

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner/Respondent,

v.

Kevin Covert, Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26632
Heard January 21, 2009 – Filed April 13, 2009

AFFIRMED AS MODIFIED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney General
Salley W. Elliott and Senior Assistant Attorney General Norman
Mark Rapoport, all of Columbia, for Petitioner/Respondent.

Katherine Carruth Link, of West Columbia, for
Respondent/Petitioner.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals decision in State v. Covert, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006)¹ and now affirm, as modified, that court's decision to grant respondent a new trial. In a split decision, Judges Short and Anderson found reversible error in the jury's possession of a statute during deliberations; in addition, Judge Short found that evidence should have been suppressed, and Judge Anderson found reversible error in the verdict form.

We hold, as did Judge Short, that an unsigned search warrant is invalid, and agree with Judge Anderson that when a verdict form is submitted to a jury in a criminal case, it must affirmatively offer a "not guilty" option. Finally, while we agree with Judges Short and Anderson that it was error to permit this jury to have a written version of the trafficking statute with it during deliberations, we would not find sufficient prejudice from that error alone to warrant reversal.

ISSUES

- 1) Did Judge Short err in holding that an unsigned search warrant is invalid?
- 2) Did Judge Anderson err in finding the verdict form here was so prejudicial as to require reversal?
- 3) Did permitting the jury to have a written version of the trafficking statute with it during deliberations require reversal?

¹ The facts are fully reported in that opinion, and the verdict form is reproduced in Judge Anderson's concurring opinion.

ANALYSIS

1. Warrant

The search warrant in this case is signed by the magistrate, and dated September 28, 2002; the accompanying two-page affidavit is signed by her on each page, and both these signatures are dated September 26, 2002. The return is signed and dated September 27, 2002. It is undisputed that the warrant was obtained and served on September 26, 2002.

At trial, respondent contended that the warrant was unsigned when it was served, that it was therefore invalid, and that accordingly the evidence seized pursuant to the search should be suppressed. Respondent argued that, without the magistrate's signature, the warrant was not issued within the meaning of South Carolina's search warrant statute, S.C. Code Ann. § 17-13-140 (1985). The trial judge refused to suppress the evidence even though he found the warrant had not been signed before it was served, holding that the search warrant statute was subject to a "good faith" exception, and that such an exception was applicable here.

On appeal, Judge Short held that the search warrant was not issued within the meaning of the statute because it lacked a timely signature. Judge Short also held there was a good faith exception to the statutory warrant procedures, but that it was inapplicable here. We agree that the absence of the magistrate's signature at the time the warrant was served invalidates it, but do not reach the issue whether there exists a "good faith" exception to the statutory warrant requirements since we find, as explained below, that no warrant was ever issued.

We have held, in the context of an arrest warrant, that such a warrant is not lawful where the issuing judicial officer failed to sign the warrant on the space provided on the warrant form. Davis v. Sanders, 40 S.C. 507, 19 S.E. 138 (1894). Although the State would characterize such an omission as merely procedural or ministerial, we disagree. The Davis Court gave a persuasive explanation of the signature requirement, albeit in the context of an arrest warrant:

[W]hen it is remembered that a sheriff or other officer, who undertakes to arrest a citizen under a warrant, is bound to show his warrant, if demanded, to the person proposed to be arrested, and if he refuses to do so the arrest may be lawfully resisted [internal citation omitted], we think it would be very dangerous to the peace of society for the court to hold that a paper, which shows on its face that it is an unfinished paper... would be a sufficient justification for an arrest.

The same policy considerations apply to a search warrant,² and thus the lack of the issuing officer's signature is not excusable as merely procedural or ministerial, but rather negates the existence of a warrant, creating instead "an unfinished paper." As the Davis Court went on to hold, the fact that the issuing officer intended to sign the warrant and had in fact signed the back was not sufficient to validate it, nor was the arrest legal despite the fact the officers who executed the arrest pursuant to the "warrant" were "entirely innocent of any intentional wrong."

The Davis requirement that a warrant must be signed by the issuing judicial officer in order to be complete is a common law decision predicated on public policy considerations. The signature is the assurance that a judicial officer has found that law enforcement has made the requisite probable cause showing, and serves as notice to the citizen upon whom the warrant is served that it is a validly issued warrant. Without the signature, it is merely an "unfinished paper." Davis, supra; see also DuBose v. DuBose, 90 S.C. 87, 72 S.E. 645 (1911) ("But it has been decided [in Davis] that, when an officer is performing the ministerial duty of issuing a paper on compliance with certain conditions prescribed by law, his signature at the foot of the paper he intended to sign is necessary to its validity").

We consider also whether the unsigned warrant can be upheld in the face of § 17-13-140, the general search warrant statute. The statute contains

² See S.C. Code Ann. § 17-13-150 (2003) (copy of warrant and affidavit shall be furnished to person served)

requirements different from those mandated by the Fourth Amendment, and is in some ways “more strict” than the federal constitution. State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). While we have recognized a “good faith” exception to the statute’s requirements where the officers make a good faith attempt to comply with the statute’s affidavit procedures, McKnight, supra, explaining State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975), we have left open the question whether a good faith exception would be applied where “the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid.” McKnight, supra. Here, we do not reach the question whether there exists a good faith exception to the statute where a defective warrant is issued, since under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17-13-140. See also Davis, supra (officers good faith irrelevant where warrant is not signed).

The circuit court erred in refusing to suppress the evidence seized pursuant to the unsigned “warrant.” Respondent is therefore entitled to a new trial.

2. Verdict Form

In this case, the jury was given a verdict form which tracked the provisions of the trafficking statute, but did not specifically allow the jury to return a “not guilty” verdict. We agree with Judge Anderson that this was error and hold that henceforth, any verdict form given to a jury for use in a criminal case must specifically include as an option “not guilty.” We therefore overrule State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct. App. 2001) to the extent it holds that a jury charge can negate prejudice from the lack of a “not guilty” choice on a verdict form.

3. Trafficking Statute

Judge Short and Judge Anderson found reversible error in the trial court’s submission to the jury of the trafficking statute, while Judge Goolsby found no error. Since this case was tried and the appeal decided by the Court of Appeals, we have held that it is within the trial judge’s discretion to “submit its instructions on the law to the jury in writing.” State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007). We caution the bench again, as we did

in Turner, that this practice should be used sparingly, and only where it will aid the jury and where it will not prejudice the defendant. It is never appropriate, however, to give only part of the charge to the jury as was done in this case.

CONCLUSION

The Court of Appeals decision reversing respondent's convictions and sentences is

AFFIRMED AS MODIFIED.

**WALLER, BEATTY, JJ., and Acting Justice James E. Moore,
concur. TOAL, C.J., concurring in a separate opinion.**

CHIEF JUSTICE TOAL: Although I concur in the decision to affirm the court of appeals' decision reversing Covert's conviction, I write separately because I would reach this decision on different grounds.

As a primary matter, I do not find that *Davis v. Sanders*, 40 S.C. 507, 19 S.E. 138 (1894) controls this case. *Davis* was decided over one hundred years ago, prior to the passage of § 17-13-140. Moreover, the *Davis* Court, in the absence of any statutory authority, relied on prior case law in declaring that a warrant must be signed.³ See *State v. Vaughn*, 16 S.C.L. (Harp.) 313 (1824) (holding that a warrant that was signed but not sealed was nevertheless a valid warrant). Moreover, I find it significant that the parties in *Davis* conceded that a warrant had to be signed, thereby leaving only the issue of whether the magistrate's notation on the warrant constituted a signature for the Court's determination. Accordingly, I believe that *Davis* is somewhat irrelevant to the facts of this case and that we must solely look to § 17-13-140 to determine the validity of this warrant.

Section 17-13-140 does not specifically require the magistrate to sign the warrant, but rather, merely requires that a magistrate "issue" the warrant. Nonetheless, a magistrate's signature indicates that she has made the necessary probable cause finding required before issuing the warrant. Even assuming that an unsigned warrant is defective, I do not believe that this alone necessarily renders the warrant void *ab initio*.

This Court has held that the good faith exception to the exclusionary rule applies in cases where officers make a good faith attempt to comply with the statute's affidavit requirements. See *State v. McKnight*, 291 S.C. 110, 112-13, 352 S.E.2d 471, 472 (1987) (refusing to apply the good faith exception where the officers failed to attempt to comply in good faith to the affidavit requirements); *State v. Sachs*, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975) (allowing evidence to be admitted pursuant to the good faith exception where officers attempted in good faith to comply with the statutory

³ Specifically, the *Davis* Court found that the lower court properly charged the jury that "a warrant need not be under seal, yet it must be in writing, and signed by the officer issuing." *Id.* at 509, 19 S.E. at 139.

requirements). In my view, the policy reasons for applying the good faith exception to the exclusionary rule in other cases are applicable in this case. See *State v. Harvin*, 345 S.C. 190, 194, 547 S.E.2d 497, 500 (2001) (recognizing that the main purpose of the exclusionary rule is the deterrence of police misconduct). Covert does not allege that the officers knew the warrant was unsigned or deliberately obtained the warrant without a signature, and the record contains no evidence that he was prejudiced by the statutory violation. Therefore, I would hold that the officers attempted in good faith to comply with § 17-13-140's requirements and the exclusionary rule should not render the evidence inadmissible.

