challenges to Appellant's THC argument at the October 8, 2019 hearing: (1) Appellant failed to properly test the THC level in the hemp in question; (2) Respondent had testing that showed 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, the alleged level 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, Appellant twice waived the THC argument on the record:

MR. BARTH: I'm not going to get into the weight issue because Patrick's right...[omitted testimony]...That's one of the ways they

¹ The fact that the Appellant continues to argue that the Respondent's complaint did not allege the hemp crop was less than the "federally defined THC level for hemp" (*Petition*, p.11), shows the disingenuous nature of the argument. Setting aside the Appellant waived the THC issue at trial, it is uncontested that the first time the Respondents were ever notified of **any argument** that the hemp was "too hot," was the October 7, 2019 *Response in Opposition* filed by Appellant. (R. p. 78, lines 11-19 and R. p. 55). In other words, there was no reason at the time of the filing of the complaint for the Respondent to address the THC level of the crop. Appellant's continued argument of this point evinces a desperation to manufacture issues that do not exist.

could probably challenge all of this is on the samples and whether the THC is too high or low.

R.p.91, 1.8-17.

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

MR. BARTH: The location.

R.p.99, 1.16-17.

Having wasted yet more time re-arguing an issue they conceded to the trial court, Appellant continues to argue that even if the THC level was not an issue, the location itself makes the hemp crop contraband per se.

As Respondent previously argued, 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, because it requires “something more” making it “derivative contraband.” See United States v. Farrell, 606 F.2d 1341, 1344 (D.C. 1979) and Cooper v. Greenwood, 904 F.2d 302, 305 (5th Cir. 1990). That “something more” being the finding of a willful violation, as both the Hemp Farming Act and the South Carolina Hemp Participation Agreement both allow farmers accused of the exact same violations as in the case, to “cure” those 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 has never addressed how the requirement of finding a “willful violation” as it relates to hemp is “something more” making this hemp crop derivative contraband, instead just

repeatedly claiming it is “contraband per se” despite the statutory and case law contradicting that argument.

Appellant continues to argue that the Court’s preliminary injunction interfered with the enforcement of criminal laws, yet still fails to identify any crime that was committed related to this crop. No warrant was sought, nor any crime ever charged for the Marion County hemp 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 by 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 previously noted by the Respondent, and completely ignored by the Appellant, 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 since 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.

Finally, Appellant asserts that Respondents did not present factual allegations in their Complaint disputing that they were in violation of the Act. Appellant continues to ignore Paragraphs 8 and 22-26 of the Complaint. R. p. 18-20. Specifically, the allegations wherein the Respondents alleged they had "attempted to follow rules for hemp production in South Carolina." R. p.20.

CONCLUSION

The Court's finding affirming the trial court's order imposing an injunction was the correct decision, did not overlook or misapprehend any points and was not in error. The purpose of the injunction was to preserve the status quo, a goal the injunction successfully achieved by implementing the very due process safeguards that the State of South Carolina has subsequently adopted via the State Plan, approved by the USDA, in compliance with the specific instructions from the General Assembly contained within the Hemp Farming Act. As such, the Appellant's petition for yet another rehearing, based upon the same arguments that have now failed two previous times, should be denied.

Respectfully submitted,

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APPEAL FROM MARION COUNTY
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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,

South Carolina Law Enforcement Division 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 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 14th day of June 2023 as follows:

Andrew F. Lindemann
Lindemann Law Firm, P.A.
Email: andrew@ldlawsc.com

s/ Patrick J. McLaughlin

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June 14, 2023

Via Email Only

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

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.

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 (*via email only*)
C. Bradley Hutto (*via email only*)