

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Deadra L. Jefferson, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

TURUK SAUNDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001240

APPENDIX

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Andre Benjamin
Cross-examination by Ms. Wilson
August 27, 2013

1 A. So I wouldn't jeopardize myself. I didn't know
2 that actually said he went in there with me. Which he
3 didn't. But if the police said they had video, they
4 should have seen he did not go in there with me.

5 MS. WILSON: Thank you.

6 THE WITNESS: Yes.

7 THE COURT: Any further questions from the
8 witness, Ms. Wilson?

9 MS. WILSON: Nothing from the State.

10 THE COURT: Any redirect?

11 MR. LEE: No, ma'am.

12 THE COURT: Sir, you may step down.

13 MR. LEE: We would have no other witnesses, Your
14 Honor.

15 MS. WILSON: Anything further from the State?

16 MS. WILSON: Yes, Your Honor. Just briefly. I
17 would like to re-call Mr. Fleming.

18 THE COURT: Certainly.

19 Mr. Fleming, if you would come back to the
20 witness stand.

21 [Whereupon, Mr. Fleming retakes the witness
22 stand]

23 THE COURT: Sir, I'll remind you you're still
24 under oath.

25 THE WITNESS: Yes, ma'am.

Andre Benjamin
Cross-examination by Ms. Wilson
August 27, 2013

1 THE COURT: You may proceed when you're ready.

2 MS. WILSON: Thank you, Your Honor. Just a
3 couple of quick questions.

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Cory Fleming
Direct Examination by Ms. Wilson
August 27, 2013

CORY FLEMING,

Having Been Previously Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MS. WILSON:

Q. Do you recall any problems with the jurors that
were at trial?

A. I don't.

Q. And did Mr. Saunders participate in voir dire
with you?

A. With every single juror.

Q. Do you recall the issue about the drug analysis
not being introduced at trial?

A. I don't recall it specifically.

I just -- I looked at it in the record. I think
it shows something to that effect. I think I even
mentioned that it wasn't introduced.

Q. Right.

And, ultimately, did you review all of the
evidence that was sent back to the jury?

A. I did.

Q. And when you elicited testimony at trial from
the State's various witnesses, did you bring out about the
codefendants' admission of guilt and how they spoke up for
the charges and so therefore Mr. Saunders wasn't guilty?

Cory Fleming
Direct Examination by Ms. Wilson
August 27, 2013

1 A. Each and every one of them.

2 MS. WILSON: Thank you.

3 MR. LEE: No cross, Your Honor.

4 THE COURT: Let me just be clear. Is it your
5 testimony, Mr. Fleming, that no evidence went back to
6 the jury that had not been actually admitted into the
7 record?

8 THE WITNESS: As far as I know.

9 THE COURT: Okay. I just wanted to be clear
10 that I heard you correctly.

11 THE WITNESS: That's correct.

12 THE COURT: Any questions as a result of the
13 Court's clarification? From the State?

14 MS. WILSON: Nothing from the State, Your Honor.

15 THE COURT: From the Applicant?

16 MR. LEE: No, Your Honor.

17 THE COURT: Sir, you can step down.

18 THE WITNESS: Thank you.

19 [Whereupon, Mr. Fleming is excused and exits the
20 witness stand]

21 MS. WILSON: Your Honor, I think this is already
22 a part of the record but I just wanted to be sure. I
23 just wanted to admit the affidavit of Andre Benjamin.
24 But I think it's attached to his application. I just
25 wanted to make sure you have it.

Cory Fleming
Direct Examination by Ms. Wilson
August 27, 2013

1 THE COURT: It's up to you.

2 MS. WILSON: Okay. I want to admit it.

3 MR. LEE: No objection.

4 THE COURT: It will be marked and admitted
5 without objection.

6 [Whereupon, State's Exhibit Number 1 is marked
7 by the court reporter]

8 [Whereupon, State's Exhibit Number 1 is admitted
9 into evidence by the Court]

10 THE COURT: All right. Any further witnesses
11 from the State?

12 MS. WILSON: Nothing from the State, Your Honor.

13 THE COURT: Any rebuttal testimony from the
14 Applicant?

15 MR. LEE: No, Your Honor.

16 THE COURT: All right. Is there any closing
17 argument?

18 MR. LEE: Just a couple of minutes, Your Honor?

19 THE COURT: It's up to you.

20 THE COURT: Okay. Judge, thank you. May it
21 please the Court. Ms. Wilson.

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Closing Argument
by Mr. Lee
August 27, 2014

CLOSING ARGUMENT

MR. LEE: Judge, if you review the advance sheets for the last several years, to me the two issues that you see the most are a lot of -- almost everything, it seems like now, requires a totality of the circumstances evaluation and they seem to be throwing all these 403 requirements into these. And it makes sense because it, you know, is talking about justice and fairness and due process.

So, you know, a lot of what we're arguing talks about these 403 analyses that were never done, for whatever reason, on the record. And, unfortunately, it certainly jeopardized Mr. Turuk's opportunity --

THE COURT: I don't think the Court is required to articulate the entire basis of its analysis. I think it's required to make a contemporaneous ruling.

But I think the absence or what the Court has highlighted in its opinions is an utter failure to perform an analysis, not that you don't give -- because sometimes I don't -- I don't think I'm required to give you everything that's in my brain that I -- I think I'm required to tell you, this is the basis of my ruling, but I don't think I'm required to go through every single element of what I've processed to come to that conclusion. I think what

Closing Argument
by Mr. Lee
August 27, 2014

1 the Court talks about is the complete absence in the
2 record of any balancing.

3 MR. LEE: Right.

4 THE COURT: And, really, that's for their
5 benefit so that they can know exactly what the Court
6 was thinking.

7 I think Judge Kinard was very clear in what he
8 was thinking and why he -- what he was inclined to do
9 and why he was inclined to do it. But I don't think
10 you have to do a textbook analysis on 404(b). Now,
11 I'm a little -- you know, I kind of -- I'm a little,
12 what's the word that I'm looking for -- I probably --
13 and in some instances I even do a written order,
14 depending on the context of a civil case if it's
15 particularly complicated, because I never want anybody
16 to guess about what I was thinking.

17 MR. LEE: Yes, ma'am.

18 THE COURT: But I'm not perfect and I probably
19 -- there have been times when I've probably done the
20 same thing and said I'm excluding it or I'm admitting
21 it based on 404(b) under this particular heading,
22 whether it be intent, absence of mistake or whatever.
23 But I don't think I have to tell you every single
24 thing in my analysis. I think I'm just required to
25 make a contemporaneous ruling on it so that it's

Closing Argument
by Mr. Lee
August 27, 2014

1 preserved for the record.

2 Most of the cases are where the judge simply
3 doesn't really articulate a basis at all and simply
4 says overruled or sustained and doesn't tell you why
5 they overruled or sustained it.

6 Of course, probably the more advisable thing to
7 do is to go through your whole analysis, but I don't
8 think there's anything that requires you to do it.

9 MR. LEE: I think that several years ago there
10 arguably was a strict requirement that it be on the
11 record. But I think they've relaxed that. They say
12 if we can glean it --

13 THE COURT: You can put -- I think we're saying
14 the same thing but differently.

15 MR. LEE: Right.

16 THE COURT: I don't think I have to tell you --
17 I don't think I have to do a textbook hornbook
18 analysis on the record. I think I have to make clear
19 what the basis of my ruling is and articulate that for
20 the record. There are forty-nine of us. We all do it
21 differently.

22 MR. LEE: Right.

23 THE COURT: And I don't think -- while I may use
24 a hornbook analysis approach to it, there's nothing
25 that says everybody else has to.

Closing Argument
by Mr. Lee
August 27, 2014

1 Sometimes in the hurry of a trial, like I said,
2 hindsight is always twenty-twenty, I think -- I don't
3 know any of us that don't have an A-type personality
4 and wish we had done it better.

5 MR. LEE: Right.

6 THE COURT: I mean, I think going back, you
7 always wish you had done it better. There have been
8 things I've been thinking in my mind --

9 MR. LEE: Tell me about it.

10 THE COURT: -- you know, my property professor
11 used to always tell me, I know you had the right
12 answer. You started at A --

13 MR. LEE: Right.

14 THE COURT: -- you had to go through the correct
15 analysis to get to D, but you did it in your mind, you
16 didn't put it on the paper.

17 MR. LEE: Right.

18 THE COURT: So I think sometimes judges do the
19 very same thing, but that doesn't mean that -- I don't
20 think you have to do a traditional hornbook analysis.
21 And that's probably not the best analogy.

22 But I think it has to be clear what the -- you
23 know, what your ruling is, what the basis of your
24 ruling is. Because oftentimes I'll say it's overruled
25 or denied based on Lyle, 404(b), whatever the category

Closing Argument
by Mr. Lee
August 27, 2014

1 is, and that it's more probative than prejudicial. I
2 don't know that you have to do anymore than that,
3 because that preserves it.

4 MR. LEE: Well, you know, I don't want to be
5 disagreeable, but I disagree a little bit.

6 I would say that the case I handed up, The State
7 vs. Speers, even though it's a 2013 case, it cites
8 State vs. Wallace, which was '09, which was in place.
9 And it says, quote, once bad-act evidence is found
10 admissible under 404(b), the trial court must,
11 italics, then conduct a prejudice analysis --

12 THE COURT: Yeah. But I don't have to do
13 anything but say that I find it's more probative than
14 prejudicial. That's what that case means. I don't
15 have to go through my analysis in my mind for you.
16 All I have to say is I find for the record that the
17 evidence is more probative than prejudicial or it's
18 more prejudicial than probative. That's all I have to
19 say. I don't have to say anything more than that for
20 the analysis to have been conducted for the record.

21 MR. LEE: I would respectfully say that it
22 requires a little more than that, just so that a
23 record can be made and you can actually have an
24 appealable issue.

25 THE COURT: I can tell you, based on our

Closing Argument
by Mr. Lee
August 27, 2014

1 seminars they tell us that's all we have to say --

2 MR. LEE: Well, I would submit to you --

3 THE COURT: -- that we don't have to belabor it.

4 MR. LEE: -- that that wasn't even -- that lower
5 standard, in my opinion, wasn't even done in this.
6 Because if you go from point A to point Z -- the
7 problem is if a judge was able to do that, they never
8 would be able to be reversed because there's no --
9 there's nothing for you to latch onto as an appellate
10 --

11 THE COURT: I think that, based on the appellate
12 record and precedent, that's all we have to say. And
13 what they complain about is when we fail to do that,
14 because they don't know what we've been thinking.

15 A record is evidence on its face. You don't
16 have to -- I don't have to say, based on these
17 factors, I find it's more probative than prejudicial.
18 All I have to say is based on 404(b), or based on
19 whatever the rule is, that it's more probative than
20 prejudicial or more prejudicial than probative, either
21 way. I don't have to tell you what I've given weight
22 to. That's sometime the more prudent way to do it
23 because you want the Court to know what you're
24 thinking. If I do it, it's because I want the Court
25 of Appeals to know what I was thinking.

Closing Argument
by Mr. Lee
August 27, 2014

1 MR. LEE: Yes, ma'am.

2 THE COURT: But that's not to preserve the
3 record. I think the record is preserved once the
4 Court rules and makes a contemporaneous ruling. I
5 think the deficit comes when a Court says it's
6 excluded or admitted and doesn't say why, because the
7 record then is devoid of any basis of why it was done
8 or not done.

9 But I think the Court can take a recess and do
10 it's weighing and come back into court and say, I find
11 that it's more probative than prejudicial and it's
12 excluded, or, I find that the issue of credibility is
13 dispositive in this case and based on blah, blah, blah
14 I find it's admissible or, you know, that it's more --
15 I don't think that you have to do what would be
16 considered a classic law school analysis and put that
17 on the record.

18 What the Court of Appeals and the Supreme Court
19 gets frustrated with is when we simply say overruled,
20 sustained --

21 MR. LEE: Right.

22 THE COURT: -- and we don't say why, or it's not
23 evidence from the record why we said why, or we don't
24 make that probative versus prejudicial analysis.

25 And I don't think anything more is required than

Closing Argument
by Mr. Lee
August 27, 2014

1 to make that statement, at least based on the guidance
2 they've given us.

3 MR. LEE: Okay. Well, obviously, I'm not privy
4 to those --

5 THE COURT: Their frustration is when we simply
6 say it's excluded --

7 MR. LEE: Yeah.

8 THE COURT: -- or it's admitted.

9 MR. LEE: Or move along, or something like that.

10 THE COURT: Yeah.

11 Or it's admitted and you don't know why it was
12 admitted.

13 MR. LEE: I would just say, from this side of
14 the bar, it just -- it makes it a lot more difficult,
15 obviously, to preserve things and to argue them.

16 And I would say even under the standard which
17 the Court is suggesting, has dictated, I don't even
18 think that in this case it meets that standard. I
19 don't think saying if it happened that day it's in and
20 if it didn't, it's out. All that does is talking
21 about temporal proximity. That is the only thing --

22 THE COURT: That's one of the elements. That's
23 one of the elements --

24 MR. LEE: That's one of --

25 THE COURT: -- under the Lyle analysis.

Closing Argument
by Mr. Lee
August 27, 2014

1 MR. LEE: -- of five that they say that you can
2 talk about.

3 THE COURT: But you don't have to weigh all of
4 them. You only have to weigh one of the five, based
5 on the case law. You don't have to include all of
6 them. At least based on my reading of that case. I
7 don't think you have to look at all of them -- I think
8 -- yeah.

9 MR. LEE: I just think that it completely
10 hamstring trial attorneys if judges can go from A to
11 Z. But, you know --

12 THE COURT: Well, there are forty-nine of us.
13 Well, fifty-one --

14 MR. LEE: I know.

15 THE COURT: -- if I count my retired brethren,
16 who work as hard as I do.

17 MR. LEE: I understand.

18 THE COURT: And who I really appreciate, to tell
19 you the truth. They come to the courthouse every day,
20 just like I do.

21 I think that it's easy, in hindsight, to say how
22 something should have -- I think you can look back in
23 hindsight -- sometimes if I were to look back at a
24 record I did three years ago, I probably would shutter
25 to think. Because I would hope that I've grown in

Closing Argument
by Mr. Lee
August 27, 2014

1 three years and I'm doing it better now than I did it
2 then. But I think in the heat of trial, it's very
3 easy to say what somebody should have done.

4 MR. LEE: No question.

5 And I mean, that's what PCRs are all about. I
6 mean, that's why we're here. And a lot of times I'm
7 here and a lot of times I'm there. So you've done
8 enough of them for you to find yourself in that
9 position.

10 But, regardless, you've heard all of our --

11 THE COURT: But it would be a direct appeal
12 issue, anyway, whether he made that analysis or not.

13 MR. LEE: Well, it would. But the problem was
14 trial counsel didn't preserve it. And so whether --

15 THE COURT: Well, I don't know that you can
16 demand and ask the judge to do more than they've done.
17 I think that you can ask -- you can -- you make your
18 objection.

19 The Court doesn't have to take argument at all.
20 As a matter of fact, I don't take speaking objections.
21 So you should succinctly be able to tell me what the
22 issue is. Argument is to aid me. It's not to
23 preserve your record. So you should be able to say
24 whether it's relevant, leading, pitting, Lyle,
25 whatever the plethora of objections there could be to

Closing Argument
by Mr. Lee
August 27, 2014

1 contemporaneously be -- to preserve the record. But I
2 don't have to listen to you go on for thirty minutes
3 about an objection, especially when it's not going to
4 aid the Court. You know, argument is to aid the Court
5 in making a decision. It's not to preserve your
6 record.

7 MR. LEE: I understand.

8 THE COURT: So sometimes there's this sort of
9 almost a misnomer with counsel, especially,
10 unfortunately -- I'm sure you have a grasp on the
11 rules, but many of your breather do not and so they go
12 on for forty minutes about something and never get to
13 the point.

14 MR. LEE: I understand.

15 THE COURT: And so then, you know, the Court has
16 to effectively manage a courtroom and manage time.

17 But argument is to benefit and aid the Court.
18 It's not to preserve your record. So you should be
19 able -- so the issue is not even whether you made an
20 objection as to whether there's some prejudice that
21 resulted.

22 And I'm sorry. Go ahead and make your argument.

23 MR. LEE: No, no. I mean, I completely
24 understand.

25 THE COURT: I apologize --

Closing Argument
by Mr. Lee
August 27, 2014

1 MR. LEE: Yeah. And I appreciate you being, I
2 mean, just being so candid about it and talking about
3 it and giving me a chance to respond.

4 But regardless if that was a proper ruling, we
5 still take the position that right or wrong, it wasn't
6 preserved and that he should have gotten the
7 opportunity to be able to have the Court say, well, we
8 see the record and this is what the judge said and do
9 we need to --

10 THE COURT: How wasn't it preserved? He made a
11 contemporaneous -- he's the one that raised the issue,
12 didn't he?

13 MR. LEE: He raised 404. It was let in. But
14 then you have to renew 404 as soon as the person is
15 getting ready to introduce the testimony that you're
16 subject to --

17 THE COURT: Depends on how -- depends on how
18 close in time. The case law says if you -- for
19 example, he calls a witness, you call --

20 MR. LEE: Right.

21 THE COURT: -- let's just say, for example,
22 you're the State, you're calling a witness. Defense
23 counsel says, Your Honor, before that witness
24 proceeds, we need to object in camera to this
25 testimony --

Closing Argument
by Mr. Lee
August 27, 2014

1 MR. LEE: Right.

2 THE COURT: -- based on blah, blah, blah.

3 MR. LEE: Right.

4 THE COURT: You hear the motion and then they
5 call the witness.

6 MR. LEE: Well, I would say at the absolute
7 minimum, at directed verdict stage you have to make it
8 or it's gone. And I think that the law is clear about
9 that. And I think this transcript is very clear,
10 which is a part of the record, that it was not renewed
11 at the directed verdict stage. And had it been, it
12 would have been an issue that could have, would have,
13 and should have been raised on appeal.

14 And, you know, my position, for those who want
15 to know, I think that has some teeth into it because
16 I'm not even sure identity is the proper -- is the
17 proper exception to be raised anyway. But if that's
18 the only thing that was raised, I think you have to
19 look at it as an identity exception to Lyle with no
20 clear and convincing evidence that's been established
21 on it and no 403.

22 But I'll move on, Your Honor. I don't think it
23 was preserved.

24 Perhaps the most significant thing is this thing
25 about the search warrant. Clearly, I don't think that

Closing Argument
by Mr. Lee
August 27, 2014

1 anything would have been jeopardized whatsoever, as
2 far as Mr. Saunders being able to go forward on his
3 theory of the case, by arguing the search warrant. It
4 would just be like suppose somebody confessed to
5 something. They can argue until they're red in the
6 face that it was an involuntary statement pretrial,
7 and the judge says, it's coming in, you know, we do
8 the Jackson v. Denno -- it's coming in. You can
9 certainly switch it to say, yeah, you know, I did give
10 that voluntarily but that isn't what I meant. So
11 there is nothing to prohibit you from taking --

12 THE COURT: I don't think you would ever have
13 somebody -- if you challenge the statement pretrial,
14 you're never going to come to trial later and say, you
15 made that statement. You're still going to continue
16 saying, I didn't make it, I didn't have sufficient
17 education, I was either intoxicated or impaired, I was
18 under duress, they kept me there for eight hours, they
19 wouldn't let me go to the bathroom, they wouldn't let
20 me eat, I did not freely and voluntarily give this
21 statement.

22 I've never had a situation -- I've been trying
23 cases now for over seventeen years -- where somebody
24 came in and said, this statement was not freely and
25 voluntarily given, and then at trial say, oh, by the

Closing Argument
by Mr. Lee
August 27, 2014

1 way, yeah, we did give the statement and it was freely
2 and voluntarily given. Those, factually, are
3 inapposite. You're not going to argue one one way in
4 a --

5 Now, if there is some nuances that you may argue
6 different at pretrial in camera --

7 MR. LEE: Right.

8 THE COURT: -- that you could then switch your
9 position, so to speak, in trial.

10 MR. LEE: Such as a search warrant versus --

11 THE COURT: I don't know. I think that you're
12 stuck with your strategy one way or the other. You
13 can't argue that you own the house but you don't own
14 the house.

15 And the problem with prosecutions like this for
16 a defendant -- and I don't mean problematic for the
17 system --

18 MR. LEE: Right.

19 THE COURT: -- is that you have, in the State's
20 theory, a rash of these prop houses where people don't
21 live there but they have dominion and control of it,
22 and they do that deliberately to sell drugs and then
23 later argue I didn't have dominion and control,
24 therefore it's not my house. And so what you
25 basically end up with is a conspiracy theory, hand of

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by Mr. Lee
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1 one, hand of all.

2 In other words, that there's one person that
3 lived in the house. Whether they were there or not,
4 they really ran this enterprise and they had control
5 of it. And it really doesn't matter whether they were
6 there that day or absent that day, they were the ones
7 basically in control of running it and -- but they
8 lived someplace else, and we acknowledge that they
9 lived someplace else. But it's all just a sham. They
10 deliberately don't particularly live in this
11 residence.

12 And rarely do you find any true evidence that
13 the person resides there. Except sometimes people
14 will leave incidental items. They might leave an old
15 ID, they might leave a -- the electric bill might or
16 might not be in their name. Usually it's in somebody
17 else's name. As a matter of fact, usually they put
18 everything in somebody else's name but they frequent
19 the residence, go in and out of it, and use it
20 basically as a base of operations or a place to
21 conduct business.

22 So I don't know that you can sort of -- I don't
23 -- you know, and I've read the transcript. And I --
24 because I read in advance to coming to court, because
25 I need a point of reference. I need to --

Closing Argument
by Mr. Lee
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1 MR. LEE: Right.

2 THE COURT: -- understand what I'm hearing about
3 it. I can't hear about it for the first time when the
4 witness is testifying.

5 But I don't know that he could have argued those
6 two, because they were just so completely --

7 MR. LEE: But all he needs to argue, for fourth
8 amendment purposes, to either -- for somebody to
9 either get consent or argue a search warrant, a
10 reasonable expectation of privacy. And it says if you
11 have any relationship to the property or to the owner
12 of the property --

13 THE COURT: Well, the issue really isn't --

14 MR. LEE: -- that gives you reasonable
15 expectation.

16 THE COURT: -- whether he could have argued it.
17 The issue is whether he would have been successful in
18 arguing it.

19 MR. LEE: Well, but that's what we tried to show
20 through the -- I mean, I think that the
21 ineffectiveness would be he didn't argue it. And then
22 we would obviously have the prejudice problem to say
23 likely would have been successful.

24 But I think that you could certainly have
25 reasonable expectation of privacy, the ability to

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1 challenge a search warrant and still be merely present
2 and be able to argue that defense. I don't think -- I
3 mean, I think that it's easy to get those two
4 confused.

5 THE COURT: I don't think you can -- I'm almost
6 inclined -- I don't know, because I wasn't there.
7 And, again, it's hindsight, Monday morning
8 quarterback.

9 MR. LEE: Right.

10 THE COURT: I don't know that you on one hand
11 can say I was just merely present and on the other
12 hand say I have dominion and control of this residence
13 such that I have an expectation of privacy here and
14 that I have a right to challenge the search warrant.

15 MR. LEE: Well, I think you can --

16 THE COURT: Either you live there or you don't.

17 MR. LEE: Suppose one of your college friends
18 comes in and brings a big bag of crack cocaine and the
19 cops come in and busted her in your house, and she's
20 an overnight guest.

21 THE COURT: That's why I'm very careful about my
22 friends --

23 MR. LEE: I know.

24 THE COURT: -- and relatives.

25 MR. LEE: I know.

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1 THE COURT: I don't have many visitors --

2 MR. LEE: That was an extreme example.

3 THE COURT: -- at all --

4 MR. LEE: But that would be an example --

5 THE COURT: -- for that very reason.

6 MR. LEE: You certainly would be able -- you
7 certainly would be able to challenge a search warrant
8 at your house; right?

9 THE COURT: That's different because you're not
10 taking the position that you didn't have an
11 expectation of privacy.

12 MR. LEE: You did --

13 THE COURT: That's my house --

14 MR. LEE: You did. You did. He did have --

15 THE COURT: -- I think the law --

16 MR. LEE: -- an expectation of privacy.

17 THE COURT: -- I think the law recognizes that
18 it's your house. You're responsible for what happens
19 at your house.

20 That's why so many people get in trouble with
21 giving folk rides. That's another reason I don't give
22 anybody a ride -- I ride alone all the time -- because
23 I don't know what you're bringing with you and I don't
24 want to be responsible for it.

25 MR. LEE: Right.

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1 THE COURT: So I don't think that you can -- I'm
2 just saying that strategically, hindsight being
3 twenty-twenty, I think it's very easy for us to say
4 one thing now, with the benefit, of course -- with the
5 advancement of case law and the development of
6 precedent.

7 But, strategically, I don't know that it was an
8 unreasonable posture, especially in light of the
9 Court's comments to him that from his perspective of
10 the law, that they were inapposite positions.
11 factually. I don't know that you can say, I was
12 merely present, and then say, oh, by the way, I have
13 an expectation of privacy and I have dominion and
14 control of this residence, at least this little part
15 that I was on.

16 MR. LEE: I certainly think you can.

17 And the other thing is, you know, what does he
18 have to lose? I mean, the Court can't step in and
19 say, I'm not going to allow -- he doesn't have to
20 argue anything. He doesn't have to prove anything to
21 argue.

22 THE COURT: He doesn't.

23 MR. LEE: The Court can't tell you, you're not
24 going to present this defense.

25 THE COURT: On challenging a search warrant, you

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1 do have the burden. In camera, that's a whole
2 different thing.

3 MR. LEE: I'm talking about -- I'm talking about
4 at trial.

5 THE COURT: Oh. Yes. At trial --

6 MR. LEE: Obviously, there's no --

7 THE COURT: -- he has no burden of proof at all.

8 MR. LEE: And if a Court tells you you're not
9 allowed to present this defense because you made a
10 valid argument at pretrial, I mean, that's never going
11 to happen. They have the burden of proof.

12 THE COURT: I'm sorry. You lost me. Tell me --
13 clarify that for me.

14 MR. LEE: The point was he had nothing to lose
15 by challenging the search warrant. Nothing. And it
16 likely would have been successful, considering there
17 were absolute misstatements --

18 THE COURT: That's the other issue. What
19 evidence do you have it would have been successful?
20 Because I've read the search warrant.

21 MR. LEE: Because there's absolute misstatements
22 on the search warrant affidavit that Mr. Reeves --
23 which is not completely inconsistent with their report
24 as well as his written statement -- as to he lied to
25 the cops right before they took him to jail --

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1 THE COURT: I don't know that that's the
2 standard, because you never got that far to know
3 whether the officers supplemented their affidavit with
4 testimony. So I don't know what they told the
5 magistrate.

6 MR. LEE: That's what I --

7 THE COURT: It happens all the time. I ask
8 questions before I sign a search warrant.

9 MR. LEE: Well, I agree --

10 THE COURT: I do them infrequently, but I --

11 MR. LEE: -- that can be done.

12 But if there's no evidence to say that it was
13 done, I think the default --

14 THE COURT: It's your burden.

15 MR. LEE: -- is that it wasn't done.

16 THE COURT: Huh-uh. The burden is on you to
17 show that what would -- what it would -- what the
18 fruit of it would have been and that you would have
19 prevailed on it. You don't get to just say --

20 MR. LEE: I understand. The burden would --

21 THE COURT: -- by the way --

22 MR. LEE: -- have been on Mr. Fleming at trial
23 to do that.

24 THE COURT: Well, no. The burden of proof is on
25 you at this hearing to show me that something would

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1 have been done that would have caused him to have
2 prevailed on the suppression motion. It's not just
3 that he didn't make it, it's that he would have
4 prevailed on it and that it's sufficient to undermine
5 the Court's confidence and outcome of the trial.

6 MR. LEE: Well, I mean, I can't prove a
7 negative, though. I can't prove --

8 THE COURT: You could have called the officer
9 and asked him those questions. There's nothing that
10 precluded you from doing that. But, then, you would
11 had to have known what they were going to say. And I
12 don't know whether they're going to say that they
13 supplemented their testimony to the magistrate. It
14 happens all the time, especially when it comes with
15 the precedent that came out about making sure that a
16 confidential informant is reliable or that a buyer is
17 reliable.

18 I don't know that that falls within the
19 category. That was the other quandary I was thinking
20 -- I'm not sure it comes within that same category,
21 because he really wasn't -- did he really fit the
22 criteria of a confidential informant where you have --

23 MR. LEE: No.

24 THE COURT: -- a CI controlled buy?

25 MR. LEE: No. He --

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1 THE COURT: I don't know that --

2 MR. LEE: They had never seen the guy before.

3 THE COURT: I don't know that he -- I don't
4 know. It's an interesting issue.

5 MR. LEE: But you can't go to some Smoo on the
6 street, who you know is a liar, and then have him say,
7 well, you know, Bob has crack in his house, and then
8 say, well, this guy told us that so we're going to get
9 -- we're going to get a search warrant.

10 THE COURT: Well, it still begs the question. I
11 don't know whether they told him -- I don't know
12 whether they supplemented it by saying, we know him,
13 we've had interactions with him and he's reliable.

14 MR. LEE: Well, I asked Mr. Fleming if there was
15 any suggestion whatsoever about any of this thing, did
16 he have any contact with him, and they said no.

17 THE COURT: He didn't --

18 MR. LEE: If they had it --

19 THE COURT: -- they didn't go far enough in the
20 process --

21 MR. LEE: Judge, if they had it, they would have
22 put it in there.

23 THE COURT: Oh, not necessarily. They didn't
24 go --

25 MR. LEE: If they thought he was reliable, they

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1 would have put it in there.

2 THE COURT: They don't have any burden of proof.

3 MR. LEE: They do at that point.

4 THE COURT: They don't have any burden of proof
5 in this hearing. That's what you're talking about.

6 It wasn't challenged. There was no need for it
7 to come up. I've never had it come up unless I've had
8 a full -- and sometimes I've never had it come up
9 unless I've asked the question yourself, which is did
10 you supplement your testimony to the -- it depends on
11 whose asking the questions. I tend to be a little
12 thorough and I want to know everything that was
13 presented to the magistrate. I often sign search
14 warrants for the DEA Task Force and other things,
15 because the federal court will only take a warrant
16 that's signed by a circuit judge.

17 MR. LEE: Well, I can just --

18 THE COURT: But I never -- when they write these
19 kind of affidavits, I always want to know what else
20 they're relying on unless -- that's a whole different
21 caliper when you start doing federal search warrants,
22 because they tend to put all that information in
23 there, what they relied on and et cetera.

24 But if I ever have a question, I swear them. I
25 ask them.

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1 MR. LEE: Arguably --

2 THE COURT: But, you know, I don't know. And
3 sometimes the officer will say to you, I need to
4 supplement this affidavit.

5 MR. LEE: And I see that. But if they did that,
6 if the officers supplemented, I would submit to you
7 that would certainly be something Mr. Fleming would
8 have gotten in discovery.

9 THE COURT: Huh-uh.

10 MR. LEE: Sure he would.

11 THE COURT: Huh-uh. It's not --

12 MR. LEE: If they supplemented --

13 THE COURT: -- reduced to writing.

14 MR. LEE: -- a search warrant affidavit?

15 THE COURT: It's not reduced to writing. The
16 only way you know it is if the officer testified to
17 it.

18 MR. LEE: Or if the judge wrote it on there.

19 THE COURT: You're not going to write it on
20 there. You never do. I've never written it on one.
21 You swear them and they say they supplemented.
22 They're giving you sworn testimony. I've never
23 written it on an affidavit.

24 Well, sometimes I've required the officer to
25 write out a colloquy. But sometimes I've taken

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1 testimony and sometimes I've told them, from this
2 affidavit I can't tell how reliable this CI is and I
3 need you to put on there for me what the basis of your
4 reliability call is on them. And I've had them -- of
5 course, it's scribble, usually, and you can't read it.

6 MR. LEE: Well, I'll tell you, the realistic
7 problem is the judge who signed that search warrant is
8 in Hawaii now. She's moved there. And I can tell
9 you, from asking these guys again and again and again
10 and again, they're going to say, 2010, I have --

11 THE COURT: They won't remember.

12 MR. LEE: -- no idea

13 THE COURT: Yeah. They won't remember.

14 MR. LEE: So, I mean, I feel like I'm being --
15 an impossible burden is being placed on me to be able
16 to --

17 THE COURT: No. You have the burden by a
18 preponderance of the evidence. And I think I'm asking
19 legitimate questions, because there are things I've
20 written in notes. I needed to know if it was
21 supplemented by testimony of the officers to the
22 magistrate. I have no way of knowing.

23 And usually it doesn't come out until you have a
24 suppression hearing. I've never had then a supplement
25 report. It always comes out, and usually comes out to

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1 the surprise --

2 MR. LEE: Right.

3 THE COURT: -- of the solicitor who's asking the
4 question, because they don't know, either.

5 MR. LEE: Wouldn't you agree that in -- I mean,
6 if it came before you and there was no testimony
7 either way about whether it was supplemented, don't
8 you agree that the Court on a review is limited to the
9 four corners of it?

10 THE COURT: I think you look to the totality of
11 the circumstances, what was presented to the
12 magistrate --

13 MR. LEE: Okay.

14 THE COURT: -- and it's usually presumed valid
15 on its face and a good-faith basis.

16 I don't question a warrant unless it's raised in
17 a suppression hearing. I don't have any reason to.
18 It's presumed to be valid. There's no reason for me
19 to question it or the validity of it unless -- because
20 the Court is not an advocate. I don't --

21 MR. LEE: I understand.

22 THE COURT: You know, you don't have any
23 position to pursue. So unless it's raised, you really
24 don't think about it.

25 MR. LEE: I guess I feel like I'm being placed

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1 in the position of trying to exclude an exception that
2 hasn't been made. I mean, because it's certainly an
3 exception to orally supplement a written --

4 THE COURT: Uh-huh. It happens all the time.

5 MR. LEE: I understand it happens all the time.

6 But if they're doing what they're supposed to,
7 and if they're on the ball, they include everything
8 written. And if that's -- I mean, that's the only
9 thing a court can consider, and I don't --

10 THE COURT: What I'm saying is I had that
11 question in my mind. I think it's a legitimate
12 question. Because not only do I have to determine did
13 he fail by failing to make the motion, but what were
14 the -- what are the chances it would have prevailed on
15 the merit. And I think that's a legitimate question,
16 because I know how the facts develop. I know what
17 happens when officers get on the stand in a
18 suppression motion. I know that it is not reduced to
19 a supplemental. And I know oftentimes they will say,
20 well, when I presented the affidavit to the
21 magistrate, I -- when I was sworn, I supplemented my
22 testimony or I supplemented my affidavit.

23 I don't really know that it's dispositive one
24 way or the other in this case. I don't know that
25 there really is any chance this search warrant would

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1 have been suppressed. I think all these things are
2 factual issues about this particular witness. And it
3 appears from the record that his credibility was more
4 than effectively impeached.

5 MR. LEE: But at trial. The problem is we're
6 talking about the search warrant. And I don't know
7 how it wasn't effectively impeached by him lying twice
8 to the police before they take his statement. And, I
9 mean, I don't know how else -- how else somebody would
10 be more unreliable than to lie right in the face of
11 the police hours before their testimony is used as the
12 basis for a warrant. I mean, I don't know how else to
13 show that this guy is more unreliable than, you know,
14 he doesn't change his spots. He lied then, he's lying
15 on this.

16 And at a minimum, Delaware vs. Franks, well,
17 okay, lets go and scratch out what isn't true, because
18 he didn't say he bought drugs from Turuk Saunders, he
19 said he was at the house and that this is the -- he
20 said that he bought drugs at the house and Turuk
21 Saunders owns -- Big T owns the trailer. So you have
22 to scratch out part of what he said.