In my view, the fatal flaw in the State's case is its failure to present any evidence at trial that the magistrate made a probable cause finding. As the majority observes, the signature on the warrant indicates that a judicial officer found that law enforcement made the requisite probable cause showing, a finding clearly required before a warrant may be issued. The State bore the burden of proving the validity of the warrant and, in my view, while the absence of a magistrate's signature may be a factor in determining whether the warrant was issued upon probable cause, it is not dispositive of the determination. However, by failing to call the magistrate to testify that she issued the warrant upon finding probable cause, the State failed to present any evidence to show the warrant was valid and therefore did not carry its burden. See *Sachs*, 264 S.C. at 555; 216 S.E.2d at 508 (recognizing that "all that is necessary to justify the issuance of a warrant is probable cause"); see also U.S. Const. amend. IV and S.C. Const. art. I (mandating that a warrant must be supported by probable cause).

For these reasons, I would hold that the good faith exception is applicable under these circumstances, but that the State failed to carry its burden of proving the magistrate issued the warrant upon finding probable cause. Accordingly, I concur with the majority's decision to affirm as modified the court of appeals' opinion.

PLEASE READ THIS

STATE Court: Warrants must be signed

COLEMBIA — The South Carolina Supreme Court has ruled a search warrant must be signed by a judge or it isn't valid.

The justices Monday unanimously overturned Kevin Covert's convictions and 25-year prison sentence for cocaine trafficking and a weapons charge.

Court records show officers found about a pound of cocaine in Covert's Greenville County home during a September 2002 search.

Covert's lawyer wanted the evidence tossed out because the search warrant wasn't signed, but the trial judge agreed with prosecutors that it was a procedural mistake.

The Supreme Court justices now say the signature is needed because it assures the public that a judge has found police have enough evidence for a search.

The justices also ruled Covert deserved a new trial because the "not guilty" option was left off a verdict form.

Woman dies after hit by car, coroner says

GREENVILLE — Authorities said an 89-year-old woman has died after her husband hit her with their car in a South Carolina grocery store parking lot.

Greenville County Deputy Coroner Kent Dill told The Greenville News that 89-year-old Jesse Roaden was pulling the car to the front of the store to pick up his wife Saturday afternoon when he lost control of the vehicle.

Dill said Roaden told investigators he may have hit the accelerator instead of the brake.

Authorities said Eula Mae Roaden died shortly after she was hit.

The Highway Patrol said a special team of troopers is investigating the crash.

368 S.C. 188
Court of Appeals of South Carolina.

The STATE, Respondent,

v.

Kevin COVERT, Appellant.

No. 4071. | Heard Nov. 7, 2005. | Decided
Jan. 17, 2006. | Rehearing Denied April 5,
2006. | Certiorari Granted Aug. 9, 2007.

Synopsis

Background: Defendant was convicted by jury in the Circuit Court, Greenville County, James C. Williams, Jr., J., of possession with intent to distribute cocaine in proximity of a school, and trafficking in cocaine. Defendant appealed.

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

[1] search warrant for defendant's residence was defective;

[2] good faith exception to exclusionary rule did not apply to warrant;

[3] good faith exception to statutory search warrant requirement did not apply;

[4] admission of evidence seized from defendant's residence as result of execution of defective warrant was not harmless error; and

[5] in a matter of first impression, trial court's submission of actual text of trafficking statute to jury in written form was erroneous.

Reversed and remanded.

Anderson, J., concurred with opinion.

Goolsby, J., dissented with opinion.

Attorneys and Law Firms

****484** Katherine Carruth Link, of West Columbia, for Appellant.

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

Opinion

SHORT, J.:

*191 Kevin Covert appeals his convictions for possession with intent to distribute cocaine in proximity of a school and trafficking in cocaine. Covert argues the trial court erred by denying his motion to suppress evidence due to a defective search warrant, allowing improper closing arguments, and using an unusual verdict form. We reverse and remand.

FACTS

Kevin Covert, Charles Henderson, and others were present in Covert's house in Greenville County when police searched it on September 26, 2002. When the officers entered the house they found Henderson in the living room with a coffee grinder containing a white powder substance, small plastic bags of white powdered substance, a cutting agent, sifting instruments, and an electronic scale, all in front of him on a coffee table. A cell phone box on the couch next to him contained a large plastic bag of cocaine, weighing 441.50 grams. Cocaine, weighing 22.89 grams, was found on the coffee table. Two smaller quantities of cocaine, weighing 6.47 grams and 1.62 grams, were also recovered. Police also found \$1,950 on the *192 floor in front of the couch. Additionally, police found a pistol on a bookshelf. Henderson was the only person in the living room. Covert was found in a bedroom on the other side of the house. A holster for a gun, a 9-mm. magazine, and several dozen rounds of ammunition were found in an adjacent bedroom that belonged to Henderson.

All the individuals in the house were arrested and charged with trafficking in cocaine. However, Covert and Henderson were also charged with possession of a weapon during the commission of a violent crime. Donald Myers and Roger Harris, both charged with trafficking, pled guilty to simple possession and were to receive suspended sentences in exchange for testifying for the State. Myers testified he purchased cocaine from Covert and Henderson at the house numerous times. Myers stated his purchases usually

amounted to between one hundred and two hundred dollars each for between **485 one and three-quarters grams and three and one-half grams of cocaine. Myers also testified he had seen both Covert and Henderson bagging cocaine. On September 26, Myers was at the house to purchase cocaine from Covert.

Harris also testified he had purchased cocaine from Covert and Henderson at their house at least twice a week for the previous two years. Harris stated Henderson sometimes delivered cocaine to his house. Harris further testified that on the morning of September 26, Covert asked him to give him a ride to Atlanta. Harris testified they drove to a bar in Atlanta where Covert met another individual. Covert asked for Harris's "electronic door opener." Covert returned about thirty minutes later and they drove back to Greenville. Although the State attempted to establish that Harris drove Covert to Atlanta to obtain over 400 grams of cocaine, Harris did not see any cocaine during the trip.

After his arrest, Covert gave a statement to the police and admitted he purchased cocaine in Atlanta on September 26. Covert's statement identifies his connection in Atlanta and details the activities of the trip. Covert did not testify at trial. On Henderson's motion, Covert's statement was redacted to remove all references to Henderson and the edited version was read into the record. Covert was tried together with his co-defendant, Henderson, and convicted of both charges. Covert *193 was sentenced to concurrent sentences of 25 years for the trafficking charge and 10 years for the distribution charge. Covert now appeals.

LAW/ANALYSIS

I. Suppression of Evidence

Covert contends the trial judge erred by denying his motion to suppress evidence and by applying a good faith exception to the statutory warrant requirement because the warrant was defective. We agree.

[1] [2] In criminal cases, an appellate court reviews errors of law only and is bound by factual findings of the trial court unless clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant." *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Cl.App.2003).

[3] During the trial, Covert and Henderson moved to suppress evidence seized during the search on the basis that although the search was conducted on September 26, 2002, the magistrate's signature is dated September 28, 2002 on the warrant itself. The magistrate's signature and the date of September 26, 2002 only appear on two separate pages of the affidavit. During the trial, Detective Timothy Conroy testified that he did not see the magistrate sign the search warrant on the 26th and that "most probably she didn't sign that night and that was brought back to her on some other occasion to sign." Upon finding the warrant was defective under section 17–13–140 of the South Carolina Code (2003), the trial judge ruled a good faith exception to the Fourth Amendment's exclusionary rule should apply to South Carolina's statutory warrant requirement and denied the motion to suppress all evidence obtained during the September 26 search.

[4] First, we must determine whether the warrant was defective because the signature was dated two days after the search was conducted. Section 17–13–140 of the South Carolina Code (2003) states that a warrant shall be "issued only upon affidavit sworn to before the magistrate, municipal judicial *194 officer, or judge of a court of record establishing the grounds for the warrant." Though the statute does not specifically require that the warrant be signed, it requires that it be "issued." In *Davis v. Sanders*, 40 S.C. 507, 19 S.E. 138 (1894), "[our supreme] court held that the warrant was not 'issued' as required by law, and conferred no authority on the sheriff to make the arrest, because the magistrate did not sign at the foot as he intended to do, and because he did not intend the indorsement on the back as his signature of the warrant." *Du Bose v. Du Bose*, 90 S.C. 87, 90, 72 S.E. 645, 646 (1911). Therefore, a warrant is not issued until signed by an appropriate magistrate, municipal judicial officer, **486 or judge of a court of record. See 77–370 S.C. Op. Att'y Gen. 295 (1977) (stating a warrant is properly issued only when signed by the magistrate and only upon a sworn affidavit). Thus, the warrant in this case was defective because there was no evidence that the magistrate signed the warrant before the search was conducted and the signature on the warrant is dated two days after the search was conducted.

[5] Courts of other states have also held a search warrant must be signed because it is the confirmation that the magistrate determined the facts asserted in the affidavit support a finding of probable cause.¹ In *State v. Surowiecki*, 184 Conn. 95, 440 A.2d 798, 799 (1981), the Connecticut Supreme Court held that a warrant is not "issued" without

a lawful signature on the search warrant by the person authorized to issue it. The court reached this conclusion even though there was no doubt the judge intended to sign the search warrant and failed to do so because of a “mere oversight.” *Id.* at 798. There are also several public policy considerations to support a requirement that the warrant be signed prior to a search: it impresses upon the magistrate the importance of his action in issuing a warrant; it discourages police misconduct by dictating that officers can not reasonably rely on an unsigned *195 document as an authorization for conducting a search and by requiring officers to take corrective measures before they conduct a search; and it provides needed protections and assurances to persons in control of the property to be searched that the search has been authorized. *State v. Hentkowski*, 154 Mich.App. 171, 397 N.W.2d 255, 258 (1986).

