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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS) THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)
	) CASE NO: 2013–CP–08–2704
State of South Carolina, Appellant	) **AMENDED ORDER OF DISMISSAL**[1]
vs.	)
Nicholas M. Blair, Respondent.	)

Presiding Judge:	Hon. Deadra L. Jefferson
Appellant's Attorney:	Marcus Gore, Esquire
Respondent's Attorney:	Gregory Deluca, Esquire
Date of Hearing:	March 17, 2014
Court Reporter:	Karen V. Andersen

This case came before the Court during the March 17, 2014 common pleas non-jury term for a criminal appeal from Magistrate's Court, filed December 5, 2013. Appellant was represented by Marcus Gore, Esquire and Respondent was represented by Gregory Deluca, Esquire. The Court had before it the Magistrate's Return, the Magistrate's record, the record on appeal, and the State's Notice of Appeal and Appeal.

In both its Notice of Appeal and Appeal and at the hearing, the State argued that its appeal should be granted based on the State's right to request a jury trial, relying on S.C. CODE ANN. § 22–2–150 (2013) ("Every person arrested and brought before a magistrate charged with an offense within his jurisdiction shall be entitled on demand to trial by jury which shall be selected as provided in this chapter"); S.C. CODE ANN. § 22–2–230 (2008), *repealed by* Act No.

[1] This Amended Order of Dismissal replaces the original Order of Dismissal, signed April 9, 2014 and filed April 15, 2014.

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267, 2008 S.C. Acts 267; Rule 37, SCRCrimP (South Carolina Rules of Criminal Procedure apply to proceedings in magistrate's court to the extent they are not inconsistent with the statutes and rules governing the magistrate's court); Rule 14(b), SCRCrimP ("A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge."); State v. Senter, 396 S.C. 547, 555, 722 S.E.2d 233, 237 (2011) (State objected to defendant's request to waive jury trial, however, issue was not reviewed on appeal); State v. Nash, 51 S.C. 319, 28 S.E. 946 (1898) (interpreting the 1893 Code of Laws and addressing whether the prosecutrix may demand a jury trial in place of the solicitor or attorney general); State v. Hanson, 285 S.C. 543, 544, 331 S.E.2d 782, 782 (1985) State v. Shuck, 278 S.C. 441, 298 S.E.2d 95 (1982). ("A defendant's waiver of a jury trial is conditioned upon the consent of the prosecutor and the trial judge. . . . If either objects to the waiver, the defendant must be tried by a jury."). Additionally, in support of its position, the State relied upon an Attorney General's opinion interpreting State v. Hanson, 285 S.C. 543, 544, 331 S.E.2d 782, 782 (1985) and the repealed S.C. CODE ANN. § 22–2–230 (2008), *repealed by* Act No. 267, 2008 S.C. Acts 267. See Mr. John Patrick, Op. Att'y Gen. (Aug. 15, 1980), *available at* 1980 WL 120825.

In support of his position, Respondent relied on S.C. CODE ANN. § 22–2–150 (2013) and Rule 2 of the South Carolina Rules of Magistrates Court, which provides: "These rules shall govern all civil suits in the magistrates court. If no procedure is provided by these rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in similar situations but not inconsistent with these rules."

The Magistrate's Return reflects the following procedural posture: On November 6, 2013, Trooper Wooten called this case that was scheduled for a bench trial before Judge Whilden V. Baggett, Berkeley County Magistrate. Nicholas M. Blair, Respondent, was charged by

citation G449285 for Driving Under the Influence with a refusal on the BA. His citation was marked as appearance required on November 6, 2013. The State was represented by Trooper Wooten and Respondent was represented by Gregory A. Deluca, Esquire for a bench trial. At the commencement of the hearing, Respondent indicated he was ready to proceed with the bench trial upon a plea of not guilty. Trooper Wooten stated he wanted a continuance or a jury trial. Thereafter, Respondent argued the State could not rely on the repealed S.C. CODE ANN. § 22–3–230 (2008) that was recognized in an Attorney General's Opinion as the source of the state's right to ask for a trial by jury and, consequently, did not have the right to request a jury trial. The defense also asserted that only the Defendant had a right to request a jury trial and referred to and did provide a copy of S.C. CODE ANN. § 22–2–150 (2013), stating that a person arrested and brought before a magistrate charged with an offense within his jurisdiction shall be entitled on demand to trial by jury. Respondent also objected to the State's request for continuance based on failure to subpoena and ensure the presence of a necessary witness and wished to proceed. Ultimately, in a Return dated January 9, 2014 and filed January 14, 2014, the Magistrate denied the State's request for continuance and denied the State's request for a jury trial based on the plain language of state statute § 22–2–150 (2013). The case was subsequently dismissed after the defense made a motion to dismiss for lack of prosecution. The Magistrate advised both parties of their right to an appeal.

Upon review of the record of the Magistrate's hearing, this Court finds that the State requested the case be continued because its witness was unavailable and an independent demand that the case be set for a jury trial. No other grounds or opposition were articulated in the lower court record. Further, the record reflects that at no time prior to the matter being set for a bench trial, after the Trooper called the case for trial or during the proceedings did the State specifically

oppose a bench trial in the lower court, nor did the State object to the Defendant's request for a bench trial.[2] Instead, the State asserted that it had an independent right to a jury trial. However, because the Magistrate ruled that the State could not request a jury trial, the issue was preserved for appellate review.

On an appeal from the Magistrate's Court, the Circuit Court acting as the appellate court, reviews the matters raised in the notice of appeal. S.C. CODE ANN. § 18–3–70 (2013) ("The appeal must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses."). Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact. S.C. CODE ANN. § 18–7–170 (2013). See State v. Hoyle, 397 S.C. 622, 725 S.E.2d 720 (Ct. App. 2012) ("In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception."); (State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) (citations omitted) (same).