23 But I also think that an officer has an
24 affirmative duty to the issuing magistrate to say,
25 look, this guy has lied to us before. Because if he

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1 had told them the truth, they sure would have put that
2 in there. But if he's lied to them before, they have
3 a duty to advise the magistrate, who doesn't know,
4 this guy has lied to us. Because what better evidence
5 of him being -- questioning his voracity than he just
6 lied to us less than twelve hours ago?

7 So I don't want to belabor the point, Your
8 Honor. I mean, I've submitted all the documents. We
9 would submit to you that -- you know, we don't
10 question Mr. Fleming's trial ability at all, I can
11 tell you that, but just that there were some things
12 that could have been and should have been done
13 different. And, unfortunately, his appellate counsel
14 had her knees cut out from under her because a lot of
15 stuff wasn't preserved.

16 And I realize that we're on a lot of speculative
17 ground here talking about things that -- when we talk
18 about prejudice, that might have happened. But, you
19 know, individually, I think that several of these
20 things are sufficient to prove the prejudice prong of
21 Strickland. And I also think that when you
22 cumulatively look at everything and get back to the
23 basic tenets of due process, that he didn't get a fair
24 shot. And, you know, if say, well, all these
25 individually aren't going to carry the day, the

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1 cumulative effect, when you look at it, I think, you
2 know, carries that burden that we have in showing that
3 he is entitled out relief.

4 And, again, I don't want to go through all the
5 cases. I've submitted them to you and I know you
6 probably need some time to review them, which is
7 certainly acceptable to us.

8 But that's our position and we appreciate your
9 time and patience in hearing us out.

10 THE COURT: Not a worry.

11 Would the State like to respond?

12 MS. WILSON: Yes, Your Honor, just briefly.

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1 CLOSING ARGUMENT

2 MS. WILSON: With regard to -- well, just in
3 general, it's the State's position that Mr. Saunders
4 has failed to carry his burden of proving that counsel
5 was ineffective.

6 THE COURT: I need you to speak up a little bit
7 more for me. I can barely hear you.

8 MS. WILSON: I'm sorry, Your Honor.

9 It's the State's position that Mr. Saunders
10 hasn't carried his burden of proving counsel
11 ineffective.

12 With regard to the search warrant, Mr. Fleming
13 articulated about a valid trial strategy about how he
14 heard the posture of the Court and he made that
15 decision right then. While he was prepared to argue
16 that, he made that decision during trial not to pursue
17 that.

18 Also, Your Honor, with regard -- his trial
19 strategy was reasonable with regard to prejudice.
20 Mr. Fleming gave credible testimony that he thought
21 that they would likely be able to establish probable
22 cause. And other than the judge who might have heard
23 the motion, he was the best to decide maybe -- or he's
24 the best here today to decide whether his motion could
25 have been successful.

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1 And with regard to Mr. Reeves's testimony,
2 Mr. Fleming challenged it immediately before trial on
3 a 404(b) basis and, since it was objected to,
4 immediately before his testimony, that it was
5 contemporaneously raised and preserved for appellate
6 review.

7 [Whereupon, Mr. Lee and Mr. Saunders confer]

8 MS. WILSON: And, also, identity is a basis for
9 a 404(b) analysis. It's motive, identity, common
10 scheme and plan, absence of mistake or accident or
11 intent.

12 With regard to Mr. Fleming's and Mr. Saunders'
13 allegation that, you know, he wasn't talked to about
14 his right to testify or obtain a ruling on prior
15 convictions, a ruling on the prior convictions wasn't
16 necessary when the defendant ultimately decided that
17 he didn't want to testify. And he was advised of this
18 right by the Court. And, also, Mr. Fleming gave
19 credible testimony that he didn't think the basis of
20 his decision not to testify was his prior convictions.
21 So there has to be -- he has to show that that was the
22 sole reason why he didn't want to testify, and we
23 don't have testimony about that today.

24 With regard to --

25 [Whereupon, Mr. Lee and Mr. Saunders confer]

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1 THE COURT: I'm going to have to ask y'all not
2 to talk because --

3 MR. LEE: I'm sorry.

4 THE COURT: -- this room is very confined. And
5 I know he -- and I'm going to give him an opportunity
6 to convey any concerns he has to you. But I have to
7 be able to hear Ms. Wilson.

8 MR. LEE: Judge, sorry about that.

9 MS. WILSON: I can talk louder, too.

10 THE COURT: No. Go ahead.

11 THE COURT: With regard to calling witnesses,
12 Mr. Fleming also articulated about his strategy for
13 not calling witnesses. Obviously, from the testimony
14 of those potential witnesses that were presented at
15 trial, credibility of the witnesses was an issue. And
16 it's also unlikely that his codefendants would have
17 testified after receiving a favorable guilty plea from
18 the State.

19 Also, and as a part of Mr. Fleming's trial
20 strategy, he said he thought it was best not to call
21 the witnesses when the defendant wouldn't testify,
22 because he was concerned about that, the perception of
23 that to the jury, and he thought that he effectively
24 challenged the State's witnesses without having
25 testimony from those witnesses.

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1 With regard to the testimony from Mr. Saunders
2 about a conflict of interest with Judge Kinard, the
3 State submits that issue is without merit and he
4 hasn't proved that a conflict existed or that
5 Mr. Fleming should have made a motion to recuse
6 himself -- for the judge to recuse himself.

7 Also, with regard to the reference to him as
8 Big T, it was established by the State in the record
9 through Mr. Reeves's testimony that that's what the
10 defendant went by and so testimony presented during
11 closing wasn't objectionable.

12 And lastly, Your Honor, with regard to Mr. Lee's
13 assertion that we should look at things cumulatively,
14 you have to look at each allegation separately and
15 make an analysis based on deficiency and prejudice and
16 you can't look at everything together and conclude
17 that there was prejudice.

18 So the State would just request that you deny
19 this application for post conviction relief.
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COURT'S RULING

THE COURT: As I've indicated, I've read the transcript prior to trial and I -- I mean, prior to this hearing, and I've looked at all the attachments. And applicant's counsel provided the Court with what is in the nature of a memo with attachments, but everything that was attached to his memo is already a part of the Court's record. The case law that he cites, the Court is well-familiar with after having tried many criminal cases as well as having heard many PCRs.

And I don't know that I'll take them in the opposite order. There are some things I want to review again and think about a little more.

But I will find for the record that I found Mr. Fleming's testimony to be credible and persuasive on many of the issue, that being, one, trial strategy. I think it's very easy for us to be a Monday morning quarterback and go back and secondguess how we would have done something. I think as my nieces and nephews say, I would like a do-over. Everybody wants a do-over because you could always do it better. There are lots of things I would like to do better. Gosh. As a matter of fact, at the end of most days I wish I could go back and do some things better. But that's not the

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1 standard by which the Court must judge Mr. Fleming's
2 performance. It is objectively whether he met the
3 standard of performance expected of professional --
4 expects of lawyers at the time that he was providing
5 his services to Mr. Saunders.

6 And, again, while we may have done some things
7 differently, that does not mean that he was deficient
8 or he fell below an objective standard in his
9 performance. And there are many issues on that point,
10 one of which is not calling witnesses. He made a
11 strategic decision regarding that. And I've listened
12 to the witnesses that were not called, that being
13 Ms. Saunders, as she termed herself, his girlfriend,
14 Ms. Tyece Brown. It has been my experience that
15 juries tend to give very little credibility to someone
16 who is romantically involved with a defendant. They
17 tend to believe that testimony is biased and that
18 there is a motive to -- not necessarily out of any
19 nefarious motives, but just motivated by love to cast
20 the most -- the best face on facts and circumstances.
21 Having made that observation, the jury could have
22 believed her testimony that he, in fact, was living
23 with her at another residence, but that still would
24 not have negated the State's theory that he had this
25 other residence where he conducted business, so to

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1 speak, if, in fact -- well, that was their theory. So
2 I'm not certain that her testimony, in and of itself,
3 would have changed the outcome of this trial.

4 Akeem Saunders testified, who is the younger
5 brother of the defendant. And certainly if he had
6 desired to testify, he could have. There's nothing
7 that precluded him from testifying. I do not find it
8 credible that he would have given up a deal beneficial
9 to him to testify on behalf of his brother. The one
10 thing that I've learned about this system, whether
11 you're related or unrelated, is self-preservation.
12 And I do not find that credible or persuasive.

13 And that of Andre Benjamin: he made
14 inconsistent statements which, at best, would have
15 nullified -- you know, he made one statement and then
16 he made another statement which he could have been
17 impeached on. And clearly I don't know that that
18 would have been beneficial to the defense.

19 And so clearly it was within Mr. Fleming's
20 professional judgment to have made a decision about
21 whether to call these witnesses or not. And I do find
22 it credible that he did not make these decisions in
23 isolation. I think he very clearly advised his client
24 of his strategy, of his trial strategy, how he
25 intended to proceed in this case. And as both he and

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1 applicant's counsel have indicated for the record,
2 that Mr. Saunders is an intelligent man, that he
3 understood the system, that he clearly participated in
4 his defense and was very active in his defense -- and
5 I do find that testimony of Mr. Fleming's credible --
6 and that he fully participated at every juncture of
7 this prosecution and in his defense.

8 One of the other issues that was raised was
9 recusal. There is absolutely no basis for Judge
10 Kinard to have recused himself in this case. I take
11 guilty pleas of codefendants all the time. It is --
12 I've taken guilty pleas of codefendants in the middle
13 of a trial, who testified against someone in trial,
14 mid trial. That happens all the time. The rules of
15 recusal are very clear. A judge is only required to
16 recuse themselves if they have some extra judicial
17 knowledge of the facts and circumstances of a case,
18 meaning they've learned something outside of the case
19 that affects their judgment of the case. Our case law
20 says that when a Court learns of facts and
21 circumstances of litigation within the court process,
22 that is called wisdom. That is not called bias or
23 prejudice or predisposition.

24 However, the Court -- case law has also been
25 very clear that where a Court has demonstrated a

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1 predisposition to rule in a particular way based on
2 facts it learned within the system, that's not bias,
3 either, and that we're entitled to that knowledge that
4 we gained within the system.

5 So there certainly would not have been any basis
6 for Judge Kindard to have recused himself and,
7 therefore, no basis for a motion for a recusal in this
8 case. And so certainly counsel could not have been
9 deficient for that.

10 There would have been no basis to have objected
11 to the references to the defendant as Big T in
12 closing. It's clearly the eyewitness or the witness
13 at trial identified him as that being the person he
14 recognized to be Big T, that basically that was his
15 nickname, and she was arguing what had already been
16 established for the record. And certainly in closing,
17 she is allowed to argue the facts that are in
18 evidence.

19 There was a motion in limine made regarding
20 prior convictions of the defendant. I find for the
21 record -- I, at least based on my perception of the
22 witnesses and their credibility, that it was Mr.
23 Saunders's decision, coupled with the advice of
24 counsel not to testify, and that ultimately the
25 decision not to testify was his. And that is

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1 corroborated by the record where the Court also
2 questions him regarding his right to testify.

3 And, generally, the Court does not make a ruling
4 regarding the admissibility of prior convictions until
5 such time that the defendant is questioned and until
6 he makes a decision to testify. Otherwise, it's
7 really a moot point. At some point, you have to see
8 how the testimony develops. Generally, however -- and
9 Mr. Fleming gave the appropriate advice to his client
10 -- that convictions regarding drug offenses are
11 generally not admissible. They are not dispositive on
12 truthfulness and they usually don't come in. However,
13 if he had any convictions involving dishonesty or
14 false statements, those would have come in
15 irregardless of punishment. I can't make any
16 observations about that because nobody testified as to
17 exactly what his record was. So I don't know.
18 There's just been some reference to the fact that he
19 had drug offenses. I don't know if he had any other
20 offenses bearing on truthfulness, so I don't know.
21 But I don't know that it really is dispositive in this
22 case. Clearly, his lawyer knew what his record was
23 and he had the ability -- but record is not the only
24 reason you don't testify.

25 One of the major reasons people don't testify,

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1 again, a valid strategic decision, is, one, you don't
2 want the State questioning your witness -- your
3 client. Second, you have no burden of proof. You
4 have nothing to prove. You don't have to testify.
5 You have the right to remain silent.

6 And under these circumstances, I find
7 Mr. Fleming's testimony credible that he advised his
8 client that under the circumstances, there really was
9 no benefit to him testifying but that he advised him
10 of the pros and cons of testifying and that,
11 ultimately, it was his decision not to testify.

12 But generally, again, the Court -- at least most
13 times, I don't make any rulings regarding the
14 admissibility of a record until I question the
15 defendant and then I have -- about his constitutional
16 rights, and then I have the Court -- the State publish
17 that record and then I advise the defendant of which
18 offenses will come in, which offenses will not come
19 in, pursuant to Rule 609.

20 And so until such time that he really indicated
21 that he was going to testify, it really would have
22 been premature. And I can't discern any prejudice
23 from the Court not ruling as to whether -- what of his
24 record was going to come in or not come in. However,
25 I do find credible Mr. Fleming's testimony that he

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1 advised his client, when he was telling him the pros
2 and cons, that his drug record probably would not have
3 come in to attack his credibility. And that was good
4 advice, because it probably would not have come in,
5 especially with the similarity of the offenses. But,
6 again, the Supreme Court has been very clear that drug
7 offenses are not dispositive on truthfulness.

8 So it's unlikely that it would have come in. So
9 I don't really know that it -- how much of that really
10 would have figured into his decision, nor do I think
11 it was incumbent upon Mr. Fleming to demand of the
12 Court that they make a ruling. Because, frankly, you
13 can demand but the Court is not going to make a ruling
14 until it's ready to. So I don't know that it really
15 would have -- you know, really -- I don't know that --
16 I can't discern any prejudice from that because I
17 don't know that it really made a difference,
18 considering the totality of the record and the fact
19 that he had decided not to testify.

20 And I do find also credible Mr. Fleming's
21 testimony that -- you know, judges, we give people
22 cues sometimes about how they -- you know, an
23 inclination of how we're going to do things. And as a
24 trial lawyer, I would imagine that everybody in this
25 room that's a trial lawyer is adept at reading those

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1 cues. And I don't think that he -- that falls within
2 a matter of strategy, as well. And certainly it
3 cannot be said that that did not benefit his client
4 where the Court has already indicated how its going to
5 rule on a particular matter, or a tendency to rule, or
6 in what direction it's leaning on a particular matter.

7 Again, I've already articulated for the record,
8 in the colloquy with applicant's counsel, that I don't
9 think that the Court is required to place a hornbook
10 type of analysis on the record. I think the Court is
11 required to make a contemporaneous ruling. And
12 sometimes that is as simple as the testimony is
13 admissible or the testimony is excluded, based on
14 citing the Rule. And it is sufficient, based on my
15 review of precedent, for the Court to say that it
16 makes a finding that the testimony is more probative
17 than prejudicial or more prejudicial than probative.
18 I don't know that the Court has to articulate anything
19 beyond that. While most of us sometimes do or don't.

20 But, again, that's a hindsight sort of a -- the
21 benefit of hindsight. In the hurry of a trial, I'm
22 not certain that judges always have the ability to do
23 that, especially with the weight of our dockets as
24 well as the time crunch that we're often under in
25 trying cases in trying to expeditiously use the

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1 judicial resources that are allocated to us.

2 The key issue is whether it was preserved,
3 whether a contemporaneous objection was made, and
4 whether the Court ruled on that issue. And clearly
5 Mr. Fleming made a 404(b) challenge regarding these
6 issues.

7 Now, whether he renewed his objections, I need
8 to go back and review the record again. And then the
9 issue, again, is not whether he failed to renew them,
10 the issue is whether any failure resulted in
11 prejudice, which is -- that prejudice that's
12 contemplated is whether the outcome is undermined by
13 that failure -- or the outcome is undermined by that
14 failure.

15 There is no indication in the record that
16 evidence went back to the jury that was not in the
17 record. I've read the transcript and I have not been
18 able to glean anything that went back to the jury that
19 was not a part of -- that had not been admitted into
20 evidence. And while the applicant made a general
21 statement regarding that, he was not able to specify
22 some bit of evidence, some -- what's the word that I'm
23 looking for?

24 Mia, help me out. When you put the sticker on
25 it.

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1 THE COURT REPORTER: Mark it?

2 THE COURT: Yeah. I'm trying to remember the
3 word I'm trying to think of.

4 UNIDENTIFIED: Exhibit?

5 THE COURT: Yeah, exhibit. I'm sorry. It's hot
6 in here. It's making my brain not work too optimally.

7 -- that there were any exhibits that were not
8 marked or, in other words, there wasn't anything that
9 went back to the jury that had not been previously
10 marked and admitted and become a part of the record.

11 Now, regarding the search warrant, I have to be
12 honest. I have looked at the search warrant in this
13 case. It is not unusual for officers to paraphrase
14 what individuals say to them and reduce it. It's not
15 unusual for officers to supplement the record, that
16 being to the magistrate or to the issuing authority,
17 information they're providing as the basis for the
18 issuance of the warrant. I am not certain -- and
19 that's really what it comes down to. It's not whether
20 the objection was made or failed to proceed. The
21 issue is whether there's some prejudice, whether
22 there's some likelihood that he would have prevailed.

23 And the rub really here is whether Mr. Fleming
24 made an appropriate strategic decision to pursue one
25 course of action or to pursue another in light of his

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1 perception that factually the positions that he would
2 have to take would be inapposite to one another.
3 There has been no ruling in South Carolina as to
4 whether judicial estoppel applies in criminal cases.
5 It clearly applies in civil cases, but our courts have
6 not ruled whether it is applicable in criminal cases.
7 Sort of talked around it, Judge Kittridge did, and
8 sort of talked about it but didn't rule on it. Just
9 said it really wasn't properly before our courts and
10 made some reference to other jurisdictions. I'm not
11 certain how it's going to turn out. I don't know that
12 it's ever going to be reached in any way in the near
13 future because it's such a rare issue to come up.

14 But I don't know that is was an inappropriate
15 strategic decision to decide between whether, my
16 client was merely present or whether he had some
17 standing, in other words, some expectation of privacy
18 in this residence to challenge this warrant. You go
19 beyond that to even if he did challenge it, would he
20 have been successful in challenging it. Because that
21 really becomes the issue. It's not whether you would
22 have done it, it's whether you would have prevailed
23 and whether it would have changed somehow the outcome
24 of these proceedings. And I'm just not certain that
25 there would have been any appreciable difference. But

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1 I'm going to think about it before I actually come to
2 a final conclusion on it. I want to read the
3 transcript again, which may take me a week based on my
4 current caseload; and then I will come to a final
5 conclusion regarding that.

6 But based on everything other than the search
7 warrant, I would find that the applicant has failed to
8 meet his burden of proof and the application would not
9 be granted. But I need to think about the search
10 warrant thing a little bit more, and I'll be in touch.

11 MR. LEE: Your Honor, under the 404(b), didn't
12 you -- I thought you suggested that you had to decide
13 whether or not the failure to renew it resulted in
14 prejudice.

15 THE COURT: I'm going to think about that, too.

16 MR. LEE: Okay.

17 THE COURT: I need to go back and review --

18 MR. LEE: Sure.

19 THE COURT: -- the record to see. I don't know,
20 in the totality of this record, that it really --

21 MR. LEE: Well, we're not pushing you. I just
22 thought that you said --

23 THE COURT: Yeah. I don't know that --

24 MR. LEE: -- that you would think --

25 THE COURT: -- it really would have made any

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1 difference. I don't know that you would have
2 prevailed on it on an appeal. I'm just not -- I'm
3 just not certain of it. But I want to think about it
4 some more.

5 MR. LEE: I just think Lyle cases are the ones
6 that come back more than any cases out there, when you
7 read the advance sheets. But --

8 THE COURT: Well, Lyle issues come back for one
9 of -- I have a very simple standard on Lyle. You
10 should be able to prove your case without it.

11 MR. LEE: Right.

12 THE COURT: Lyle should be gravy. Unfortunately
13 some --

14 MR. LEE: I agree.

15 THE COURT: -- some cases are not tried that
16 way. Because sometimes it's so intertwined that you
17 can't -- you know, you can't pull it apart.

18 But I think jurors are astute enough that they
19 really listen to our instructions. And, you know, we
20 are very fortunate in both Beaufort, Charleston --
21 many counties in South Carolina, we have an incredibly
22 educated jury pool and they -- well, I take -- that,
23 and we have another group of folk that's just got an
24 inordinate amount of commonsense. And those two
25 things put together amazes me at how they are able to

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1 apply such complicated legal principles to facts and
2 always, in my estimation, come out with the right
3 result. I have never once vacated a jury's verdict
4 sitting as the thirteenth juror. I've never
5 questioned the jury's verdict based on the sufficiency
6 of the evidence.

7 But, again, I think it's easy to be a Monday
8 morning quarterback. And I think I need to go back
9 and look at the totality of the record and just think
10 about it a little bit before I come to a final
11 conclusion about it. But I'm not going -- I mean,
12 like I said, it just depends on how long it takes me
13 to read the transcript again, which I might be able to
14 read it in the next couple of days, I might not.

15 MR. LEE: That's fine.

16 THE COURT: We'll see.

17 All right. Is there anything else before we
18 adjourn for the evening?

19 MS. WILSON: Nothing from the State, Your Honor.

20 MR. LEE: No. Thank you.

21 THE COURT: You're welcome.

22 [HEARING CONCLUDES AT 4:55 P.M.]
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24
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C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the hearing before the Honorable Deadra L. Jefferson, on Tuesday, August 27, 2013.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 10th day of August, 2014.



Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Turuk Saunders, #199803,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2012-CP-07-4095

ORDER OF DISMISSAL

Presiding Judge:
 Applicant's Attorney:
 Respondent's Attorney:
 Trial Counsel:
 Date of Hearing:
 Court Reporter:

Hon. Deadra L. Jefferson
 Scott W. Lee, Esquire
 Ashleigh R. Wilson, Esquire
 Cory H. Fleming, Esquire
 August 27, 2013
 Susan "Mia" Perron

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 30, 2012. The Respondent made its Return on February 25, 2013. An evidentiary hearing on the matter was convened on August 27, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Scott W. Lee, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Present to testify at the hearing was Cory Fleming, Esquire the Applicant's trial counsel, Tyece Brown, Akeem Saunders, and Andre Benjamin. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South

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 JUDGE ROSENEAU
 BEAUFORT COUNTY S.C.
 CLERK OF COURT

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Carolina Department of Corrections, the Applicant's application, the Respondent's Return, the appellate records, and the exhibits and case law submitted by the parties at the hearing.¹

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the March 2007 term of the Beaufort County Grand Jury for Possession with Intent to Distribute (PWID) Marijuana (2007-GS-07-0505),² PWID Cocaine (2007-GS-07-0506),³ PWID Ecstasy (2007-GS-07-0507),⁴ Trafficking Cocaine, 10-28 grams (2007-GS-7-0508),⁵ and Possession of a Weapon During the Commission of a Violent Crime (2007-GS-07-0509).⁶ He was represented by Cory Fleming, Esquire.

The Applicant proceeded to trial and was found not guilty of Possession of a Weapon during the Commission of a Violent Crime, but was found guilty of all the other charges. On May 26, 2010, the Applicant was sentenced by the Honorable Ernest Kinard to twenty (20) years for PWID Marijuana and PWID Ecstasy and twenty-seven (27) years for PWID Cocaine and Trafficking Cocaine. The sentences are to be served concurrently.

¹ State's Exhibit 1 is a copy of a signed affidavit of Andre Benjamin which was attached to the Applicant's application for post-conviction relief.

² Possession with Intent to Distribute Marijuana, third or subsequent offense, is a felony punishable by twenty (20) years imprisonment or up to a twenty-thousand dollar (\$20,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(2) (2012).

³ Possession with Intent to Distribute Cocaine, third or subsequent offense, is a serious felony punishable by thirty (30) years imprisonment or up to a fifty-thousand dollar (\$50,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(1) (2012).

⁴ Possession with Intent to Distribute Ecstasy, third or subsequent offense, is a serious felony punishable by thirty (30) years imprisonment or up to a fifty-thousand dollar (\$50,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(2) (2012).

⁵ Trafficking Crack, 10-28 grams, third or subsequent offense, is a violent, serious felony punishable by a mandatory minimum term of imprisonment for twenty-five (25) years, maximum imprisonment for thirty (30) years, none of which time may be suspended, nor probation granted, and a fifty-thousand dollar (\$50,000) fine. See S.C. CODE ANN. § 44-53-375(c)(1) (2012).

⁶ Possession of a Weapon During the Commission of a Violent Crime is a felony punishable by a mandatory, minimum five (5) years imprisonment. See S.C. CODE ANN. § 16-23-490 (2010).

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A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Nicole Mace, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Saunders, Op. No. 2012-UP-456 (S.C. Ct. App. July 25, 2012). The Remittitur was issued August 10, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Failure to object to inadmissible hearsay and character evidence.
 - b. Failure to object to the court allowing evidence to go back to the jury that was never properly admitted.
 - c. Failure to properly inquire into the facts of a juror who knew a witness who was due and did testify.
 - d. Failure to object to the prosecutor's continued reference to the Applicant as "Big T".
 - e. Failure to ensure that all issues raised were preserved for proper review.
2. Ineffective assistance of appellate counsel.

The Applicant amended his application on August 26, 2013 to allege the following:

1. Ineffective assistance of counsel.
 - a. Trial counsel failed to properly challenge the issue of probable cause for issuance of the search warrant which led to the State's discovery of the drugs for which the Applicant was charged.
 - b. Trial counsel failed to properly argue against the admissibility of testimony of Witness Reeves with regard to State v. Lyle and SCRE Rule 404(b), or under any other theory.
 - c. Trial counsel failed to argue and obtain a ruling on the admissibility of Defendant's prior record for purposes of impeachment.
 - d. Trial counsel failed to fully discuss the benefits and pitfalls of Applicant's testifying because he did not obtain a ruling on the admissibility of the Applicant's prior convictions, thereby preventing Applicant from making a fully informed decision about whether or not he would testify.
 - e. Trial counsel failed to call exculpatory witnesses who would have refuted testimony offered by the State, despite their ability, availability and willingness to testify.

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- f. Trial counsel failed to properly renew and preserve the issue of the admissibility of Witness Reeves' testimony, thereby procedurally barring and preventing same from being considered on appeal.
- g. Trial counsel failed to request a jury instruction from the Court regarding the limited purpose of admissibility of testimony admitted pursuant to State v. Lyle.

At the hearing, the Applicant proceeded solely on the allegation of ineffective assistance of trial counsel. This Court finds the allegation of ineffective assistance of appellate counsel was abandoned by the Applicant and is hereby dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

Summary of the Testimony

Cory Fleming, Esquire, testified at the evidentiary hearing that he was retained to represent the Applicant at trial. He testified he also filed a Notice of Appeal for the Applicant and remained on the case until he received the trial transcript. Counsel testified he has been practicing law for nineteen (19) to twenty (20) years and has practiced criminal law regularly. He testified he met with the Applicant many times prior to trial.

Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the discovery materials with the Applicant. He testified he discussed with the Applicant the elements of the charges he was facing and the State's burden of proof. He testified he discussed with the Applicant his version of the facts and possible defenses at length and met with

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the Applicant as much as necessary. Counsel testified he had ample time to prepare for trial. Counsel testified, although the Applicant complained that a juror knew Robert Jenkins, he gave the trial judge the names of his witnesses during *voir dire* "out of an abundance of caution" and did not recall any problems with jurors during trial. He testified he and the Applicant participated in *voir dire* and selection of each juror. Counsel further testified that he reviewed all evidence that was sent back to the jury during deliberations and that no evidence was sent back to the jury that was not admitted in the record.

Counsel testified the Applicant's case was the classic drug investigation involving the drug task force and complaints about drug activity at a trailer. Counsel testified the task force set up observation of the trailer and followed a car leaving the trailer. He testified the task force stopped the car and, based on the information they received from the car's occupants, obtained a search warrant for the trailer and found drugs.

Counsel testified he investigated all leads given to him by the Applicant. He further testified that he spoke with all witness prior to trial except Reeves and Jenkins but that he was given time to speak with Jenkins and Reeves was made available to him right before his testimony at trial. He testified that he was able to successfully challenge Reeves' credibility on cross basically establishing that he would say "anything" to save himself. He further testified that he was able to use Reeves' statements to effectively impeach him. He further testified that he got a receipt book late or last as Jenkins had just found it and wished he had received it sooner however this did not affect his trial preparation. Counsel further testified that he was able to cross examine Jenkins regarding the receipts and did not feel that his testimony was particularly damaging to the case.

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Counsel also testified the Applicant provided him no alibi witnesses. Counsel testified that each of the Applicant's co-defendants were represented by legal counsel. He further testified that all witnesses needed for his trial purposes were present whether subpoenaed or not. Counsel testified that the Applicant "fully" participated in his defense.

Counsel testified the Applicant was charged with multiple drug offenses. He testified the evidence at trial showed the Applicant was leaving the trailer as the raid team entered and was seen throwing down marijuana. He testified no drugs were found on the Applicant. Counsel testified his strategy at trial was to argue a mere presence defense and that the Applicant was not linked to the drugs found in the trailer, but was only present during the raid. Counsel testified there were so many people at the home and it was clear the Applicant did not live there. He testified his ability to defend the case was based on one witness' testimony identifying the Applicant as the drug dealer. He further testified there was a belief that the Applicant was the "ring leader" however there was no direct testimony of that.

Counsel testified he originally intended to challenge the search warrant, but ultimately decided against it. He testified he believed the Applicant did not have specific standing to suppress the search, but he wanted to challenge the search nevertheless. He testified in response to this position that the trial Court had indicated that if he challenged the search warrant, he would be judicially estopped from arguing his client lacked dominion and control over the home, which would jeopardize his trial strategy. He testified he thought he had the right to challenge the search warrant, but decided not to do so based on the Court's guidance as he could not argue two factually inconsistent positions. He testified he made a strategic decision not to challenge the search warrant, since the judge advised he was "warning [him] away from it." He further testified that while the probable cause for the warrant was "shabby" because of the veracity of

the State's witness based on the "totality" and "ongoing" nature of the investigation ultimately probable cause existed. He further testified that he felt even if he challenged the search warrant there was sufficient evidence in the record and he felt the trial Court would have found there was probable cause.

Counsel testified the challenge of the search warrant was not particularly strong and he felt the Applicant's mere presence defense was stronger without having Reeves' testimony. Counsel testified he did not want the State to be able to assert that the Applicant had control. He testified he also did not want to box himself in on what he thought was his best defense in light of the evidence. He testified that at trial he was operating under the assumption that Reeves would not be present. Counsel testified no direct testimony supported the theory that the Applicant was the "ring leader" and, ultimately, his defense was that the Applicant did not have control over the house and was merely a visitor.

Counsel testified even if the search warrant for the trailer was valid, the veracity of the witnesses was "shabby" and no evidence proved the Applicant was involved with the large quantity of drugs found. He testified, based on the "ongoing" nature of the investigation, he thought the police had enough probable cause to obtain the search warrant of the trailer, which conclusion he felt the court would also reach. Counsel testified he is familiar with the law on standing to challenge the validity of a search warrant under the Fourth Amendment and a defendant's reasonable expectation of privacy. He testified, although he received the rent receipts last, he was able to cross examine Robert Jenkins on how he received payment for the trailer. Counsel testified he originally intended to challenge the search warrant, but ultimately decided against that challenge.

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Counsel testified Reeves was the State's key witness. He testified that Reeves' statement was the basis of the search warrant for the trailer and that his testimony was the single most important evidence in the case. Counsel testified he did not know prior to trial if Reeves would be present to testify but that he reviewed Reeves' statement prior to trial. He testified he was aware that Reeves' testimony at trial was different from his testimony in the warrant and was able to cross-examine Reeves at trial about the inconsistency. He testified he was able to get Reeves to admit he lied to the police about certain things. Counsel testified a Delaware v. Franks⁷ hearing could have been part of a package deal, but that he chose not to request one for the same reasons he chose not to challenge the search warrant.

Counsel testified he was concerned about Reeves' testimony about the Applicant participating in previous drug activity. He testified he made a timely objection to Reeves' testimony based on Rule 404(b), SCRE and the fact that the Applicant was not charged with direct distribution and was not actively participating in drug transactions. Counsel testified that, although he did not state State v. Lyle⁸ specifically, it was clear that the trial court was performing a Lyle and Rule 404(b), SCRE-based analysis. He testified he objected to Reeves' testimony before he was called as a witness. Counsel testified he did not remember if he renewed his objections at the directed verdict stage.

Counsel testified he did not file a motion to determine the admissibility of the Applicant's prior convictions. He testified he raised the issue in passing to the court during housekeeping matters and said that he may raise the issue later after the Applicant made a decision on whether he would testify. Counsel further testified both he and the court advised the Applicant of his right to testify. He testified he would have requested a ruling on the admissibility of the Applicant's

⁷ See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

⁸ See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

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prior convictions had the Applicant decided to testify. Counsel testified the request was premature at the time he originally mentioned it to the court. Counsel also testified he told the Applicant it was likely the court would exclude his prior drug convictions. Counsel testified it was the sole decision of the Applicant not to testify based on Counsel's advice of the strong possibility of impeachment, not based on the admissibility of his prior convictions. Counsel testified that he fully advised the Applicant of his right to testify and his options. He further testified that the Applicant never told him he desired to testify.

Counsel testified he did not call any witnesses to testify at trial. He testified that several of the witnesses he considered calling were the Applicant's co-defendants. He testified he was told by the attorneys who represented the Applicant's co-defendants that they did not want to testify and that their testimony would not have been helpful to the Applicant. He testified all the Applicant's co-defendants had retained counsel so he was not sure what they would testify to and that the Applicant's co-defendants pled guilty in "short order" around the time the Applicant went to trial. Counsel testified the potential witnesses were not credible and the Applicant's case looked better without their testimony. Counsel testified he discussed his decision not to call any witnesses with the Applicant and the Applicant agreed. He testified he was able to challenge the testimony of the State's witnesses without calling any witnesses and that the strategy of calling witnesses but not calling the defendant to testify sends a bad signal to the jury. He testified he was also able to successfully show that the co-defendants were guilty without the co-defendants testifying at trial. Counsel testified he successfully challenged Reeves' credibility at trial by using his statements to impeach him. Counsel testified all the witnesses he needed were present and he was able to preserve last argument to the jury.

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Counsel testified he saw no problem with the trial judge having knowledge about the case prior to trial and there was no basis for a request to Judge Kinard to recuse himself from the trial. Counsel also testified he made a motion to preclude the State from referring to the Applicant as "Big T." He testified Reeves established the Applicant's identity as "Big T" during his testimony and the "Big T" reference during the State's closing was "problematic but not objectionable" and was a fair statement of the evidence in line with the judge's previous ruling on the issue. Additionally, Counsel testified he renewed all motions at the end of trial. He testified the Applicant was a smart participant in his trial, understood the court system, and participated fully in his defense. Finally, he testified that he and the Applicant made many crucial decisions together, including plea offers and calling witnesses to testify.

Also present and testifying was Tyece Brown. Brown testified she lives at 27 Big Road in Beaufort, South Carolina. She testified the Applicant was her boyfriend at the time of the incident and trial and that they lived together at 145 William Campbell Road at the time of the incident and since 2002, which residence was twenty (20) to twenty-five (25) minutes away from the site of the incident. She testified she spoke with trial counsel and gave him a copy of their lease. She testified she was listed as a witness at trial and sequestered. Lastly, Brown testified she was not called as a witness, but would have testified that the Applicant lived somewhere else had she been called.