[6] [7] Having found the warrant was defective because the signature was dated two days after the search was conducted, we must next determine whether the good faith exception to the Fourth Amendment’s exclusionary rule should apply to South Carolina’s statutory warrant requirement. The trial judge allowed the introduction of the evidence seized pursuant to a good faith exception as adopted by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The *Leon* rule applies when a search warrant is defective on Fourth Amendment grounds. *Id.* However, in this case, the evidence Covert sought to have excluded was obtained because of a defective search warrant based on a state statutory violation, not a constitutional violation.

[8] In South Carolina, the statutory warrant requirement is separate and distinct from the prohibition in the federal and state constitutions against unreasonable searches and seizures. S.C.Code Ann. 17–13–140 (2003); see U.S. Const. amend. IV; S.C. Const. art. I, 10. In fact, as the South Carolina Supreme Court has recognized, section 17–13–140 of the South Carolina Code actually imposes stricter warrant requirements than the constitutional provisions. See *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). Therefore, the *Leon* good faith exception is not applicable to this case and we must determine whether there is a good faith exception to the statutory warrant requirement in South Carolina.

In *State v. Sachs*, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975), the Supreme Court of South Carolina found a good faith exception permits the introduction of evidence seized

pursuant to a warrant that is defective under section 17–13–140 of the South Carolina Code if the officers have made a good faith attempt to comply with the affidavit requirement. In *Sachs*, the affidavit the officers relied on contained misstated facts; however, the court determined that such misstatements *196 in an affidavit were “necessary hazards” encountered when federal and state authorities search in a joint effort and the affidavit satisfied a good-faith attempt to comply with the statute relating to search warrants. *Id.*

**487 [9] In *State v. McKnight*, 291 S.C. 110, 112–13, 352 S.E.2d 471, 472 (1987), the officers orally recited the facts upon which the warrant was based, but no affidavit was ever executed. As a result, the court found that there was no good faith effort to comply with the statute; however, the court declined to decide whether there is a good faith exception for officers who execute a search with objectively reasonable reliance on a warrant that is ultimately found to be invalid. *Id.* at 114, 352 S.E.2d at 473. The instant case falls somewhere between the cases of *McKnight* and *Sachs*. This is not a case of the “necessary hazards” of obtaining a warrant as in the case of *Sachs* and it is not a failure to comply with the statutory warrant requirement as in *McKnight*. Here, the officers failed to notice that either the magistrate did not sign the warrant on September 26 or that the signature on the warrant itself was misdated as September 28, while the search was conducted on September 26, 2002.² The officers could have discovered either error by simply looking at the warrant itself; therefore, we find there was no good faith effort to comply with the statute.

[10] [11] [12] Because we find the warrant was defective and the good faith exception to the warrant requirement does not apply in this case, we must finally determine if the admission of the evidence found with the defective warrant constituted harmless error. “Error is harmless where it could not reasonably have affected the result of the trial.” *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990). Generally, appellate courts will not set aside convictions due to insubstantial error not affecting the result. *State v. Davis*, 364 S.C. 364, 409, 613 S.E.2d 760, 784 (Ct.App.2005). The violation found in this case cannot be seen as harmless error because exclusion of the evidence could have reasonably affected the *197 result of the trial and the issue of the amount of cocaine allegedly possessed by Covert was a central issue in this case.

II. Trafficking Statute

[13] Covert claims the judge erred by submitting the actual text of the trafficking statute to the jury in written form. We agree.

This is a novel question of law in South Carolina; however, historically, as a common practice, trial judges in South Carolina have not given the actual text of a statute in written form to a jury. The Court of Appeals of New York has ruled that the “consent of defense counsel is an ‘absolute precondition’ to furnishing the jury with the text of a statute because ‘questions may arise concerning which sections of pertinent statutory material should be given to the jury.’ ” *People v. Sanders*, 70 N.Y.2d 837, 838, 523 N.Y.S.2d 444, 517 N.E.2d 1330 (1987) (citations omitted). Therefore, we find that the judge’s submission of the actual text of the statute was in error because Covert’s counsel did not consent to it being given to the jury.

REVERSED AND REMANDED.

ANDERSON, J., concurs in a separate opinion. GOOLSBY, J., dissents in a separate opinion.

ANDERSON, J., (concurring in a separate opinion):

I **VOTE** to reverse the conviction and sentence of the appellant and to remand for a new trial because of the egregious error committed by the circuit judge in submitting a copy of the trafficking statute to the trial jury.

PRESERVATION OF ERROR

After the circuit judge charged the jury and sent them back to the jury room to begin deliberations, the judge asked whether there were any exceptions from the State or the defense.

Mr. Warder [counsel for Covert]: Yes, sir. It’s the procedure I’m beginning to object to. We’ve now sent the jury out with a statute that provides—

The Court: Did they—

****488 *198 Mr. Warder:**—four ways to—

The Court: I meant to take up all those papers. Go get those papers from them. Every paper I gave them. Sir, go ahead.

Mr. Warder: Yes, sir. We have a verdict form that in essence breaks the statute down in parts. *And, of course, for trafficking it gives them four different choices, all to find him guilty.* You know, I figure if we gave everybody enough choices, if we broke it down long enough we could have fifteen or twenty ways to find somebody guilty. And I just think that’s highly prejudicial.

You know, I’d really like to send a sheet out that had the presumption of innocence, and the burden of proof, and have it all broken down in one line sentences so they could read through and check, do you find that on each of them? I mean, it’s a way of highlighting the case to make it more likely that somebody will sooner or later check a yes. And it seems to me that it’s highly prejudicial.

It seems to me like the form in itself tends to keep going until there’s a high probability that somebody will think they’re supposed to find one of the four. *They have four things, and they’re asked for an amount four times. And I think that the jury’s going to think that they’re supposed to fill one of them in and write an amount in.* And I just—I just think it’s prejudicial.

Mr. Abdalla: Your honor, I’d like to be heard on that. My position is I’d just rather have the indictment sent back as is with the way we’ve—I’ve always thought it was guilty or not guilty. And that’s just my position, your honor.

The Court: Well, we can’t do that because the jury has to determine the amount. So we can’t just send the indictments in. *I note your exceptions.* I don’t think by splitting it out into four is doing anything but making it easier for the jury to understand. They’re going to still have every bit of it. And in a case like this, I can’t conceive a jury deliberating without having a copy of the statute. It’s very frequently that a copy of the statute is sent back in, or some portion of the charge that they request be in writing, or sometimes the entire charge is sent back in writing.

**199 Mr. Warder: You know, I’ve heard of the entire charge being sent, but I’ve never heard of a court selecting the parts that they want to send back so it would be emphasized. And I—*

The Court: Well, I’ve explained to them it’s not that I’m emphasizing, it’s trying to help them understand.

Mr. Warder; I understand, but that’s—

The Court: Now I don't bring them back—I don't object to bringing them back out and telling them that, you know, they can't find them guilty of anything unless the State has proven that particular charge beyond a reasonable doubt. But I don't see how there can be any doubt in their minds of that fact.

Mr. Abdalla: And, your honor, just for the record, I've joined in on Mr. Warder's objections.

The Court: All right. Well, it seems *the verdict form doesn't suit anybody but me. But that's the way it's going back.* I'm going to make the couple of corrections that we made at the bench a few minutes ago and that I explained to the jury while I was going through it. And then I'll let you gentlemen look at it to be sure we've done that before I send it back. And then I'll have it sent back. So we'll be at ease a few minutes.

(Whereupon court was in recess)

The Court: All right. I have made the changes that we talked about to the verdict form. If either one of you want to look at it the bailiff has it. Mr. Warder, the jury has already asked that I send into them the definition of the trafficking statute, the print form.

Mr. Warder: Well, I mean—

The Court: *And I note your objection.*

Mr. Warder:—it's predictable when we took it all to them.

The Court: Well, it's—I think it's proper. I think it's good. I think it would be worse not to do it than to do it. *So I overrule your objection.*

****489** “The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal.” *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct.App.2005) (citing ***200** *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003); *State v. Lee*, 350 S.C. 125, 564 S.E.2d 372 (Ct.App.2002)). Our courts have “consistently refused to apply the plain error rule.” *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (citations omitted). Instead, we have held: “it is the responsibility of counsel to preserve issues for appellate review.” *Id.*

Our supreme court, in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), explained the rationale behind this longstanding rule:

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

Id. at 422, 526 S.E.2d at 724 (citations omitted); *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004) (“Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.”).