This Court finds that the Magistrate did not abuse its discretion in denying the State's motion for continuance. See State v. Browder, 277 S.C. 206, 207, 284 S.E.2d 775, 776 (1981) ("Motions for continuance are addressed to the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent a clear showing of abuse of discretion."). The record reflects that the basis of the motion was Trooper Wooten's assertion that he did not have

[2] It is apparent from the record that at some time prior to Trooper Wooten calling the case on November 6, 2013 that the case had been set by some mechanism in the Magistrate's Court for a bench trial. The record does not reflect that the State opposed the matter being set for a bench trial prior to the November 6, 2013 trial date. Further, the Return reflects that the case had been scheduled in advance as a bench trial for the November 6, 2013 court date.

the witness he needed to proceed. Upon further inquiry by the Magistrate it was determined that the Trooper had failed to subpoena the witness. Based on this procedural posture this Court can discern no abuse of discretion as there exists no error of law and factual support exists in the record for the lower court's denial of the continuance.

Similarly, this Court finds the Magistrate did not abuse its discretion in ruling that, based on the plain language of S.C. CODE ANN. § 22–2–150 (2013), the State could not request a jury trial.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, we must give the words found in the statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Id. at 499, 640 S.E.2d at 459. Thus, if the words are unambiguous, we must apply their literal meaning. Id. at 498, 640 S.E.2d at 459. However, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). In that vein, we must read the statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous," Id. at 377, 665 S.E.2d at 651, for "[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law." Id. at 382, 665 S.E.2d at 654. See CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "A court must take the statute as it finds it, giving effect to the legislative intent as expressed in the language of the statute, and cannot, under its power of construction, supply an omission in a statute." State v. Johnson, 396 S.C. 424, 429, 721 S.E.2d

786, 788-89 (S.C. Ct. App. 2012), *reh'g denied* (Feb. 16, 2012) (citing State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999)).

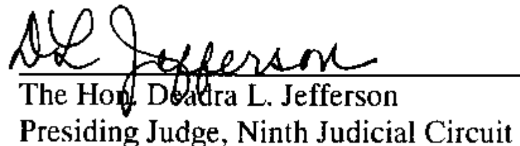
Initially, this Court finds that the cases and authorities cited by the State in support of its position all interpret the repealed S.C. CODE ANN. § 22–3–230 (2008), which explicitly provided that either party—both the defendant and the State—are entitled to a jury trial.[3] Applying the established rules of statutory construction, this Court finds that, according to the plain language of S.C. CODE ANN. § 22–2–150 (2013)—which provides that "[e]vry person arrested," in other words, only the defendant, is entitled to a jury trial—read in harmony with the entirety of Chapter 22 of the South Carolina Code of Laws, as well as the South Carolina Rules of Magistrates Court, the State is not entitled to an independent demand for a jury trial. This Court finds that it need not address whether the South Carolina Rules of Criminal Procedure—specifically, Rule 14(b), which provides the procedure by which a defendant may waive his right to a jury trial—provide the State a right to a jury trial by implication because this issue is squarely addressed within the Code applicable to Magistrate's Court. This Court declines to read into the Code a provision granting the State an independent right to demand a jury trial, where not only did the state Legislature repeal an old statute disposing of that issue, but also failed to provide a corresponding right to the State in the only statute in the Code applicable to the Magistrate's Court on point. See S.C. CODE ANN. § 22–2–150 (2013).

[3] This Court declines to address the entirety of the above mentioned Attorney General opinion. See Mr. John Patrick, Op. Att'y Gen. (Aug. 15, 1980), *available at* 1980 WL 120825. The Opinion reviews two distinctly different factual scenarios inapposite to the Respondent's case. First, the Opinion answers the question of whether the Magistrate may *sua sponte* and without consent of either or both parties refuse to try a defendant without a jury, even where a defendant has elected to proceed with a bench trial. The Opinion also addresses case law regarding waiver of a jury trial in the civil context. Here, the Magistrate never refused to try Respondent's criminal case as a bench trial and impose a jury trial on his own accord. Therefore, the cases and analysis employed by the Attorney General in explicating this issue are not applicable to the case at bar. The second question presented to the Attorney General is whether the prosecution in a criminal case may demand a jury trial without the consent of the defendant. As explained above, the Opinion answers this question relying solely on the repealed S.C. CODE ANN. § 22–2–230 (1976). Therefore, this portion of the Opinion is equally inapplicable to the present case.

Moreover, considering the State's argument that a criminal defendant may not unilaterally waive his right to trial by jury absent the consent of the solicitor and the trial judge, see Rule 14(b), SCRCrimP, this Court finds that the State never interposed or preserved any objection to the Respondent's waiver for the record. It is clear from the Magistrate's record that Trooper Wooten made one singular request for a jury trial after the case had been set for a bench trial and did not withhold consent to Respondent's waiver of his right to trial by jury. Therefore, this Court declines to review the issue of whether Respondent properly waived his right to a jury trial pursuant to Rule 14, SCRCrimP. See State v. Black, 319 S.C. 515, 521–22 462 S.E.2d 311, 315 (1995) (failure to make contemporaneous objection to the Magistrate operated as waiver of right to object and issue could not be addressed by the Circuit Court upon appeal); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party cannot argue one ground at trial and another ground on appeal).

This Court, having found adequate evidentiary support in the record, no error of law, and finding no abuse of discretion, AFFIRMS the decision of the lower court and dismisses the appeal, pursuant to S.C. CODE ANN. § 18–7–170 (2013).

IT IS SO ORDERED.



The Hon. Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

August 28, 2014
Charleston, South Carolina
At Chambers.