Akeem Saunders, the Applicant's younger brother, also testified at the hearing. He testified he was present during the raid at the time of the search warrant execution and arrests and was also charged with a drug offense. Saunders testified he pled guilty prior to the Applicant's trial and served one and one-half (1 ½) years of a three (3) year sentence in prison. Saunders testified the Applicant was not present when Reeves said the Applicant was at the

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trailer. He testified the night before the search warrant was executed the Applicant was not at the trailer when Reeves was present. Saunders further testified he lives at 11 Bay Pine Road and that the Applicant had not lived there for three (3) to four (4) months, but was simply visiting at the time of the raid. He testified he did not know why he was not called to testify at trial. Saunders testified he was represented by counsel and was "locked up" at the time of trial at Beaufort County Detention Center. Lastly, Saunders testified he wanted to testify on the Applicant's behalf at trial even though doing so would have implicated himself and he would have effectively forfeited a favorable plea offer.

Finally, Andre Benjamin testified at the evidentiary hearing. Benjamin testified he went to 11 Bay Pine Road with his wife, Reeves, and Reeves' girlfriend. He testified he went in to see Akeem Saunders about some ladies. He testified Reeves stayed in the car and when he went into the house, Reeves drove off. Benjamin testified he returned to the car to get money from Reeves to buy marijuana. Benjamin testified the Applicant was not present when he purchased marijuana. He further testified Reeves did not enter the trailer with him. Benjamin further testified that he signed an affidavit dated October 26, 2012 and given to the Applicant's counsel (Lee) for the PCR hearing stating Reeves did go inside the home with him to purchase drugs. Benjamin testified he did not know exactly what the affidavit said. However, line two (2) of the affidavit states that he and Reeves went in the trailer together.

The Applicant testified on his behalf at the hearing and alleged a juror knew the witness Jenkins; however, the Applicant could not identify the juror, nor could he produce evidence that the juror was seated on the panel. The Applicant testified that Counsel failed to preserve multiple issues on appeal, specifically Counsel's renewed motion for directed verdict, the juror issue, and the allegation that reports not in evidence went back to the jury room during deliberations. The

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Applicant also claimed Counsel failed to investigate additional witnesses who could have provided his alibi, testified that he did not live at the premises in question, and discredited Reeves' testimony. The Applicant claimed that Judge Kinard was biased and should have recused himself because he took the Applicant's co-defendants' guilty pleas and possessed knowledge of the facts of the case and the Applicant's history. The Applicant testified that his attorney did not advise him of his right to testify. He testified that the decision not to testify was not his own but that counsel made the decision for him. However, on cross examination, the Applicant admitted that the trial court advised him of his rights and that his decision to testify was solely his own.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)).

Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must

overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds trial counsel's testimony is credible. This Court finds the testimony of the Applicant's witnesses Tyece Brown, Akeem Saunders, and Andre Benjamin not credible. Specifically, this Court finds the testimony of Andre Benjamin, whose testimony at the hearing was contradictory to his testimony in a signed affidavit attached to the Applicant's application, particularly lacks credibility. The Court finds most persuasive on the issue of Benjamin's credibility his testimony at the hearing that his testimony in the signed and sworn affidavit was untruthful.

This Court finds that trial counsel has extensive experience in the practice of criminal law and has been practicing law for almost twenty (20) years. This Court finds that Counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that Counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed

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the received discovery with the Applicant. This Court finds that Counsel discussed with the Applicant the elements of the charges against him, what the State was required to prove, his constitutional rights and range of penalty. This Court finds that Counsel discussed the Applicant's version of the facts and possible defenses with the Applicant. This Court further finds trial counsel adequately conferred with the Applicant and was thoroughly competent in his representation.

I. Rule 404(b), SCRE Evidence and State v. Lyle.

The Applicant alleges Counsel failed to fully and properly argue State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807–810 (1923) and Rule 404(b), SCRE as a basis for his objection to the testimony of William Reeves.⁹ This Court finds Counsel adequately challenged the admissibility of Reeves' testimony that the Applicant sold drugs in the trailer at trial. The record reflects trial counsel moved to exclude Reeves' testimony on the basis of 404(b) and argued the prior bad act that Reeves would testify to was not encompassed within the charges the Applicant was on trial for. (Tr. Vol. III 6:2–14). This Court finds Counsel's argument was properly aligned with Lyle. The rule of law is that, for prior bad acts evidence to be admissible, "[t]he record must

⁹ The Applicant's review of the trial transcript leads him to believe the Solicitor's response to trial counsel's motion raised the "identity" exception under Rule 404(b), SCRE and State v. Lyle. See Tr. Vol. III 6:1–15. The Applicant asserts the trial court made only a "cursory" ruling, relying solely on the temporal proximity of the prior bad act evidence and the execution of the search warrant. See Tr. Vol. III 7:4–13. Applicant further asserts that trial counsel failed to object to the limited nature of the court's ruling and the exception upon which it was relying and failed to request a more detailed ruling on this issue, including the necessity of a Rule 403 balancing test, in order to properly preserve the issue for appeal. The Applicant additionally asserts the court's sole reliance on the time between the acts is a legally insufficient basis and finding under Rule 404(b), SCRE.

The Applicant specifically argues that trial counsel was ineffective for failing to request a full, or at least a more comprehensive, analysis under Rule 404(b), SCRE and for failing to renew his objection at the directed verdict stage of the trial. The Applicant argues that trial counsel's failure to properly object to the trial court's summary denial of his Rule 404(b), SCRE motion, without conducting a sufficient Rule 404(b), SCRE analysis, including but not limited to, an on-the-record balancing test under Rule 403, SCRE, caused the issue not to be properly argued and preserved for direct appeal purposes. Stated differently, the Applicant alleges that trial counsel's failure to press the trial court into articulating specific reasons for denying his Rule 404(b), SCRE motion, however "uncomfortable" it may have been to do so, was absolutely necessary and appropriate, and caused the record to be incomplete, thus preventing a meaningful opportunity for subsequent review by the PCR and appellate courts. The Applicant asserts that the court's ruling did not even cite which exception it believed the proffered evidence satisfied under Rule 404(b), SCRE and Lyle, and that trial counsel's failure to even inquire into this basic fact prevented him from being able to properly respond to the court's ruling.

support a logical relevance between the prior bad act and the crime for which the defendant is accused.” State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). This Court finds it is also clear from the State’s response to the Applicant’s motion that Reeves’ testimony went to the identity exception (Tr. Vol. III 6:15–20) and the Court’s ruling (Tr. Vol. III 7:4–6) that the Court properly performed an analysis pursuant to Lyle and Rule 404(b).

II. Preserving Error for Appeal.

The Applicant alleges Counsel failed to preserve the issue of the admissibility of Reeves’ testimony for appeal.¹⁰ This Court finds that Counsel adequately preserved this issue for appellate review. To preserve an issue for review on appeal, a party must raise the issue and obtain a ruling. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733–34 (1998) (citing Creech v. S.C. Wildlife & Marine Res. Dep’t, 328 S.C. 24, 33–34, 491 S.E.2d 571, 576 (1997)). Typically, counsel must make a contemporaneous objection in order to preserve issues for appellate review. See Sea Cove Dev., LLC v. Harbourside Community Bank, 387 S.C. 95, 108 n.5, 691 S.E.2d 158, 165 n.5 (2010). However, where the judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party need not renew the objection and the objection is preserved. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001).

This Court finds and the record reflects Counsel raised the issue of the admissibility of Reeves’ testimony immediately prior to Reeves’ testimony (Tr. Vol. II 6:2–14) and the Court ruled the testimony was admissible (Tr. Vol. II 7:4–6, 12–13). Furthermore, the trial court is not

¹⁰ The Applicant specifically asserts that trial counsel failed to properly preserve the 404(b), SCRE/Lyle issue because he did not renew his objections at the directed verdict stage of the proceedings; did not ask the court for a more complete basis or explanation of the ruling at that time for record purposes, and that such failure resulted in a procedural waiver of his ability to challenge the trial court’s ruling on direct appeal.

obligated to hear, nor is counsel obligated to make argument on an objection. Counsel is required to cite the basis of the objection and the Court may hear argument to aid in making its decision. See Rule 18, SCRCrimP. Counsel sufficiently preserved error by objecting to the impermissible character evidence prior to the witness' testimony. This Court further finds that the record is clear that the trial court made a contemporaneous ruling and the trial judge performed the necessary evidentiary balancing test. The record lacks any indication that the trial court judge failed to perform a full and thorough analysis on this issue. Although whether Counsel renewed his objection at the directed verdict stage is unclear, the record is clear that the trial judge was aware that Reeves' testimony was objectionable at the time he denied Counsel's motion for directed verdict. (Tr. Vol. III 35:1-8). This Court finds no merit to Applicant's argument that the issue of the admissibility of Reeves' testimony was properly preserved for appellate review.

III. Limiting Instruction.

The Applicant alleges Counsel failed to request a limiting instruction for Reeves' testimony. "The general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered." State v. Johnson, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991). "[A] limiting charge is unnecessary where evidence of other crime is admissible on the main issue or where the evidence admitted to show motive or intent is of acts which may well be supposed to have been done in furtherance of such motive or intent." State v. Nix, 288 S.C. 492, 497-98, 343 S.E.2d 627, 630 (Ct. App. 1986) (citing 23 C.J.S. *Criminal Law* § 1032(3) (1970)).

This Court finds a limiting instruction following Reeves' testimony was unnecessary because his testimony that he went to the trailer with his brother in law to purchase cocaine from

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the Applicant was directly related to the crime for which the Applicant was on trial. Cf. Nix, 288 S.C. at 497-98, 343 S.E.2d at 630 (where prior crime was means to accomplish present crime for which accused was on trial, evidence was admissible on main issue at trial and no limiting instruction was necessary). Based on Reeves' testimony, the State was able to obtain a search warrant of the trailer which resulted in the Applicant's arrest. This Court finds the Applicant has failed to carry his burden of proving Counsel provided ineffective assistance of Counsel with regard to Counsel's handling of Reeves' testimony at trial. Moreover, based on the record and unique facts presented in this case, this Court cannot discern any unfair prejudice resulting from the admission of Reeves' testimony. See State v. Johnson, 306 S.C. 119, 125, 410 S.E.2d 547, 551 (1991) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); Rule 403, FRCP).

IV. The Applicant's Prior Record.

The Applicant alleges Counsel was ineffective for failing to obtain a ruling on the admissibility of the Applicant's prior record for impeachment purposes, had the Applicant chosen to testify at trial. This Court finds Counsel had no obligation to request a ruling on the admissibility of the Applicant's criminal record before the Applicant decided whether or not he would testify. This Court finds it unlikely the admissibility of the Applicant's prior record greatly impacted the Applicant's decision not to take the stand, since Counsel provided credible testimony that he advised the Applicant that it was unlikely his prior drug convictions would be admissible for impeachment purposes.¹¹ This Court also finds Counsel provided credible

¹¹ The Applicant's prior record is as follows: The Applicant was convicted of Possession of Marijuana with Intent to Distribute and Driving While License Suspended or Revoked, a misdemeanor offense, on January 26, 2005 in Bleckley County, Georgia. The Applicant was convicted of Sale or Distribution of Marijuana, Possession of Crack Cocaine with Intent to Distribute-First Offense, Possession of Crack Cocaine-First Offense, on November 8, 1993 in Beaufort County, South Carolina. The Applicant was convicted of Distribution of Marijuana, Distribution of Cocaine, and Possession of Cocaine, on December 1, 1993 in Beaufort County, South Carolina. The Applicant was convicted of Shoplifting on June 1, 1995 in Beaufort County, South Carolina. The Applicant was convicted of two

testimony that he discussed with the Applicant his right to testify and gave him the option to make his decision based strongly on his advice prior to trial. (Tr. Vol. III 35:11-16). This Court finds and the record reflects the Applicant was also advised by the trial court of his right to testify. (Tr. Vol. III 35:11-20). Moreover, the trial court was not obligated to rule on the admissibility of the Applicant's prior record at the beginning of trial expending time on what may well have been a moot issue. This Court finds the Applicant was adequately informed of his right to testify and his decision not to testify was freely and voluntarily made. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective.

V. Witness Testimony.

The Applicant alleges Counsel was ineffective for failing to call exculpatory witnesses. This Court finds Counsel was not ineffective for failing to call Tycece Brown, Andre Benjamin, and Akeem Saunders as witnesses at trial. With regard to Akeem Saunders, this Court finds most persuasive Counsel's testimony that he spoke with the attorneys of the Applicant's co-defendants and none of the co-defendants could offer testimony beneficial to the Applicant. This Court finds it is also unlikely that Saunders would have risked losing a beneficial plea offer from the State to testify on the Applicant's behalf.

This Court also finds Counsel's decision not to call Andre Benjamin as a witness was beneficial to the Applicant in light of the incredible testimony that Benjamin provided at the post-conviction relief hearing. During the hearing, Benjamin admitted to lying in a sworn

(2) counts of Possession of Crack Cocaine with Intent to Distribute-First Offense and Sale and Distribution of Crack Cocaine on September 20, 1995 in Beaufort County, South Carolina. The Applicant was convicted of three (3) counts of Sale/Distribution of Unlawful Drugs, Crack Cocaine on September 27, 1995. The Applicant was convicted of Possession of Other Controlled Substance, Schedule I-V-First Offense on February 12, 2002 in Beaufort County, South Carolina. The Applicant was convicted of Open Container of Beer/Wine, Speeding, and Driving Under Suspension, on November 13, 2002. The Applicant was convicted of Failure to Surrender Driver's License when Required on January 30, 2004 in Beaufort County, South Carolina. The Applicant was convicted of Manufacturing, Possessing Schedule I, II, III Substance, Marijuana, with Intent to Distribute-Third or Subsequent Offense on June 13, 2004 in Georgia.

statement which he signed. (See State's Exhibit 1). This Court finds credible Counsel's testimony that there was some concern about the credibility of the witnesses' testimony. See State v. Stokes, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (when trial counsel articulates valid reasons for employing a particular strategy, such as declining to call certain witnesses who lack credibility and provide no information likely to have changed the outcome of the trial, no ineffective assistance of counsel results).

With regard to calling Tyce Brown, the Applicant's girlfriend, this Court finds it unlikely the jury would have given Brown's testimony any considerable weight or credibility considering her relationship with the Applicant. This Court further finds no prejudice resulted from Counsel's decision not to call Brown because, even without Brown's testimony, Counsel was able to adequately challenge the Applicant's control of the trailer during his cross-examination of Robert Jenkins. Furthermore, this Court finds credible Counsel's testimony that he fully discussed these matters with the Applicant and the Applicant agreed with his strategic decisions not to call certain witnesses. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to call these witnesses at trial. This Court finds in light of the testimony presented at the hearing, it is unlikely prejudice resulted from the omission of these witnesses' testimony at trial.

VI. Probable Cause and Search Warrant.

The Applicant alleges Counsel was ineffective for failing to challenge the probable cause for the search warrant of the trailer where the Applicant was arrested.¹² This Court finds Counsel was not ineffective for failing to challenge the probable cause for the search warrant of the trailer. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

This Court finds Counsel's decision not to challenge the search warrant was based on a valid trial strategy. Counsel provided credible testimony that he originally intended to challenge the search warrant, but ultimately decided against it. He testified he was aware the Applicant did not have specific standing to suppress the search, but he wanted to challenge the search nonetheless. Counsel testified that in response to this position, he was told by the court that he could not challenge the search warrant and then argue that the Applicant lacked control of the drugs without jeopardizing his trial strategy. This Court finds most persuasive Counsel's testimony that based on the court's guidance he chose not to challenge the search warrant. Further, it is clear from the trial court transcript and the colloquy what Counsel would have argued; therefore, no proffer was necessary. (Tr. Vol. I 34:8-37:13). This Court finds that

¹² The Applicant asserts that trial counsel would not have been judicially estopped or prevented from asserting a mere presence defense at trial if his motion *in limine* to suppress the search warrant was denied pretrial. The Applicant argues that he had a reasonable expectation of privacy at the property, and a concomitant right to challenge the search warrant, and, further, that such right was not mutually exclusive of his right to argue a mere presence defense at trial. In other words, the Applicant asserts that counsel "had nothing to lose, and everything to gain," by proceeding on a motion to suppress the evidence found at the trailer as "fruit of the poisonous tree," and that such a decision to refrain from doing so is error and not a legitimate strategic decision.

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Counsel's trial strategy was valid and that it was reasonable and wise for counsel to seek the court's guidance in deciding whether to challenge the warrant based on the court's opinion.

Additionally, the Applicant argues that Counsel was ineffective for failing to request a Delaware v. Franks¹³ hearing to challenge the search warrant. Although Counsel could have challenged the validity of the search warrant and attacked the validity of Reeves' attestation by impeachment, Counsel did successfully impeach Reeves on the stand. This Court finds that from the record it appears the search warrant was valid and that Counsel's decision not to request a formal Delaware v. Franks hearing was a valid strategic decision. This Court can discern no basis for a successful challenge, even if made, and that the failure to request a formal hearing in no way prejudiced the Applicant.

This Court also finds the Applicant has failed to carry his burden of proving prejudice resulted from Counsel's failure to challenge the search warrant. Counsel provided credible testimony that it was unlikely any challenge to the search warrant would have been successful. This Court finds that Counsel provided reasonable performance with regard to his decision not to challenge the search warrant and his performance did not prejudice the Applicant.

VII. Judge Kinard's Recusal.

The Applicant alleges Counsel was ineffective for failing to request the recusal of Judge Kinard. The Applicant argues Counsel should have requested Judge Kinard recuse himself based on Judge Kinard's judicial knowledge of the case, by virtue of his knowledge of the co-defendants' guilty pleas, prior to the Applicant's trial.

Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from

¹³ See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

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an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge.

State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003). This Court finds the Applicant has failed to show any evidence of actual bias or prejudice constituting grounds for Judge Kinard's recusal. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective and this allegation is wholly without merit.

VIII. "Big T."

The Applicant alleges Counsel was ineffective for failing to object to the State's reference to the Applicant as "Big T" during the State's closing argument. This Court finds the State's reference to the Applicant as "Big T" during the State's closing argument was not objectionable as the State laid the proper foundation to establish the Applicant as "Big T." Prior to the start of trial, trial counsel made a motion *in limine* to preclude the State from referencing the Applicant's street name without laying a proper foundation. (Tr. Vol. I. 38:17-39:1). The State agreed not to refer to the Applicant as "Big T" unless the proper foundation was laid. (Tr. Vol. I 38:2-9). The Court granted the Applicant's motion, but allowed testimony from law enforcement that they were looking for "Big T." (Tr. Vol. I 39:3-14).

During trial, William Reeves testified he went to Bay Pines Road to purchase cocaine from "Big T." (Tr. Vol. III 15:17-19). Reeves then identified the Applicant as "Big T." (Tr. Vol. III 15:20-16:10). This Court finds the State laid the proper foundation through Reeves' testimony to identify the Applicant as "Big T." This Court also finds the State's reference to the Applicant in its closing argument as "Big T" was a proper comment on the facts presented during trial. This Court finds the Applicant failed to carry his burden of proving Counsel was ineffective. This Court also finds that no prejudice resulted from Counsel's performance and this allegation is without merit.

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IX. Jurors and *Voir Dire*.

The Applicant alleges Counsel was ineffective for failing to inquire into the facts of a juror who knew one of the State's witnesses. The record reflects an unidentified juror indicated he knew the State's witness, Robert Jenkins. (Tr. Vol. I 16:3-8). The juror told the Court he and Jenkins were classmates and that he could be fair and impartial if Jenkins testified at trial. (Tr. Vol. I 6-11). This Court finds this juror was adequately questioned by the court about his relationship with Jenkins and that Counsel need not have made any further inquiry. This Court finds the Applicant has failed to carry his burden of proving Counsel should have further questioned the juror. This Court finds no prejudice resulted from Counsel's performance and this allegation is without merit.

X. Evidence in Jury Deliberation Room.

The Applicant alleges Counsel was ineffective for failing to object to evidence going back to the jury that was not properly admitted. The record reflects the court instructed counsel to check the evidence before it was sent back to the jury. (Tr. Vol. III 90:17-18). The State's counsel indicated exhibits number 57, 58, and 59 were not listed as admitted. She indicated she thought that they were admitted, which Counsel confirmed. (Tr. Vol. III 91:14-20; 92: 7-9). The Court allowed the evidence to be admitted and sent back to the jury. (Tr. Vol. III 92:10-19).

The decision to permit the State to re-open its case and present evidence lies within the sound discretion of the trial court. State v. Humphrey, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981); State v. Green, 350 S.C. 580, 586, 567 S.E.2d 505, 508 (Ct. App. 2002) (citing State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978); State v. Harrison, 236 S.C. 246, 113, S.E.2d 783 (1960)). This Court finds no prejudice resulted from Counsel's failure to object to the admission of this evidence after the close of the State's case because the evidence included in the

exhibits was already presented to the jury through the testimony of the analysts. See Hammond, 270 S.C. at 355–56, 242 S.E.2d at 415. This Court finds the Applicant has failed to carry his burden of proving Counsel's performance was ineffective.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed. Thereby, this Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations occurring before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by

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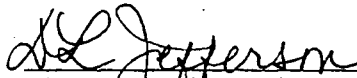
Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 5th day of March, 2014


The Honorable Deadra L. Jefferson
Presiding Judge

Charleston, South Carolina.
at chambers.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
TURUK F. SAUNDERS #199803,	)	Case No.: 2012-CP-07-4095
Applicant	)	
-versus-	)	APPLICANT'S MOTION TO ALTER AND
	)	AMEND JUDGMENT
STATE OF SOUTH CAROLINA,	)	
<u>Respondent</u>	)	

Applicant Turuk F. Saunders, pursuant to SCRCP Rule 59, hereby moves for reconsideration of the Court's Order of Dismissal filed March 10, 2014, and received by Applicant's counsel on March 21, 2014 in the above-captioned Post-Conviction Relief case. The purpose of this motion is to request that the Court reconsider its findings and rulings so that issues raised and facts presented by Applicant are adequately addressed for preservation and appellate review should the Court not find an alteration of the judgment appropriate. In support of this motion, Applicant respectfully asserts as follows:

1. Applicant's PCR Petition was heard on August 27, 2013 by the Honorable Deadra L. Jefferson in the Beaufort County Court of Common Pleas.
2. At the conclusion of the hearing, Judge Jefferson informed the parties that she would be taking the matter under advisement.
3. On October 24, 2013 Applicant's counsel received an email from Assistant Attorney General Ashleigh R. Wilson containing a proposed Order of Dismissal, apparently prepared at the request of Judge Jefferson.
4. On October 29, 2013, Applicant's attorney forwarded his objections and proposed amendments to the Order to Judge Jefferson and Ms. Wilson.
5. Applicant's attorney received a written copy of the signed and filed Order on March 21, 2013.
6. Applicant respectfully requests that the Court reconsider its March 10, 2014 Order of Dismissal holding that plea counsel was not ineffective, on the following grounds:

- a. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of probable cause for issuance of the search warrant;
- b. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves' testimony under State v. Lyle, SCRE Rule 404(b), or under any other theory;
- c. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Applicant's prior record for impeachment purposes;
- d. The Court incorrectly found that trial counsel had fully discussed the potential benefits and pitfalls of Applicant testifying because he did not obtain a ruling on the admissibility of prior convictions, thereby preventing Applicant from making a fully informed decision about whether or not he would testify;
- e. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves' testimony;
- f. The Court incorrectly found that trial counsel was not deficient in failing to request a jury instruction regarding the limited purpose of admissibility of testimony admitted under State v. Lyle;
- g. The Court erred in failing to address the cumulative effect of the above errors committed by trial counsel;
- h. The Court erred in finding that trial counsel's failure to challenge the search warrant was a valid trial strategy; and
- i. The Court erred in finding that trial counsel's performance was not deficient, and that such performance did not result in unfair prejudice to Applicant during the trial, and for appellate purposes

For the reasons set forth above, Applicant respectfully requests that the Court reconsider its Order of Dismissal filed October 17, 2011, and amend same to grant the relief sought by Applicant in his PCR Application.

Respectfully submitted,



Scott W. Lee
Attorney for Applicant

Beaufort, South Carolina

March 28, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
TURUK F. SAUNDERS #199803,	)	Case No.: 2012-CP-07-4095
Applicant	)	
-versus-	)	APPLICANT'S AMENDED MOTION TO
	)	ALTER OR AMEND JUDGMENT
STATE OF SOUTH CAROLINA,	)	
Respondent	)	

2014 APR -8 AM 8:50
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

Applicant Turuk F. Saunders, pursuant to SCRPC Rule 59, hereby moves for reconsideration of the Court's Order of Dismissal filed March 10, 2014, and received by Applicant's counsel on March 21, 2014 in the above-captioned Post-Conviction Relief case. The purpose of this motion is to request that the Court reconsider its findings and rulings so that issues raised and facts presented by Applicant are adequately addressed for preservation and appellate review should the Court not find an alteration of the judgment appropriate. This Amended Motion incorporates by reference Applicant's grounds set forth in his original Motion to Alter or Amend, and adds several additional grounds not set forth in the original motion. In support of this motion, Applicant respectfully asserts as follows:

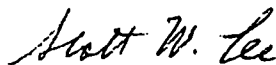
1. Applicant's PCR Petition was heard on August 27, 2013 by the Honorable Deadra L. Jefferson in the Beaufort County Court of Common Pleas.
2. At the conclusion of the hearing, Judge Jefferson informed the parties that she would be taking the matter under advisement.
3. On October 24, 2013 Applicant's counsel received an email from Assistant Attorney General Ashleigh R. Wilson containing a proposed Order of Dismissal, apparently prepared at the request of Judge Jefferson.
4. On October 29, 2013, Applicant's attorney forwarded his objections and proposed amendments to the Order to Judge Jefferson and Ms. Wilson.
5. Applicant's attorney received a written copy of the signed and filed Order on March 21, 2013.

6. Applicant respectfully requests that the Court reconsider its March 10, 2014 Order of Dismissal holding that plea counsel was not ineffective, on the following grounds:

- a. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of probable cause for issuance of the search warrant;
- b. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves' testimony under State v. Lyle, SCRE Rule 404(b), or under any other theory;
- c. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Applicant's prior record for impeachment purposes;
- d. The Court incorrectly found that trial counsel had fully discussed the potential benefits and pitfalls of Applicant testifying because he did not obtain a ruling on the admissibility of prior convictions, thereby preventing Applicant from making a fully informed decision about whether or not he would testify;
- e. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves' testimony;
- f. The Court incorrectly found that trial counsel was not deficient in failing to request a jury instruction regarding the limited purpose of admissibility of testimony admitted under State v. Lyle;
- g. The Court erred in finding that trial counsel's failure to challenge the search warrant was a valid trial strategy;
- h. The Court erred in finding that trial counsel was not ineffective in failing to request Judge Kinard's recusal from the case;
- i. The Court erred in finding that trial counsel was not ineffective in failing to object to the State's reference to Applicant as "Big T" during the State's closing argument;
- j. The Court erred in finding that trial counsel was not ineffective for failing to inquire further into the facts of a juror who knew one of the State's witnesses, Robert Jenkins;
- k. The Court erred in finding that trial counsel was not ineffective for failing to object to evidence going back to the jury that was not properly admitted during trial;
- l. The Court failed to address all issues raised by Applicant's original *pro se* PCR Application;
- m. The Court erred in failing to address the cumulative effect of the above errors committed by trial counsel; and
- n. The Court erred in finding that trial counsel's performance was not deficient, and that such performance did not result in unfair prejudice to Applicant during the trial, and for appellate purposes

For the reasons set forth above, Applicant respectfully requests that the Court reconsider its Order of Dismissal filed October 17, 2011, and amend same to grant the relief sought by Applicant in his PCR Applications.

Respectfully submitted,

A handwritten signature in cursive script, reading "Scott W. Lee".

Scott W. Lee
Attorney for Applicant

Beaufort, South Carolina

April 7, 2014

ALW
14

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TURUK SAUNDERS #199803,

Applicant

vs.

STATE OF SOUTH CAROLINA,

Respondent.

) IN THE COURT OF COMMON PLEAS
) THE FOURTEENTH JUDICIAL CIRCUIT

) CASE NO: 2012-CP-07-4095

) ORDER DENYING APPLICANT'S
) MOTION TO ALTER AND AMEND
) JUDGMENTPresiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Date of PCR Hearing:
Court Reporter:Hon. Deadra L. Jefferson
Scott W. Lee, Esquire
Ashleigh R. Wilson, Esquire
Cory H. Fleming, Esquire
August 27, 2013
Susan "Mia" Perron2014 MAY 28 PM 3:31
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This matter is before the Court on the Applicant's Motion to Alter and Amend Judgment, filed with the Beaufort County Clerk of Court on April 2, 2014 and received by this office on April 1, 2014. The Respondent filed a Return and Motion to Dismiss Applicant's Motion to Alter or Amend with the Beaufort County Clerk of Court on April 7, 2014, which was received by this office via email on April 3, 2014. The Applicant filed an Amended Motion to Alter or Amend with the Beaufort County Clerk of Court on April 8, 2014 and received by this office on April 8, 2014 in order to address issues raised by the Applicant in his initial, *pro se* application for post-conviction relief. The Respondent filed a Return and Motion to Dismiss the Applicant's Amended Motion to Alter or Amend with the Beaufort County Clerk of Court on April 15, 2014, which was received by this office on May 22, 2014. The Applicant moves this Court to reconsider its Order of Dismissal dismissing the Applicant's application for post-conviction

RECEIVED
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BEAUFORT COUNTY, S.C.

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ATTORNEY GENERAL'S OFFICE

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ADMINISTRATIVE INSTRUCTIONS

☒ FILE _____ OPEN _____ END
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Scott Lee
- return w/ file

relief (PCR), signed March 5, 2014 and filed with the Beaufort County Clerk of Court on March 10, 2014. For the reasons set forth below, this Court denies the Applicant's Amended Motion to Alter and Amend Judgment. This Court finds and concludes as follows.

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52, SCRPC. The trial judge presiding over an Applicant's PCR hearing must issue a supplemental order setting forth specific findings of fact and expressly stating conclusions of law, which order becomes a final judgment in the Applicant's PCR case. See S.C. CODE ANN. § 17-27-80 (2013). The trial court's failure to specifically rule on the issues presented at the PCR hearing in its order precludes appellate review of the particular issues. See Marlar v. State, 375 S.C. 407, 408, 409, 653 S.E.2d 266, 266-67 (2007) (citing Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992)). Appellate review of a PCR order is provided by writ of certiorari under the South Carolina Appellate Court Rules. See S.C. CODE ANN. § 17-27-100 (2013). The Applicant's PCR "counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by [S.C. CODE ANN.] § 17-27-80 [(2013)] and Rule 52(a), SCRPC." Pruitt, 310 S.C. at 256, 423 S.E.2d at 128. Accord Hall v. Catoe, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004).

"The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 1720 (1988)). "Our supreme court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule

2 2016
[Signature]

59(e) [, SCRCPP] motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations.” Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012); McCray v. State, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991).

In his Amended Motion to Alter or Amend Judgment, the Applicant enumerates fourteen (14) grounds in support of his motion:

1. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of probable cause for issuance of the search warrant.
2. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves’ testimony under State v. Lyle, SCRE Rule 404(b), or under any other theory.
3. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of the Applicant’s prior record for impeachment purposes.
4. The Court incorrectly found that trial counsel had fully discussed the potential benefits and pitfalls of the Applicant testifying because he did not obtain a ruling on the admissibility of prior convictions, thereby preventing the Applicant from making a fully informed decision about whether or not he would testify.
5. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves’ testimony.

Handwritten signature and initials, possibly "Belle" and "JG", written in black ink.

6. The Court incorrectly found that trial counsel was not deficient in failing to request a jury instruction regarding the limited purpose of admissibility of testimony admitted under State v. Lyle.
7. The Court erred in finding that trial counsel's failure to challenge the search warrant was a valid trial strategy.
8. The Court erred in finding that trial counsel was not ineffective in failing to request Judge Kinard's recusal from the case.
9. The Court erred in finding that trial counsel was not ineffective in failing to object to the State's reference to the Applicant as "Big T" during the State's closing argument.
10. The Court erred in finding that trial counsel was not ineffective for failing to inquire further into the facts of a juror who knew one of the State's witnesses, Robert Jenkins.
11. The Court erred in finding that trial counsel was not ineffective for failing to inquire further into the facts of a juror who knew one of the State's witnesses, Robert Jenkins.
12. The Court erred in finding that trial counsel was not ineffective in failing to object to evidence going back to the jury that was not properly admitted during trial.
13. The Court failed to address all issues raised by the Applicant's original *pro se* PCR Application.
14. The Court erred in failing to address the cumulative effect of the above errors committed by trial counsel.

4
A. J. 6
[Signature]

15. The Court erred in finding that trial counsel's performance was not deficient, and that such performance did not result in unfair prejudice to the Applicant during the trial, and for appellate purposes.

In its Return and Motion to Dismiss Applicant's Amended Motion to Alter or Amend, the Respondent argues this Court's Order contains the requisite findings of facts and conclusions of law. See S.C. CODE ANN. § 17-27-80 (1976); Rule 52(a), SCRCP; McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

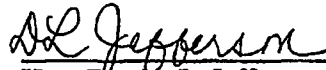
This Court finds that the Applicant has outlined no sound reason for this Court to alter or amend its judgment. The Defendant's Motion raises no new issues, nor proffers any arguments not considered by the Court during the Applicant's hearing and in the Court's Order. Moreover, the Court fully addressed each of the Applicant's grounds for relief and made specific finds of fact and conclusions of law on each ground in its Order. Additionally, in its Order, this Court found that any allegations raised in the Applicant's applications for post-conviction relief that were not addressed in the order were waived by the Applicant by failing to present any evidence regarding such allegations. Moreover, in its Order, this Court found that holistically, the Applicant's trial counsel was not deficient in any regard; cumulatively, counsel rendered reasonably effective assistance under prevailing professional norms; and the Applicant was not unduly prejudiced by trial counsel's performance. See Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989); Fraiser v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

Having fully considered the Applicant's Motion to Alter or Amend Judgment, the evidence presented at the PCR hearing, the Respondent's responses, as well as having fully reviewed the record and the various interests balanced by the Court at the time of the ruling, the

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Applicant's Motion to Alter or Amend Judgment is hereby **DENIED** pursuant to Rule 59, SCRCP.¹

IT IS SO ORDERED.


Hon. Deadra L. Jefferson
Presiding Judge

May 22, 2014
Charleston, South Carolina
At Chambers

¹ This motion is disposed of without the necessity of a hearing and decided on the record, briefs, and motions submitted by the parties. See Rule 59, SCRCP. Pollard v. County of Florence, 314 S.C. 397, 401-402, 444 .E.2d 534, 536 (1994).

6 

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.G.C. PLS. AND G.S.

DOCKET NO. 2007-GS-07-00505

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

MARCH TERM 2007

THE STATE
vs.

TURUK REMAR SAUNDERS

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE MARIJUANA

SC Code: 44-53-370(b)(2)
CDR Code: 186
Class FEL/F

WITNESSES

McIntosh/BCSO

ARREST WARRANT NUMBER

J331980

ACTION OF GRAND JURY

TRUK BILL

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT

At a Court of General Sessions, convened on March 22, 2007, the Grand Jurors of Beaufort County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA

That Turuk Remar Saunders did in Beaufort County on or about February 23, 2007, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance, to wit: Marijuana. All in violation of SC Code of Laws § 44-53-370.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ISAAC M. STONE, III, SOLICITOR

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

[Handwritten signature]

DOCKET NO. 2007-GS-07-00506

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

MARCH TERM 2007

THE STATE
vs.

TURUK REMAR SAUNDERS

Indictment for
POSSESSION WITH INTENT TO
DISTRIBUTE COCAINE
SC Code: 44-53-370(b)(1)
CDR Code: 0183
Class FEL/D

WITNESSES

McIntosh/BC80

ARREST WARRANT NUMBER

J331961

ACTION OF GRAND JURY

TRUE BILL

Ex-officio of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT

At a Court of General Sessions, convened on March 22, 2007, the Grand Jurors of Beaufort County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE COCAINE

That Turuk Remar Saunders did in Beaufort County on or about February 23, 2007, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance, to wit: cocaine, in violation of Section 44-53-370 Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ISAAC M. STONE, III, SOLICITOR

DOCKET NO. 2007-GS-07-00507

The State of South Carolina
County of Beaufort

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS

MARCH TERM 2007

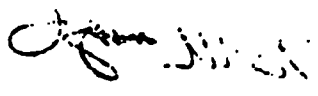
Defendant

Witness:

C.C.C. PLS. AND G.S.