The rule that an unpreserved issue will not be considered on appeal does have its exceptions. Foremost is the axiomatic principle of law that lack of subject matter jurisdiction may be raised at anytime, including for the first time on appeal. *Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998); *State v. Richburg*, 304 S.C. 162, 403 S.E.2d 315 (1991). Additionally, an exception exists where the interests of minors or incompetents are involved. *See Shake v. Darlington County Dep't of Soc. Servs.*, 306 S.C. 216, 219 n. 2, 410 S.E.2d 923, 924 n. 2 (Ct.App.1991) (noting, in a termination of parental rights action, that “[a]lthough it is questionable whether Mrs. Shake properly raised each of [the] grounds for termination at trial, we nevertheless address them all.”); *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 536 S.E.2d 372 (2000) (approving the court of appeals' conclusion that procedural rules are subservient to the court's duty to zealously guard the rights of minors); ***201** *Caughman v. Caughman*, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965) (holding that “the duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review.”).

Furthermore, our courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure

to raise the objection will be excused. *See State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding “[a]s to counsel’s failure to raise an objection, the tone and tenor of the trial judge’s remarks concerning her gender and conduct were such that any objection would have been futile.”); *State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001) (employing the futility doctrine).

In the present case, counsel for Covert perspicuously raised an objection (1) to the submission of the statute to the jury and (2) to the lack of a “not guilty” option on the jury verdict form. As to the judge providing the jury with a written copy of the statute, counsel professed, “We’ve now sent the jury out with a statute,” before his argument was interrupted by the court. Counsel noted he had “never heard of a court selecting the parts that they want to send back so it would be emphasized,” and averred, “You know, I’d really like to send a sheet out that had the presumption of innocence, and the burden of proof, and have it all broken down in one line sentences so they could read through and check, do you find that on each of them?”

Additionally, Covert’s attorney took exception to the jury verdict form’s failure to provide for the option of “not guilty”: “You know, I figure if we gave everybody enough choices, if we broke it down long enough we could have fifteen or twenty ways to find somebody guilty. And I just think that’s highly prejudicial.”

****490** Lucidly, a contextual reading of the trial record demonstrates Covert’s attorney timely objected both to the format of the jury verdict form and to the procedure of providing the jury with the trafficking statute. The circuit judge acknowledged: “I note your exceptions,” and again, “... I note your objection.” Further, the judge observed, “Well, it seems the verdict form doesn’t suit anybody but me. But that’s the way it’s going back.” Finally, he pronounced: “So I overrule your ***202** objection.” Pursuant to Rule 18 of the South Carolina Rules of Criminal Procedure, “Counsel shall not attempt to further argue any matter after he has been heard and ruling of the court has been pronounced.” Rule 18(a), SCRCrimP. My reading of the transcript leads me to the ineluctable conclusions that (1) counsel raised multiple objections to the jury verdict form and the submission of the statute, and (2) the court acknowledged and overruled the objections. Therefore, both objections are pristinely preserved.

PREJUDICIAL SUBMISSION OF THE TRAFFICKING STATUTE TO THE JURY

Historically in South Carolina jurisprudence, circuit judges have **NOT** submitted in writing to the trial jury any portion of the jury charge. The circuit judge committed a colossal prejudicial error in the instant case by submitting only the trafficking statute. This practice defies fairness and justice by emphasizing the offense while ignoring the basic constitutional guarantees afforded the defendant which were in the jury charge, including: (1) the presumption of innocence; (2) the burden of proof beyond a reasonable doubt; (3) the credibility of witnesses; (4) an elemental analysis of the actual charge of which the defendant is accused; and (5) the right not to testify. In my judgment, submitting the statute to the jury violated Covert’s right to a fair trial.

Admittedly, some states permit a judge to submit the jury charge to the fact finder for purposes of edification and enlightenment during jury deliberations. Most of the states that allow this procedure do so through a court rule or statute.

Under Louisiana law, after a court charges the jury, “a copy of the written charge shall be delivered to the jury if such delivery is consented to by both the defendant and the state in open court but not in the presence of the jury.” LSA–C.Cr.P. Art. 801(B)(1). However, “No charge shall be reduced to writing at the request of a juror pursuant to this Article unless consent is obtained from both the defendant and the state in open court but not within the presence of the jury.” LSA–C.Cr.P. Art. 808. *See State v. Joseph*, 875 So.2d 1011, 1016–17 (La.App. 5 Cir.2004) (“With the 2001 amendments to LSA–C.Cr.P. arts. 801 and 808, it is now statutorily permissible ***203** for the jury to receive a copy of the written jury instructions to use during deliberations. However, the use is clearly conditioned upon the consent of the parties.”).

In Alabama,

Neither a copy of the charges against the defendant nor the “given” written instructions shall go to the jury room; provided, however, that the court may, in its discretion, submit the written charges to the jury in a complex case.

Alabama RCRP Rule 21.1. *See Wright v. State*, 740 So.2d 1147 (Ala.Crim.App.1999).

The Ohio Rules of Criminal Procedure require that written instructions be provided to the jury. “The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instruction to the jury for use during deliberations, and preserve those instructions for the record.” Ohio Crim. R. Rule 30(A); *see State v. Kersey*, 124 Ohio App.3d 513, 706 N.E.2d 818 (1997).

Under the West Virginia Rules of Criminal Procedure, “The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room.” W.Va.Rules of Cr. P. 30; *see State v. Lutz*, 183 W.Va. 234, 395 S.E.2d 478 (1988).

The law in Arkansas is succinctly declared by that state's supreme court in *Oliver v. State*, 286 Ark. 198, 691 S.W.2d 842 (1985): “A.R.Cr.P. Rule 33.3 clearly states it is the duty of the judge to deliver to the jury a ****491** typewritten copy of the oral instructions. This is to be done upon the request of either party or any juror.” *Id.* at 842.

The California Penal Code provides:

Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

Cal.Penal Code § 1093(f) (West 2004).

The rule in Minnesota is:

***204 (4) Giving of Instructions.** The court in its discretion shall instruct the jury either before or after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. The instructions may be in writing and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.

Rules Crim. Proc., rule 26.03, subd. 18(4), 27A M.S.A.

Unlike Louisiana, Alabama, Ohio, West Virginia, Arkansas, California, and Minnesota, there is no court rule or statute in South Carolina which gives a judge the discretion to submit to the jury written copies the charge. My research reveals no case from the appellate entities in South Carolina placing their imprimatur or approbation upon this practice.

In Florida,

Under certain circumstances, it is reversible error for the trial court to provide the jury with a copy of only a portion of the jury instructions; if the trial court provides the jury with any written instructions, it must provide the jury with all of the instructions. *Van Loan v. State*, 779 So.2d 497 (Fla. 2d DCA 2000); *Pettit v. State*, 612 So.2d 1381 (Fla. 2d DCA 1992); *Wilson v. State*, 746 So.2d 1209 (Fla. 5th DCA 1999); Fla. R.Crim. P. 3.400(a)(3).

Bouchard v. State, 847 So.2d 598, 599 (Fla.App. 2 Dist.2003).

According to *Jewell v. State*, 624 N.E.2d 38, 43 (Ind.App. 1 Dist.1993):

In Indiana, the accepted practice is not to allow the jurors to take the written instructions with them into the jury room. *Cornett [v. State]*, 436 N.E.2d 765 [(Ind.1982)]. However, the trial court has discretion to send the entire body of written instructions to the jury “cleansed” of extraneous information. *Mitchell v. State* (1989), Ind., 535 N.E.2d 498, 501.

See also Denton v. State, 455 N.E.2d 905 (Ind.1983) (“It is also the general rule of law that jury instructions are not to be sent to the jury room.”).

Pursuant to statute in New York,

At any time during its deliberation, the jury may request the court for further instruction or information with

respect *205 to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper.

N.Y.Crim. Proc. Law 310.30 (McKinney 2002). In *People v. Johnson*, 81 N.Y.2d 980, 981–82, 599 N.Y.S.2d 525, 615 N.E.2d 1009 (N.Y.1993), the Court of Appeals of New York held:

We affirm the order of the Appellate Division because CPL 310.30 prohibits giving “copies of the text of any statute” to a deliberating jury without the consent of the parties. Here, defendant expressly objected to complying with the jury's request to receive the entire charge in writing, which included statutory textual material.

The fact that CPL 310.30 allows a deliberating jury to “request the court for further instruction or information * * * with respect to any * * * matter pertinent to **492 the jury's consideration of the case” does not impliedly authorize an override of the specific prohibition. Inasmuch as the entire written jury instruction included forbidden statutory textual material, the Appellate Division correctly concluded that the trial court committed reversible error in providing that material to the jury over defendant's objection (see, *People v. Taylor*, 76 N.Y.2d 873, 560 N.Y.S.2d 982, 561 N.E.2d 882 [(1990)]; *People v. Nimmons*, 72 N.Y.2d 830, 530 N.Y.S.2d 543, 526 N.E.2d 33 [(1988)]; *People v. Owens*, 69 N.Y.2d 585, 516 N.Y.S.2d 619, 509 N.E.2d 314 [(1987)]).

The New York case of *People v. Sanders*, 70 N.Y.2d 837, 523 N.Y.S.2d 444, 517 N.E.2d 1330 (1987), is particularly on point. In *Sanders*, the Court of Appeals of New York ruled the “consent of defense counsel is an ‘absolute precondition’ to

furnishing the jury with the text of a statute because ‘questions may arise concerning which sections of pertinent statutory *206 material should be given to the jury.’” *Sanders* at 838, 517 N.E.2d 1330.

Because South Carolina has no applicable statute or rule, I vote to reverse Covert's conviction on the ground that submission of only the trafficking statute to the jury tainted the fairness of his trial.

