THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-211546

State of South Carolina, Appellant,

v.

Michael J. Hilton, Petitioner.

PETITION FOR REHEARING

Respondent Michael J. Hilton, by and through his undersigned attorneys, petitions the Court for a rehearing, pursuant to Rule 221, SCACR, in State v. Hilton, Op. No. 5178, Filed October 30, 2013. Appellant respectfully submits the Court overlooked or misapprehended the following facts and their legal implications in its opinion.

ISSUE PRESERVATION

The trial court did not specifically rule on Appellant's argument that the savings clause prevented retroactive application of the statute. The Court of Appeals recognized this omission in its order: "Although the circuit court did not specifically refer to the savings clause in its order, it acknowledged considering the parties' memoranda. We find the State raised its savings

clause argument to the circuit court, and in applying the amendment retroactively, the circuit court ruled on that argument. Thus it is properly before this court." Id. at __.

The court's opinion overlooks or misapprehends our rules of error preservation and essentially dispenses with the requirement that an issue be specifically ruled upon by the trial court in order to be preserved for review. The court's conclusion that the trial court's general ruling on the retroactive application of the statute preserves the specific savings clause issue conflicts with clear controlling precedent. The standard error preservation rule provides that "[i]n order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge. When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal." Cowburn v. Leventis, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005). See also, Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) ("When a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal." Citing Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991)).

Petitioner recognizes that this is a criminal matter and Rule 59(e), SCRCP, is not implicated here. However the fundamental preservation rule requiring the appealing party to first ask the trial court for a ruling on a specific issue does not distinguish between criminal and civil matters, and Appellant was required to ask the trial court for a specific ruling on its savings clause argument to preserve that argument for appeal. This court recently recognized this in State v. Samuels, 400 S.C. 593, 735 S.E.2d 541 (Ct. App. 2012). In Samuels, the State made a general

objection to the defendant's pretrial motion to suppress her out-of-court statements. The trial court suppressed certain statements and the State immediately appealed. The court of appeals found the State failed to preserve for review its specific bases for admitting the statements. After the trial court ruled, "[t]he State had the opportunity to request a more specific basis for the trial court's ruling, thereby preserving the argument," but the State failed to do so. Accordingly, this court found "the State did not preserve this particular argument." Id. at 600, 735 S.E.2d at 545.

Moreover, it is error for an appellate court to address an unpreserved issue. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (Because respondent did not make a post-trial motion asking the trial judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the court of appeals erred in addressing the merits of the issues.).

As the Supreme Court recently reiterated,

> error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court. We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us. In fact, a rule which would permit such an "appeal by consent" is contrary to the very core of our preservation requirement: "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006).
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> Nevertheless, these rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it. This is so regardless, to use the Chief Justice's terms, of the "life-blood litigant or criminal defendant" before us. However, this is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.

Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012). The rule and reasoning explained above apply here: the trial court did not address the specific argument Appellant advances on appeal and the trial court's general denial of the State's request to admit the evidence does not preserve the specific issue where the State did not first ask the trial court to address it. To hold otherwise and find that a general ruling preserves every possible grounds for reversal effectively eviscerates our rules of error preservation and creates an exception that would swallow the rule.

Because the trial judge did not rule on the impact of the savings clause and Appellant did not ask for a specific ruling, any error in not applying the savings clause is not preserved for review. Petitioner respectfully submits that the court misapprehended this point and misapplied the law of error preservation in reversing the trial court.

AS A PROCEDURAL CHANGE, THE TWO-HOUR TIME LIMIT SHOULD APPLY RETROACTIVELY

The court relies on the savings clause as indicia of legislative intent that the two-hour time limit contained in amended S.C. Code §56-5-2950(A) is to be applied prospectively only. As set forth above, any argument based on the savings clause is not preserved for appellate review where the trial court did not reach the issue. Regardless, the amendment was, by its own terms, procedural, and should apply retroactively despite the savings clause. This court and the Supreme Court have consistently applied statutory amendments retroactively where those amendments affect procedural, rather than substantive, rights. See, e.g., State v. Frey, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004); State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009), cert. denied, April 8, 2010; and State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2010).

In its order, the court attempts to distinguish the procedural changes here from those changes made in Bryant, supra. The court reasoned that Bryant did not repeal or amend any previously existing law as contemplated by the savings clause. State v. Hilton, Op. No. 5178, Filed October 30, 2013, n.1. But the amendment in Bryant made wholesale changes to the rules of evidence and made out of court statements – clearly inadmissible before the change – admissible against defendants charged with certain sex crimes. It is difficult to imagine a more sweeping change in the law than that effected by the statute in issue in Bryant (and Stahlnecker). Both of those cases implicated the confrontation clause of the Constitution because they permitted the admission of hearsay evidence without affording the accused an opportunity to cross-examine the declarant. Yet neither this court in Bryant nor the Supreme Court in Stahlnecker had any reluctance in applying the new law retroactively to cases pending long before the change in the law. The courts reasoned that procedural changes are to be applied retroactively, notwithstanding the inclusion of a savings clause identical to the one included in Act No. 201, 2008 S.C. Acts __.

Here, the court acknowledges the savings clause is identical to the savings clause in Bryant; however, the distinction the opinion attempts to make between this case and Bryant is illusory at best. Bryant changed the rule of hearsay, dramatically and unequivocally. The court should reject a rule of law that has the impact of always favoring the State, but should instead apply the rule pronounced in Frey, Bryant and Stahlnecker with an even hand.

The primary cases the opinion cites for concluding the new law should not apply retroactively are, on the other hand, easily distinguished. State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013), involved an amendment that effectively changed the definition of grand larceny and redefined the property value associated with the offense (before the amendment

grand larceny involved property valued at $1,000 or more; after the amendment, the threshold value was increased to $2,000. The defendant argued he should be treated under the amended statute which substantively redefined the offense). Likewise, State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (Ct. App. 2009), involved a defendant's argument that he was entitled to avail himself of a statutory amendment that "substantively expanded the law of self defense." Id. at 560, 673 S.E.2d at 886.

Bolin and Brown both involved changes in the substance of the law. They did not implicate procedural changes. They have no application to the issues involved in this appeal. Here, the legislature specifically called the amendment in the time for administering breath test changes in the "procedure for administering breath tests . . ." Act No. 201, 2008 S.C. Acts __. The legislature is presumed to know that our appellate courts have applied "procedural" changes retroactively, and it is presumed the legislature did not use the phrase quoted above without intending to impart some meaning thereby.

CONCLUSION

The court's opinion overlooks or misapprehends that the State's savings clause argument is not preserved for appellate review because the trial court did not rule on the issue and the State did not ask the court for a specific ruling. The State should not now be allowed to raise the issue on appeal. Irrespective of the State's failure to preserve the issue, South Carolina appellate courts have consistently and repeatedly applied procedural changes to existing statutes and new rules of procedure retroactively. The court's opinion overlooks this precedent. For these reasons, the

Petitioner respectfully asks the court to grant this petition for rehearing pursuant to Rule 221, SCACR, and to affirm the well-reasoned decision of the trial court.

Respectfully submitted,

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November 14, 2013

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CERTIFICATE OF SERVICE

I, Holli Langenburg, paralegal to the attorney for the Respondent, Richard A. Harpootlian, P.A., hereby certify that I have served, via U.S. Mail, on November 14, 2013, the below named individual with a copy of the following:

Document: Petition for Rehearing

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