THE STATE
vs.

TURUK REMAR SAUNDERS



WITNESSES

McIntosh/BCSO

ARREST WARRANT NUMBER

J331962

ACTION OF GRAND JURY

TRUE BILL



Foreperson of Grand Jury
Date: 11-1-07

VERDICT

Indictment for
POSSESSION WITH INTENT TO
DISTRIBUTE ECSTASY
SC Code: 44-53-370(b)(2)
CDR Code: 0186
Class FEL/F

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT

At a Court of General Sessions, convened on March 22, 2007, the Grand Jurors of Beaufort County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE ECSTASY

That Turuk Remar Saunders did in Beaufort County on or about February 23, 2007, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance, to wit: "Ecstasy".

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Isaac M. Stone, III, Solicitor

DOCKET NO. 2007-GS-07-00508

WITNESSES

McIntosh/BCSO

The State of South Carolina

County of Beaufort

After being fully advised as to my legal rights, I hereby-waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS**MARCH TERM 2007**

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

J331863

THE STATE
vs.**TURUK REMAR SAUNDERS**

Defendant

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: 4/11/07**VERDICT**

Indictment for

TRAFFICKING IN CRACK COCAINE
10-28 GRAMS

SC Code: 44-53-375C(2)(a)

CDR Code: 0450

Class FEL/B(V)

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT

At a Court of General Sessions, convened on March 22, 2007, the Grand Jurors of Beaufort County present upon their oath:

**TRAFFICKING IN CRACK COCAINE OVER 10 GRAMS BUT LESS THAN
28 GRAMS**

That Turuk Remar Saunders did in Beaufort County on or about February 23, 2007, knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase or bring into this State, or did knowingly actually or constructively possess or did knowingly attempt to become in actual or constructive possession of more than 10 grams but less than 28 grams of Crack Cocaine or any mixture thereof, all in violation of Section 44-53-375 Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ISAAC M. STONE, III, SOLICITOR

WITNESSES

R. McIntosh/BCSO

ARREST WARRANT NUMBER

J331864

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 4/23/07

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2007-GS-07-00509

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

MARCH 2007 TERM

THE STATE
vs.

TURUK REMAR SAUNDERS

Indictment for**USE OF A FIREARM DURING
COMMISSION OF A VIOLENT CRIME**

SC Code: 16-23-0480

CDR Code: 0549

Class FEL/F

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT

At a Court of General Sessions, convened on March 22, 2007, the Grand Jurors of Beaufort County present upon their oath:

USE OF A FIREARM DURING COMMISSION OF A VIOLENT CRIME

That Turuk Remar Saunders did in Beaufort County on or about February 23, 2007, possess or visibly display a firearm or visibly display a knife during the commission or attempted commission of a violent crime, to wit: Trafficking Crack, in violation of Code Section 16-23-490, Code of Laws of South Carolina, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ISAAC M. STONE, III, SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

AFFIDAVIT OF
ANDRE BENJAMIN

I, ANDRE BENJAMIN, HAVING BEEN FIRST DULY SWORN UPON MY OATH, DEPOSE AND SAY THAT THE MATTERS AND STATEMENTS HEREIN ARE TRUE AND I DECLARE UNDER THE PENALTY OF PERJURY.

1. FEBRUARY 22, 2007, I WENT TO 11 BAY PINE ROAD IN BEAUFORT COUNTY.
2. AS I WALKED INSIDE THE TRAILER WITH WILLIAM REESE THERE WAS ONLY TWO OTHER PEOPLE IN THE TRAILER BESIDE REESE AND I, AKEEM AND JARRET.
3. I SPOKE TO JARRET AS HE WAS PLAYING A VIDEO GAME BUT I DID GO TO THE BACK ROOM TO TALK WITH AKEEM BECAUSE I KNEW THAT AKEEM LIVED THERE.
4. AFTER WE LEFT THE TRAILER WE WERE PULLED OVER BY UNDERCOVER AGENTS AND REESE WAS CHARGED WITH THE MARIJUANA THAT I HAD PURCHASED FOR HIM.
5. MY WIFE, KEICA BENJAMIN EXPLAINED TO ME LATER ABOUT THE ACTIVITIES THAT REESE WAS INVOLVED IN AND SHE WANTED ME TO GO TELL THE TRUTH ABOUT THE ENTIRE SITUATION. I CONTACTED TURUK SAUNDERS GIRL FRIEND "TYECE", AND I INFORMED HER THAT I WANTED TO TESTIFY UPON HIS BEHALF.
6. MAY 24-26, 2010 I APPEARED AT THE BEAUFORT COUNTY COURTHOUSE ALONG WITH MY WIFE TO TESTIFY ABOUT WHAT TRULY HAD TRANSPIRED.
7. THAT DAY, THAT I ARRIVED AT THE TRAILER TURUK SAUNDERS WAS NOT THERE NOR DID WILLIAM REESE SEE HIM THERE AT 11 PINE BAY ROAD IN BEAUFORT COUNTY.
8. MY BROTHER INLAW WILLIAM REESE GAVE FALSE TESTIMONY UNDER OATH THROUGH OUT TURUK SAUNDERS ENTIRE TRIAL AND I WAS THERE AT THE COURTHOUSE TO TELL THE TRUTH ABOUT WHAT WAS WRONG TO BE MADE RIGHT.

FURTHER AFFIANT SAYETH NOT,

S/ Andre Benjamin
ANDRE BENJAMIN, AFFIANT
SCD 100724991
lff 8-23-2016

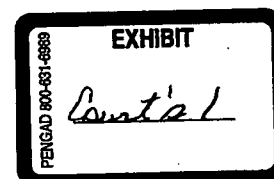
SWORN TO AND BEFORE ME THIS
26th DAY OF October, 2012
[Signature] (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: January 29, 2017



Turuk Saunders v. State of South Carolina**Case No.: 2012-CP-07-4095****INDEX**

- 1. Applicant's Amended Application for Post-Conviction Relief**
- 2. Failure to Challenge Search Warrant**
 - a. Search Warrant**
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 - c. 1/2/07 Receipt #576655 for \$550.00**
 - d. State v. Flowers, 360 S.C. 1, 598 S.E.2d 725 (2004)**
 - e. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004)**
 - f. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (1994)**
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- 4. Failure to Argue Admissibility of Prior Convictions**
 - a. Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000)**
 - b. State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2006)**
 - c. State v. Howard, 384 S.C. 212, 682 S.E.2d 42 (2009)**
- 5. Failure to Object/Renew/Preserve**
 - a. Transcript Volume 3, pp.34-35**



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
TURUK SAUNDERS #199803,	)	Case No.: 2012-CP-07-4095
Applicant	)	
-versus-	)	AMENDED APPLICATION FOR POST
	)	CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
Respondent	)	

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

Defendant, by and through his undersigned attorney, hereby submits this Amended Application for Post Conviction Relief, seeking a vacation of his convictions and sentencing. This Application amends Defendant's *pro se* Application filed November 30, 2012.

1. Applicant is detained at Broad River Correctional Institution, 4460 Broad River Road, Columbia SC 29210.
2. The sentence was imposed by the Beaufort County Court of General Sessions, the Honorable J. Ernest Kinard, Jr. presiding.
3. Names of Co-Defendant(s): Akeem Saunders, Jarret Jackson, Elijah Clark, Jonathan Kelly.
4. The indictment numbers upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-07-0505 (PWID Marijuana);
 - (b) 2007-GS-07-0506 (PWID Cocaine);
 - (c) 2007-GS-07-0507 (PWID Ecstasy);
 - (d) 2007-GS-07-0508 (Trafficking Crack Cocaine 10-28 g);
5. The date upon which sentence was imposed and the terms of the sentence:

Defendant was sentenced concurrently for third and subsequent offenses as follows after being found guilty on the above counts by a jury on May 26, 2010:

 - (a) PWID Marijuana 3rd- 20 years;
 - (b) PWID Cocaine 3rd- 27 years;

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 BEAUFORT COUNTY, SC
 CLERK OF COURT

(c) PWID Ecstasy 3rd- 20 years;

(d) Trafficking Crack 3rd- 27 years and \$50,000

6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from the judgment of conviction and sentence.
8. (a) Applicant appealed to the SC Court of Appeals
 - (b) Applicant's conviction and sentence was affirmed in Unpublished Opinion No. 2012-UP-456
 - (c) The date of each such result: affirmed on July 25, 2012
9. If you answered "no" to (7), state your reason for not so appealing: N/A
10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

Ineffective assistance of trial counsel

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

Trial counsel failed to properly challenge the issue of probable cause for issuance of the search warrant which led to the State's discovery of the drugs for which Applicant was charged.

Trial counsel failed to properly argue against the admissibility of testimony of Witness Reeves with regard to State v. Lyle and SCRE Rule 404(b), or under any other theory.

Trial counsel failed to argue and obtain a ruling on the admissibility of Defendant's prior record for the purposes of impeachment.

Trial counsel failed to fully discuss the benefits and pitfalls of Applicant testifying because he did not obtain a ruling on the admissibility of Applicant's prior convictions, thereby preventing Applicant from making a fully informed decision about whether or not he would testify.

Trial counsel failed to call exculpatory witnesses who would have refuted testimony offered by the State, despite their ability, availability and willingness to testify.

Trial counsel failed to properly renew and preserve the issue of the admissibility of Witness Reeves' testimony, thereby procedurally barring and preventing same from being considered on appeal.

Trial counsel failed to request a jury instruction from the Court regarding the limited purpose of admissibility of testimony admitted pursuant to State v. Lyle.

12. Prior to this application, Defendant has not filed any petitions, other than specified in (8) with this or any other Court.

13-16. N/A

17. Defendant was not represented by an attorney at his arraignment. He was represented by Cory H. Fleming at his trial and sentencing, and by Nicole N. Mace on his direct appeal.

18. Circuit Court motions, trial and sentencing:

Cory H. Fleming
P.O. Drawer 507
Beaufort, SC 29901

Appeal to SC Court of Appeals:

Nicole N. Mace
1341 44th Avenue N, Ste. 205
Myrtle Beach, SC 29577-5710

19. State clearly the relief you seek in filing this application:

Vacation of Defendant's convictions and sentencing.

20. Defendant is not under sentence from any other court.

Respectfully submitted,



Scott W. Lee
Attorney for Applicant
Post Office Box 2124
Beaufort, South Carolina 29901
(843) 986-9030

Beaufort, South Carolina

August 21, 2013

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

COPY

SEARCH WARRANT

DATE February 22, 2007

OFFICER Robin McIntosh

Certified to be a true and correct
copy of the original document on file
with the Office of Sheriff for Beaufort County.

Michael M. Holtzfeld
Chief Deputy Beaufort County Sheriff's Office

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

SEARCH WARRANT

611 Form Approved by
S.C. Attorney General
Section 17-13-160
March 15, 1918

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF BEAUFORT

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure
under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

**DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED**

SEE EXHIBIT "C"

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize
such property if found:

DESCRIPTION OF PROPERTY

SEE EXHIBIT "B"

Certified to be a true and correct
copy of the original document on file
with the Office of Sheriff for Beaufort County.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

Michael M. Hatfield
Chief Deputy Beaufort County Sheriff's Office

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy
of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such
search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person
in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy
shall be attached to a prominent place on such premises.

Beaufort, S.C.
02/22, 2007

AS

(L.S.)

My appeared before me, one Robin McIntosh

, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

SEE EXHIBIT "B"

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

SEE EXHIBIT "C"

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

SEE EXHIBIT "A"

Sworn to and Subscribed before me

this 22 day of Feb 2007

Signature of Judge

(L.S.)

Robin McIntosh

Affiant

Address 2001 Duke Street

BEAUFORT, SC

Phone (843) 757-1575

Certified to be a true and correct
copy of the original document on file
with the Office of Sheriff for Beaufort County.

Michael M. Halgield
Chief Deputy Beaufort County Sheriff's Office

I received the attached Search Warrant 2-22-07,

, and have executed it as follows 613

On 2-23-07, at 0107 o'clock A M, I searched
(the person) described in the warrant and (the premises)

I left a copy of the warrant with on kitchen table of residence

Name of person searched or "at the place of search" with
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

see attached

This inventory was made in the presence of MSgt. C. Sankowski
AND PFC H. Criss

I swear that the Inventory is a true and detailed account of all property taken by me on the warrant.

SWORN to before me this 15th

DAY OF March, 2007

[Signature] (L.S.)
Signature of Judge

[Signature]
(Signature of Officer Executing Warrant)

Certified to be a true and correct
copy of the original document on file
with the Office of Sheriff for Beaufort County.

Michael M. Hatfield
Chief Deputy Beaufort County Sheriff's Office



**OFFICE OF SHERIFF
BEAUFORT COUNTY**

P.O. BOX 1758
BEAUFORT, SOUTH CAROLINA 29901

AREA CODE (843)

SHERIFF	470-320
CHIEF DEPUTY	470-318
CRIMINAL RECORDS	470-318
CIVIL RECORDS	470-318
FAX #	470-318

P.J. Tanner
Sheriff

**STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT**

EXHIBIT A

SEARCH WARRANT AFFIDAVIT:

Personally appeared before me, Robin McIntosh, who being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of section 17-13-140, 1976 Code of Law of South Carolina, as amended, is located on the following premises in this county.

I have been a sworn and certified South Carolina Police Officer since 2002. I have participated in and conducted numerous criminal investigations, including illicit drug investigations, for the past year. These investigations resulted in numerous arrests and seizures of drugs. I am currently assigned as an Investigator with the Beaufort / Jasper Multi-Agency Drug Task Force.

I have attended several law enforcement schools related to the enforcement of controlled substance laws, and I have read numerous papers, articles, and books dealing with the enforcement of drug laws and the effects of illicit drugs. I have worked numerous hours with more tenured drug investigators and participated in the preparation and service of drug related search warrants throughout both Beaufort and Jasper County in the State of South Carolina.

The information provided herein is based upon my own investigation, as well as the investigations of agents of the Beaufort / Jasper Multi-Agency Drug Task Force, whose results have been provided to me.

Affiant

Robin McIntosh

Signature of Judge

DB

(L.S.)

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copy of the original document on file
with the Office of Sheriff for Beaufort County.

Michael M. Holtfield
Chief Deputy Beaufort County Sheriff's Office

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

EXHIBIT B

DESCRIPTION OF PROPERTY SOUGHT

Any and all illicit narcotics or drugs, to include, but not limited to: Marijuana, Cocaine, Hashish and Crack Cocaine. Any items, devices, containers, implements, or tools commonly associated with the use, sale, manufacturing, storage, transportation, or distribution of illicit drugs. Any proceeds or records of proceeds of illicit drug transactions to include, but not limited to, currency, ledgers, or magnetic media. Any items, which would tend to identify persons, found in the place to be searched. Any and all firearms and dangerous weapons present.

Affiant

Robi M. Santos

Signature of Judge

DB

(L.S.)

2/22/07

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with the Office of Sheriff for Beaufort County.

Michael M. Hatfield
Chief Deputy Beaufort County Sheriff's Office

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

EXHIBIT C

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

A grey, 20'x 40' double wide mobile with black shutters and black trim located at [REDACTED], Burton, SC Beaufort County. The home has a concrete front porch and treated wood deck on the rear of the home. The home is a three bedroom, two bathroom home. The mobile home is located down a dirt driveway approximately fifty (50) feet from the roadway. Upon turning onto Bay Pines Rd. from Shanklin Rd., the mobile home is located at the second lot on the left side of the roadway. There are numerous vehicles parked throughout the yard, with a blue Chevy Caprice on the left side of the trailer parked next to a utility pole which is believed to be disabled. Also to be searched, any outbuildings located on the property and any vehicles located on the property at the time of the execution of the search warrant.

Affiant

Robin McIntosh

Signature of Judge

DF

(L.S.)

2/22/07

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copy of the original document on file
with the Office of Sheriff for Beaufort County.

Michael M. Hatfield
Chief Deputy Beaufort County Sheriff's Office

**Reason For Affiant's Belief That The
Property Sought Is On The Subject Premises**

1. That members of the Beaufort / Jasper Multi-Agency Drug Task Force have received several anonymous complaints over the last month of illegal drug activity occurring at the residence located at [REDACTED] Burton, SC Beaufort County. The Drug Task Force had received information that illegal drugs were being sold and distributed from this residence. Based on these complaints, on 2-22-07, members of the Beaufort/Jasper Multi-Agency Drug Task Force were conducting surveillance in the area of the residence located at [REDACTED]. The residence was identified as a grey double wide mobile home with black shutters and black trim with a white mailbox located directly across the street with the number 11 on it. During the surveillance, numerous vehicles were observed coming to the residence, staying a short time, then leaving. This traffic observed appeared to be consistent with drug enterprise traffic.

2. During the surveillance conducted on 2-22-07, Lt. Woodward observed a white Ford Crown Victoria 4-door vehicle pull into the driveway of the residence. Two black male occupants exited the vehicle and entered the residence for a short period of time, then returned to the vehicle. The vehicle then left the residence, turning right back onto Bay Pines Rd, headed back towards Shanklin Rd. The vehicle was then observed turning left onto Shanklin Rd., towards Hwy 21. This information was relayed to SSgt. Faucett and I (LCpl. McIntosh). At that time, SSgt. Faucett and I observed the vehicle coming towards us on Shanklin Rd. We pulled in behind the vehicle, noting it displayed SC license plate [REDACTED]. The vehicle continued on Shanklin Rd. turning right onto Hwy. 21, headed towards Beaufort. The vehicle continued, finally making a right turn from Hwy. 21 onto [REDACTED] (Hwy 280).

Shortly after turning onto [REDACTED] a traffic stop was initiated on the vehicle for a traffic violation committed on Parris Island Gateway. The traffic stop was conducted and vehicle stopped, pulling into the driveway of the residence located at [REDACTED].

The traffic stop was conducted at approximately 1826 hours and resulted in the arrest of the rear black male passenger, identified as William Reeves for Simple Possession of Marijuana, and rear female passenger, identified as Kimberly Wilson, for Simple Possession of Marijuana and Possession of a Controlled Substance (Percocet). Reeves was found to have a small quantity of green leafy substance believed to be marijuana (less than 1 oz.). Wilson was also found to have a small quantity of green leafy substance believed to be marijuana (less than 1 oz.). The front black male passenger, identified as Andre Soloman Benjamin, was found to have an open container of liquor. The driver was identified as Keica Benjamin.

Upon consensual search of the vehicle given by driver, Keica Benjamin, a small beige jewelry box containing a small quantity of white rock substance believed to be crack cocaine was found underneath the driver's seat.

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Michael M. Hotzfeld
Chief Deputy Beaufort County Sheriff's Office

[Signature]
2/22/07
[Signature]

3. Upon interview of William Reeves, he advised that the crack cocaine belonged to his brother-in-law, Andre Benjamin, who was in the front passenger seat of the vehicle at the time of the traffic stop. Reeves advised that just prior to the traffic stop, he and Benjamin had gone to the residence located at the second lot on the left to purchase drugs. Reeves advised that he and Benjamin went into the residence where he (Reeves) purchased a "dime bag" quantity of marijuana from a black male known to him as "Big Tee" for \$10.00 (US currency). Reeves advised that Benjamin may have purchased the crack cocaine found during the search, but he did not see the transaction. Reeves advised that he and Benjamin then left the trailer, got back in the vehicle and left. Reeves advised that after getting pulled over, Benjamin asked him to claim the crack cocaine. Reeves provided a written statement documenting the events leading up to and including the purchase of the drugs and his subsequent arrest.

4. Based on the above statement of facts collected by various task force officers including the affiant, it is the affiant's belief that the residence is used to conduct a continuing criminal enterprise involving the Storage, Sale and Distribution, and Transportation of illicit drugs, in the Beaufort County, South Carolina area.

5. A no-knock warrant is requested due to the possible destruction of evidence and that drug traffickers are known to possess firearms.

It is also the affiant's belief that there is presently concealed with in the premises to be searched, items which constitute evidence of violations of sections 44-53-370 and 44-53-375 of the South Carolina Code of Laws, 1976 as amended. The source of your affiant's information and the grounds for his belief are based as follows:

Based upon your affiant's training, experience, and participation in other drug investigations, I know:

a) That drug traffickers maintain books, records, receipts, notes, ledgers, money orders, and other papers relating to the negotiation, purchase, transportation, and distribution of controlled substances. That drug traffickers commonly "front" (provide on consignment) controlled substances. That the aforementioned books, records, receipts, notes, ledgers, etc., are maintained where the traffickers have ready access to them.

b) That drug traffickers of controlled substances commonly maintain addresses and/or telephone numbers in books or papers, which reflect names, addresses and/or telephone numbers of their associates in the trafficking organization.

c) That drug traffickers maintain paraphernalia for manufacturing, weighing, cutting, packaging, storing, and distributing controlled substances, including scales, baggies, utensils, etc.

d) That drug traffickers take or cause to be taken, photographs of themselves, their associates, their property, and their product, and that these photographs are usually in their possession.

e) That drug traffickers must maintain on hand, large amounts of U.S. Currency in order to maintain and finance their on-going narcotics business.

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Michael M. Hatfield 22/67
Chief Deputy Beaufort County Sheriff's Office

f) That drug traffickers very often place assets in names other than their own to avoid detection/seizure of these assets by law enforcement authorities.

g) That even though these assets are in the name of others, the drug trafficker actually owns and continues to use these assets and exercise dominion and control over them.

h) That it is common for drug traffickers to hide contraband proceeds of drug sales, and records of drug transactions in secure locations within their residence and within vehicles and outbuildings at their residence for their ready access, and to conceal them from law enforcement authorities.

i) That persons involved in drug trafficking conceal in their residence, large amounts of currency, items of value and/or proceeds of drug transactions, evidence of financial transactions relating to obtaining, transferring, secreting, or spending large amounts of money made from engaging in drug trafficking activities.

j) That people in general, drug traffickers included, maintain evidence of residency, occupancy and/or ownership of premises and locations described in the warrant to include: telephone and utility bills, canceled checks, bank statements, keys, rental/lease agreements, tax returns, etc.

k) That drug traffickers commonly have in their possession, that is on their person, at their residence or place of business, firearms, including but not limited to: handguns, revolvers, rifles, shotguns, and other weapons. Said property may include, but not limited to: drugs, jewelry, drug paraphernalia, books, records, U.S. Currency, etc.

l) That drug traffickers commonly have other associates holding the illegal drugs, to avoid detection by law enforcement officers, this officer asked that all persons present during the execution of this search warrant, be subjected to search.

Affiant

Robin M. Dutton

Signature of Judge

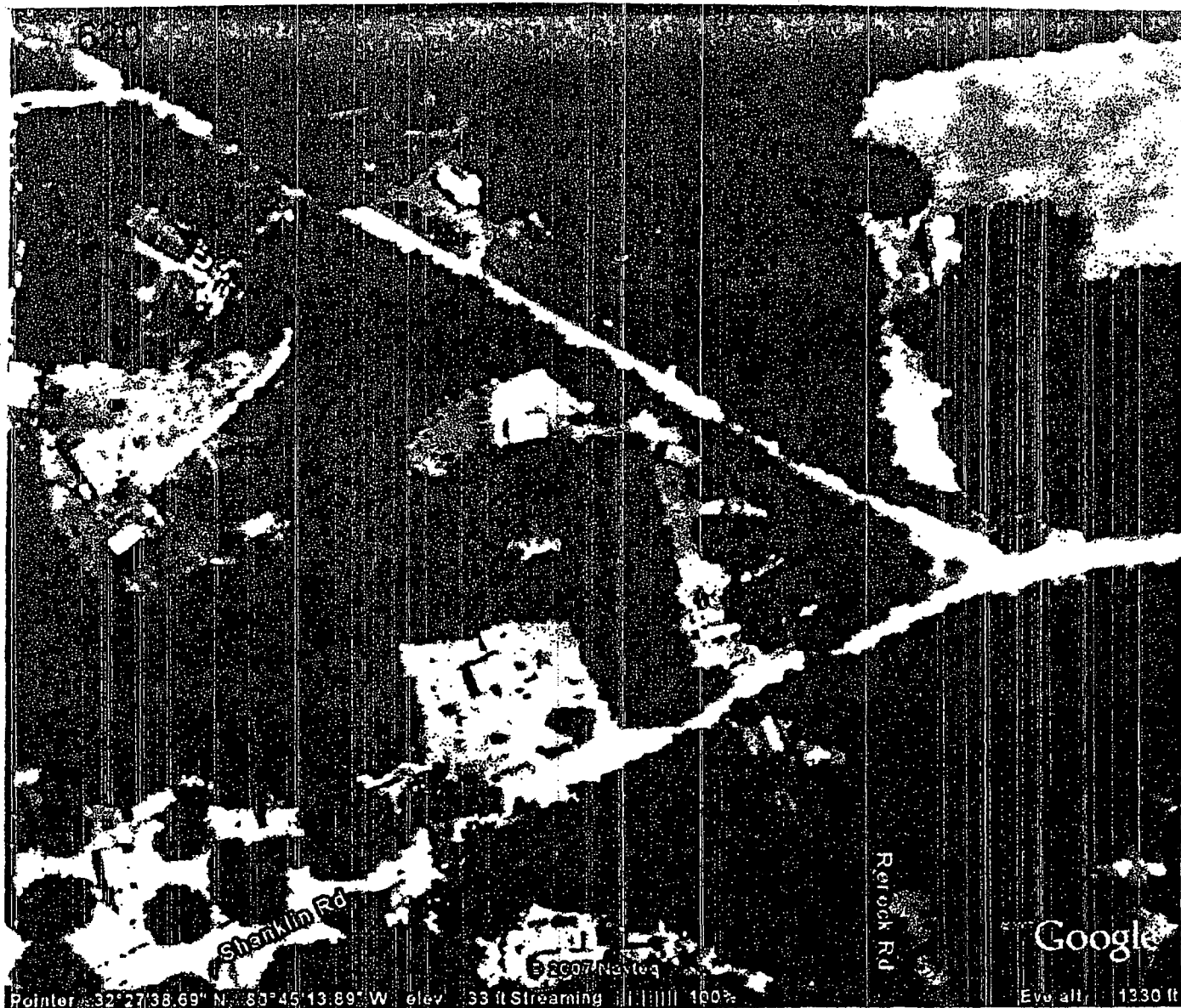
DA

(L.S.)

2/22/07

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with the Office of Sheriff for Beaufort County.

Michael M. Hatfield
Chief Deputy Beaufort County Sheriff's Office



DS
2/22/07

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pm

Michael M. Hatfield
Chief Deputy Beaufort County Sheriff's Office

State vs. Thruok Saunders
Jury Trial, Volume 1 of 3
May 24, 2010

1 MS. TANNER: Yes, sir.

2 THE COURT: It's just like why did you stop
3 that blue Chevrolet, it was a BOLO out, you know,
4 without going into how it was. It was, you know, a
5 BOLO said stop a blue vehicle. So there you go.

6 All right. What else?

7 MR. FLEMING: Thank you, Your Honor.

8 Then with regards to the search warrant
9 itself, I'm in a quandary. And I'll sort of explain
10 it to you for just a second and then you -- maybe we
11 can sort of move forward from that.

12 It is our belief, it is our position, that my
13 client neither owned, operated, stayed in, domiciled,
14 spent the night, or in any other way had any control
15 over the trailer in question. That would lend me to
16 the clear conclusion that he has no standing to
17 challenge a search warrant because he's not the
18 subject of the search.

19 THE COURT: He just happened to be there when
20 the search was conducted?

21 MR. FLEMING: That is correct. And that --

22 THE COURT: As I understand the facts. I
23 mean, I don't know anything.

24 MR. FLEMING: He was -- I believe that the
25 State will present testimony that my client was

State vs. Turuk Saunders
Jury Trial, Volume 1 of 3
May 24, 2010

1 present when the search warrant was effected and he
2 was apprehended on the front-porch steps momentarily
3 after the initial entry.

4 THE COURT: On the front steps smoking a
5 marijuana cigarette and throwing the crack down? No.
6 Not really.

7 MR. FLEMING: I don't expect that particular
8 testimony, but --

9 THE COURT: We wouldn't be here, would we?

10 MR. FLEMING: No, sir.

11 However, as such, I however believe that
12 they're going to attempt to show that my client was
13 in some way in possession or control of that house
14 and, as a result, I believe that I am entitled to
15 challenge the search warrant, even though I don't
16 think my client has standing.

17 And the quandary that I find myself in is I
18 don't want to in any way prohibit my ability to argue
19 our position, which is that he has no ownership,
20 control, et cetera, but at the same time defend the
21 allegations of the search warrant.

22 THE COURT: Well, unfortunately, you can't
23 have it both ways.

24 MR. FLEMING: Well, then --

25 THE COURT: He was either -- he was just

State vs. Turuk Saunders
Jury Trial, Volume 1 of 3
May 24, 2010

1 there, which is your best position, in the abstract.
2 I don't know.

3 MR. FLEMING: Well, then, I will not choose to
4 have it both ways, then.

5 I will not challenge, then, the validity of
6 the search warrant, subject, of course, to the ruling
7 that you made concerning what was in it.

8 THE COURT: I don't know if -- if it develops
9 that somehow they say he was in ownership and
10 control, then it reverts back, doesn't it? If they
11 say he was in control of the premises, then that
12 relaxes certain rulings. But I don't know what's
13 going to transpire. So there you go.

14 MR. FLEMING: Well, to predict -- at my
15 peril here, to predict what I think will transpire,
16 I believe that they are going to call the physical
17 owner or the landlord, Robert Jenkins, and attempt
18 through his testimony to show that my client, at
19 the bare minimum, paid rent at this trailer. Whether
20 true or not, I believe that's what the testimony
21 will be.

22 And, again, you see my position. And I
23 will -- I do want my cake and eat it, too, but I am
24 certainly not going to jeopardize my client's
25 position concerning our contention that he has no

State vs. Tazuk Saunders
Jury Trial, Volume 1 of 3
May 24, 2010

1 control.

2 THE COURT: Assuming it shakes down like that,
3 then that's just facts in the case. A says he
4 rented; he says he doesn't rent it. If he testifies,
5 which he certainly does not have to do. If they say
6 he rented it, he says he didn't rent it.

7 MR. FLEMING: Well, it seems then at this
8 juncture, then, barring something else, that I will
9 not challenge the validity of the search warrant,
10 again, subject to renewing or just reaffirming my
11 motion concerning the hearsay statements that would
12 not be admissible unless I open the door.

13 THE COURT: Got it.

14 MR. FLEMING: There is -- that, then,
15 eliminates a great portion of what we were going
16 to do this afternoon.

17 There are two other small matters, Your Honor.

18 I don't believe, then, that they are going to
19 then talk about an alleged marijuana sale earlier.
20 But I want to be very specific about that. It is
21 both contained in the search warrant, this
22 information, and also contained in an independent
23 report. There is a statement by an individual, a
24 witness by the name of Reeves, that -- concerning the
25 sale and the possible involvement of my client.

RECEIPT

DATE 11/28/06 No. 575653

RECEIVED FROM Mr. Raymond Clark \$ 4500.00

Four thousand, five hundred, and no/100 DOLLARS

☐ FOR RENT
☒ FOR 1994 Cadi

ACCOUNT	<u>4500.00</u>	☒ CASH	FROM <u>PA IN</u> TO <u>FEEL</u>
PAYMENT	<u>4500.00</u>	☐ CHECK	BY <u>Robert J. Parker</u>
BAL. DUE	<u>—</u>	☐ MONEY ORDER	

1182

RECEIPT

DATE 12/2/06 No. 576654

RECEIVED FROM Mr. T. Sanders \$ 550.00

Five hundred fifty & 00/100 DOLLARS

☐ FOR RENT
☒ FOR Dec 2006

ACCOUNT	<u>550.00</u>	☒ CASH	FROM <u>Nov 25</u> TO <u>Dec 25</u>
PAYMENT	<u>550.00</u>	☐ CHECK	BY <u>Robert J. Parker</u>
BAL. DUE	<u>—</u>	☐ MONEY ORDER	

1182

RECEIPT

DATE 1/2/07 No. 576655

RECEIVED FROM Mr. T. Sanders \$ 550.00

Five hundred, fifty & 00/100 DOLLARS

☐ FOR RENT
☒ FOR Jan. 2007

ACCOUNT	<u>550.00</u>	☒ CASH	FROM <u>Dec 25/06</u> TO <u>Jan 2/07</u>
PAYMENT	<u>550.00</u>	☐ CHECK	BY <u>Robert J. Parker</u>
BAL. DUE	<u>—</u>	☐ MONEY ORDER	

1182

RECEIPT

DATE 11/29/07 No. 576656

RECEIVED FROM Harold Lawrence \$ 500.00

Five hundred, and no/100 DOLLARS

☐ FOR RENT
☒ FOR Edgar 2007

ACCOUNT	<u>500.00</u>	☒ CASH	FROM <u>Dec</u> TO <u>JAN</u>
PAYMENT	<u>500.00</u>	☐ CHECK	BY <u>Robert J. Parker</u>
BAL. DUE	<u>—</u>	☐ MONEY ORDER	

1182

C

Court of Appeals of South Carolina.
The STATE, Respondent,
v.
Damico S. FLOWERS, Appellant.

No. 3828.

Submitted March 19, 2004.

Decided June 21, 2004.

Background: Defendant was convicted in the Circuit Court, Charleston County, A. Victor Rawl, J., of trafficking in cocaine and other offenses. He appealed.

Holdings: The Court of Appeals, Howard, J., held that:

- (1) defendant had reasonable expectation of privacy in homeowner's residence, but
- (2) defendant's denial of police officers' request to search residence did not deprive homeowner of right to subsequently grant consent.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚡ 1158.2

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.2 k. Search and arrest. Most CitedCases

(Formerly 110k1158(2))

Appellate standard of review in Fourth Amendment search and seizure cases is limited to determin-

ing whether any evidence supports the trial court's finding, and the appellate court may only reverse where there is clear error. U.S.C.A. Const. Amend. 4.

[2] Criminal Law 110 ⚡ 392.4(2)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k392.1 Wrongfully Obtained Evidence.

110k392.4 Exclusionary Rule in General

110k392.4(2) k. Searches, seizures, and arrests. Most Cited Cases
(Formerly 110k394.4(1))

Evidence obtained as a result of an unlawful search constitutes a violation of the Fourth Amendment and is inadmissible at trial. U.S.C.A. Const. Amend. 4.

[3] Searches and Seizures 349 ⚡ 26

349 Searches and Seizures

349I In General

349k25 Persons, Places and Things Protected

349k26 k. Expectation of privacy. Most Cited Cases

When a defendant has a reasonable expectation of privacy in the property being searched, Fourth Amendment rights apply to the search. U.S.C.A. Const. Amend. 4.

[4] Searches and Seizures 349 ⚡ 26

349 Searches and Seizures

349I In General

349k25 Persons, Places and Things Protected

349k26 k. Expectation of privacy. Most Cited Cases

A reasonable expectation of privacy exists in property being searched when the defendant has a relationship with the property or property owner. U.S.C.A. Const.Amend. 4.

[5] Searches and Seizures 349 ↪26

349 Searches and Seizures

349I In General

349k25 Persons, Places and Things Protected

349k26 k. Expectation of privacy. Most Cited Cases

Although a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy, an overnight guest may have a reasonable expectation of privacy in the host's property. U.S.C.A. Const.Amend. 4.