JURY VERDICT FORM

In addition to the submission of the trafficking statute, I find prejudicial error in the court's verdict form. The jury verdict form utilized by the circuit judge read as follows:

I. Trafficking in Cocaine

Do you unanimously find, beyond a reasonable doubt that Kevin Paul Covert:

1. Knowingly sold, manufactured, cultivated, delivered, purchased or brought into this state 10 grams or more of cocaine?

YES _____ NO _____

If yes, how many grams? _____

2. Provided financial assistance or otherwise aided abetted attempted or conspired to sell, manufacture, cultivate, deliver, purchase or bring into this state 10 grams or more of cocaine?

YES _____ NO _____

If yes, how many grams? _____

3. Was knowingly in actual or constructive possession of 10 grams or more of cocaine?

YES _____ NO _____

If yes, how many grams? _____

4. Knowingly attempted to become in actual or constructive possession of 10 grams or more of cocaine?

YES _____ NO _____

If yes, how many grams? _____

II. Possession with Intent to Distribute Cocaine

If your answer to all four of the above questions is **NO**, then answer this question:

***207** Do you unanimously find, beyond a reasonable doubt that Kevin Paul Covert possessed with intent to distribute less than 10 grams of cocaine?

YES _____ NO _____

III. Simple Possession of Cocaine

If your answer to all five of the above questions I through 4 and II is **NO**, then answer this question:

Do you unanimously find that Kevin Paul Covert possessed cocaine?

YES _____ NO _____

IV. Proximity

If your answer to any of the above questions except III, Simple Possession of Cocaine, was **YES**, then answer this question:

Do you unanimously find beyond a reasonable doubt, that the above conduct occurred within a radius of one half mile of the grounds of a public or private elementary, middle, or secondary school or public playground or park, a public vocational or trade school or technical educational center; or a public or private college or university?

YES _____ NO _____

****493** In my view, the jury verdict form should have provided the specific option of finding the defendant **NOT GUILTY**. This Court, in *State v. Myers*, 344 S.C. 532, 536, 544 S.E.2d 851, 853 (Ct.App.2001), observed,

It is the preferred practice to submit the possible verdict of “not guilty” to the jury; however, the law to be charged must be determined from the evidence presented. *State v. Somerset*, 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981); *State v. Rogers*, 275 S.C. 485, 486, 272 S.E.2d 792, 792 (1980). **A jury should be instructed that one verdict it can reach is “not guilty,” especially where the crime charged is of a serious nature.** *State v. Griggs*, 184 S.C. 304, 315–16, 192 S.E. 360, 365 (1937) (stating that where the trial judge in his charge instructed

the jury that if it had a reasonable doubt as to appellant's guilt it must find him not guilty, there is no reversible error if the trial ***208** judge then fails to tell the jury that “not guilty” is one verdict it could render).

(Emphasis added.)

The *Myers* court found the “trial judge's clear and cogent jury instructions ameliorated any possible prejudice emanating from the failure to include ‘not guilty’ on the verdict form.” *Id.* In contradistinction to the judge's “clear and cogent jury instructions” in *Myers*, the judge's jury instructions in this case failed to immunize the verdict form due to the improper and prejudicial act of submitting the trafficking statute to the jury. Not only was the jury inundated with the many ways it could find the defendant guilty, the defective verdict form omitted the “not guilty” option. Therefore, the judge's charging practice compounded the prejudice of the verdict form rather than ameliorating it.

“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.” *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (citation omitted). I find the circuit judge's overemphasis of the ways the jury could find Covert guilty and the concomitant underemphasis of Covert's fundamental and constitutionally guaranteed rights encouraged the jury, again and again, to find the defendant guilty. The result in the instant case is that the jury was excessively encouraged to find the defendant guilty, rendering the trial unfair. Covert was deprived of due process of law. Accordingly, I **VOTE** to **REVERSE** the conviction and sentence and **REMAND** for a new trial.

GOOLSBY, J. (dissenting): ~~X~~

I would affirm the judgment below and for that reason I write separately.

1. Covert maintains the trial court erred in denying his motion to suppress evidence due to what Covert claims was a defective warrant and in applying a good faith exception to a statutory warrant requirement.

On September 26, 2002, Greenville Detective Timothy Conroy, after being sworn by a magistrate to tell the truth, applied to the magistrate for a warrant authorizing the search of Covert's residence. The affidavit Conroy submitted in ***209** support of his application for a search warrant provided a description of the premises to be searched and the

property sought. His application also incorporated an attached one-page, second affidavit that presented the facts on which he set forth probable cause for issuance of the search warrant. The date of September 26, 2002, and the signatures of Conroy and the magistrate appear on the affidavit and its attachment.

Later, at Covert's trial, Conroy testified *in camera* the magistrate reviewed his affidavit and issued the search warrant. Conroy also testified he and other officers, with the affidavit and search warrant in hand, immediately executed the search warrant at Covert's residence. An officer other than Conroy signed the return on September 27, 2002; however, the search warrant, which the magistrate signed, bears the date of the following day, *i.e.*, September 28, 2002.

Covert moved to suppress the evidence seized from his residence pursuant to the search warrant, pointing to evidence that the search occurred prior to the date that appears on the search warrant and claiming the magistrate failed to sign the warrant prior to its execution. The trial court, however, upheld the search, basing its holding, as noted ****494** above and as Judge Short's opinion more fully discusses, on a good faith exception.³

Unlike Judge Short and the trial court, I see no need to address the question of whether a good faith exception should be applied in an instance where the issuing magistrate's signature reflects a date later than those appearing on the affidavit and the return. Another ground appearing in the record supports the judgment of the trial court.⁴

***210** The validity of the search warrant did not depend either upon a date appearing above the magistrate's signature nor upon there being a signature of the issuing judicial officer. Nothing in the statute governing the issuance of search warrants in South Carolina, S.C.Code Ann. § 17-13-140 (2003),⁵ as Judge Short himself acknowledges, "specifically require[s] that the [search] warrant be signed." Moreover, nothing in the statute requires it to be dated, for that matter.

Here, the magistrate either wrote an incorrect date on the warrant when she signed it or failed to sign the warrant when she issued it, but then signed and dated the warrant after the officer returned it. At most, the omission of the date and signature or of the date when a magistrate issues a search warrant, without more, constitutes a ministerial defect that does not affect its validity.⁶ And as this court has

held, a ***211** ministerial ****495** error will not invalidate an otherwise valid search warrant under section 17-13-140.⁷

I add one final note regarding the search warrant. Covert does not argue the search warrant otherwise failed to meet either constitutional⁸ or statutory standards. He does not ***212** contend the magistrate did not issue the search warrant, she lacked probable cause to issue it, or she did not intend to issue it.

2. Covert argues the trial court abused its discretion in not granting a mistrial when the lawyer for Covert's codefendant, Charles Henderson, made an apparently factually incorrect statement regarding Covert during closing argument.

In his closing argument, Henderson's counsel attacked the credibility of Donald Myers and Roger Harris, both of whom testified about buying cocaine from Covert and Henderson. Counsel pointed to Myers's statements to the police and said the first time Myers implicated Henderson was after Myers received a free "get out of jail card." Counsel followed this assertion with the remark that "[a]ccording to Mr. Covert[,] he confirmed that Roger [Harris] ... had been buying cocaine from him for two years" and that Myers's statement didn't "mention Mr. Henderson in a conspiracy with him." Covert objected, arguing this undermined Covert's credibility because counsel had mentioned Henderson's involvement and counsel's statement created the impression in the jury's mind that Covert had been dishonest with the police when he gave his statement to them following his arrest. Covert's criminal involvement with Henderson had earlier been redacted from Covert's published statement to the police.

Covert refused an offer by the trial judge for a curative instruction and insisted on a mistrial.

The question of whether to grant or deny a motion for mistrial rests within the sound discretion of the trial court⁹ whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.¹⁰

The trial court did not abuse its discretion in this instance. The reference to Covert was an isolated one and was not directed to Covert's guilt, but to the veracity of Myers. Moreover, evidence as to Covert's guilt in the context of the entire record was overwhelming, particularly since he admitted ***213** to selling cocaine both before and after September 26, 2002.¹¹

6 See *State v. Smith*, 562 N.E.2d 428 (Ind.Ct.App.1990) (noting the search warrant statute contained no explicit requirement that the issuing magistrate sign a search warrant in order to validate it and holding the failure of the issuing judge to sign a search warrant did not invalidate the warrant when the magistrate found probable cause and intended to issue it; the court concluded the addition of a signature was a ministerial task); *Commonwealth v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514 (1989) (holding a failure of a judge to sign a warrant was a ministerial error that did not invalidate the warrant in the absence of a constitutional or statutory requirement that the issuing judge, without exception, sign a search warrant); see also *Yuma County Attorney v. McGuire*, 109 Ariz. 471, 512 P.2d 14, 15–16 (1973) (stating even where the statute required a magistrate's signature, “[w]arrants and the affidavits on which they are based must be read in a common-sense way rather than technically” and holding a magistrate's inadvertent failure to sign a search warrant was an oversight that did not invalidate the warrant where the judge signed the affidavit in support of the warrant and considered the existence of probable cause and thus intended by his action to give legal effect to the issuance of the warrant); *People v. Superior Court*, 75 Cal.App.3d 76, 141 Cal.Rptr. 917 (1977) (holding a magistrate's inadvertent failure to sign a search warrant did not require suppression of evidence seized pursuant thereto); *State v. Spaulding*, 239 Kan. 439, 720 P.2d 1047 (1986) (holding where a judge made findings of probable cause and intentionally issued a search warrant, the warrant was not void because the issuing judge failed to sign it where the warrant was executed and returned to the same judge and filed on the same date it was issued); *State v. Andries*, 297 N.W.2d 124 (Minn.1980) (stating the requirement that an issuing judge sign a search warrant is a purely ministerial task); cf. S.C. Op. Atty. Gen. 295 (1977) (advising, per the attorney general, that only judicial officers may sign a search warrant).

The Arizona, California, and Minnesota statutes, respectively Ariz.Rev.Stat. § 13–1441 (now renumbered as § 13–3911), Cal.Penal Code § 1523, and Minn.Stat. Ann. §§ 626.05 and 626.11, expressly require a search warrant to be signed. Yet, the appellate courts of these three states found the lack of a signature to be ministerial in nature. Other courts, however, hold a failure to sign a warrant invalidates the warrant and renders its issuance a nullity where the statutes expressly require a signature by a judicial officer. See, e.g., *Kelley v. State*, 55 Ala.App. 402, 316 So.2d 233 (Crim.App.1975) (discussing a statute defining a search warrant as “an order in writing in the name of the state, signed by a magistrate”); *Martin v. State*, 344 So.2d 248, 249 (Fla.Dist.Ct.App.1976) (noting the statute contained language stating that the magistrate shall “issue a search warrant signed by him”).

7 See, e.g., *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct.App.2004) (holding a failure to observe the requirement that search warrants be executed and a return made within ten days after the date of the warrant does not invalidate the search); *State v. Mollison*, 319 S.C. 41, 459 S.E.2d 88 (Ct.App.1995) (stating the failure to list on the return all the items seized or to make the return within ten days is a ministerial error that does not invalidate the search).

8 Article 1, section 10 of the South Carolina Constitution, which mirrors the Fourth Amendment to the United States Constitution, contains no signature and dating requirement. S.C. Const. art. 1, § 10. It requires only that the warrant issue “upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.” *Id.*

9 *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989).

10 *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626 (2000).

11 See *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct.App.2001) (noting an appellate court will review an alleged error in the context of the entire record and may affirm under a harmless error analysis where there is overwhelming evidence of guilt), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

12 See, e.g., *State v. Patterson*, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (holding the alleged impropriety of the solicitor's closing argument was not preserved for review where the trial court sustained an objection by defense counsel, but counsel did not move to strike or request a curative instruction); *State v. McFadden*, 318 S.C. 404, 458 S.E.2d 61 (Ct.App.1995) (noting no error was preserved for review where the trial court sustained defense counsel's objection to testimony and counsel made no further motion to strike the testimony).

13 See *State v. Myers*, 344 S.C. 532, 544 S.E.2d 851 (Ct.App.2001) (concluding the jury's use of a special verdict form did not prevent the jury from finding the defendant not guilty in light of the trial court's instructions).

14 *State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.App.2003) (“Arguments not raised to or ruled upon by the trial court are not preserved for appellate review.”).

40 S.C. 507
Supreme Court of South Carolina.

DAVIS
v.
SANDERS, Sheriff, et al.

March 5, 1894.

Appeal from common pleas circuit court of Sumter county; J. H. Hudson, Judge.

Action by H. Murray Davis against Marion Sanders, sheriff, and William T. Hurst, deputy sheriff, for false imprisonment. From a judgment for defendants, plaintiff appeals. Reversed.

Attorneys and Law Firms

*138 Lee & Moise, for appellant.

R. O. Purdy, for respondents.

Opinion

McIVER, C. J.

The plaintiff brought this action to recover damages for false imprisonment. The facts do not seem to have been disputed, and are as follows: A paper purporting to be a warrant was delivered to the defendant Sanders, as sheriff, by a trial justice, commanding him to arrest the plaintiff under a charge for resisting an officer in the execution of a warrant to enforce an agricultural lien, which paper was delivered *139 by the sheriff to his deputy, the codefendant, Hurst, to be executed, and the plaintiff was by him arrested. But when the plaintiff was brought to the courthouse, it was for the first time discovered that the alleged warrant under which the arrest was made was not signed by the trial justice in the usual form, nor was it dated in the attesting clause, the date not having been filled in at the place left for that purpose. As soon as this discovery was made, the sheriff released the plaintiff from arrest, and he returned to his home. The paper under which the arrest was made was the usual printed blank form, of which the following is a copy, after the words which are in italics had been inserted by the trial justice in his own handwriting, to wit:

“The State of South Carolina, County of *Sumter*. By C. C. Manning, Trial Justice in and for the said County and the

said State. To any Lawful Constable, or the Sheriff of said County. Whereas complaint upon ath has been made unto me by *I. S. Arrants that at the farm of Murray Davis, in the county and state aforesaid, on the 6th and the 13th days of January, 1893, one Murray Davis and Lafayette Davis and Joshua Davis did resist I. S. Arrants, lawful constable of I. L. Parrott, a duly-qualified trial justice for said county and state, in the execution of a certain warrant of attachment against the crops of said Murray Davis on his farm in said county and state, duly issued under the hand and seal of said trial justice*: These are therefore to command you to apprehend the said defendants, and bring *them* before me, to be dealt with according to law. Given under my hand and seal the ___ day of ___, one thousand eight hundred and ___.
“___ Trial Justice. [L. S.]”

This paper was then folded, and indorsed as follows:

“The State of South Carolina, County of Sumter. The State vs. *Murray Davis, Lafayette Davis, Joshua Davis*. Arrest Warrant. Offense, *Resisting an Officer*.
“C. C. Manning, Trial Justice.

“Date: *Jan. 27th, 1893*. Officer: *Sheriff*.”

The defendants, in their answer, pleaded justification, relying on the paper copied above as their authority for making the arrest.

The circuit judge charged the jury that, while it had been decided long ago (*State v. Vaughn, Harp. 313*) that a warrant need not be under seal, yet it must be in writing, and signed by the officer issuing; but he instructed the jury that the warrant set up in this case, having the name of the trial justice written by himself in the body of the warrant and in the indorsement made thereon, was a sufficient signing to make it a legal warrant, and sufficient to justify the defendants in making the arrest, and he therefore directed a verdict in favor of defendants. From the judgment entered upon such verdict the plaintiff appeals upon the several grounds set out in the record, which really make the single question whether there was error in the instruction given to the jury that this warrant was sufficiently signed to make it a legal warrant and justify the arrest. There can be no doubt that the paper relied upon as a legal warrant shows upon its face that it is an incomplete paper, inasmuch as it lacks the signature of the trial justice at the foot of the paper where the signature is most usually,

and we may say, universally, found, and where, in this case, the printed blank used shows it was intended to be. Now, when it is remembered that a sheriff or other officer, who undertakes to arrest a citizen under a warrant, is bound to show his warrant, if demanded, to the person proposed to be arrested, and if he refuses to do so the arrest may be lawfully resisted (*State v. Wimbush*, 9 S. C. 309), we think it would be very dangerous to the peace of society for the court to hold that a paper which shows on its face that it is an unfinished paper, lacking the essential element of the signature of the officer who issues it, would be a sufficient justification for an arrest. The circuit judge seems to have based his view upon the fact that, as the paper in question contained in the body of it the name of the trial justice, as well as in the indorsement on the paper, this was a sufficient compliance with the conceded law requiring the signature of the officer issuing the paper. In the first place, we think that to maintain this view it would be necessary to strain the meaning of the word "signature" so far beyond its usual and ordinary signification as would not be admissible, certainly not in a criminal or quasi criminal case. We do not think it would do to hold that a person cannot be excused for resisting an arrest under a paper purporting to be a warrant, when, upon inspection, it shows the lack of the essential element of signature, as commonly understood by that term. But, in the second place, the mere writing of one's name on a paper does not constitute such a signature as is necessary to authenticate such paper; for, as is said in 2 Greenl. Ev. § 674: "A signature consists both of the act of writing the party's name and of the intention of thereby finally authenticating the instrument." So, while it was held in England, prior to the statute of Victoria, that where the whole will was in the handwriting of the testator, his name occurring in the body of the will, as the usual exordium, "I, A. B., do make," etc., would be a sufficient signing, yet, "if the testator contemplated a further signature, which he never made, the will must be considered unsigned." 1 Jarm. Wills (3d Am. Ed.) at page 115. Now, even if this principle could with any

propriety be applied to a case like this, it could not avail the defendants, for it is abundantly shown, by the testimony of the trial justice himself, that when he wrote his name in the body of the warrant and in the indorsement he did *140 not intend that as his signature to the warrant, but, on the contrary, that he intended to sign the warrant in the usual place, at the foot, and was under the impression that he had done so; but when he had reached the attesting clause in the preparation of the warrant he was interrupted by other duties, and when he returned, being under the impression that he had signed the warrant, he folded it up, made the indorsements on it, and handed it to the prosecutor, requesting him to deliver it to the sheriff. His language was: "I wrote out the warrant with the exception of filling out the date and signing it. When I got down to that place, the deputy came in with four or five persons to give bond. I got up to go and attend to them, wrote out their bonds, etc. I was under the impression that I had signed the warrant. I folded and wrote that on the back there, and handed the warrant to Mr. Arrants, constable of Mr. Parrott, and asked him to take it to the sheriff, and he did so." It is due, however, to the defendants, who were acting as public officers, to say that we find nothing in the case even tending to show that they were guilty of any harsh, or even rude, conduct in making the arrest, or subjected the plaintiff to any ill usage after the arrest. On the contrary, they seem to have been entirely innocent of any intentional wrong. While, therefore, we would have been glad to relieve them, we cannot do so, consistently with our views of the law. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

McGOWAN and POPE, JJ., concur.