[6] Searches and Seizures 349 ↪173.1

349 Searches and Seizures

349V Waiver and Consent

349k173 Persons Giving Consent

349k173.1 k. In general. Most Cited Cases

Third party consent may be given by one who has common authority over or some other sufficient relationship to the premises or effects being searched; common authority does not require common ownership, but merely mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for the searching officers to believe that the person granting consent had the authority to do so. U.S.C.A. Const.Amend. 4.

[7] Searches and Seizures 349 ↪174

349 Searches and Seizures

349V Waiver and Consent

349k173 Persons Giving Consent

349k174 k. Owners of property; hosts and guests. Most Cited Cases

A homeowner may grant consent to search the premises on which a criminal defendant resides if the homeowner possesses common authority over or sufficient relationship to the premises or effects to be inspected. U.S.C.A. Const.Amend. 4.

[8] Searches and Seizures 349 ↪26

349 Searches and Seizures

349I In General

349k25 Persons, Places and Things Protected

349k26 k. Expectation of privacy. Most Cited Cases

Defendant had reasonable expectation of privacy in homeowner's residence, where defendant and homeowner testified that defendant spent approximately five nights per week at residence, kept change of clothes at residence, and occasionally paid the rent. U.S.C.A. Const.Amend. 4.

[9] Searches and Seizures 349 ↪174

349 Searches and Seizures

349V Waiver and Consent

349k173 Persons Giving Consent

349k174 k. Owners of property; hosts and guests. Most Cited Cases

Defendant's denial of police officers' request to search residence did not deprive homeowner of right to subsequently grant consent, even though defendant occasionally resided at residence, where defendant did not claim to have exclusive control over any portion of residence. U.S.C.A. Const.Amend. 4.

[10] Searches and Seizures 349 174349 Searches and Seizures349V Waiver and Consent349k173 Persons Giving Consent

349k174 k. Owners of property; hosts and guests. Most Cited Cases

A homeowner does not relinquish control over the premises to a third party simply because the third party occasionally resides in the home, for purposes of determining the homeowner's authority to consent to a search. U.S.C.A. Const.Amend. 4.

****726 *3** Assistant Appellate Defender Aileen P. Clare, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General W. Rutledge Martin, all of Columbia; ****727** and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

HOWARD, J.:

Damico S. Flowers appeals his convictions for trafficking in cocaine; possession with intent to distribute cocaine near a school, park or playground; trafficking in crack cocaine; possession with intent to distribute crack cocaine near a school, park or playground; possession of marijuana with intent to distribute; possession of marijuana near a school, park or playground; possession of a pistol by a person under twenty-one years of age; and possession of a pistol during the commission of a violent crime. He argues the circuit court erred by admitting evidence obtained pursuant to a warrantless search of his girlfriend's residence, when he had previously denied officers' request to enter the residence. We affirm.^{FN1}

FN1. Because oral argument would not aid

the court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

FACTUAL/PROCEDURAL BACKGROUND

On August 14, 2001, Officer Phillip Kirkland and Sergeant Delmar Johnson went to 1918 Graham Street to investigate a complaint of drug activity and shots being fired in the yard. The officers knocked on the door and identified themselves as police. A male voice from inside the home told the officers to come in. As they stepped into the entryway of the home, *4 Flowers jumped up and told the officers to step back outside onto the porch. The officers complied and Flowers followed them out, closing the door behind him. Flowers told the officers he did not own the residence but the owner would be returning soon.

Shortly thereafter, the owner of the residence, Latonya Simmons, arrived in her vehicle. Sergeant Johnson approached Simmons while Officer Kirkland remained with Flowers. According to Sergeant Johnson, he asked Simmons if any drugs were in the residence, and she indicated there were. Sergeant Johnson then asked Simmons if he could search the house. With Simmons' consent, Sergeant Johnson and Simmons entered the residence.

Inside the home, Sergeant Johnson saw bags of marijuana and crack cocaine lying on a speaker in plain view. Additionally, he saw a gun lying on a nearby table. Both Simmons and Flowers were taken into custody. Simmons then signed a consent to search form. A further search of the residence revealed more illegal drugs. Subsequently, Flowers confessed that all of the contraband belonged to him.

At trial, Flowers moved to suppress the drug evidence, arguing it was obtained pursuant to a warrantless search of his girlfriend's residence over his objections. Flowers claimed he had a reasonable expectation of privacy in the residence, requiring the

officers to heed his refusal to allow a search, notwithstanding Simmons' later consent. The circuit court denied the motion, finding although Flowers had a reasonable expectation of privacy in the residence, his statements to the police indicating he did not own the house and the owner would return shortly limited his authority to the time until the owner returned. The circuit court found Flowers did not have standing to challenge Simmons' consent to search the residence.

LAW/ANALYSIS

Flowers argues the circuit court erred by admitting evidence obtained pursuant to a warrantless search of his girlfriend's⁵ residence, when he had previously denied officers' request to enter the residence.^{FN2}

^{FN2} Initially, we note Flowers does not contend this is a landlord-tenant relationship. Nor does he claim to have exclusive control over any portion of the residence.

[1] "[T]he appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error." *State v. Green*, 341 S.C. 214, 219 n. 3, 532 S.E.2d 896, 898 n. 3 (Ct.App.2000) (citing *State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661 (2000)).

^{**728} [2][3][4][5] Evidence obtained as a result of an unlawful search constitutes a violation of the Fourth Amendment and is inadmissible at trial. *State v. Nelson*, 336 S.C. 186, 192 n. 3, 519 S.E.2d 786, 789 n. 3 (1999). When a defendant has a reasonable expectation of privacy in the property being searched, Fourth Amendment rights apply to the search. *Minnesota v. Olson*, 495 U.S. 91, 95-96, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). A reasonable expectation of privacy exists when the defendant has a relationship with the property or property owner. *State v. Missouri*,

352 S.C. 121, 129, 572 S.E.2d 467, 470-471 (Ct.App.2002). Although a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy, an overnight guest may have a reasonable expectation of privacy in the host's property. *Olson*, 495 U.S. at 98-99, 110 S.Ct. 1684.

[6][7] Third party consent may be given by one who has common authority over or some other sufficient relationship to the premises or effects being searched. *State v. Moultrie*, 271 S.C. 526, 528, 248 S.E.2d 486, 487 (1978) (citing *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)). Common authority does not require common ownership, but merely " 'mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable' for the searching officers to believe that the person granting consent had the authority to do so." *Moultrie*, 271 S.C. at 528, 248 S.E.2d at 487 (quoting *Matlock*, 415 U.S. at 171 n. 7). However, a homeowner may grant consent ^{*6} to search the premises on which a criminal defendant resides if the homeowner possesses common authority over or sufficient relationship to the premises or effects to be inspected. *State v. Pressley*, 288 S.C. 128, 130, 341 S.E.2d 626, 627 (1986).

[8] The circuit court found Flowers had a legitimate expectation of privacy in Simmons' residence. Flowers and Simmons both testified Flowers spent approximately five nights a week at Simmons' home, kept a change of clothing there, and occasionally paid the rent. This evidence is sufficient to conclude that Flowers and Simmons had common authority over the residence, and to support the circuit court's finding that Flowers had a reasonable expectation of privacy in Simmons' residence.

[9][10] Flowers argues because he had previously denied the officers' request to search, Simmons did not have authority to subsequently consent to a search. However, Flowers provides no authority for the

proposition that a guest's refusal to consent to a search deprives a homeowner of the right to subsequently grant consent. To the contrary, a homeowner does not relinquish control over the premises to a third party simply because the third party occasionally resides in the home. Pressley, 288 S.C. at 130, 341 S.E.2d at 627; see also State v. Vaster, 24 Wash.App. 405, 601 P.2d 1292, 1294-95 (1979) (holding where a guest does not maintain exclusive control over any portion of the residence, even if the guest has a legitimate expectation of privacy, a homeowner's power to consent to a search of his own home overrides the objection of a guest to a search).

CONCLUSION

As evidence exists to support the circuit court's denial of the motion to suppress, Flowers convictions are

AFFIRMED.

GOOLSBY and BEATTY, JJ., concur.

S.C.App.,2004.
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360 S.C. 1, 598 S.E.2d 725

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361 S.C. 107, 603 S.E.2d 594

(Cite as: 361 S.C. 107, 603 S.E.2d 594)

Page 1

▷

Supreme Court of South Carolina.
The STATE, Respondent,
v.
Victor MISSOURI, Petitioner.

No. 25874.

Heard June 8, 2004.

Decided Sept. 27, 2004.

Background: Defendant charged with trafficking in crack cocaine moved to suppress evidence obtained during execution of search warrant for friend's apartment. The Circuit Court denied motion. Defendant appealed, and the Court of Appeals reversed and remanded. On writ of certiorari, the Supreme Court, 337 S.C. 548, 524 S.E.2d 394, affirmed. On remand, the Circuit Court, Greenville County, H. Dean Hall, J., found that defendant had reasonable expectation of privacy in apartment. The state appealed. The Court of Appeals, 352 S.C. 121, 572 S.E.2d 467, reversed. Defendant petitioned for writ of certiorari.

Holding: The Supreme Court, Toal, C.J., held that defendant had reasonable expectation of privacy in apartment.

Decision of Court of Appeals reversed.

West Headnotes

11 Criminal Law 110 ↪ 1158.2

110 Criminal Law

110XXXIV Review

110XXXIV(O) Questions of Fact and Findings

110k1158.2 k. Search and Arrest. Most

Cited Cases

(Formerly 110k1158(2))

When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is any evidence to support the ruling; the appellate court will reverse only when there is clear error. U.S.C.A. Const.Amend. 4.

12 Searches and Seizures 349 ↪ 26

349 Searches and Seizures

349I In General

349k25 Persons, Places and Things Protected

349k26 k. Expectation of Privacy. Most

Cited Cases

To claim protection under the Fourth Amendment, defendants must show that they have a legitimate expectation of privacy in the place searched. U.S.C.A. Const.Amend. 4.

13 Searches and Seizures 349 ↪ 26

349 Searches and Seizures

349I In General

349k25 Persons, Places and Things Protected

349k26 k. Expectation of Privacy. Most

Cited Cases

A legitimate expectation of privacy is both subjective and objective in nature; the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable. U.S.C.A. Const.Amend. 4.

14 Controlled Substances 96H ↪ 151

96H Controlled Substances

96HIV Searches and Seizures

96HIV(C) Search Under Warrant

96Hk150 Execution and Return of Warrants
in General

96Hk151 k. In General. Most Cited
Cases

Defendant had reasonable expectation of privacy in his friend's apartment, even though detective, during execution of search warrant, found defendant in kitchen standing over several dishes of cooling crack cocaine; defendant and friend testified that they had grown up together and were good friends, defendant had frequently visited apartment in past and occasionally spent night, defendant described apartment as place to get away and find comfort, defendant at times had key to apartment and kept change of clothes there, and defendant paid nothing to use apartment and was there for at least seven hours on day of search. U.S.C.A. Const.Amend. 4.

****594 *109** Assistant Appellate Defender Tara S. Taggart, of South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

Chief Justice TOAL:

This Court granted certiorari to review the court of appeals' decision reversing the trial court, which held that Petitioner Victor Missouri (Missouri) did not have a reasonable expectation of privacy in another's apartment and therefore could not challenge the search of the apartment under the Fourth Amendment. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In early 1995, Greenville detectives were investigating a crack-cocaine ring. The police obtained a warrant to search the apartment of Curtis and Laura Sibert (Siberts) for cocaine. Missouri was in the apartment at the time, standing near a quantity of crack cocaine. Missouri was arrested and charged with trafficking in crack cocaine.

****595** At trial, lead detective Eric Cureton (Detective Cureton) admitted that he lied in the affidavit issued in support of the search warrant. In addition, Missouri argued that exculpatory information was omitted from the affidavit. Nonetheless, the trial court denied Missouri's motion to suppress the evidence obtained in the search. In an unpublished opinion, the court of appeals reversed, ruling that the omitted information was necessary for the magistrate's finding of probable cause, and remanded the matter for a hearing to determine whether Missouri had a reasonable expectation of privacy in the Siberts' apartment. *State v. Missouri*, Op. No. 97-UP-448 (S.C. Ct.App. filed September 15, 1997). This Court affirmed the court of appeals' ruling, holding that the search warrant was ***110** invalid because it was not supported by probable cause. *State v. Missouri*, 337 S.C. 548, 556-557, 524 S.E.2d 394, 398 (1999).

A hearing was then held to determine, as the court of appeals instructed, whether Missouri had a reasonable expectation of privacy in the Siberts' apartment. Missouri and Curtis Sibert (Curtis) testified that are close friends and have known each other for many years. On occasion, Curtis would give Missouri a key to the Siberts' apartment, allowing Missouri to come and go as he pleased. Even though Missouri lived only a few miles away, he would stay at the Siberts' apartment whenever he wanted to "get away." Missouri testified that the apartment was a place of comfort and solace for him and that he felt a sense of privacy there.

The State presented the testimony of the arresting officer, Detective Cureton. When Detective Cureton

conducted surveillance on the Siberts' apartment the day of the arrest, he observed Missouri enter the apartment between 2:30 and 3:00 p.m. Detective Cureton also observed Curtis and his wife Laura purchasing large quantities of baking soda ^{FN1} at different locations around town earlier that day. The police searched the Siberts' apartment between 9:30 and 10:00 p.m.

FN1. Baking soda is used in transforming powdered cocaine into crack cocaine.

When he entered the apartment, Detective Cureton discovered Missouri in the kitchen standing over several dishes of cooling crack cocaine, while Curtis and Laura sat on the couch watching television. Detective Cureton testified that the police confiscated Missouri's keys and that the key ring held only three keys: two car keys and a key to Missouri's residence. In addition, Detective Cureton recovered a black bag belonging to Missouri that contained scales and packaging paper. Detective Cureton testified that Missouri had no other items in the apartment. But on cross-examination, Detective Cureton admitted that he did not know whether Missouri had a change of clothes in the Siberts' apartment at the time of the search.¹

Curtis testified that Missouri did not stay over the night before the search took place and could not remember the last time Missouri had spent the night. Curtis testified that at the time of arrest, (1) Missouri had a key to the apartment; (2) he *111 would not have allowed Missouri to use the apartment if he had known Missouri intended to mix drugs there; and (3) Missouri was in the apartment for social reasons only.

After considering the testimony presented at the hearing, the trial judge found Missouri had a reasonable expectation of privacy in the Siberts' apartment. The court of appeals reversed, holding that Missouri did not have "standing" ^{FN2} because he did not have a

reasonable expectation of privacy in the Siberts' apartment. Missouri was merely a permitted guest conducting business, the court ruled, not an overnight guest entitled to Fourth Amendment protection. *State v. Missouri*, 572 S.E.2d 467, 471, 352 S.C. 121, 130 (Ct.App.2002).

FN2. The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine; instead, the analysis is based on substantive Fourth Amendment law. *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978). The use of the term "standing" has created confusion in this context, and therefore "standing" is no longer appropriate to "connote the legitimate expectation of privacy in the evidence seized or the premises searched." *United States v. Bouffard*, 917 F.2d 673, 675 (1st Cir.1990).

This Court granted Missouri's petition for writ of certiorari to review the following question:

****596** Did the court of appeals err in reversing the trial judge's ruling that Missouri had a reasonable expectation of privacy in the Siberts' apartment?

LAW/ANALYSIS

Standard of Review

[1] When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is *any* evidence to support the ruling. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (emphasis added). The appellate court will reverse only when there is clear error. *Id.*

Reasonable Expectation of Privacy

Missouri argues that he had a reasonable expectation of privacy in the Siberts' apartment at the time the police searched the apartment. We agree.

(Cite as: 361 S.C. 107, 603 S.E.2d 594)

*112 [2][3] The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable. Oliver v. United States, 466 U.S. 170, 177, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (citing Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)).

At the “very core” of the Fourth Amendment is a person's right “to retreat into his own home and there be free from unreasonable government intrusions.” Kyllo v. United States, 533 U.S. 27, 31, 121 S.Ct. 2038, 2041, 150 L.Ed.2d 94 (2001) (citation omitted). What is less clear is whether a person has a legitimate expectation of privacy in the home of another. Three cases from the United States Supreme Court (USSC) provide guidance in our consideration of this question.

When first presented with this question, the USSC held that a defendant could challenge a search under the Fourth Amendment simply by being “legitimately on the premises.” Jones v. United States, 362 U.S. 257, 267, 80 S.Ct. 725, 734, 4 L.Ed.2d 697 (1960), *overruled in part*, United States v. Salvucci, 448 U.S. 83, 89, 100 S.Ct. 2547, 2551, 65 L.Ed.2d 619 (1980) (rejecting the “automatic standing” rule, which conferred standing to any defendant charged with crimes of possession). The standard of simply being “legitimately on the premises” was eventually repudiated as being “too broad a gauge for measurement of Fourth Amendment rights.” Rakas v. Illinois, 439 U.S. 128, 142, 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978).

Nonetheless, the Rakas Court did “not question the conclusion of Jones that the defendant in that case suffered a violation of his personal Fourth Amendment rights.” *Id.* at 141, 99 S.Ct. at 429. In affirming the ultimate conclusion of Jones, the Court was persuaded by the following facts: (1) Jones and the owner of the apartment were friends; (2) *113 the owner had given Jones a key to the apartment; (3) Jones had a suit and shirt in the apartment; (4) Jones had slept there at least once before; and (5) Jones was the sole occupant of the apartment at the time it was searched. *Id.* Accordingly, the Court agreed that the defendant was entitled to Fourth Amendment protection. *Id.*

In a subsequent case, the USSC found that an overnight guest had a reasonable expectation of privacy in another's home. Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). The defendant in Olson was suspected of robbing a gas station and fatally wounding the station manager. An investigation led the police to a house where they thought the suspect was hiding. When the police confirmed that the defendant was inside the upper unit of the home, they drew their weapons, entered the duplex without the owner's permission, found the defendant hiding in a closet, and arrested him. The Minnesota Supreme Court held that the defendant had a “sufficient interest” in the home such that he could challenge the legality**597 of the warrantless search and arrest. *Id.* at 94, 110 S.Ct. at 1687.

The USSC affirmed, concluding that the defendant's status as an overnight guest was “alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.” *Id.* at 96, 110 S.Ct. at 1688. Although the Court noted that the defendant had been staying at the home, sleeping on the floor for several days before the robbery, and had a change of clothes with him, the Court did not articulate what constitutes an “overnight” guest. *Id.* at 97 n. 6, 110 S.Ct. 1688 n. 6. Instead, the Court supported its holding by speaking generally about the social expectations of privacy

recognized by houseguests:

From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.

...

The houseguest is there with the permission of his host, who is willing to share his house and *his privacy* with his guest.

*114 *Id.* at 99, 110 S.Ct. at 1690 (emphasis added). Accordingly, the Court concluded that the defendant's expectation of privacy in the home of another "was rooted in 'understandings that are recognized and permitted by society,' " and therefore the defendant was permitted to challenge the search. *Id.* at 100, 110 S.Ct. at 1690.

Most recently, the USSC held that the defendants did not have a reasonable expectation of privacy in the home of another when the nature of the defendant's visit was purely commercial, the visit was short, and there was no previous connection between the defendants and the lessee. *Minnesota v. Carter*, 525 U.S. 83, 90, 119 S.Ct. 469, 473, 142 L.Ed.2d 373 (1998). The defendants in *Carter* lived out-of-state and used the lessee's apartment for the sole purpose of packaging cocaine. The defendants had never visited the apartment before and stayed for two-and-a-half hours. In exchange for use of the apartment, the defendants gave the lessee one-eighth ounce of cocaine. The Court concluded that the defendants did not have a legitimate expectation of privacy because they were "essentially present for a business transaction and were only in the home a matter of hours." *Id.* at 90, 119 S.Ct. at 473. In addition, the Court was persuaded by the fact that the defendants had no "previous relationship" with the lessee and nothing "to suggest a

degree of acceptance into the household." *Id.* Accordingly, in a 5-4 decision, the Court held that the defendants were not entitled to Fourth Amendment protection.^{FN3}

FN3. Although the majority in *Carter* held that the defendants were not entitled to Fourth Amendment protection, a "different majority" recognized that social guests present for less than an overnight stay may enjoy a reasonable expectation of privacy in their host's home. In a concurring opinion, Justice Breyer explicitly stated that he agreed with the dissent-which concluded that *all* invited guests are entitled to Fourth Amendment protection, whether present for a business purpose or not-but he agreed with the majority's decision because he thought the search itself was lawful. *Id.* at 104, 119 S.Ct. at 480 (Breyer, J., concurring). In another concurrence, Justice Kennedy stated that, in his view, "*almost all social guests* have a legitimate expectation of privacy ... in their host's home." *Id.* at 99, 119 S.Ct. at 478 (Kennedy, J., concurring) (emphasis added). But because the defendants in *Carter* were not "guests," they did not have an expectation of privacy in the owner's home. *Id.* at 102, 119 S.Ct. at 479. Accordingly, it is apparent that at least five members of the Court-the three who dissented and the two who concurred-would be willing to extend protection to guests present for social reasons and present for some time less than an overnight stay.

*115 [4] In the present case, Missouri and Curtis testified that they had grown up together and were "good friends." Missouri had frequently visited the Siberts' apartment in the past and occasionally spent the night. Missouri described the Sibert home as a place to "get away" and as a place to "find comfort." At times, Missouri had a key to the Siberts' apartment

and kept a change of clothes there. He paid nothing to use the apartment and was there for at least seven hours on the day of the search.

By choosing to share the privacy of their home with Missouri on several occasions in the past and on the occasion in question, both the Siberts and Missouri demonstrated a ****598** subjective expectation of privacy, and that expectation, we hold, is one that society is prepared to recognize as reasonable. See *Oliver*, 466 U.S. at 177, 104 S.Ct. at 1741 (citing *Katz*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring) (a reasonable expectation of privacy is both subjective and objective in nature)). Moreover, the trial judge's findings of fact support his ruling that Missouri's expectation of privacy in the Sibert home was reasonable. See *Brockman*, 339 S.C. at 66, 528 S.E.2d at 666 (an appellate court must affirm if there is *any evidence* in the record supporting the trial judge's ruling). Therefore, we reverse the court of appeals' decision.

CONCLUSION

For these reasons, we reverse the court of appeals' decision and hold that Missouri had a reasonable expectation of privacy in the Siberts' apartment. Missouri is therefore entitled to challenge the search under the Fourth Amendment. In addition, because we held in a prior decision that the search warrant executed in this case was invalid, the evidence seized must be suppressed and Missouri's conviction vacated.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

S.C., 2004.

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314 S.C. 89, 441 S.E.2d 832

(Cite as: 314 S.C. 89, 441 S.E.2d 832)

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Court of Appeals of South Carolina.
The STATE, Respondent,
v.
Antonnier ADOLPHE, Appellant.

No. 2140.

Heard Dec. 8, 1993.

Decided Feb. 22, 1994.

Defendant was convicted in the Circuit Court, Beaufort County, Jackson V. Gregory, J., of two counts of trafficking crack cocaine. Defendant appealed. The Court of Appeals, Howell, C.J., held that: (1) issuance of search warrant was not supported by probable cause, as affidavit coupled with hearing testimony of officer/affiant failed to establish confidential informant's reliability and informant's allegations were never corroborated by any identifiable individuals, and (2) good faith exception was inapplicable.

Reversed and remanded.

West Headnotes

[1] Searches and Seizures 349**113.1**349 Searches and Seizures349II Warrants349k113 Probable or Reasonable Cause349k113.1 k. In general. Most Cited Cases

Task of magistrate when determining whether to issue search warrant is to make practical, common-sense decision as to whether, under totality of circumstances set forth in affidavit, there is fair probability that evidence of crime will be found in particular place, which includes consideration of veracity of person supplying information and basis of his or her knowledge. U.S.C.A. Const. Amend. 4.

[2] Searches and Seizures 349**200**349 Searches and Seizures349VI Judicial Review or Determination

349k200 k. Scope of inquiry or review, in general. Most Cited Cases

Task of court reviewing magistrate's issuance of search warrant is to decide whether magistrate had substantial basis for concluding that probable cause existed. U.S.C.A. Const. Amend. 4.

[3] Searches and Seizures 349**108**349 Searches and Seizures349II Warrants349k105 Complaint, Application or Affidavit

349k108 k. Necessity for writing; or oral presentation or supplementation. Most Cited Cases

If search warrant affidavit standing alone is insufficient to establish probable cause, it may be supplemented by sworn oral testimony before magistrate. U.S.C.A. Const. Amend. 4.

[4] Criminal Law 110 392.49(1)110 Criminal Law110XVII Evidence110XVII(T) Competency in General110k392.1 Wrongfully Obtained Evidence110k392.49 Evidence on Motions110k392.49(1) k. In general. MostCited Cases

(Formerly 110k394.6(4))

If it is unclear at trial whether information regarding confidential informant's reliability was furnished to magistrate issuing search warrant, trial court may take testimony in effort to supplement facts in search warrant affidavit. U.S.C.A. Const.Amend. 4.

[5] Controlled Substances 96H 148(4)96H Controlled Substances96HIV Searches and Seizures96HIV(C) Search Under Warrant

96Hk144 Affidavits, Complaints, and Evidence for Issuance of Warrants

96Hk148 Informants

96Hk148(4) k. Confidential or unnamed informants. Most Cited Cases

(Formerly 138k188(7) Drugs and Narcotics)

Issuance of search warrant was not supported by probable cause, as affidavit coupled with hearing testimony of officer/affiant failed to establish confidential informant's reliability and informant's allegations were never corroborated by any identifiable individuals; assuming that one of two possible individuals was confidential informant referenced in affidavit, record did not suggest his awareness of drug stash house or its location, and if informant was other individual, it was apparent that affiant had no knowl-

edge of his reliability, as he was taken into custody only short time before warrant issued. U.S.C.A. Const.Amend. 4.

[6] Criminal Law 110 392.38(12)110 Criminal Law110XVII Evidence110XVII(T) Competency in General110k392.1 Wrongfully Obtained Evidence

110k392.38 Good Faith or Objectively Reasonable Conduct Doctrine

110k392.38(6) Exceptions Relating to Defects in Warrant

110k392.38(12) k. Particular cases. Most Cited Cases

(Formerly 110k394.4(6))

Good faith exception did not apply where search warrant affidavit was defective on its face and affiant's testimony was insufficient to cure defect. U.S.C.A. Const.Amend. 4.

****832 *90** Assistant Appellate Defender M. Anne Pearce, of South Carolina Office of Appellate Defense, Columbia, for appellant.

Attorney General T. Travis Medlock, Chief Deputy Atty. Gen. Donald J. Zelenka, Sr. Asst. Atty. Gen. Harold M. Coombs, Jr., and Staff Atty. Rakale B. Smith, Columbia; & Sol. Randolph Murdaugh, III, Hampton, for respondent.

HOWELL, Chief Judge:

Defendant Antonnier Adolphe was convicted of two counts of trafficking crack cocaine. We reverse and remand for a new trial.

Adolphe argues several issues on appeal. First, he contends the trial court erred in denying his motion to suppress evidence seized pursuant to a search

warrant. Second, Adolphe asserts the trial court erred in denying his new trial motion based on the judge's granting a directed verdict to the co-****833** defendants. Finally, he argues the trial court erred in denying his severance motion and the related new trial motion.

On the evening of October 1, 1991, through the cooperation of a confidential informant, the Beaufort County Sheriff's Department organized a controlled buy. The confidential informant, Richard "Tex" Chung, was wired at the time of the buy. When Chung arrived at the trailer where the buy was to take place, he met a man named Michael Donnell.^{FN1} Donnell accompanied Chung into the trailer and acted as an intermediary in the buy.

FN1. Donnell was unknown to the police and not assisting them at that time.

After the buy, Chung met with the officer supervising the controlled buy and turned over the crack. In addition, Chung gave them a detailed description of the man who sold the crack to him. Immediately after receiving the crack from Chung, Officer Young obtained a search warrant for the ***91** trailer.^{FN2} Shortly thereafter, the police arrested several people in and around the trailer. Donnell was among those arrested.

FN2. The validity of the search warrant issued for the trailer is not argued on appeal.

From all accounts, the scene at the trailer was chaotic. The record reflects several people escaped from the trailer after the police entered. Donnell, however, was present and placed into custody. At that point, he offered to help police, stating that Adolphe had fled to Adolphe's "stash house." Donnell claimed he knew the location of the stash house.

At Donnell's direction, Donnell and the police

proceeded to the alleged stash house. Upon arriving, the police entered with the consent of one of the occupants. Adolphe, attempting to exit through a back door, was arrested. He matched the description of the man who made the sale to Chung. Donnell also identified him as the one who had sold the crack at the trailer.

Minutes later, an officer arrived at the stash house with a search warrant.^{FN3} Pursuant to the warrant, the police searched the house and seized the crack and other evidence introduced in Adolphe's trial.

FN3. Officer Young obtained a search warrant for the stash house from the same magistrate. Because of the closeness in time between the controlled buy and Adolphe's arrest, much of the information in Officer Young's sworn affidavit to secure the search warrant for the stash house was conveyed to him by police radio while he was at the magistrate's office. It is uncontroverted that both Young and the magistrate listened to the transmission.

Adolphe first argues the trial court erred in denying his motion to suppress evidence seized from the stash house. Adolphe contends the warrant was defective because it contained no sworn statement as to the reliability of the confidential informant nor was there any declaration of corroboration.

The affidavit stated:

An individual, positively identified by a confidential informant, as having sold crack cocaine to the confidential informant within the last 48 hours, and being observed by drug agents fleeing the location of the previous bust, was located at this location within minutes after fleeing previous location on the night of 1-2, October, 1991. *C.I. and others de-*

scribe this residence as a "stash" house where money and drugs are stored after sale from previous location is completed.

*92 (Emphasis added).

[1][2] The task of a magistrate when determining whether to issue a warrant is to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. *State v. Clifton*, 302 S.C. 431, 396 S.E.2d 831 (Ct.App.1990) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)), cert. dismissed, 305 S.C. 85, 406 S.E.2d 337 (1991). This includes consideration of the veracity of the person supplying the information and the basis of his or her knowledge. *Id.* As a reviewing court, our task is to decide whether the magistrate had a substantial basis for concluding probable cause existed. *Id.*

[3][4] If the affidavit standing alone is insufficient to establish probable cause it may be supplemented by sworn oral testimony before the magistrate. *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990). If it is unclear at trial whether the information regarding the confidential informant's reliability was furnished to the magistrate, the trial **834 court may take testimony in an effort to supplement the facts in the affidavit of the search warrant. *Id.*

[5] The trial court found the search warrant deficient on its face and conducted a hearing. The only testimony taken was from the affiant, Officer Young.^{FN4} This testimony, however, did not cure the deficiencies in the search *93 warrant. To the contrary, it only established that Donnell was the person that positively identified Adolphe. It remains unclear as to whether Donnell or Chung was the confidential informant referred to in the affidavit.

FN4. Officer Young's testimony, in part, was as follows.

Examination By The Court

Q: The affidavit, Mr. Young, says the CI, the confidential informant, and others described this residence as a stash house where money and drugs are stored. Who are the others that you refer to on that?

A: Your Honor, that's the information we received over the radio. I have no idea who they were.

Cross Examination

Q: Now, the face of the affidavit on this search warrant reads,.... The confidential informant you're referring to there is who?

A: As having positively identified?

Q: Yes.

A: The person, the individual, that positively identified Adolphe was Michael Donnell.

Q: At the time you obtained the search warrant from the magistrate, you didn't know anything about Michael Donnell, did you?

A: No, ma'am, I didn't.

Nor does the testimony of Officer Young, together with the sworn affidavit, clear up the matter of the informant's reliability or whether or not his conclusions were corroborated. Assuming Chung was the

441 S.E.2d 832
314 S.C. 89, 441 S.E.2d 832
(Cite as: 314 S.C. 89, 441 S.E.2d 832)

confidential informant referenced in the affidavit, we find nothing in the record to suggest Chung was aware of the stash house or its location. On the other hand, if the confidential informant was Donnell, it is apparent the affiant had no knowledge of Donnell's reliability because Donnell was taken into custody only a short time before the warrant was issued.

Considering the totality of the circumstances, we conclude the search warrant should not have been issued because the affidavit coupled with the Johnson hearing failed to supply facts creating probable cause. There was no showing of the confidential informant's reliability and the informant's allegations were never corroborated by any identifiable individuals. The evidence, therefore, obtained as a result of the search warrant was inadmissible at Adolphe's trial.

[6] The State argues the facts of this case fall within the good faith exception adopted in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). We reject this argument.

In Johnson, as here, the affidavit did not contain any information regarding the reliability of the informant nor was there any corroboration. Our Supreme Court declined to apply the good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause.^{FN5} Johnson, 302 S.C. at 248, 395 S.E.2d at 170; see also State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991) (stating the holding in Johnson). In addition, the Court stated that, absent a finding by the trial court *94 on remand of sufficient oral testimony to cure the affidavit, the defendant was entitled to a new trial and the evidence seized pursuant to the warrant must be suppressed. Johnson, 302 S.C. at 248, 395 S.E.2d at 170.

FN5. The dispositive issue in determining the applicability of the good faith exception in Johnson was "whether sufficient informa-

tion was given to the magistrate to perform his 'neutral and detached' function rather than serve as a 'rubber stamp for the police.' "Johnson, 302 S.C. at 248, 395 S.E.2d at 170.

Having concluded the affidavit in this case is defective on its face and having determined the testimony of Officer Young is not sufficient to cure the defect, we find the good faith exception inapplicable.

Because of our disposition on the above issue, we need not address appellant's remaining arguments.

REVERSED AND REMANDED.

CURETON and GOOLSBY, JJ., concur.

S.C.App.,1994.
State v. Adolphe
314 S.C. 89, 441 S.E.2d 832

END OF DOCUMENT

BEAUFORT COUNTY SHERIFF'S OFFICE PROSECUTORIAL SUMMARY

1. DEFENDANT'S NAME Kimberly Raye Wilson

AGE 36 RACE W SEX F

2. (A) CHARGE Possession of Controlled Substance (Sch. II)

WARRANT

J-331943

TICKET

44672

(B) CHARGE

WARRANT

TICKET

(C) CHARGE

WARRANT

TICKET

(D) CHARGE

WARRANT

TICKET

(E) CHARGE

WARRANT

TICKET

(F) CHARGE

WARRANT

TICKET

3. INCIDENT DATE 2-22-07 TIME 1826 LOCATION [REDACTED] Beaufort, SC

4. ARREST INFORMATION: DATE/TIME 2-22-07/1840 OFFICER LCpl. R. McIntosh

5. DESCRIBE THE PROBABLE CAUSE FOR THE ARREST OF DEFENDANT:

On 2-22-07 at approximately 1826 hours, the defendant, Kimberly Raye Wilson, was found to be knowingly and unlawfully in possession of a Schedule II controlled substance. The substance, a partial white pill which Wilson admitted to being Percocet, was found concealed in Wilson's bra, below her left breast. The pill was found during a consensual search of Wilson's person after Wilson admitted to having attempted to conceal the contraband. At the time, Wilson was being detained as a passenger in a vehicle that had been lawfully stopped for a traffic violation, and in which other illicit drugs had been found. This offense occurred at the scene of the traffic stop, [REDACTED] Beaufort, Beaufort County, SC.

6. VICTIMS NAME State of South Carolina

PHONE 843-757-1575

7. REPORTING OFFICER LCpl. R. McIntosh

COMMENTS

Prosecute

8. INVESTIGATING OFFICER LCpl. R. McIntosh

COMMENTS

Prosecute

9. SUPERVISOR MSgt. C. Sankowski

COMMENTS

Prosecute

NOTE: (A) ONE PROSECUTORIAL SUMMARY FOR EACH DEFENDANT

(B) LIST ANY ADDITIONAL OR ADDITIONAL INFORMATION ON REVERSE SIDE

AGENCY I.D.
SCO 070000

INCIDENT REPORT

CASE NUMBER

20070222529

643

INC. ENT.