Parallel Citations

19 S.E. 138

410 S.C. 259
Court of Appeals of South Carolina.

Steve BAGWELL, Petitioner,
v.

STATE of South Carolina, Respondent.
Appellate Case No. 2010-173947.

No. 5267. | Heard June 3, 2014. | Decided
Aug. 27, 2014. | Rehearing Denied Oct. 21, 2014.

Synopsis

Background: After his conviction for robbery was upheld on direct appeal, 2007 WL 8327957, defendant applied for post-conviction relief, alleging ineffective assistance of counsel. The Circuit Court, Greenville County, Robin B. Stilwell, J., denied the application. Defendant appealed.

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

[1] trial counsel's decision not to seek DNA testing of blood found on glass from victim's door was ineffective assistance of counsel, and

[2] defendant was not prejudiced by counsel's failure to call witness at trial.

Reversed.

Williams, J., filed an opinion concurring in part and dissenting in part.

Attorneys and Law Firms

**631 Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Karen Christine Ratigan, both of Columbia, for Respondent.

Opinion

LOCKEMY, J.

*261 In this appeal from the denial of his post-conviction relief (PCR) application, Steve Bagwell argues the PCR

court erred in finding his trial counsel was not ineffective for (1) failing to request DNA testing for blood found on glass recovered at the crime scene and (2) failing to argue a witness's testimony was admissible to show evidence of a victim's bias and motive to fabricate testimony. We reverse and grant Bagwell a new trial.

FACTS

This case involved an alleged burglary at an apartment complex in Greenville County. At trial, Jarrett Armstrong testified he and **632 his roommate Chris Snoddy (collectively, the *262 victims) were on their way home from work one night, when he received a call from a neighbor that caused them to hurry home. Armstrong testified that when they arrived, a large crowd was gathered outside their apartment. According to Armstrong, he entered the front door of the apartment and saw Bagwell, whom Armstrong had known since elementary school, exiting through the back glass patio door, which was shattered. Armstrong stated he did not see Bagwell's roommate, Daryl¹ Spain, inside the apartment and he did not punch Daryl.

Armstrong, however, testified he confronted Bagwell outside Bagwell and Daryl's apartment and punched Bagwell in the face. According to Armstrong, Bagwell's face was scarred with "blood coming down" before Armstrong punched him. The State admitted a photograph of Bagwell taken after the burglary, which shows blood streaming down the left side of his face. On cross-examination, Daryl's counsel asked Armstrong, "This gash that [Bagwell] had on his forehead ... isn't it true that [Bagwell] received that gash when you hit him on the forehead with a handgun?" Armstrong replied, "No, sir."

Snoddy testified he saw Daryl exiting the apartment through the glass patio door; however, he stated he did not see Bagwell inside the apartment. Snoddy further testified Armstrong and Bagwell began fighting in front of Bagwell and Daryl's apartment. Snoddy also stated Bagwell had "blood or a scratch" down his face before Armstrong punched him.

Bagwell testified in his defense.² According to Bagwell, he was asleep in his apartment at the time of the burglary, and he awoke to find Armstrong "beating on [him]" and accusing Daryl of breaking into Armstrong and Snoddy's apartment.

After Armstrong left his apartment, Bagwell called the police and reported that Armstrong had broken into his apartment.

Bagwell testified he then looked outside and saw Armstrong beating Daryl and holding a gun to his head. *263 Bagwell further explained that his face was bleeding after the incident because Armstrong attacked him.

During its closing argument, the State asserted,

Some other testimony that's important for you to remember. If you remember both [Snoddy] and [Armstrong] said that when they went over to [Bagwell]'s apartment and he was out front, when they went over there they both saw a scratch on his top eye and blood. A little blood trail coming down the side of [Bagwell's] face. Now how did he get that? How did [Bagwell] get that? How did he get this right here? How did he get this cut? One way he could have gotten this cut, ladies and gentlemen, one way is if when he ran out, ran through the glass in a hurry, see the arc on this glass? He could have cut his eye when he was running out. When [Armstrong] startled them when they came back.

Subsequently, the jury convicted Bagwell and Daryl of first-degree burglary. The trial court sentenced Bagwell to twenty years' imprisonment and Daryl to fifteen years' imprisonment.

At the PCR hearing, Bagwell's PCR counsel introduced DNA test results indicating blood found on three pieces of glass recovered from the victims' glass patio door did not match Bagwell.³ Bagwell alleged his trial counsel was ineffective for failing to request DNA testing for the glass prior to trial.

Bagwell testified trial counsel never informed him the State had the blood samples at the time of his trial. Trial counsel admitted she knew the State had the blood samples prior to trial, but she did not request DNA testing. Trial counsel explained the State originally planned to test the samples, but another solicitor took over the case and decided not to follow through with testing. **633 Trial counsel admitted the test results "may have affected" the outcome at trial; however, she stated the test results would not have excluded the possibility of Bagwell's guilt. Trial counsel further stated that during its closing argument, the State "probably" displayed a picture of the broken glass door in front of the jury. Finally, trial *264

counsel asserted Bagwell's trial was essentially a "swearing match" between the victims and defendants.

The PCR court found trial counsel was not ineffective for failing to seek DNA testing of the glass prior to trial. To support its finding, the PCR court noted trial counsel believed the State would be performing a DNA test prior to trial, and she did not learn until "much later" the State would not be doing so. Moreover, it found trial counsel made a reasonable decision to proceed to trial without the DNA test because the results of the test could have damaged Bagwell's defense. Additionally, the PCR court found no prejudice from trial counsel's failure to test the glass because "the fact that DNA from the bloody glass did not match [Bagwell] did not mean[] [Bagwell] could not have been in the victims' apartment on the night in question." After the denial of PCR relief, Bagwell filed a petition for writ of certiorari, which this court granted on July 8, 2013.

STANDARD OF REVIEW

[1] "The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id.* (internal quotation marks omitted).

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove trial counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. *Id.* at 688, 104 S.Ct. 2052. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Id.* at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.* However, "[a] 'reasonable probability' is less than a preponderance of the evidence...." *Weik v. State*, Op. No. 27421 (S.C. Sup.Ct. filed July 23, 2014) (Shearouse *265 Adv. Sh. No. 29 at 42). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest

case.’” *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

LAW/ANALYSIS

I. Failure to Investigate

Bagwell contends trial counsel was ineffective for failing to request DNA testing for the pieces of glass prior to trial. He further argues he was prejudiced by trial counsel's deficiency because the State implied to the jury throughout the trial Bagwell cut his face running through the glass patio door and “touted this as the linchpin evidence to place [him] at the crime scene.” We agree.

[2] [3] [4] [5] [6] Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). “[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent **634 investigation of the facts and circumstances of the case.” *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). “[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions...” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” *Id.* at 690, 104 S.Ct. 2052.

*266 [7] We hold trial counsel's failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel. First, trial counsel's decision not to seek DNA testing prior to trial was unreasonable because the State used the glass as circumstantial evidence of Bagwell's guilt. *See Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (stating trial counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes investigation unnecessary). Specifically, the State

asserted in its closing argument Bagwell “could have cut his eye when he was running out [the victims' glass patio door,]” therefore, the State used the glass as evidence that placed Bagwell at the crime scene. Moreover, the evidence was reasonably available to trial counsel because she knew the State had the evidence prior to trial. *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360 (“A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.”). Trial counsel's explanation that she did not request DNA testing because she believed the State planned to do so was unreasonable because criminal defense attorneys have a duty “to make an *independent* investigation of the facts and circumstances of the case.” *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis added). Her duty to test the blood from the glass was especially important here because the test results could have supported Bagwell's claim that he was asleep in his apartment at the time of the burglary. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (stating counsel's conversations with the defendant may be critical when assessing counsel's investigation decisions). Although this court must give heavy deference to trial counsel's decision not to investigate, we find trial counsel's decision to not seek DNA testing prior to trial was objectively unreasonable. *Cf. Simpson*, 367 S.C. at 597, 627 S.E.2d at 706 (stating counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment).

[8] Additionally, we hold trial counsel's failure to test the blood samples prior to trial was prejudicial to Bagwell. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052 (stating a PCR applicant must prove trial counsel's performance was deficient *267 and the deficient performance prejudiced the applicant's case to establish a claim of ineffective assistance of counsel). Initially, we note prejudice may be found because trial counsel admitted the results of the DNA test “may have affected” the outcome of Bagwell's trial. *See Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998) (noting a court may find ineffective assistance of counsel when trial counsel admitted the testimony of a witness might have made the difference in obtaining an acquittal). Furthermore, the State's case against Bagwell was not strong. As trial counsel explained, Bagwell's trial was essentially a “swearing match” between the victims and defendants. The only direct evidence linking Bagwell to the burglary was Armstrong's testimony that he saw Bagwell exiting the apartment through the glass

and [Armstrong] said he hit [Bagwell] against the head with the butt of his gun.” Jerry further stated Armstrong told him he then went outside the apartment, beat Daryl, and dragged him around the apartment complex parking lot. Finally, Jerry testified Armstrong told him he wanted to kill Daryl and was angry with him because he previously told a resident at their apartment complex that Armstrong was selling marijuana.