INCIDENT TYPE

COMPLETED

FORCED ENTRY

PREMISE TYPE

INITIALS
ENTERED

TYPE VICTIM

1. Traffic Stop

☒ YES ☐ NO

☐ YES ☒ NO

Private Driveway

2. Unlawful Possession of a Schedule II Controlled Substance

☒ YES ☐ NO

☐ YES ☒ NO

Private Driveway

3. Possession of Crack Cocaine/Simple Possession of Marijuana

☒ YES ☐ NO

☐ YES ☒ NO

Private Driveway

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)
Driveway of [REDACTED] Beaufort, SC

ZIP CODE
29902

WEAPON TYPE
None

INCIDENT DATE 24 HR. CLOCK TO DATE 24 HR. CLOCK
2-22-07 1826

DISP. DATE 2-22-07
DISP. TIME 1826
TIME ARRIVED 1826
DEPART. TIME 1947

LOCATION NO.
1233

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)

McIntosh, Robin

RELATIONSHIP TO SUBJECT
#1 stranger #2 stranger #3 stranger

RESIDENT ☒ RACE W SEX F AGE 27 ETH N DAY TIME PHONE [REDACTED]

EVENING PHONE

ADDRESS

CITY
Beaufort

STATE SC ZIP CODE 29902

LOCATION NO.

VICTIM'S NAME (LAST, FIRST, MIDDLE)

State of South Carolina

RELATIONSHIP TO SUBJECT
#1 #2 #3

RESIDENT ☒ RACE W SEX F AGE 27 ETH N DAY TIME PHONE [REDACTED]

EVENING PHONE

HEIGHT WEIGHT HAIR EYES FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS

CITY

STATE SC ZIP CODE 29902

LOCATION NO.

VISIBLE INJURY (VICT. I) ☐ YES ☒ NO EXPLAIN -

COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES ☒ NO

VICTIM (NO. 1) USING ALCOHOL ☐ YES ☒ NO UNK. ☐ DRUGS: ☐ YES ☒ NO UNK. ☐ TYPE:

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ J-This Jurisdiction S-State O-Out of State U-Unknown

☒ SUSPECT NAME (LAST, FIRST, MIDDLE)

Reeves, William Jessie

RACE B SEX M AGE 29 ETH N DATE OF BIRTH [REDACTED] HEIGHT 604 WEIGHT 270 HAIR Blk EYES Brn

☐ RUNAWAY FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
☐ WANTED aka: "Black Sheep"; tattoo on rt. and lft. forearm and lft. shoulder

☐ WARRANT ADDRESS

CITY
Beaufort

STATE SC ZIP CODE 29902

☒ ARREST SUBJECT (NO. 1) USING ALCOHOL ☐ YES ☒ NO UNK. ☐ TYPE:

ARRESTED NEAR SCENE ☒ YES ☐ NO

DATE/TIME OF OFFENSE

DATE/TIME OF ARREST

☒ JAIL DRUGS: ☐ YES ☒ NO UNK. ☐ TYPE:

TOTAL # ARRESTED

2

2-22-07 1826

2-22-07 1840

Synopsis: On 2-22-07 at approximately 1826 hours, a traffic stop was conducted on a white Ford Crown Victoria operated by Keica Benjamin for a traffic violation, at which time contact was made with the other vehicle occupants: William Reeves, Kimberly Wilson, and Andre Benjamin, who were ultimately placed under arrest for the above violations.

Open container - 90B

JURISDICTION OF THEFT
LAW ENFORCEMENT AGENCY

JURISDICTION OF RECOVERY
LAW ENFORCEMENT AGENCY

TOTAL VALUE

TYPE (GROUP)

Marijuana

Percocet

STOLEN

DAMAGED

BURNED

RECOVERED

SEIZED

approx. 1.5g

1/2 pill

SUBJECT IDENTIFIED

SUBJECT LOCATED

☐ ACTIVE

☐ ADM. CLOSED

☐ ARRESTED UNDER 18

☐ EX-CLEAR UNDER 18

☒ YES ☐ NO

☒ YES ☐ NO

☐ UNFOUNDED

☒ ARRESTED 18 AND OVER

☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. OFFENDER DEATH 2. NO PROSECUTION 3. EXTRADITION DENIED 4. VICTIM DECLINES COOPERATION 5. JUVENILE - NO CUSTODY

REPORTING OFFICER(S)

DATE

UNIT
NUMBER

APPROVING OFFICER

DATE

UNIT
NUMBER

R. McIntosh

2-27-07

M3874

FOLLOW-UP
INVESTIGATION ☐ YES ☒ NO

OFFICER

3-1-07

57084

FM

644

AGENCY I.D.
SCO 070000

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER

20070222529

NCIC

INQ.

ENTD.

☒ ORIGINAL
REPORT
☐ MODIFIES
ORIGINAL☐ SUPPLEMENTAL
REPORT
☐ CASE STATUS
CHANGE☐ ADDITIONAL
VICTIMS
☐ ADDITIONAL
OFFENDERS☐ ADDITIONAL
STOLEN PROPERTY
☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 2 OF 2 PAGES

☐ COMPLAINANT	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE	D.O.B.	ETH.
☐ VICTIM #	Wilson, Kimberly Raye			☒ S	W	F	36		N
☒ SUBJECT #	2	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.			
☐ RUNAWAY	506	135	Blk	Blu					
☐ WANTED	ADDRESS								
☐ WARRANT	CITY								
☐ ARREST	Burton								
☐ JAIL	STATE								
☐ SUMMONS	SC 29906								
☐ LOCATION NO.	DAY PHONE								
☐ EVENING PHONE									
☐ VICTIM NO.	VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK								
☐ COMPLAINT OF NON-VISIBLE INJURY	☐ NO ☐ YES ☐ UNK								
☐ EXPLAIN:	DELIVER: ☐ NO ☐ YES ☐ UNK								
☒ SUBJECT NO. 2	USING ALCOHOL: ☐ NO ☐ YES ☐ UNK								
☐ USING DRUGS:	☐ NO ☐ YES ☐ UNK								
☐ TYPE:	☒ UNK								
☐ COMPLAINANT	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE	D.O.B.	ETH.
☐ VICTIM #	Benjamin, Andre Solomon			☒ S	B	M	31		N
☒ SUBJECT #	3	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.			
☐ RUNAWAY	509	170	Blk	Bm					
☐ WANTED	ADDRESS								
☐ WARRANT	CITY								
☐ ARREST	Beaufort								
☐ JAIL	STATE								
☐ SUMMONS	SC 29902								
☐ LOCATION NO.	DAY PHONE								
☐ EVENING PHONE									
☐ VICTIM NO.	VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK								
☐ COMPLAINT OF NON-VISIBLE INJURY	☐ NO ☐ YES ☐ UNK								
☐ EXPLAIN:	DELIVER: ☐ NO ☐ YES ☐ UNK								
☒ SUBJECT NO. 3	USING ALCOHOL: ☐ NO ☐ YES ☐ UNK								
☐ USING DRUGS:	☐ NO ☐ YES ☐ UNK								
☐ TYPE:	☒ UNK								

STATUS		TYPE		VIN AND/OR OWNER APPLIED NO.		JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY		JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
☐ STOLEN	☐ VEHICLE	☐ BROCKED	☐ OWN	☐ FOUND	☐ BOAT	☐ TOWED	☐ LICENSE PLATE	☐ SUSPECT	☐ SECURITIES/BONDS, STOCKS
☐ VICTIM	☐ ARTICLE			YEAR OF REGISTRATION		YEAR OF EXPIRATION		YEAR	
				MODEL		STYLE		MAKE	
				NIC NO.		COLOR		BRAND NAME	
				MISCELLANEOUS		DENOMINATION		ISSUER	
								SECURITIES DATE	
TYPE (GROUP)								TOTAL VALUE	
STOLEN									
DAMAGED									
BURNED									
RECOVERED									
SEIZED									
SUBJECT IDENTIFIED		SUBJECT LOCATED		☐ ACTIVE		☐ ADM CLOSED		☐ ARRESTED UNDER 18	
☒ YES ☐ NO		☒ YES ☐ NO		☐ UNFOUNDED		☐ ARRESTED 18 AND OVER		☐ EX-CLEAR 18 AND OVER	
REASON FOR EXCEPTIONAL CLEARANCE:		1. ☐ OFFENDER DEATH		2. ☐ NO PROSECUTION		3. ☐ EXTRADITION DENIED		4. ☐ VICTIM DECLINES COOPERATION	
REPORTING OFFICER(S)		DATE		UNIT NUMBER		APPROVING OFFICER		DATE	

R. McIntosh

2-27-07 M3874

FOLLOW-UP
INVESTIGATION ☐ YES ☐ NO

OFFICER

646

AGENCY I.D.
SCO 070000

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER
02220529
20070223038

NCIC

INQ. | ENTO.

☒ ORIGINAL
REPORT
☐ MODIFIES
ORIGINAL☐ SUPPLEMENTAL
REPORT
☐ CASE STATUS
CHANGE☐ ADDITIONAL
VICTIMS
☐ ADDITIONAL
OFFENDERS☐ ADDITIONAL
STOLEN PROPERTY
☐ ADDITIONAL
RECOVERED PROPERTY

PAGE. 4 OF PAGES.

Officer Observations:

On 2-22-07 at approximately 1826, a white in color Ford Crown Victoria bearing SC license plate # [REDACTED] was the subject of a traffic stop for an observed traffic violation occurring on [REDACTED]. The driver of the vehicle, later identified as Keica Michelle Benjamin, was observed turning right from [REDACTED]. Immediately after making the turn onto [REDACTED], Keica made a quick lane change from lane 1 to lane 2 without appropriately signaling the lane change.

Traffic Stop:

Upon observing the above described traffic violation, I activated my emergency lights to initiate a traffic stop upon the vehicle. The traffic stop ultimately occurred in the private driveway of #79 Parris Island Gateway, where Keica later advised that she lives.

Contact with Vehicle Occupants:

SSgt. Faucett (of the Beaufort/Jasper Multi Agency Drug Task Force) who was operating the emergency vehicle we were riding in approached the driver (Keica Benjamin), identified himself, advised her of the reason for the traffic stop, and requested her driver's license and vehicle credentials.

While SSgt. Faucett made contact with Keica, I made contact with the three other occupants of the vehicle. Upon identifying myself, I asked the three occupants if they had any identification, which they all stated they did not. At that time I asked each occupant for their name. The front passenger advised his name was Solomon Benjamin. The rear passenger (pass. side) identified himself as William Reeves. The other rear passenger (driver's side) identified herself as Kimberly Wilson.

Using the names as provided by each passenger, I requested dispatch check for any outstanding wants/warrants on the individuals. Dispatch advised of two active family court bench warrants on file for a William Reeves. Reeves was instructed to exit the vehicle and was detained pending location and confirmation of the warrants.

While waiting for confirmation of the warrants from dispatch, Reeves advised that the warrants were not for him, but were instead for another William Reeves. Reeves advised that his date of birth was [REDACTED] and that the warrants were for a William Reeves with a date of birth of [REDACTED]. Reeves advised that he'd been stopped before and the warrants had come up then, but that they were not for him.

Dispatch came back advising of two active family court bench warrants for a William Reeves, DOB: [REDACTED]. I attempted to confirm the warrants by asking Reeves his social security number. Reeves provided a number. I then asked dispatch for the number listed as Reeves social security number on the warrant, which dispatch provided as [REDACTED]. When I returned to Reeves and asked for his social security number again, he became very nervous and agitated, stumbling through a number, then advised, "Forget it, it's me...the warrants are for me."

At that time, Reeves was advised he was under arrest for the bench warrants and was searched incident to arrest. During the search of Reeves' person, a small bag of green leafy substance suspected to be marijuana was found in the right front watch pocket of Reeves' pants. Reeves confirmed that the substance was, in fact, marijuana.

A marked patrol unit responded for Reeves' transport to BCDC.

During the time I was dealing with Reeves, SSgt. Faucett completed a warning ticket for Keica in reference to failing to signal the lane change. Upon issuing the warning citation to Keica, SSgt. Faucett asked her if there was any illegal contraband in the vehicle. Keica stated that there was not, and advised that officers were free to search the vehicle if they wanted to.

Search of the Vehicle:

Upon receiving consent to search from the vehicle's owner/driver, Keica Benjamin, the two remaining passengers (Solomon Benjamin and Kimberly Wilson) were asked to exit the vehicle. Solomon Benjamin advised that there was an open bottle of liquor stuck down under the front passenger seat. SSgt. Faucett and Officer T. Herald (who had arrived on scene along with LCpl. Carter to assist with the multiple suspects) searched the vehicle, locating the bottle described by Solomon.

Also found during search of the vehicle was small, gray in color jewelry box containing a white rock substance suspected to be crack cocaine. The substance field tested positive for the presence of cocaine base using a NIK Cocaine test swab. Upon finding the crack cocaine, Kimberly Wilson, Keica Benjamin, and Solomon Benjamin were detained. All three were advised of their Miranda Rights by LCpl. Carter. All three denied possession or knowledge of the crack cocaine found in the vehicle.

SUBJECT IDENTIFIED
☒ YES ☐ NOSUBJECT LOCATED
☒ YES ☐ NO☐ ACTIVE ☐ ADM. CLOSED
☐ UNFOUNDED☐ ARRESTED UNDER 18
☐ ARRESTED 18 AND OVER☐ EX-CLEAR UNDER 18
☐ EX-CLEAR 18 AND OVERREASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH.2. ☐ NO PROSECUTION.3. ☐ EXTRADITION DENIED.4. ☐ VICTIM DECLINES COOPERATION.5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)

DATE

UNIT
NUMBER

APPROVING OFFICER

DATE

UNIT
NUMBER

R. McIntosh

2-27-07 M3874

FOLLOW-UP
INVESTIGATION ☐ YES ☐ NO

OFFICER

AGENCY I.D.
SCO 070000

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER

20070222529

NCIC

INQ. ENTD.

☒ ORIGINAL
REPORT
☐ MODIFIES
ORIGINAL☐ SUPPLEMENTAL
REPORT
☐ CASE STATUS
CHANGE☐ ADDITIONAL
VICTIMS
☐ ADDITIONAL
OFFENDERS☐ ADDITIONAL
STOLEN PROPERTY
☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 5 OF PAGES.

Interview of Kimberly Wilson:

When asked about the crack cocaine, Wilson denied any knowledge of it. I advised Wilson that if no one claimed ownership of the crack cocaine, then all occupants of the vehicle could be charged with its constructive possession. Wilson again denied any knowledge of the crack cocaine. I asked Wilson if she had any illicit contraband on her person, at which time she advised that she did have a small quantity of marijuana and 1/2 of a Percocet pill concealed in her bra under her left breast. I recovered the marijuana which was wrapped up in a small piece of white paper, and 1/2 of a white in color pill from Wilson's bra, and advised her that she was under arrest for their possession. Wilson advised that the marijuana she'd been concealing actually belonged to Keica Benjamin. Wilson advised that Keica asked her to hold the marijuana when they were getting pulled over. Wilson advised that she'd gotten the Percocet pill from her mother who has a prescription for it. Wilson advised that she got the pill from her mother because she had severe pain in her jaw from an abscessed tooth she could not afford to have treated.

Interview of Solomon Benjamin:

When asked about the crack cocaine, Solomon denied any knowledge of it. Solomon admitted that the bottle of brandy that was in the vehicle belonged to him, but advised he had no idea the crack cocaine had been in the vehicle. I advised Solomon the same regarding the possibility of him being charged with its constructive possession if no one admitted ownership. Solomon continued to deny knowledge of the crack cocaine.

Interview of Keica Benjamin:

When asked about the crack cocaine, Keica also denied any knowledge of it. Keica advised that numerous people had been in her car that day and that anyone could have put the crack there. When asked about the marijuana that Wilson had been concealing and had alleged had belonged to Keica, she advised that she also knew nothing about the marijuana. Keica repeatedly advised that she is a nurse and had nothing to do with drugs of any kind. Keica was also advised that she could be charged with the constructive possession of the crack cocaine, and she continued to deny any knowledge of it.

While conducting separate interviews of each subject, Solomon Benjamin advised us that William Reeves had just called him from the jail and was on the phone wanting to speak with officers about the crack cocaine. SSgt. Faucett spoke with Reeves on the phone. SSgt. Faucett advised me that Reeves claimed that the crack cocaine was his, and that he didn't want his wife, Kimberly Wilson, holding the charge for something that was his. SSgt. Faucett advised Reeves that we would be to the jail to speak with him about the crack cocaine upon completing the traffic stop.

Based on Reeves statement claiming possession of the crack cocaine, Keica was released from detention. Solomon Benjamin was issued a courtesy summons (UTT 54587DF) for the Open Container in a Motor Vehicle, and was also released from detention pending his appearance at Magistrate Court on 3-14-07/1000 hours.

A marked unit responded and transported Kimberly Wilson to BCDC. Wilson was issued UTT 54586DF for Simple Possession of Marijuana and County Ticket # 44672 for Possession of a Schedule II Controlled Substance. An arrest warrant (#J331943) was obtained for that offense. Magistrate Court appearance is set for the Simple Possession of Marijuana charge on 3-14-07/1000 hours, and General Sessions appearance is set for the Schedule II charge for 3-23-07/0845 hours.

Interview of William Reeves (at BCDC):

SSgt. Faucett and I responded to BCDC to meet with Reeves at his request. Reeves was advised that he was being charged with Possession of Crack Cocaine based on his statement. Reeves then advised that he couldn't lie and that the crack was not his. Reeves advised that the crack had, in fact, belonged to Solomon Benjamin, who is his brother-in-law. Reeves advised that Solomon's first name is Andre and that the crack had belonged to him. At that time I asked Reeves if he would be willing to provide a written statement attesting to such, and he agreed. Prior to writing the statement, I provided Reeves a written copy of his Miranda Rights. Reeves was again read his rights, which he stated he understood, and signed and initialed the written copy. Reeves provided a written statement advising that the crack cocaine had belonged to Andre Solomon Benjamin. Reeves also advised in the statement that he had just purchased the marijuana that he'd been caught with from a black male known to him as "Big Tee" at a trailer off of Bay Pines Rd.

SUBJECT IDENTIFIED ☒ YES ☐ NO		SUBJECT LOCATED ☒ YES ☐ NO		☐ ACTIVE	☐ ADM. CLOSED	☐ ARRESTED UNDER 18	☐ EX-CLEAR UNDER 18
				☐ UNFOUNDED		☐ ARRESTED 18 AND OVER	☐ EX-CLEAR 18 AND OVER
REASON FOR EXCEPTIONAL CLEARANCE:		1. ☐ OFFENDER DEATH	2. ☐ NO PROSECUTION	3. ☐ EXTRADITION DENIED	4. ☐ VICTIM DECLINES COOPERATION	5. ☐ JUVENILE - NO CUSTODY	
REPORTING OFFICER(S)		DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER
R. McIntosh		2-27-07	M3874				
				FOLLOW-UP INVESTIGATION ☐ YES ☐ NO			

648

AGENCY I.D.
SCO 070000

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER

20070222529

INCIC

INQ.

BNTD.

☒ ORIGINAL
REPORT
☐ MODIFIES
ORIGINAL☐ SUPPLEMENTAL
REPORT
☐ CASE STATUS
CHANGE☐ ADDITIONAL
VICTIMS
☐ ADDITIONAL
OFFENDERS☐ ADDITIONAL
STOLEN PROPERTY
☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 6 OF PAGES.

Interview of William Reeves (continued):

Reeves was provided with a copy of his written statement, which was left with his personal property at the booking desk.

****Note:** Further investigation may lead to charges being filed in reference to the crack cocaine found. At this time, no charges have been filed for its possession.

Disposition of Evidence:

All evidence collected was submitted to Evidence Technician Cpl. Jean Roberts on 2-26-07. All suspected illicit drugs were documented as such and appropriate analysis requested to confirm identification of substances.

Attachments:

County Ticket

Prosecutorial Summary

Booking Report

Evidence Submittal and Drug Evidence Examination Request Forms

Copy of Written Statement

Signed Miranda Rights Form

SUBJECT IDENTIFIED

☒ YES ☐ NO

SUBJECT LOCATED

☒ YES ☐ NO☐ ACTIVE☐ ADM CLOSED☐ UNFOUNDED☐ ARRESTED UNDER 18☐ EX-CLEAR UNDER 18☐ ARRESTED 18 AND OVER☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE:

1. ☐ OFFENDER DEATH2. ☐ NO PROSECUTION3. ☐ EXTRADITION DENIED4. ☐ VICTIM DECLINES COOPERATION5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)

DATE

UNIT
NUMBER

APPROVING OFFICER

DATE

UNIT
NUMBER

R. McIntosh

2-27-07 M3874

FOLLOW-UP
INVESTIGATION ☐ YES ☐ NO

OFFICER

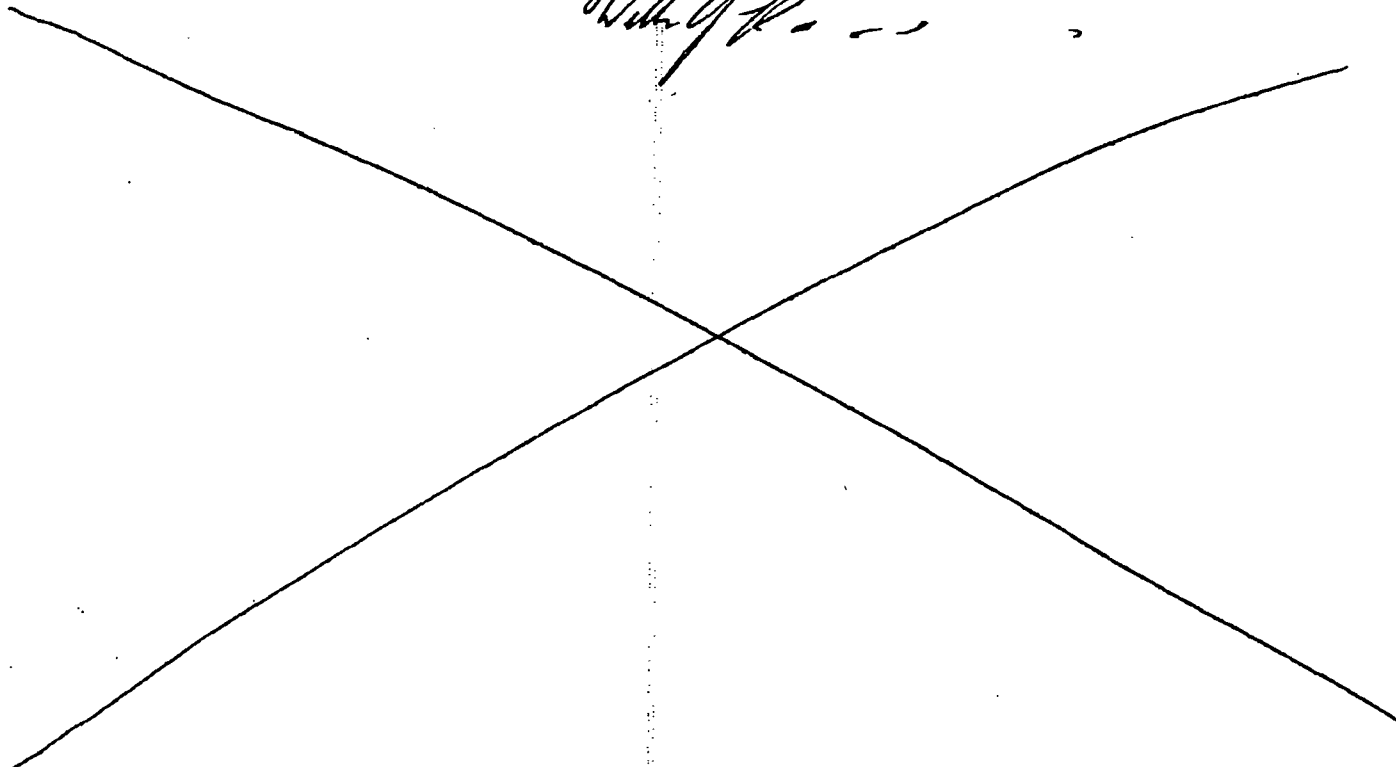
STATEMENT OF:

Date 2-22-07

Page No.

Tonight I rode with my sister Kecia Benjamin and her husband Andre Benjamin to a house off of Bay Pines Rd. When we left the house we were pulled over. At the house I bought a dime of weed. After being arrested and sent to jail I was calling and Andre got on the phone told me that they found crack in a jewelry box and basically asked me to say it's mine. I knew that if I didn't say that everyone (including Kim) would go to jail so I said I did it, it was mine. Honestly the crack is not mine, I was saying it to keep the charge off my girl (Kim). The only reason I said that was to save them from that charge, but now I can't take that, It was not mine. The weed is mine. The crack belongs to Andre. The house (trailer and on left) belongs to a guy called Big Tee.

William J Reeves
Will J Reeves



H

Court of Appeals of South Carolina.
The STATE, Respondent,
v.
Karen Ann McCALL, Appellant.

No. 3965.

Heard Jan. 12, 2005.

Decided March 21, 2005.

Rehearing Denied May 19, 2005.

Certiorari Denied Oct. 19, 2006.

Background: Defendant was convicted by a jury in the Circuit Court, Anderson County, John W. Kirtledge, J., of criminal conspiracy, failure to stop when signaled by law enforcement, resisting arrest with a deadly weapon, armed robbery, three counts of assault and battery with intent to kill, and one count of assault and battery of a high and aggravated nature. Defendant appealed.

Holding: The Court of Appeals, Short, J., held that defendant failed to establish that the State was judicially estopped from prosecuting her for various criminal offenses, even though defendant testified at co-defendant's trial.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚡ 1134.27

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)4 Scope of Inquiry

110k1134.27 k. In General. Most CitedCases

(Formerly 110k1134(3))

In criminal cases, an appellate court sits to review errors of law only.

[2] Criminal Law 110 ⚡ 1158.1

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.1 k. In General. Most Cited Cases

(Formerly 110k1158(1))

In criminal cases, the Court of Appeals is bound by the trial court's factual findings unless they are clearly erroneous.

[3] Estoppel 156 ⚡ 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

~~*Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.~~

[4] Estoppel 156 ⚡ 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

The purpose of judicial estoppel is to protect the integrity of the courts, not to protect litigants from allegedly improper or deceitful conduct by their adversaries.

151 Estoppel 156 ⚡ 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Judicial estoppel in South Carolina generally applies only to inconsistent statements of fact, not inconsistent positions of law.

161 Estoppel 156 ⚡ 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

The elements of judicial estoppel are as follows:
(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another;

(3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

171 Estoppel 156 ⚡ 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Defendant failed to establish that the State was judicially estopped from prosecuting her for various criminal offenses, even though defendant testified at co-defendant's trial; the State's conduct did not impinge on the integrity of the courts, the allegedly contradictory positions involved questions of law, not questions of fact, defendant failed to establish privity, and there was no evidence that the allegedly contradictory positions were taken in a deliberate attempt to mislead the court.

181 Estoppel 156 ⚡ 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

The doctrine of judicial estoppel should be applied sparingly, with clear regard for the facts of the particular case.

[9] Estoppel 156 68(2)156 Estoppel156III Equitable Estoppel156III(B) Grounds of Estoppel156k68 Claim or Position in Judicial Proceedings156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Judicial estoppel must not be applied to impede the truth-seeking function of the court.

****454 *207** Acting Deputy Chief Attorney Wanda P. Hagler, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Amie L. Clifford, all of Columbia; and Solicitor Druanne Dykes White, of Anderson, for Respondent.

SHORT, J.:

In this appeal from a criminal case, Appellant Karen Ann McCall argues that her conviction should be overturned on the ground that the State should be judicially estopped from prosecuting her. We affirm.

FACTS

In December 2000, John Richard Wood left the scene of an incident in Greenville County ^{FNI} on a moped scooter, weaving through heavy traffic. Wood then rode behind a building, parked the scooter and got into a Jeep driven by McCall. The Jeep sped off with McCall at the wheel and witnesses called ***208** the police with the Jeep's license tag number. Wood and McCall fled to Anderson County where authorities located and followed them before a high-speed chase ensued. The Jeep's back window rolled down

and Wood fired several rounds of shots at police with a gun owned by McCall, resulting in a bullet fragment striking an officer in the head. Subsequently, the Jeep rammed into a van and veered into oncoming traffic, and Wood carjacked a pickup truck. Wood and McCall continued fleeing from the police. The chase ultimately ended in a standoff in which Wood was also shot.

FNI. See *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).

A trial of Wood was held in Greenville County and McCall was not named as a defendant. She testified that she had acted under duress, arguing essentially that Wood coerced her into assisting him through threats with the gun as well as with physical force. The State offered her no grant of immunity, nor made any promises or deals in order to obtain this testimony.

Subsequently in Anderson County, McCall was charged with, among other things, criminal conspiracy. At a pretrial hearing, McCall moved to quash the indictments, arguing that because the State called her as a witness in the Greenville trial and allowed her to testify she acted under duress, the State should be judicially estopped from prosecuting her as a co-conspirator in the Anderson case. The trial court denied the motion, finding McCall's testimony in Greenville largely self-serving.

After a joint trial with co-defendant Wood, where McCall asserted the defense of duress in keeping with her testimony in Greenville, the jury convicted her of criminal conspiracy, failure to stop when signaled by a law enforcement vehicle, resisting arrest with a deadly weapon, armed robbery, three counts ****455** of assault with intent to kill, one count of assault and battery with intent to kill, and one count of assault and battery of a high and aggravated nature. The circuit court sentenced McCall to prison for twenty-five years. This

appeal follows.

STANDARD OF REVIEW

[1][2] In criminal cases, an appellate court sits to review errors of law only. *209 State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This court is bound by the trial courts factual findings unless they are clearly erroneous. Id. at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

[3][4][5] South Carolina officially recognized the doctrine of **judicial estoppel** in Havne Fed. Credit Union v. Bailev, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). “**Judicial estoppel** precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.” Id. The purpose of **judicial estoppel** is to protect the integrity of the courts, not to protect litigants from allegedly improper or deceitful conduct by their adversaries. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003); see also Quinn v. Sharon Corp., 343 S.C. 411, 540 S.E.2d 474 (Cl.App.2000) (Anderson, J., concurring) (providing a thorough discussion of the history, purpose, and application of **judicial estoppel**). **Judicial estoppel** in South Carolina generally applies only to inconsistent statements of fact, not inconsistent positions of law. Carrigg v. Cannon, 347 S.C. 75, 82-83, 552 S.E.2d 767, 771 (Cl.App.2001).

[6] The elements of **judicial estoppel** are as follows: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

South Carolina courts have not addressed the applicability of **judicial estoppel** in criminal cases. To date, all cases involving **judicial estoppel** have arisen in the civil context, although one court considered applying **judicial estoppel** in a civil case based on a prior guilty plea. Carrigg, 347 S.C. at 84, 552 S.E.2d at 772 (holding that **judicial estoppel** did not apply based on lack of privity). North Carolina has recently rejected the use of **judicial estoppel** in criminal cases. See *210 Whitacre Partnership v. Biosignia, Inc., 358 N.C. 1, 591 S.E.2d 870 (2004) (providing extensive discussion of the doctrine and holding that **judicial estoppel** applies only in civil cases).

[7] We need not reach the issue of whether **judicial estoppel** applies in criminal cases, however, because even if the doctrine applied, McCall's case fails to meet the required elements. The purpose of **judicial estoppel** would not extend to cases such as this one. Nothing in the State's conduct would impinge on the integrity of the courts. McCall was simply permitted to testify in the prior proceeding as a fact witness.

Secondly, **judicial estoppel** would not apply here because the allegedly contradictory positions involve issues of law. The facts are undisputed. McCall is simply arguing that the State impliedly acknowledged the validity of her defense of duress in the prior case. Additionally, since McCall was not charged in Greenville, a separate judicial circuit from Anderson, the State had no reason to challenge her testimony. Thirdly, the privity requirement is not met. The Greenville case was against Wood and McCall was only a witness. As the trial judge noted, although both cases involved the same incident involving McCall and Wood, the State did not have the same motive to cross-examine McCall.

[8][9] Finally, there is absolutely no evidence that the allegedly contradictory positions were taken in a deliberate attempt to mislead the court. See Cothran, 357 S.C. at 217, 592 S.E.2d at 632 (requiring some evidence of intent to mislead). The trial judge noted

“as a fact witness, Ms. McCall's purpose was obviously to link the primary defendant,**456 Mr. Wood, to the crimes in Greenville County.” “The doctrine of **judicial estoppel** ... should be applied sparingly, with clear regard for the facts of the particular case.” *Id.* **Judicial estoppel** “must not be applied to impede the truth-seeking function of the court.” *Id.*

We think the application of **judicial estoppel** in a case such as this one would impede the truth-seeking function of the court. McCall's testimony was necessary in Wood's trial for purposes unrelated to her case. Estopping the State from later prosecuting McCall would have the effect of unduly limiting the prosecution's ability to seek justice. Thus, without reaching the issue of whether **judicial estoppel** applies in *211 South Carolina in criminal cases, we hold that McCall has failed to make out a case for **judicial estoppel**. We affirm the trial court's denial of McCall's motion to quash the indictments.

AFFIRMED.

ANDERSON and STILWELL, JJ., concur.

S.C.App.,2005.
State v. McCall
364 S.C. 205, 612 S.E.2d 453

END OF DOCUMENT

State vs. David Saunders
Jury Trial, Volume 3 of 3
May 26, 2011

1 correct.

2 My major concern -- and I would move to
3 exclude the sum total of his testimony on the --
4 excuse me one second, Your Honor, and let me get --

5 404(b), the -- I am told that the witness --
6 and it appears that the witness is prepared to testify
7 that sometime prior to the service of this search
8 warrant, which is obviously the focus of this case,
9 Mr. Reeves will allege that Mr. Saunders ostensibly
10 was selling dope to another fellow.

11 That is a prior bad act. It is not
12 encompassed within the charges that he is charged with
13 and, as such, under 404(b) we would move to suppress
14 the entire testimony.

15 MS. TANNER: Your Honor, this absolutely goes
16 to identity. Their defense has been, I was just there
17 to buy marijuana from my dirty brother. This goes to
18 the identity of the defendant as the one who is there
19 trafficking, which is what he is charged with. It is
20 the day --

21 THE COURT: Tell me more.

22 MS. TANNER: As to --

23 THE COURT: I don't have enough information.

24 MS. TANNER: On his testimony?

25 THE COURT: When is he going to testify that

State vs. Turner Saunders
Jury Trial, Volume 3 of 3
May 26, 2004

1 this gentleman, Mr. Saunders, was dealing in dope?

2 MS. TANNER: The day that the search warrant
3 was executed. It was executed early-morning hours --

4 THE COURT: All right. Well, if it's that
5 day, it can come in; if it's not that day, it can't
6 come in.

7 MS. TANNER: It's that day. It's February the
8 22nd, which is while they're doing surveillance on the
9 house while they're getting the search warrant. The
10 search warrant is executed the early-morning hours of
11 the 23rd. But it's within twelve hours.

12 THE COURT: If its within twelve hours, that's
13 part of the deal.

14 MS. TANNER: Yes, sir. Thank you, Your Honor.

15 MR. FLEMING: And then one last point. And I
16 don't know what the solicitor's decision on this is,
17 and I bring it up as a matter of caution.

18 There is an allegation that several years, or
19 some time in that range -- there is an allegation that
20 my client in some way insinuated a threat to this
21 witness about him testifying. And even if true, I
22 would still -- I would still argue that that is not
23 admissible in this trial. It certainly may come up at
24 some point in some other relevant nature.

25 THE COURT: You can't bring that up. But I

Westlaw

742 S.E.2d 878

403 S.C. 247, 742 S.E.2d 878

(Cite as: 403 S.C. 247, 742 S.E.2d 878)

Page 1

H

Court of Appeals of South Carolina.
The STATE, Respondent,
v.
Brian K. SPEARS, Appellant.
Appellate Case No. 2010-162287.

No. 5119.

Heard Jan. 17, 2013.

Decided April 17, 2013.

Rehearing Denied June 13, 2013.

Background: Defendant was convicted in the Circuit Court, Horry County, Larry B. Hyman, Jr., J., of murder and three counts of assault and battery with intent to kill (ABWIK), and received concurrent sentences of 30 years' imprisonment for murder and 20 years' imprisonment on each ABWIK count. Defendant appealed.

Holdings: The Court of Appeals, Pieper, J., held that:

- (1) trial court failed to conduct requisite on-the-record balancing test with respect to prior bad act testimony;
- (2) such failure was not harmless; and
- (3) remand to permit trial court to conduct on-the-record balancing test was appropriate.

Remanded.

West Headnotes

[1] Criminal Law 110 ↪ 1134.27

110 Criminal Law110XXIV Review110XXIV(L) Scope of Review in General110XXIV(L)4 Scope of Inquiry110k1134.27 k. In general. Most CitedCases

Criminal Law 110 ↪ 1158.1

110 Criminal Law110XXIV Review110XXIV(O) Questions of Fact and Findings110k1158.1 k. In general. Most Cited Cases

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous.

[2] Criminal Law 110 ↪ 661

110 Criminal Law110XX Trial110XX(C) Reception of Evidence110k661 k. Necessity and scope of proof.Most Cited Cases

Criminal Law 110 ↪ 1153.1

110 Criminal Law110XXIV Review110XXIV(N) Discretion of Lower Court110k1153 Reception and Admissibility ofEvidence110k1153.1 k. In general. Most CitedCases

Admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion, which occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.

[3] Criminal Law 110 ⚡ 368.13**110 Criminal Law****110XVII Evidence****110XVII(F) Other Misconduct by Accused****110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General****110k368.7 Factors Affecting Admissibility****110k368.13 k. Prejudicial effect and probative value. Most Cited Cases**

For purposes of determining the admissibility of prior bad acts evidence, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis. Rules of Evid., Rules 403, 404(b).

[4] Criminal Law 110 ⚡ 368.13**110 Criminal Law****110XVII Evidence****110XVII(F) Other Misconduct by Accused****110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General****110k368.7 Factors Affecting Admissibility****110k368.13 k. Prejudicial effect and probative value. Most Cited Cases**

Once prior bad act evidence is found admissible by reason of its purpose, the trial court must then conduct a prejudice analysis, and may exclude the evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. Rules of Evid., Rules 403, 404(b).

[5] Criminal Law 110 ⚡ 374.24**110 Criminal Law****110XVII Evidence****110XVII(F) Other Misconduct by Accused****110XVII(F)13 Proof and Effect****110k374.21 Determination of Admissibility****110k374.24 k. Findings and statement of reasons. Most Cited Cases**

~~Trial court failed to conduct requisite on-the-record balancing test; in murder prosecution, to determine whether probative value of testimony concerning prior shooting was substantially outweighed by danger of unfair prejudice; other than finding there was clear and convincing evidence of prior shooting and that testimony of victim's sister concerning victim's account of prior incident was admissible, trial court made no specific findings on record as to why testimony had probative value, nature of unfair prejudice, or whether probative value of testimony was substantially outweighed by danger of unfair prejudice, and consideration of applicable rule could not be implied from record.~~ Rules of Evid., Rules 403, 404(b).

[6] Criminal Law 110 ⚡ 1169.11**110 Criminal Law****110XXIV Review****110XXIV(O) Harmless and Reversible Error****110k1169 Admission of Evidence****110k1169.11 k. Evidence of other offenses and misconduct. Most Cited Cases**

Erroneous admission of prior bad act testimony in murder prosecution, without conducting requisite balancing test, was not harmless; defendant was tried for shooting and killing victim, prior bad act testimony involved defendant shooting victim a month before murder, and based upon similarities, jury could have determined defendant was guilty on improper basis, by relying on prior bad act testimony as propensity evidence. Rules of Evid., Rules 403, 404(b).

[7] Criminal Law 110 1181.5(7)

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition
of Cause

110k1181.5 Remand in General; Vacation

110k1181.5(3) Remand for Determina-
tion or Reconsideration of Particular Matters

110k1181.5(7) k. Admissibility of
evidence; arrest and search. Most Cited Cases

Remand to permit trial court to conduct on-the-record balancing test of probative value of prior bad act testimony against danger of unfair prejudice was appropriate, in murder prosecution. Rules of Evid., Rules 403, 404(b).

****879** Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and J. Gregory Hembree, of Conway, for Respondent.

PIEPER, J.

***249** Brian K. Spears appeals his convictions for murder and three counts of assault and battery with intent to kill (ABWIK). On appeal, Spears argues the trial court improperly admitted evidence of a prior shooting incident between Spears and Aaron Hammonds (Victim) that occurred one month before Victim was killed. Spears contends the trial court failed to conduct a balancing test to determine if the probative value of the prior shooting testimony was substantially outweighed by the danger of unfair prejudice to Spears. We remand.

FACTS

On May 27, 2007, Victim was fatally shot on

Ocean Boulevard in Myrtle Beach. Upon responding to the scene, Detective Michael Hull interviewed eyewitnesses. Detective Hull *250 created a composite of the suspected shooter that resembled Jeffrey Bethea. After seeing the composite on the news, Bethea turned himself in to the police. Bethea told Detective Hull that Spears and Nathaniel Douglas were responsible for Victim's death. Thereafter, Bethea, Spears, and Douglas were each charged with murder and three counts of ABWIK. As part of an agreement with the State, Bethea pled guilty to voluntary manslaughter. As a result of Bethea's plea, Douglas and Spears became codefendants in the case.

During pretrial motions, the solicitor argued Victim's death was a gang-related revenge killing. The solicitor contended that Victim's death was connected to the murder of Eric Floyd. Prior to his murder, Victim pled guilty to accessory after the fact in connection with Floyd's murder and served a four-year sentence. Approximately one month after Victim was released from prison, Spears allegedly shot Victim in a Wal-Mart parking lot in North Carolina. Spears argued any introduction of gang evidence would be prejudicial under Rule 403, SCRE. The trial court asked the solicitor "what about the shooting the month before, was, is there some way to connect that with this gang as well ... I'm just wondering are you going to be able to get that in." The solicitor responded that she would not know if she could lay the foundation for the Wal-Mart shooting until Danyell Hammonds' testimony was proffered. Spears then argued testimony about the Wal-Mart shooting should be excluded because it was hearsay and because there was not clear and convincing evidence of the shooting as required by Rule 404(b), SCRE. Upon completion of the arguments, the trial court found the gang affiliation evidence was relevant and the probative value of the gang affiliation evidence was not substantially outweighed by any danger of unfair prejudice it might have caused. Spears then questioned whether the trial court ruled on the admissibility of the shooting incident at Wal-Mart. The trial court, in response to

Spears' question about the Wal-Mart shooting, took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

****880** After the trial began, the court held an in camera hearing to proffer the testimony of Hammonds, Victim's sister, who intended to testify regarding Victim's statements about the Wal-Mart shooting. Hammonds testified that one month ***251** before Victim was fatally shot, Victim told her "Bos" shot him outside of a Wal-Mart in North Carolina. Hammonds indicated she knew Bos to be Spears. ^{FN1} According to Hammonds, Victim and Lemark Irons came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained that she believed the shooting had just occurred because the blood in Victim's hand was still wet. Hammonds testified that Spears was a member of the 41-Curve gang and Victim was a member of the East Side Blood gang. Hammonds also testified a group of 41-Curve members told her that they were "going to get" Victim.

^{FN1}. Bos is Spears' street name.

The trial court expressed its concerns that Hammonds' testimony was hearsay and questioned the solicitor about how she would get Hammonds' testimony regarding the Wal-Mart shooting admitted into evidence. Before the solicitor responded, Spears argued against introducing Hammonds' testimony of the prior shooting incident, stating "it's a 4[04](B) issue. My client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it." Spears also argued that the testimony was hearsay and "taking it together with the whole more prejudicial than probative thing and you've got my argument." The solicitor then argued Victim's testimony fell under the excited utterance hearsay exception.

Before adjourning for the night, the trial court

discussed with Spears and the solicitor whether Hammonds' testimony was hearsay. The next day, Spears renewed his Rule 403, SCRE, argument. After further discussion on whether Hammonds' testimony was hearsay, the trial court admitted Hammonds' testimony about the Wal-Mart shooting under the excited utterance exception to hearsay. Next, the solicitor proffered the video of the Wal-Mart shooting to introduce Hammonds' testimony as prior bad act evidence pursuant to Rule 404(b), SCRE. The trial court asked the solicitor the purpose for which she was offering the prior shooting evidence under Rule 404(b). The solicitor responded the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected and argued the evidence was not clear and convincing. Spears also renewed all of his ***252** previous objections. The trial court found clear and convincing evidence existed to support admission of the Wal-Mart shooting testimony and admitted Hammonds' testimony of the Wal-Mart shooting as a prior bad act.

A jury found Spears guilty. The trial court sentenced Spears to thirty years' imprisonment for murder and twenty years' imprisonment for each ABWIK count, to be served concurrently. This appeal followed.

STANDARD OF REVIEW

[1][2] In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous. State v. McEachern, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct.App.2012). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

LAW/ANALYSIS

Spears' sole issue on appeal is that the trial court erred by failing to conduct an on-the-record balancing test to determine whether the probative value of the prior bad act testimony was substantially outweighed by the danger of unfair prejudice. We agree.

[3][4] South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish: (1) motive; (2) intent; (3) the absence of mistake **881 or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. Rule 404(b), SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative *253evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998). "Once bad act evidence is found admissible under Rule 404(b), the trial court *must* then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) (emphasis added). The court may exclude the 404(b) evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*

This court has held if "an on-the-record Rule 403 analysis is required, [we] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct.App.2002). In *King*, this court determined the trial court's ruling was "a compressed Rule 403/404(b) analysis" with "some indicia of his

consideration of whether admission of the testimony was fair to King (*i.e.*, more probative than prejudicial)." *Id.* at 157, 561 S.E.2d at 647.

[5] Here, the trial court ruled Hammonds could testify as to Victim's statements about the Wal-Mart shooting pursuant to the excited utterance exception to hearsay. Immediately thereafter, the solicitor proffered the video of the Wal-Mart shooting. The trial court indicated it understood the solicitor was offering the evidence of the prior shooting "under 404 or evidence of a prior bad act." The solicitor argued testimony regarding the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected, arguing the evidence was not clear and convincing and renewed all of his previous objections, including his earlier objection that the unfair prejudice of the Wal-Mart shooting testimony substantially outweighed its probative value. The trial court found clear and convincing evidence existed to support the prior bad act, but the trial court made no further findings. We recognize the trial court did spend time expressing its concerns and questioned the solicitor on the prior shooting. However, other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific *254 findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.^{FN2}

^{FN2} Admission under an excited utterance theory would also be subject to a 403 objection and balancing analysis. See Rule 403, SCRE.

Furthermore, we find it is not implicit or apparent from the record that the trial court *considered* whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice. Unlike the trial court in *King*, here, the trial court

made no indication that it considered Rule 403. Thus, if the trial court did consider the unfair prejudice of the Wal-Mart shooting testimony, it is not readily implicit or apparent from the record. For the foregoing reasons, we find the trial court erred by failing to conduct an on-the-record Rule 403 balancing test.

Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy. South Carolina has not addressed the procedure for when an appellate court is unable to determine from the record whether the trial court considered Rule 403 in admitting a prior bad act under Rule 404(b). However, our courts have discussed the procedure for when the trial court fails to include a Rule 609, SCRE, balancing test on the record. See **882 State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000). In Colf, the court of appeals undertook its own Rule 609(b) balancing test. Id. On appeal, the supreme court held that this court should have remanded the question to the trial court instead of conducting the balancing test itself. Id. The court reasoned that “[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision.” Id. Furthermore, the supreme court explained, “[t]he balancing test required by Rule 609(b) must be conducted by the trial court.” Id. (emphasis added).

Similarly, in State v. Scriven, this court was unable to determine whether the trial court “conducted a meaningful analysis to balance the impeachment value of these prior convictions, if any, against the prejudicial impact, as clearly *255 required under Rule 609(a)(1).” 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct.App.2000). Because the court was unable to ascertain whether the error was harmless, we remanded to the trial court with instructions to hold a hearing on the admissibility of the prior convictions and to carefully weigh the probative value of impeachment of the prior convictions against the prejudice to the defend-

ant. Id. at 344, 529 S.E.2d at 77. We further instructed that in “the event the State does not carry its burden, or the court determines that the prejudicial impact to Scriven outweighed the probative value for impeachment, the court shall order a new trial. Otherwise, subject to further appellate review, the conviction is affirmed.” Id.

More recently, this court found that the trial court erred by not conducting a proper Rule 609(b) balancing test because it provided no analysis of the prejudicial impact of admitting the defendant's prior conviction. State v. Howard, 384 S.C. 212, 223, 682 S.E.2d 42, 48 (Ct.App.2009). We followed the procedure set forth in Scriven, and remanded for an on-the-record balancing test. Id.

We have reviewed other jurisdictions and found that when appellate courts cannot ascertain whether the trial court conducted a Rule 403 balancing test on the record, these courts have either: (1) determined whether the error was harmless; (2) conducted a de novo review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test.

As indicated, some courts have ascertained whether the trial court's failure to conduct a Rule 403 balancing test is harmless. In Wardlow v. State, the Alaska Court of Appeals found the trial court committed error when it failed to conduct a balancing test under Rule 403 in admitting a witness' testimony as evidence pursuant to Rule 404. 2 P.3d 1238, 1248 (Alaska Ct.App.2000). However, the court determined the defendant failed to establish he was unfairly prejudiced. Id. Therefore, the court held the trial court's error in failing to conduct a Rule 403 balancing test was harmless. Id. Similarly, the Mississippi Supreme Court has held the failure to apply a Rule 403 balancing test on the record could be harmless error. McKee v. State, 791 So.2d 804, 805 (Miss.2001). In McKee, the trial court admitted testimony regarding the defendant's prior use of crack cocaine over the

defendant's *256 objection. *Id.* at 806. The court found the trial court erred by not applying the Rule 403 balancing test on the record. *Id.* at 810. However, the court also found the error was harmless based on the overwhelming evidence of the defendant's guilt. *Id.*

Other courts have found the trial court's failure to conduct an on-the-record Rule 403 balancing test is not reversible error when the appellate court can undertake a de novo review of the record and conduct its own balancing test. The Tenth Circuit held it had authority to "conduct a *de novo* balancing where the trial court failed to make explicit findings to support a Rule 403 ruling" on the admission of Rule 404(b) evidence. *United States v. Lazcano-Villalobos*, 175 F.3d 838, 847 (10th Cir.1999).^{FN3} Additionally, **883 the Ninth Circuit explained that it reviews "for abuse of discretion a district court's decision to exclude evidence at trial." *United States v. Leo Sure Chief*, 438 F.3d 920, 925 (9th Cir.2006). "However, when the district court excludes evidence under Federal Rule of Evidence 403 but does not engage in explicit balancing, we review such a determination de novo." *Id.* (footnote omitted).

FN3. Rule 403 of the Federal Rules of Evidence is worded differently than the South Carolina rule and provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 404(b) further provides:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person

acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pre-trial notice.

Fed.R.Evid. 404(b).

Finally, other courts have determined that remand is appropriate when the appellate court is unable to determine from the record whether the trial court implicitly made a Rule 403 *257 finding. In *State v. Taylor*, the Arizona Supreme Court reversed and remanded for a Rule 403 determination. 169 Ariz. 121, 817 P.2d 488, 492-93 (1991). The *Taylor* court recognized that even though the trial court did not specifically mention Rule 403 or prejudice in its analysis, "the record indicates that the court *may have been* weighing the prejudice against the probative value." *Id.* at 492. However, the court also found it could not determine whether the trial court excluded the prior conviction because it was irrelevant or because the prejudice outweighed the probative value. *Id.* The court noted that "[a] remand with instructions to conduct a Rule 403 determination may be ordered when uncertainty in a trial court's ruling might be removed." *Id.* (quoting *Shows v. M/V Red Eagle*, 695 F.2d 114, 118 (5th Cir.1983)). Accordingly, the court remanded this issue with instructions to the trial court

"to make an on-the-record finding based on specific facts and circumstances." *Id.* at 493.

Likewise, in *State v. McFarland*, the West Virginia Supreme Court held that because "the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit" the prior bad act evidence in question. 228 W.Va. 492, 721 S.E.2d 62, 73 (2011). Therefore, the *McFarland* court held that the circuit court erred in failing to conduct an on-the-record balancing test required by Rule 403. *Id.* The court reversed and remanded to the trial court for a new trial. *Id.*^{FN4}

FN4. In the absence of on-the-record prejudice versus probative value findings as to the admission of a Rule 404(b) evidence, the Fifth Circuit has found it is "obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir.1983). In *Robinson*, the court determined that its review of the record led to uncertainty concerning the admissibility of the extrinsic offense testimony and remanded the case to the trial court for an on-the-record balancing test. *Id.* at 214. Additionally, the Seventh Circuit recognizes the district court's deference in admitting Rule 404(b) evidence, but also recognizes the appellate court's authority to "reverse if the district court failed to consider the prejudicial nature of the Rule 404(b) evidence before allowing it to be admitted." *United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir.2010). "A 'perfunctory' analysis is insufficient." *Id.* In *Ciesiolka*, the court held that:

[T]he district court abused its discretion in

failing to propound reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice. We have reviewed the transcript of the district court's Rule 404(b) hearing, but could find no portion within it where the court explained its bare-bones conclusion that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

Id.

*258 Having discussed the options considered by other courts, we decline to conduct a de novo Rule 403 balancing test. This decision is consistent with our supreme court's prior decision that an appellate court should not **884 conduct its own balancing process when the trial court does not perform a Rule 609(b), SCRE, balancing test in admitting a prior conviction. See *Colf*, 337 S.C. at 629, 525 S.E.2d at 249 (noting an appellate court should not undertake the Rule 609(b) balancing test itself, but should remand the question to the trial court).

[6][7] We note the potential prejudice to Spears upon the introduction of this evidence. Spears was tried for shooting and killing Victim. The prior bad act testimony involved Spears shooting the Victim a month before the incident herein. Based upon these similarities, the jury could have determined Spears was guilty on an improper basis by relying on the Wal-Mart testimony as propensity evidence. See *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity."); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being

tried, the danger of prejudice is enhanced”); State v. Taylor, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Cl.App.2011) (recognizing the prejudicial effect of admitting “evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime”). Moreover, based upon the record herein, we are unable to say that the admission of the prior bad act testimony was harmless error. See Black, 400 S.C. at 27, 732 S.E.2d at 890 (“In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having *259 changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt.”); Scriven, 339 S.C. at 344, 529 S.E.2d at 77 (“On the basis of this record, we are unable to say that the admission of these prior convictions was harmless error.”). Accordingly, we find it appropriate to remand for an on-the-record Rule 403 balancing test.

403 S.C. 247, 742 S.E.2d 878

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CONCLUSION

Based on the trial court’s failure to conduct a Rule 403 balancing test to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, we remand with instructions for the trial court to conduct an on-the-record balancing test. If upon remand the trial court determines the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, the court should order a new trial. If the trial court determines the probative value of the prior shooting testimony is not substantially outweighed by the danger of unfair prejudice to Spears, the conviction shall be affirmed subject to the right of appellate review.

REMANDED.

FEW, C.J., and WILLIAMS, J., concur.

S.C.App.,2013.
State v. Spears

C

Supreme Court of South Carolina.
Burney Don GREEN, Respondent,

v.

The STATE of South Carolina, Petitioner.

No. 25059.

Submitted Dec. 15, 1999.

Decided Jan. 24, 2000.

Petitioner who was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school sought postconviction relief. The Circuit Court, Horry County, David H. Maring, Sr., J., granted petition, and state petitioned for writ of certiorari. Granting review, the Supreme Court, Burnett, J., held that: (1) finding that counsel was ineffective for failing to argue that prejudicial effect of petitioner's prior convictions outweighed their probative value was supported by evidence, and (2) any prejudice caused by counsel's ineffectiveness was not cured by limiting instruction.

Affirmed.

West Headnotes

111 Criminal Law 110 1613

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)2 Affidavits and Evidence

110k1613 k. Burden of Proof. Most

Cited Cases

(Formerly 110k998(16))

In a postconviction relief proceeding, the burden

of proof is on the applicant to prove the allegations in his application.

121 Criminal Law 110 1519(1)

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1511 Counsel

110k1519 Effectiveness of Counsel

110k1519(1) k. In General. Most

Cited Cases

(Formerly 110k998(8))

For an applicant to be granted postconviction relief as a result of ineffective assistance of counsel, he must show both: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) he was prejudiced by his counsel's ineffective performance. U.S.C.A. Const. Amend. 6.

131 Criminal Law 110 1883

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1883 k. Prejudice in General.

Most Cited Cases

(Formerly 110k641.13(1))

In order to prove prejudice by counsel's deficient performance, defendant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different; a "reasonable probability" is a probability sufficient to un-

dermine confidence in the outcome of the trial.
U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚡ 1158.36

110 Criminal Law

110XXXIV Review

110XXXIV(O) Questions of Fact and Findings

110k1158.36 k. Post-Conviction Relief.

Most Cited Cases

(Formerly 110k1158(1))

If there is any probative evidence to support the findings of the postconviction relief judge, those findings must be upheld.

[5] Criminal Law 110 ⚡ 1158.36

110 Criminal Law

110XXXIV Review

110XXXIV(O) Questions of Fact and Findings

110k1158.36 k. Post-Conviction Relief.

Most Cited Cases

(Formerly 110k1158(1))

A postconviction relief judge's findings should not be upheld if there is no probative evidence to support them.

[6] Criminal Law 110 ⚡ 1935

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1921 Introduction of and Objections to Evidence at Trial

110k1935 k. Impeachment or Contradiction of Witnesses. Most Cited Cases

(Formerly 110k641.13(6))

Counsel was ineffective for failing to argue that the prejudicial effect of admitting defendant's prior convictions outweighed their probative value; credibility was crucial in prosecution for distribution of crack cocaine, as jury had to choose between defendant's and Law Enforcement Division agents' version of events, and defendant was impeached with evidence of two convictions for possession of cocaine that were four and five years old. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 609(a)(1).

[7] Witnesses 410 ⚡ 337(10)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(10) k. Extent of Punishment. Most Cited Cases

Witnesses 410 ⚡ 337(25)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(25) k. Prejudice or Unfairness; Balancing Probative Value. Most Cited Cases

Whether a defendant's prior convictions can be used to impeach him is determined under a two-part

test: (1) the prior crime must have been punishable by death or imprisonment in excess of one year, and (2) the court must determine that the probative value of admitting the evidence outweighs its prejudicial effect to the accused. Rules of Evid., Rule 609(a)(1).

[8] Witnesses 410 ⚡ 337(11)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(11) k. Moral Turpitude; Infamous Crimes. Most Cited Cases

Evidentiary rule for determining whether a defendant's prior convictions can be used to impeach defendant removes the necessity of determining whether a crime is one of moral turpitude. Rules of Evid., Rule 609(a)(1).

[9] Witnesses 410 ⚡ 337(25)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(25) k. Prejudice or Unfairness; Balancing Probative Value. Most Cited Cases

Witnesses 410 ⚡ 337(27)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(27) k. Similarity to Charged Offense. Most Cited Cases

In determining whether similar prior convictions can be used to impeach accused, trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence. Rules of Evid., Rule 609(a)(1).

[10] Witnesses 410 ⚡ 337(27)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(27) k. Similarity to Charged Offense. Most Cited Cases

In determining whether similar prior convictions can be used to impeach accused, the following factors, along with any other relevant factors, should be considered: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the

credibility issue. Rules of Evid., Rule 609(a)(1).

[11] Criminal Law 110 ↪ 1927

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1921 Introduction of and Objections to Evidence at Trial

**110k1927 k. Other Offenses and Prior Misconduct. Most Cited Cases
(Formerly 110k641.13(6))**

Any prejudice caused by defense counsel's failure to argue that the prejudicial effect of admitting petitioner's prior convictions for similar offenses outweighed their probative value was not cured by limiting instruction. U.S.C.A. Const.Amend. 6; Rules of Evid., Rule 609(a)(1).

[12] Criminal Law 110 ↪ 1169.5(3)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.5 Curing Error by Withdrawal, Striking Out, or Instructions to Jury

110k1169.5(3) k. Other Offenses and Character of Accused. Most Cited Cases

Limiting instructions alone do not make an erroneous admission of prior conviction evidence harmless. Rules of Evid., Rule 609(a)(1).

****99 *430** Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Teresa A. Knox, Assistant Attorney General J. Benjamin Aplin, of Office of the Attorney General, of Columbia, for petitioner.

Assistant Appellate Defender Melissa J. Reed Kimbrough, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

BURNETT, Justice:

Respondent was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school. His application for post-conviction relief (PCR) was granted. We affirm.

FACTS

Respondent was arrested as a result of an undercover sting operation conducted by the South Carolina Law Enforcement *431 Division (SLED) in conjunction with the Conway Police Department. SLED agents parked a van outside a bar in Conway, where respondent was standing in a group of men. An agent called respondent over and asked for a "twenty," meaning a twenty dollar rock of crack cocaine. Respondent returned to the group of men. The agents testified respondent returned with the drugs and accepted a marked twenty dollar bill. Respondent testified he never went back to the van, rather, another man in the group, identified as A.J., sold the agents the cocaine.

****100** One of the agents, who was wired with a microphone transmitting to a surveillance team nearby, described respondent to the surveillance team, and respondent was arrested. Respondent testified that when the surveillance officers arrived, the men standing with him ran. He did not run "because I figure I didn't do anything; I don't need to run anywhere." The marked twenty dollar bill was not recovered.

On cross-examination, the State impeached respondent with a 1990 conviction for possession of crack cocaine and a 1991 conviction for possession of cocaine.^{FNI} The trial court gave the jury limiting instructions. The jury found respondent guilty as charged. Respondent was granted PCR for his trial

counsel's failure to object that the prejudicial effect of his prior convictions outweighed their probative value.

^{FN1}. Respondent's trial took place in 1995.

ISSUE

Did the PCR court err in finding trial counsel ineffective for failing to object that the prejudicial effect of respondent's prior convictions outweighed their probative value?

DISCUSSION

[1][2][3][4][5] In a PCR proceeding, the burden of proof is on the applicant to prove the allegations in his application. *Bell v. State*, 321 S.C. 238, 467 S.E.2d 926 (1996); *Rule 71.1(c)*, SCRPC. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) he was prejudiced by *432 his counsel's ineffective performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Judge v. State*, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* If there is any probative evidence to support the findings of the PCR judge, those findings must be upheld. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Likewise, a PCR judge's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

[6] The PCR court ruled defense counsel was ineffective for failing to argue the prejudicial effect of admitting respondent's prior convictions outweighed their probative value. See *Rule 609(a)(1)*, SCRE. We

agree.

[7][8] Under the common law rule, a witness could be impeached by showing he was convicted of a crime of moral turpitude as long as it was not too remote in time ^{FN2} and its probative value outweighed its prejudicial effect. *Rule 609(a)(1)* provides a similar two-part test for determining whether a defendant's prior convictions can be used to impeach him: (1) the prior crime must have been punishable by death or imprisonment in excess of one year, and (2) the court must determine that the probative value of admitting the evidence outweighs its prejudicial effect to the accused. *Rule 609(a)(1)*, SCRE. Thus, the new evidentiary rule removes the necessity of determining whether a crime is one of moral turpitude.

^{FN2}. *Rule 609(b)*, SCRE governs admissibility of remote convictions. That rule is not at issue here.

We have not previously addressed whether the probative value of a prior conviction, similar to the crime charged, not involving dishonesty or false statement, ^{FN3} outweighs its prejudicial *433 effect, where credibility is critical. ^{FN4} Federal courts have held that prior **101 convictions for the same or similar crimes are highly prejudicial and should be admitted sparingly. See Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.05[3][d] (2d ed. 1999). While some federal circuits have held such convictions admissible if, after consideration of other factors, their probative value outweighs their prejudicial effect, the Fourth Circuit has been one of the stricter circuits, refusing to permit impeachment with similar prior convictions. ^{FN5} See, e.g., *United States v. Sanders*, 964 F.2d 295, 298-99 (4th Cir.1992) (in prosecution for assault with a knife, prior conviction for identical conduct should have been excluded as highly prejudicial).

^{FN3}. Conviction of a crime involving dis-

honesty or false statement is always admissible for impeachment purposes, regardless of the punishment. Rule 609(a)(2), SCRE. Narcotics convictions generally do not fall under this rule. See Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.04[3][d] (2d ed.1999).

FN4. Relying on *State v. Lilly*, 278 S.C. 499, 299 S.E.2d 329 (1983), the Court of Appeals in *State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (Ct.App.1991), affirmed the trial court's ruling admitting evidence of prior similar narcotics convictions for impeachment purposes over defense counsel's objection that the probative value of the evidence was greatly outweighed by its prejudicial effect. However, *Lilly* did not address the probative/prejudicial balancing test. In *Green v. Hewett*, 305 S.C. 238, 407 S.E.2d 651 (1991), we addressed the balancing test in the context of a civil suit for personal injury damages. *Green* is not dispositive in this case.

FN5. One tactic the Fourth Circuit Court of Appeals employs is to allow the prosecutor to ask the defendant about the existence of prior convictions, but not their nature. See *United States v. Boyce*, 611 F.2d 530, 531 (4th Cir.1979) ("In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the Government to prove the nature of the offense on the ground that to do so would amount to unfair prejudice.").

[9][10] We decline to hold similar prior convictions inadmissible in all cases. Trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence. The

following factors, along with any other relevant factors, should be considered:

1. The impeachment value of the prior crime.
2. The point in time of the conviction and the witness's subsequent history.
- *434 3. The similarity between the past crime and the charged crime.
4. The importance of the defendant's testimony.
5. The centrality of the credibility issue.

See *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

In the instant case, evidence in the record supports the PCR court's ruling that respondent was prejudiced by defense counsel's failure to argue the prejudicial effect of the convictions outweighed their probative value. Respondent was impeached with evidence of two convictions for possession of cocaine that were four and five years old. His credibility was critical, as the jury had to choose between his version of events and that of the SLED agents.

[11][12] Finally, the State argues any error was cured by the trial court's limiting instruction. We disagree. As the Fourth Circuit Court of Appeals noted in the context of Rule 609(b):

Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged.

United States v. Beahm, 664 F.2d 414, 418-19 (4th Cir.1981) (footnote omitted). Limiting instructions alone do not make an erroneous admission of prior conviction evidence harmless.

AFFIRMED.

FINNEY, C.J., TOAL, MOORE, and WALLER, JJ.,
concur.

S.C.,2000.

Green v. State

338 S.C. 428, 527 S.E.2d 98

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Westlaw

628 S.E.2d 271

368 S.C. 230, 628 S.E.2d 271

(Cite as: 368 S.C. 230, 628 S.E.2d 271)

Page 1

¶¶

Court of Appeals of South Carolina.
The STATE, Respondent,
v.
David Bernard ELMORE, Appellant.

No. 4082.

Submitted Jan. 1, 2006.

Decided Feb. 21, 2006.

Rehearing Denied April 20, 2006.

Certiorari Denied April 5, 2007.

Background: Defendant was convicted in the Circuit Court, Saluda County, Marc H. Westbrook, J., of possession with intent to distribute marijuana, and he appealed.

Holdings: The Court of Appeals, Kittredge, J., held that:

(1) issue as to defendant's intent was for jury; and
(2) because defendant did not testify, he failed to preserve for review his claim that trial court committed reversible error in ruling the State could impeach him through the use of two prior drug convictions if he testified.

Affirmed.

West Headnotes

[1] Controlled Substances 96H ⚡93

96H Controlled Substances96HIII Prosecutions96Hk91 Questions for Jury

96Hk93 k. Possessory Offenses. Most Cited Cases

Issue as to defendant's intent was for jury in prosecution of defendant for possession with intent to distribute marijuana; after the car was pulled over, the deputies noticed several bags fly out of the vehicle's passenger side window, eight small bags, each containing a green leafy substance, were found on the side of the road, testing confirmed the leafy substance was marijuana, and defendant was carrying \$653 in cash in his pockets.

[2] Criminal Law 110 ⚡1144.13(3)

110 Criminal Law110XXIV Review110XXIV(M) Presumptions

110k1144 Facts or Proceedings Not Shown by Record

110k1144.13 Sufficiency of Evidence

110k1144.13(2) Construction of Evidence

110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State.

[3] Criminal Law 110 ⚡753.2(3.1)

110 Criminal Law110XX Trial

110XX(F) Province of Court and Jury in General

110k753 Direction of Verdict110k753.2 Of Acquittal

110k753.2(3) Insufficiency of Evidence

110k753.2(3.1) k. In General.

Most Cited Cases

The trial court, in a directed verdict motion, is concerned with the existence or nonexistence of evidence, not with its weight, and this standard remains constant even when the State relies exclusively on circumstantial evidence.

[4] Criminal Law 110 ⚡ 753.2(3.1)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k753 Direction of Verdict

110k753.2 Of Acquittal

110k753.2(3) Insufficiency of Evidence

110k753.2(3.1) k. In General.

Most Cited Cases

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.

[5] Criminal Law 110 ⚡ 753.2(6)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k753 Direction of Verdict

110k753.2 Of Acquittal

110k753.2(3) Insufficiency of Evidence

110k753.2(6) k. Suspicion or Conjecture; Reasonable Doubt. Most Cited Cases

A trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty.

[6] Criminal Law 110 ⚡ 753.2(3.1)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k753 Direction of Verdict

110k753.2 Of Acquittal

110k753.2(3) Insufficiency of Evidence

110k753.2(3.1) k. In General.

Most Cited Cases

Criminal Law 110 ⚡ 753.2(4)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k753 Direction of Verdict

110k753.2 Of Acquittal

110k753.2(3) Insufficiency of Evidence

110k753.2(4) k. Substantial Evidence. Most Cited Cases

If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, appellate court must find that the case was properly submitted to the jury.

[7] Controlled Substances 96H ⚡ 31

96H Controlled Substances

96HII Offenses

96Hk31 k. Possession for Sale or Distribution. Most Cited Cases

Conviction of possession with intent to distribute does not hinge upon the amount involved.

[8] Controlled Substances 96H ↪ 31

96H Controlled Substances

96HII Offenses

96Hk31 k. Possession for Sale or Distribution.

Most Cited Cases

Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute.

[9] Criminal Law 110 ↪ 1036.2

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)I In General

110k1036 Evidence

110k1036.2 k. Competency, Examination, and Impeachment of Witnesses. Most Cited Cases

When the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not preserved for review.

[10] Criminal Law 110 ↪ 1036.2

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)I In General

110k1036 Evidence

110k1036.2 k. Competency, Examination, and Impeachment of Witnesses. Most Cited

Cases

Because defendant did not testify, he failed to preserve for review his claim that trial court committed reversible error in ruling the State could impeach him through the use of two prior drug convictions if he testified.

[11] Witnesses 410 ↪ 337(25)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(25) k. Prejudice or Unfairness; Balancing Probative Value. Most Cited Cases

In weighing the probative value of prior convictions used to impeach defendant's credibility, trial court should consider all relevant factors including but not limited to: 1) the impeachment value of the prior crime; 2) the point in time of the conviction and the witness's subsequent history; 3) the similarity between the past crime and the charged crime; 4) the importance of the defendant's testimony; and 5) the centrality of the credibility issue. Rules of Evid., Rule 609(a)(1).

[12] Witnesses 410 ↪ 337(25)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Crimi-

nal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(25) k. Prejudice or Unfairness; Balancing Probative Value. Most Cited Cases

Witnesses 410 ⚡ 337(31)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(31) k. Determination; Hearing and Findings. Most Cited Cases

When determining admissibility of prior convictions to impeach credibility of defendant, the law does not mandate the trial court make an on-the-record specific finding as long as the record reveals that the trial judge engaged in a meaningful balancing of the probative value and the prejudicial effect before admitting prior conviction; however, when balancing the probative value of a prior conviction against the prejudicial effect, meaningful appellate review is best achieved when the trial court articulates its ruling and the basis for it. Rules of Evid., Rule 609(a)(1, 2).

113] Witnesses 410 ⚡ 337(27)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(27) k. Similarity to Charged Offense. Most Cited Cases

The similarity of a prior crime to the crime charged heightens the prejudicial value of the crime, and the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission. Rules of Evid., Rule 609.

114] Witnesses 410 ⚡ 337(25)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(25) k. Prejudice or Unfairness; Balancing Probative Value. Most Cited Cases

Witnesses 410 ⚡ 337(27)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(27) k. Similarity to Charged Offense. Most Cited Cases

Witnesses 410 ⚡ 337(31)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(31) k. Determination; Hearing and Findings. Most Cited Cases

For prior similar convictions involving violations of narcotics laws, the prejudicial value is further increased as such violations are generally not probative of truthfulness, and this relative lack of probative value should figure prominently in the weighing of prejudice against probative value of prior convictions used to impeach defendant, and trial courts should engage in an on-the-record analysis when admitting such convictions because of the presumption against their admission. Rules of Evid., Rule 609.

****272** C. Rauch Wise and Robert J. Tinsley, both of Greenwood, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Special Assistant Attorney General Amie L. Clifford, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

KITTREDGE, J.:

***233** David Bernard Elmore appeals his conviction and sentence for possession with intent to distribute marijuana. Elmore argues the trial court erred in failing to grant his motion for a directed verdict and erred in ruling the State could use two prior drug convictions for impeachment if he testified. We affirm.

FACTS

On December 16, 2001, Deputies Mike Rushton and Chuck Padgett of the Saluda County Sheriff's Office were on patrol on Highway 178 in Saluda County. The deputies observed a white Cadillac cross the center line. The deputies suspected the driver of the Cadillac was driving under the influence and pulled the car over.

After the car was pulled over, the deputies noticed several bags fly out of the vehicle's passenger side window. Deputy Rushton approached the car and asked the driver (and sole occupant), David Bernard Elmore, for his driver's license. Elmore did not have a license and was arrested for driving without a license.

The deputies searched Elmore, the car, and the ground around the car. Eight small plastic sandwich bags, each containing a green leafy substance, were found on the side of the road; one larger bag, containing a similar substance, was found in the Cadillac's center console. Elmore was carrying \$653 in cash in his pockets. The deputies found no marijuana residue, no evidence of marijuana being smoked in the car, and no drug paraphernalia—"no cigarette lighters, no matches, no marijuana smoking pipes or anything of that nature ..., no rolling papers, [and] no blunts."

Testing confirmed the leafy substance was marijuana, and Deputy Rushton testified that the street value of each bag ranged from ten to thirty dollars. The total weight of the marijuana was 27.55 grams. Investigator Joe Collier testified that four of the bags were virtually identical in weight. Elmore***234** ****273** was charged with possession with intent to distribute marijuana.

At the close of the State's case, Elmore argued the State failed to prove the element of intent and moved for a directed verdict. The trial court found the State "submitted evidence that could be viewed by the jury as intent to distribute" and denied the motion.

The trial court then informed Elmore of his right to testify and explained that his prior convictions may be “brought up” if he testified. The Solicitor informed the trial court of the State’s desire to question Elmore about two prior drug convictions: a 1995 conviction for possession of crack cocaine; and a 2001 conviction for possession with intent to distribute marijuana. Elmore contended the convictions were prejudicial and objected to their admission. Specifically, Elmore argued the marijuana conviction should not be allowed because it is “unduly similar” and cited Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), and State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). The trial court summarily noted the objection and found the State could ask about both convictions if Elmore testified. Elmore elected not to testify.

Elmore was found guilty of possession with intent to distribute marijuana and sentenced. This appeal followed.

LAW/ANALYSIS

I. Denial of Motion for a Directed Verdict

[1] Elmore argues the trial court erred in not granting a directed verdict because there was insufficient evidence to establish an intent to distribute marijuana. We disagree.

[2][3][4][5][6] “On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State.” State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). The trial court, in a directed verdict motion, is concerned with the existence or nonexistence of evidence, not with its weight. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). This standard remains constant even when the State relies exclusively on circumstantial evidence. *Id.* “A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense *235 charged.” McHoney, 344 S.C. at 97, 544 S.E.2d at 36. A trial

court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). However, “[i]f there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.” McHoney, 344 S.C. at 97, 544 S.E.2d at 36.

[7][8] Section 44-53-370(d)(3) of the South Carolina Code (Supp.2004) creates a “permissive inference to be considered by the jury” that possession of more than twenty-eight grams or one ounce of marijuana constitutes possession with intent to distribute.^{FN1} State v. Andrews, 324 S.C. 516, 522, 479 S.E.2d 808, 812 (Ct.App.1996). However, “conviction of possession with intent to distribute does not hinge upon the amount involved.” State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (1987). “Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute.” State v. James, 362 S.C. 557, 561-62, 608 S.E.2d 455, 457 (Ct.App.2004).

^{FN1}. This section has subsequently been amended and the pertinent language is currently in section 44-53-370(d)(4). See 2005 Act No. 127, § 4 (eff. June 7, 2005).

Although we find no South Carolina precedent directly on point, we do find instructive two cases with overlapping features. In State v. Robinson, 344 S.C. 220, 224, 543 S.E.2d 249, 250 (Ct.App.2001), and State v. Cherry, 361 S.C. 588, 594-95, 606 S.E.2d 475, 478 (2004), sufficient evidence of the intent to distribute was found to withstand motions for directed verdicts. In Robinson, the court found sufficient indicia of intent to distribute when the State presented testimony from police officers that a user of cocaine would not typically possess seven rocks of cocaine, that a dealer is not typically found with scales or individual baggies in his possession, and that a dealer

typically wraps crack cocaine**274 as Robinson did. Robinson, 344 S.C. at 224, 543 S.E.2d at 250.

In State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct.App.2001) (en banc), *aff'd in result*, 361 S.C. 588, 606 S.E.2d 475 (2004), this court found sufficient evidence of the intent to *236 distribute to withstand a motion for a directed verdict where: (1) the arrest occurred in a high crime area; (2) defendant possessed eight rocks of crack cocaine; (3) defendant possessed no drug paraphernalia; (4) defendant possessed \$322 in cash, predominantly in twenty dollar bills; and (5) testimony provided that a single rock of crack cocaine is typically sold for twenty dollars. Cherry, 348 S.C. at 285, 559 S.E.2d at 299. Our supreme court granted a writ of certiorari to review this court's opinion in Cherry, and the majority opinion affirmed this issue,^{FN2} holding the above combination of factors was sufficient to submit the charge of possession with intent to distribute to the jury. Cherry, 361 S.C. at 594-95, 606 S.E.2d at 478. The majority further held that, when reviewing a directed verdict motion, the trial court is not required to find the evidence infers guilt to the exclusion of any other reasonable hypothesis. *Id.* at 594, 606 S.E.2d at 478.

FN2. The dissent in Cherry took no exception to the majority's analysis on the directed verdict issue. 361 S.C. at 602-06, 606 S.E.2d 482-84. The dissent advocated reversal based on a challenge to the jury charge on circumstantial evidence. *Id.* We are not presented with any challenge to the jury charge in the present case.

Elmore argues the facts of this case more closely mirror those in State v. James, 362 S.C. 557, 608 S.E.2d 455 (Ct.App.2004), where this court found evidence was insufficient to submit to the jury a possession with intent to distribute charge. We disagree.

We believe the facts of the case before us more

closely line up with those in Robinson and Cherry. The overlapping features include the number of "baggies" containing drugs, the method of individual packaging, the amount of cash found on Elmore, and the complete absence of drug paraphernalia. Conversely, James is readily distinguishable. In James, two of the reasons this court found insufficient evidence of intent were: (1) James did not have a large amount of cash on his person, he only possessed thirty-seven dollars; and (2) the amount of crack cocaine possessed by James was speculative, because the bag containing the crack cocaine was never recovered for evidentiary testing and was only seen briefly by the arresting police officer. James, 362 S.C. at 565, 608 S.E.2d at 459.

*237 Viewing the evidence in the light most favorable to the State, as we must, we find the trial court properly denied the directed verdict motion, for a jury question was presented on the element of intent. We construe Elmore's final brief as tacitly acknowledging the presence of a jury question. As Elmore puts it: "The fact that marijuana is commonly sold in small packages also means that marijuana is commonly purchased in small packages. With only nine small bags, the evidence is *just as susceptible* as establishing ... Elmore had purchased the marijuana in small bags." (emphasis added). We agree that the evidence is reasonably susceptible of two inferences—one of which is consistent with the State's theory of possession of marijuana with intent to distribute, especially in view of the commonality of factors shared with Robinson and Cherry.^{FN3}

FN3. In Cherry, the court "rejected the contention that in ruling on a directed verdict motion, the trial judge must grant a directed verdict unless the circumstantial evidence pointed conclusively to the defendant's guilt, to the exclusion of every other reasonable hypothesis." Cherry, 361 S.C. at 594, 606 S.E.2d at 478, (citing State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889, *cert.*

denied, 493 U.S. 895, 110 S.Ct. 246, 107 L.Ed.2d 196 (1989)).

II. Admissibility of Prior Convictions

Elmore asserts the trial court committed reversible error in ruling the State could impeach him through the use of two prior drug convictions if he testified. We disagree based on supreme court precedent.

[9][10] "[W]hen the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is **275 not preserved for review." *State v. Glenn*, 285 S.C. 384, 385, 330 S.E.2d 285, 286 (1985). In *Glenn*, the court adopted the United States Supreme Court's reasoning in *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), that "when the defendant does not testify, appellate review is too speculative for several reasons," including:

the freedom of the trial judge to later alter his ruling; the possibility the prosecution may not have sought to impeach the defendant with the prior convictions; the likelihood that *238 an adverse ruling might not have been the real motivation for the defendant's decision not to testify; and the inability of the appellate court to review any error for harmlessness.

Glenn, 285 S.C. at 385, 330 S.E.2d at 285-86. We adhere to the *Luce* preservation rule adopted in *Glenn*. See S.C. Const. art. V, 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Thus, because Elmore did not testify, we find he failed to preserve the question of improper impeachment for review.

Elmore urges a departure from a strict application of *Glenn*, desiring instead a less rigid preservation rule. Some jurisdictions have declined to follow the *Luce* preservation rule. See generally *State v. Gal-*

more, 994 S.W.2d 120, 123-25 (Tenn.1999) (discussing, for states that have not adopted the *Luce* preservation rule, the two primary alternative approaches to preserving a challenge to a trial court's pre-testimony decision on admissibility of prior convictions for impeachment purposes). As an error correction court, we leave it to our supreme court to determine if a retreat from *Glenn* is warranted.

[11][12] We take this opportunity to remind and caution the bench and bar of the inherent prejudice that flows from the use of similar prior convictions for impeachment purposes under Rule 609(a)(1), SCRE. The trial court, in weighing the probative value of prior convictions pursuant to Rule 609(a)(1), SCRE,^{FN4} should consider all relevant factors including but not limited to: "1) the impeachment value of the prior crime; 2) the point in time of the conviction and the witness's subsequent history; 3) the similarity between the past crime and the charged crime; 4) the importance of the defendant's testimony; and 5) the centrality of the credibility issue." *State v. Bryant*, 356 S.C. 485, 490, 589 S.E.2d 775, 777-78 (Ct.App.2003) (citations omitted) (emphasis added). The current state of the law does not mandate the trial court make an on-the-record specific finding "as long as the record reveals that the trial judge did engage in a meaningful balancing of the probative value and the prejudicial effect before admitting *239 a non-609(a)(2) prior conviction under 609(a)(1)." *State v. Scriven*, 339 S.C. 333, 341, 529 S.E.2d 71, 75 (Ct.App.2000). However, as we have urged trial courts, when balancing the probative value of a prior conviction under Rule 609(a)(1) against the prejudicial effect, meaningful appellate review is best achieved when the trial court "articulate[s] its ruling and the basis for it." *Id.* at 342, 529 S.E.2d at 75.

^{FN4}. We recognize that under a precedent of this court, the use of a prior conviction under Rule 609(a)(2), SCRE, does not require a probative value versus prejudice analysis. *State v. Al-Amin*, 353 S.C. 405, 425-27, 578

S.E.2d 32, 43-44 (Cl.App.2003).

[13][14] An on-the-record analysis is especially needed when undertaking a balancing that involves a prior similar offense under Rule 609(a)(1). This is because the “the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.” State v. Dunlap, 353 S.C. 539, 542, 579 S.E.2d 318, 320 (2003); *see also*, Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000) (finding trial counsel's failure to argue that the prejudicial effect of the convictions outweighed their probative value constituted ineffective assistance of counsel and prejudiced the defendant). Indeed, the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime. State v. Cofl, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000). Moreover, for prior similar convictions involving violations of narcotics laws, the prejudicial value is further increased as such violations “are generally not probative of truthfulness,” and “this relative lack of probative value should figure prominently in the weighing of prejudice.” **276 Dunlap, 353 S.C. at 542, 579 S.E.2d at 320. Thus, we strongly encourage trial courts to engage in an on-the-record analysis when admitting such convictions because of the presumption against their admission.^{FNS}

^{FNS}. One permissible approach, advocated by the United States Fourth Circuit Court of Appeals, is to allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1) without disclosing to the jury the nature of the prior offense. *See United States v. Boyce*, 611 F.2d 530, 531 n. 1 (4th Cir.1979). The Boyce approach was approvingly referenced by our supreme court in Green v. State, 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n. 5 (2000). The Boyce approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice oc-

casioned by the similarity of the prior crime to the crime charged is removed.

CONCLUSION

We find the trial court properly denied Elmore's motion for a directed verdict. We adhere to the State v. Glenn precedent *240 in holding that Elmore's challenge to the trial court's presumptive ruling concerning the admissibility of his prior drug convictions for impeachment under Rule 609(a)(1) is not preserved for review.

AFFIRMED.

STILWELL and WILLIAMS, JJ., concur.

S.C.App.,2006:
State v. Elmore
368 S.C. 230, 628 S.E.2d 271

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¶

Court of Appeals of South Carolina.
The STATE, Respondent,
v.
Stacy Walter HOWARD, Appellant.

No. 4579.
Heard March 4, 2009.
Decided July 1, 2009.
Rehearing Denied Aug. 25, 2009.

Background: Defendant was convicted in the Circuit Court, Georgetown County, J. Michael Baxley, J., of assault and battery of a high and aggravated nature. Defendant appealed.

Holdings: The Court of Appeals, Lockemy, J., held that:

(1) trial judge was not required to recuse himself on grounds of alleged personal bias against defendant;
(2) trial court erred by not conducting on-the-record balancing test weighing probative value of defendant's prior convictions against their prejudicial effect; and
(3) trial court did not err in holding probation revocation hearing and revoking defendant's probation.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Judges 227 ⚡51(4)

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of objections.
Most Cited Cases

A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned.

[2] Criminal Law 110 ⚡1166(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166 Preliminary Proceedings
110k1166(1) k. In general. Most Cited

Cases

Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.

[3] Judges 227 ⚡51(3)

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(3) k. Sufficiency of objection or affidavit. Most Cited Cases

It is not enough for a party seeking disqualification to simply allege judicial bias; the party must show some evidence of bias.

[4] Judges 227 ⚡49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In general. Most Cited Cases

Alleged judicial bias must be personal, as distinguished from judicial, in nature, in order to warrant disqualification.

[5] Criminal Law 110 ⚡ 1130(5)

110 Criminal Law

110XXIV Review

110XXIV(1) Briefs

110k1130 In General

110k1130(5) k. Points and authorities.

Most Cited Cases

Defendant abandoned for appellate review claim that trial court erred in declining to grant his motion for mistrial, where defendant failed to cite any authority in support of his assertion that trial court erred in denying his motion for mistrial.

[6] Criminal Law 110 ⚡ 1130(5)

110 Criminal Law

110XXIV Review

110XXIV(1) Briefs

110k1130 In General

110k1130(5) k. Points and authorities.

Most Cited Cases

An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.

[7] Judges 227 ⚡ 47(2)

227 Judges

227IV Disqualification to Act

227k47 Acting as Counsel or Other Participation in Cause

227k47(2) k. Presiding at former trial relating to same or similar matter. Most Cited Cases

Trial judge was not required to recuse himself on grounds of alleged personal bias against defendant; alleged bias stemmed from previous trial where trial judge found defendant in contempt and gave him six month sentence, trial judge indicated he had no animosity toward defendant and was not aware defendant had filed complaint with clerk of court, trial judge noted that incident in question occurred three years earlier and that he had not seen or heard from defendant since that time, and thus, there was no evidence trial judge had any personal bias toward defendant.

[8] Criminal Law 110 ⚡ 1035(10)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1035 Proceedings at Trial in General

110k1035(10) k. Reception of evidence. Most Cited Cases

Defendant failed to preserve for appellate review claim that trial court erred in interfering with his presentation of defense, where defendant made no objection at trial.

[9] Criminal Law 110 ⚡ 1036.1(2)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1036 Evidence

110k1036.1 In General

110k1036.1(2) k. Time of objection. Most Cited Cases

Defendant failed to preserve for appellate review claim that trial court erred in admitting evidence of stun gun and pepper spray found in his pockets when he was arrested, where defendant failed to contemporaneously object to testimony regarding these items.

[10] Criminal Law 110 ⚡ 1036.2**110 Criminal Law****110XXIV Review****110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review****110XXIV(E)1 In General****110k1036 Evidence**

110k1036.2 k. Competency, examination, and impeachment of witnesses. Most Cited Cases

Trial court erred by not conducting on-the-record balancing test weighing probative value of defendant's prior convictions against their prejudicial effect; given similarity between prior convictions and crime charged, defendant was likely prejudiced by admission of prior convictions, although evidence of prior convictions may have been probative of defendant's credibility, they were highly prejudicial because they involved same conduct for which defendant was on trial, and while trial court articulated that defendant's prior convictions were probative of his credibility, trial court provided no analysis of prejudicial impact of admitting these prior convictions.

[11] Criminal Law 110 ⚡ 661**110 Criminal Law****110XX Trial****110XX(C) Reception of Evidence****110k661 k.** Necessity and scope of proof.

Most Cited Cases

Criminal Law 110 ⚡ 1153.1**110 Criminal Law****110XXIV Review****110XXIV(N) Discretion of Lower Court****110k1153 Reception and Admissibility of Evidence**

110k1153.1 k. In general. Most Cited Cases

The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion; an abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.

[12] Criminal Law 110 ⚡ 1141(2)**110 Criminal Law****110XXIV Review****110XXIV(M) Presumptions****110k1141 In General**

110k1141(2) k. Burden of showing error. Most Cited Cases

Criminal Law 110 ⚡ 1163(3)**110 Criminal Law****110XXIV Review****110XXIV(Q) Harmless and Reversible Error****110k1163 Presumption as to Effect of Error**

110k1163(3) k. Rulings as to evidence. Most Cited Cases

To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice.

[13] Witnesses 410 ⚡ 337(7)**410 Witnesses**

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(7) k. In general. Most Cited Cases

The following factors, along with any other relevant factors, should be considered by the trial court in admitting evidence of other crimes to impeach defendant: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Rules of Evid., Rule 609(a)(1).

[14] Witnesses 410 ↪ 337(25)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(25) k. Prejudice or unfairness; balancing probative value. Most Cited Cases

Witnesses 410 ↪ 337(27)

410 Witnesses

410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness

410k334 Witnesses Who May Be Impeached as to Character

410k337 Accused as Witness in Criminal Prosecution

410k337(5) Former Accusation or Conviction of Crime

410k337(27) k. Similarity to charged offense. Most Cited Cases

An on-the-record balancing test is particularly important for prior similar convictions, under rule governing impeachment by evidence of conviction of a crime, because the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime. Rules of Evid., Rule 609(a)(1).

[15] Criminal Law 110 ↪ 1043(3)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1043 Scope and Effect of Objection

110k1043(3) k. Adding to or changing grounds of objection. Most Cited Cases

Defendant failed to preserve for appellate review claim that trial court's basis for admitting prior convictions constituted error as a matter of law, where defendant did not object to trial court's basis for admitting his prior convictions.

[16] Sentencing and Punishment 350H ↪ 2012

350H Sentencing and Punishment

350HIX Probation and Related Dispositions

350HIX(1) Revocation

350HIX(1)3 Proceedings

350Hk2012 k. Arrest or apprehension of probationer. Most Cited Cases

Trial court did not err in holding probation revocation hearing and revoking defendant's probation,

because defendant was served with citation. Code 1976, §§ 24-21-300, 24-21-450.

****44** Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Asst. Deputy Atty. Gen. Christina J. Catoe, all of Columbia; and Solicitor John G. Hembree, of Conway, for Respondent.

LOCKEMY, J.

***216** Stacy Howard appeals his conviction for assault and battery of a high and aggravated nature (ABHAN). Howard argues the trial court erred in: 1) declining to grant his motion for a mistrial; 2) refusing to recuse himself and interfering with Howard's presentation of a defense by wrongfully removing relevant testimony; 3) admitting irrelevant evidence; 4) admitting Howard's prior convictions into evidence; and 5) holding a probation revocation hearing and revoking Howard's probation without a warrant. We affirm in part, reverse in part, and remand.

FACTS

A Georgetown County grand jury indicted Stacy Howard for ABHAN. During trial, Howard's former girlfriend testified he struck her during an argument in his truck. The victim's nose was broken in three places, and she underwent surgery for her injury. The victim initially lied to the hospital staff and to the police about how she was injured. She told the emergency room doctor she hit the dashboard when Howard slammed on the brakes. Howard was arrested after the victim felt safe enough to tell the police what really occurred the night of the incident. She testified Howard struck her twice with his fists. Howard testified the victim was out of control, and he unintentionally hit her while attempting to get a clear view of the road. He stated he was unsure whether his blow

broke her nose or whether she hit the dashboard. Howard testified he and the victim had been drinking the day of the incident.

Howard was impeached with three prior ABHAN convictions. The trial court ruled Howard's convictions for ABHAN from November 1995, April 2004, and December 2004 were within the ten year rule and the probative value of their admission outweighed the prejudicial effect to Howard. Howard objected to the admission of his prior convictions on the ground the prejudicial nature of the convictions outweighed the probative value.

At the conclusion of trial, the jury found Howard guilty of ABHAN and the trial court sentenced Howard to eight years imprisonment. The trial court also found Howard's ABHAN ***217** conviction violated the terms of two probationary sentences. Howard consented to have the two probation revocation hearings held at the same time immediately following ****45** the ABHAN sentencing. There, the trial court revoked Howard's first probation case consecutively for eight years and his second probation case consecutively for four and a half years. This appeal follows.

STANDARD OF REVIEW

[1][2][3][4] "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct.App.2002). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." Id. "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." Id.

"The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of

discretion.” *State v. Swafford*, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct.App.2007) (citation omitted). “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” *State v. Rice*, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct.App.2007). “To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice.” *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct.App.2006).

LAW/ANALYSIS

I. Motion for mistrial

[5][6] Howard argues the trial court erred in declining to grant his motion for a mistrial. We find this issue abandoned on appeal. An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. *Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct.App.2001). *218 Howard failed to cite any authority in support of his assertion that the trial court erred in denying his motion for a mistrial. Therefore, Howard abandoned this issue on appeal, and we decline to consider the argument.

II. Trial judge's failure to recuse himself

[7] Howard argues the trial judge erred in failing to recuse himself. We disagree.

“A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned.” *State v. Cheatham*, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct.App.2002). “Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.” *Id.* “It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias.” *Id.* “Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature.” *Id.* In addition, “a judge is not disqualified in a criminal action because of an adverse decision in a former

case involving entirely different and unrelated criminal charges against the same party.” *State v. Cabiness*, 273 S.C. 56, 57, 254 S.E.2d 291, 292 (1979).

The alleged bias in this case stems from a previous trial where the trial judge found Howard in contempt and gave him a six month sentence. The trial judge indicated he had no animosity toward Howard and was not aware Howard had filed a complaint with the clerk of court. Moreover, the trial judge noted the incident in question occurred three years earlier and that he had not seen or heard from Howard since that time. There is no evidence the trial judge had any personal bias toward Howard. The alleged bias in this case stems from a previous judicial proceeding where the trial judge was obligated to handle Howard's contempt. Accordingly, the trial judge had no proper basis to recuse himself and did not abuse his discretion in declining to recuse himself from the trial.

III. Interference with the presentation of a defense

[8] Howard argues the trial court erred in interfering with his presentation of a defense.**46 We believe this issue is not properly preserved for review.

*219 During Howard's testimony, the State asked “how much had [the victim] had as it relates to drinking anything non-alcoholic or alcoholic, what was that?” In response, Howard testified the victim used cocaine the night before the incident. The State objected on the ground the testimony was nonresponsive and asked that the testimony be stricken from the record. The trial court asked the jury to disregard Howard's testimony. The State again objected when Howard testified the victim used Oxycontin in response to the State's question as to whether or not the victim had consumed beer or alcohol the day of the injury. The trial court sustained the objection and asked the jurors to “disregard the comments that you just heard that refer to illegal drug use on the part of anyone else in this case.”

Howard made no objection to the trial court's instruction that any testimony regarding illegal drug use was not to be considered. Therefore, Howard's argument that the trial court interfered with his presentation of a defense is not preserved for review.^{FN1} See *State v. Lee*, 350 S.C. 125, 130, 564 S.E.2d 372, 375 (Ct.App.2002) ("An issue must be raised to and ruled upon by the trial judge to be preserved for appellate review.").

^{FN1}. We note the jury heard testimony that the victim had been drinking for seven hours on the day in question. Therefore, Howard's defense that the victim was intoxicated was before the jury even without the illegal drug use testimony.

IV. Admission of stun gun and pepper spray

[9] Howard argues the trial court erred in admitting evidence of the stun gun and pepper spray found in his pockets when he was arrested. However, Howard failed to contemporaneously object to the testimony regarding these items. Therefore, we find this issue is not properly preserved for review. See *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.").

*220 At the start of trial, defense counsel made a motion in limine to exclude the admission of the stun gun and pepper spray, arguing those items were not relevant. The trial court reminded defense counsel to make a contemporaneous objection and asked the State to inform defense counsel in advance when the testimony concerning the stun gun and pepper spray would be offered. The State informed defense counsel it planned to illicit testimony regarding the stun gun and pepper spray from arresting officer Ron Crabtree. Officer Crabtree later testified that at the time he

placed Howard under arrest a check of his pockets revealed a stun gun and a can of pepper spray. Defense counsel made no objections during Officer Crabtree's testimony and waited until after the testimony of the next witness to place his objection to the admission of the stun gun and pepper spray on the record. The trial court noted the objection was not contemporaneous and explained that the testimony was permitted because it was relevant and probative on the issue of the victim's fear of Howard.

Although defense counsel made an in limine motion to suppress the introduction of the stun gun and pepper spray into evidence, counsel did not renew his objection at trial when the testimony regarding these items was entered into evidence. Because no objection was renewed at the time the evidence was offered, the matter is not preserved for appeal. See *id.*

V. Admission of prior convictions

[10] Howard argues the trial court erred in admitting his prior ABHAN convictions. We find the trial court erred by not conducting an on-the-record balancing test weighing the probative value of Howard's prior convictions against their prejudicial effect. Accordingly, we reverse the trial court's admission of Howard's prior ABHAN convictions and we remand this issue to the trial court for a proper balancing test.

**47 [11][12] "The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Swafford*, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct.App.2007) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that *221 is without evidentiary support." *State v. Rice*, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct.App.2007). "To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct.App.2006).

[13] According to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies when "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Our Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id.*

[14] In State v. Martin, this court noted a preference for an on-the-record Colf balancing test by the trial court:

While Colf involved the admission of prior convictions more than ten years old under Rule 609(b), SCRE, this court has implicitly recognized the value of these factors in making such a determination under Rule 609(a)(1), and urged the trial bench to not only articulate its ruling, but also provide the basis for it, thereby clearly and easily informing the appellate courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1).

347 S.C. 522, 530, 556 S.E.2d 706, 710 (Ct.App.2001) (citations omitted). An on-the-record balancing test is particularly important for prior similar convictions under Rule 609(a)(1) because the "similarity of a prior crime to the crime charged heightens the prejudicial value of the crime." State v.

Elmore, 368 S.C. 230, 239, 628 S.E.2d 271, 275 (Ct.App.2006).

*222 The trial court ruled Howard's convictions for ABHAN from November 1995, April 2004, and December 2004 were within the ten-year rule and the probative value of their admission outweighed the prejudicial effect to Howard. While the trial court found this case was one of credibility, the court further found Howard's previous ABHANS were probative on the issue of whether he was capable of committing such an act. The trial court ruled it would limit the prejudicial effect by not allowing testimony that the victims in two of the prior ABHANS were Howard's mother and the victim in this case. The trial court also noted that a contemporaneous instruction would be given to the jurors advising them that Howard's prior convictions were not to be used to determine his guilt or innocence. During Howard's testimony regarding the convictions and during final jury instructions, the trial court informed the jury that Howard's prior convictions could be used to weigh Howard's credibility but not his propensity to commit the offense.

[15] Howard argues that while the trial court indicated his prior convictions were admitted for the purpose of determining his credibility, the trial court further stated the convictions were admitted because they were probative of whether he was capable of committing the ABHAN. He argues the trial court's basis for admitting the prior convictions constituted an error as a matter of law. However, Howard did not object to the trial court's basis for admitting his prior convictions, therefore we find this issue is not properly preserved for review. See State v. Lee, 350 S.C. 125, 130, 564 S.E.2d 372, 375 (Ct.App.2002) ("An issue must be raised to **48 and ruled upon by the trial judge to be preserved for appellate review.").

Howard also argues the prejudicial effect of admitting his prior convictions outweighs the probative value. We remand this issue to the trial court for an on the record balancing test weighing the probative value

of Howard's prior convictions against their prejudicial effect.

Given the similarity between the prior convictions and the crime charged we cannot conclude Howard was not prejudiced by the admission of his prior convictions. Although evidence of the prior convictions may be probative of Howard's credibility, they were highly prejudicial because they involved the *223 same conduct for which Howard was on trial. See *State v. Bryant*, 369 S.C. 511, 517-18, 633 S.E.2d 152, 156 (2006) (holding that when a prior offense is similar to the charged offense the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission."); *State v. Scriven*, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct.App.2000) (holding that when prior convictions are "similar or identical to charged offenses ... the likelihood of a high degree of prejudice to the accused is inescapable."). While the trial court articulated that Howard's prior convictions were probative of his credibility, the trial court provided no analysis of the prejudicial impact of admitting these prior convictions. Therefore, we find the trial court erred by not conducting the proper on-the-record balancing test when weighing the probative value and prejudicial impact of Howard's prior convictions and we remand this issue to the trial court.

On remand the trial court should conduct a hearing on the admissibility of Howard's prior convictions and carefully weigh the probative value of the prior convictions for impeachment purposes against their prejudicial effect. See *Colf*, 337 S.C. at 629, 525 S.E.2d at 249; *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77 (finding the appellate court should not undertake a Rule 609 balancing test, but should remand the issue to the trial court). If upon remand the trial court determines the prejudicial impact to Howard outweighs the probative value of impeachment, the court should order a new trial. See *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77. Otherwise, the conviction and sentence should be affirmed subject to appellate review. *Id.*

Therefore, we reverse the trial court's admission of Howard's prior convictions, and we remand this issue to the trial court for an on-the-record *Colf* balancing test.

VI. Probation revocation

[16] Howard argues the trial court erred in holding a probation revocation hearing and revoking his probation without a probation violation warrant. We disagree.

During sentencing after Howard's ABHAN trial, the court heard from Agent Brown, Howard's probation officer. Agent Brown informed the court Howard had pending warrants in *224 two probation cases for failure to report, failure to notify of arrest, and failure to follow instructions of probation agent. Defense counsel conceded his client's ABHAN conviction constituted a violation of his probation cases, and indicated he had no objection to the "jurisdiction or venue of this court today to hear these probation violation hearings." Additionally, defense counsel suggested the court only consider Howard's ABHAN conviction as the violation. In response, the Department of Probation agreed to withdraw the prior two warrants and "issue a new citation charging [Howard] only with the new conviction, and disregard the other charges." The court asked defense counsel if he had any objection to this procedure and he indicated that he had "none whatsoever."

Pursuant to section 24-21-450 of the South Carolina Code (2007) a warrant must be issued and the probationer must be served with the warrant before probation can be revoked. However, section 24-21-300 of the South Carolina Code (2007) permits the use of a citation and affidavit in lieu of a warrant. The probation citation in the record indicates Howard was served with the citation during sentencing following his ABHAN conviction. Accordingly, because Howard was served with the citation the trial court did not err in holding a probation revocation hearing and revoking Howard's probation. Therefore, the ruling of

682 S.E.2d 42

384 S.C. 212, 682 S.E.2d 42

(Cite as: 384 S.C. 212, 682 S.E.2d 42)

the circuit court is

****49 AFFIRMED IN PART, REVERSED IN
PART, AND REMANDED.**

HEARN, C.J., and PIEPER, J., concur.

S.C.App.,2009.

State v. Howard

384 S.C. 212, 682 S.E.2d 42

END OF DOCUMENT

State vs. Turuk Saipalov
Jury Trial, Volume 3 of 3
May 26, 2010

1 back. But y'all know what a shotgun is. It doesn't
2 need to go back to the jury room.

3 Once the State rests, that just means they are
4 putting up no more evidence at this time. When that
5 happens, I have to go over the whole case with the
6 attorneys and talk about what defense's plans are and
7 so forth. It takes a little while. It might be
8 longer than ten or twelve minutes, so don't knock and
9 say y'all are ready to come back because it'll just
10 take us a little while. But as quick as we can, we'll
11 bring you back. Okay?

12 So don't talk about the case yet.

13 [Whereupon, the jury exits the courtroom at:
14 10:02 a.m.]

15 -----
16 ~~MOTION FOR A DIRECTED VERDICT~~

17 THE COURT: Okay. The State has rested. What
18 say the defense, if anything?

19 MR. FLEMING: Your Honor, at this time I would
20 move for a directed verdict on all charges but the
21 lesser included offense of possession of marijuana. I
22 believe the State has failed to carry their burden of
23 proof, even at the lowest standard, on all but the
24 possession of marijuana and, as such, I would move for
25 a directed verdict.

State vs. Roman Saunders
Jury Trial, Volume 1 of 3
May 16, 2010

1 THE COURT: Well, we were in a little trouble
2 until the last witness testified. The last witness,
3 as you in your heart of hearts know, if believed by
4 the jury in the light most favorable, which version
5 they believe, shows not only that he owned the house,
6 had control of the house, was dealing out of the
7 house.

8 I can't grant your DV on any charges, since
9 the drugs were in the house, so forth and so forth.

10 MR. FLEMING: Thank you.

11 THE COURT: Okay. Now, you've talked over
12 with Mr. Saunders, Mr. Fleming, I'm sure, whether he's
13 going to testify or not. Do you need me to question
14 him any further, or have you made your decision?

15 MR. FLEMING: No, sir, he is not going to
16 testify.

17 THE COURT: All right. So he can still change
18 his mind at any time.

19 You're aware of that, Mr. Saunders?

20 MR. SAUNDERS: Yes, sir. Right now I am.

21 THE COURT: But you do plan to put up some
22 witnesses?

23 MR. FLEMING: Yes, sir. But I need about five
24 minutes to digest --

25 THE COURT: You've got as much time as you