Thereafter, the trial court ruled Jerry's testimony was inadmissible under Rule 613(b), SCRE.

At the PCR hearing, Bagwell asserted Jerry's testimony that Armstrong was angry with Daryl for telling a neighbor that Armstrong sold marijuana would have provided a motive for Armstrong to fabricate the burglary allegations against Bagwell and Daryl. Trial counsel testified she interviewed Jerry, but she never intended to call him as a witness because there was “some deviation” between his testimony and Bagwell's *270 testimony. Trial counsel further testified she did not argue Jerry's testimony was admissible under Rule 608, SCRE; however, Daryl's counsel argued the testimony was admissible under Rule 613, SCRE.

The PCR court found trial counsel was not ineffective for failing to argue Jerry's testimony was admissible to show Armstrong's bias and motive to fabricate the allegations against Bagwell and Daryl. Specifically, it found Bagwell failed to prove prejudice because Jerry did not testify at the PCR hearing.

We find the PCR court did not err in finding trial counsel was not ineffective for failing to introduce Jerry's testimony at trial. On direct appeal, this court held that any error in excluding Jerry's testimony was harmless because physical evidence corroborated Armstrong's and Snoddy's testimony,⁵ and counsel for Bagwell and Daryl were allowed to cross-examine Armstrong and Snoddy. *See State v. Bagwell*, Op. No.2007–UP–377, 2007 WL 8327957 (S.C. Ct.App. filed Sept. 18, 2007). Because this court previously found that any error in excluding Jerry's testimony would be harmless, we find Bagwell has not shown that but for trial counsel's failure to properly argue for the admission of this testimony, there is a reasonable probability the result at trial would have been different. Accordingly, we hold the PCR court properly determined trial counsel was not ineffective as to this issue.

CONCLUSION

In conclusion, we hold the PCR court erred in determining trial counsel was not ineffective for failing to request DNA testing on blood found on glass recovered at the crime scene. We further hold the PCR court properly determined trial counsel was not ineffective for failing to introduce Jerry's testimony at trial. Accordingly, we reverse the denial of PCR and find Bagwell is entitled to a new trial.

REVERSED.

KONDUROS, J., concurs.

WILLIAMS, J.

*271 I concur with the majority's opinion that Bagwell was not prejudiced by his counsel's failure to properly argue for the admission of Jerry Spain's testimony. I also agree with the majority's finding that Bagwell's trial counsel was deficient in failing to request DNA testing on the blood from the broken glass found at the crime scene. However, I disagree with the conclusion that Bagwell **637 was prejudiced by his counsel's failure to request DNA testing on the blood from the broken glass found at the crime scene.

“In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.” *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, the 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, 186, 480 S.E.2d 733, 735 (1997). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” *Id.* at 186, 480 S.E.2d at 735; *see also Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

I do not believe Bagwell has shown his counsel's failure to request DNA testing prejudiced his case. At trial, the State produced witness testimony and photographic evidence that Daryl Spain sustained multiple lacerations on the bottom of his feet on the night of the robbery. Snoddy also testified that Daryl Spain was barefoot when he exited the apartment through the shattered glass door. The cuts on Daryl Spain's feet provide a reasonable alternative explanation for the presence of blood on the glass pieces collected from the scene. In fact, Daryl Spain's lacerations, which were likely inflicted

when he attempted to exit the apartment barefooted, are a more plausible explanation for the presence of blood at the scene of the crime than the “scratch on [Bagwell's] top eye.” However, the blood on the glass collected from the scene was only tested for a match with Bagwell's DNA; it was never tested for a match with Daryl Spain's DNA. Without also *272 proving the blood does not match with Daryl Spain's DNA, this evidence would not necessarily exonerate Bagwell. Moreover, at his PCR hearing, Bagwell failed to establish the bloody glass pieces later tested for his DNA were collected from the arch of glass remaining in the doorway, which was allegedly depicted in the photograph entered into evidence by the State.⁶ The tested glass pieces could have easily been collected from the shattered glass covering the apartment floor, which would have supported the State's version of events presented at trial. Without further information to accompany the DNA testing results, the State's theory of the case is unaffected by the DNA evidence because the bloody glass could still be attributed to Daryl Spain's injuries. Accordingly, I find there is not “a reasonable probability the result of the trial would have been different” if this DNA evidence had been introduced at trial. Johnson, 325 S.C. at 187, 480 S.E.2d at 735.

Ultimately, this case was presented to the jury as a “swearing match” between the victims, Armstrong and Snoddy, and the alleged burglars, Bagwell and Daryl Spain. This case turned on credibility, and the jury found the former to be more credible than the latter. As noted in the majority's opinion, the DNA testing results do not exonerate Bagwell or preclude the possibility that he participated in the burglary. Further, as explained above, the State's version of events is unaffected by the presence of blood that did not belong to Bagwell at the scene of the crime. Thus, I would find Bagwell failed to establish that if his counsel had introduced the DNA results at trial, there is “a reasonable probability the result of the trial would have been different.” Johnson, 325 S.C. at 187, 480 S.E.2d at 735.

Based on the foregoing, I would hold that Bagwell's case was not prejudiced by his trial counsel's errors, and the PCR court properly dismissed his PCR application.

Parallel Citations

763 S.E.2d 630

Footnotes

- 1 Spain's name is spelled “Darryl” throughout the appendix; however, it is spelled “Daryl” on the South Carolina Department of Corrections website. We refer to him as Daryl in this opinion.
- 2 Daryl did not testify at trial.
- 3 The test results do not indicate who the DNA belonged to.
- 4 Bagwell also claims he is entitled to a new trial because the DNA test results constitute after-discovered evidence. Because we reverse the PCR court's finding that trial counsel was not ineffective and grant Bagwell a new trial, we decline to address this argument. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).
- 5 We note with interest that the only physical evidence linking Bagwell to the crime was the blood on Bagwell's face, which the State argued was from a cut Bagwell received when he exited the apartment. However, the DNA evidence Bagwell presented to the PCR court tends to refute that argument.
- 6 The photograph depicting the shattered glass doorway allegedly showing blood on the remaining glass was not included in the record.

South Carolina Case Law

STATE v. SALMON, 279 S.C. 344 (1983)

306 S.E.2d 620

The STATE, Respondent, v. Christopher Flynn SALMON, Appellant.

21981

Supreme Court of South Carolina.

August 25, 1983.

Deputy Appellate Defender David W. Carpenter and Asst. Public Defender Venable Vermont, Jr., Columbia, for appellant.

Atty. Gen. T. Travis Medlock, Sr. Asst. Atty. Gen., Brian P. Gibbes and Asst. Gen. Carolyn M. Adams, Columbia, for respondent.

August 25, 1983.

Per Curiam:

Appellant was indicted for murder and assault and battery with intent to kill. At a bench trial, a verdict of not guilty by reason of insanity was directed. Appellant, appearing at a

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different proceeding, requested that his police record be destroyed pursuant to § 17-1-40 S.C. Code Ann. (1976). Appellant now appeals from the circuit court order denying his request to expunge his record.

Section 17-1-40 states:

Any person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots, and fingerprints of such person shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law-enforcement agency.

The question to be resolved is whether a verdict of "not guilty by reason of insanity" satisfies the conditions of the statute necessary to expunge the record.

In construing a statute the intent of the Legislature must prevail. *State v. Harris*, 268 S.C. 117, 232 S.E.2d 231 (1977). Where the terms of the statute are clear and unambiguous, they must be applied according to their literal meaning. *Green v. Zimmerman*, 269 S.C. 535, 238 S.E.2d 323

(1977).

The statute clearly does not include the verdict of not guilty by reason of insanity as one of the dispositions which warrant expungement of a police record. Had the Legislature deemed it necessary to include this verdict as one of those mandating destruction of criminal records, it was free to do so.

The Legislature did not think a verdict of not guilty by reason of insanity necessitated destruction of police records.

Accordingly, the judgment of the lower court is affirmed.

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South Carolina Case Law

GIST v. BERKELEY COUNTY SHERIFF'S DEPT., 336 S.C. 611 (Ct.App. 1999)

521 S.E.2d 163

Anthony Gist, Appellant, v. Berkeley County

Sheriff's Department, Respondent.

Opinion No. 3031

Court of Appeals of South Carolina.

Heard June 9, 1999

Filed August 2, 1999

Appeal from Berkeley County B. Hicks Harwell, Jr., Circuit Court Judge

REVERSED AND REMANDED

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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

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Peter J. Tepley and Vanessa G. Crittenden, both of Turnipseed & Associates, of Columbia, for appellant.

Sandra J. Senn, of Charleston; and Stephanie P. McDonald, of Mt. Pleasant, for respondent.

PER CURIAM:

Anthony Gist sued the Berkeley County Sheriff's Department alleging false arrest and imprisonment.^[fn1] The trial court granted summary judgment in favor of the Sheriff's Department. Gist appeals. We reverse and remand.

FACTS

On April 27, 1992, an African-American male robbed the Fuel Depot, a convenience store in Monck's Corner, by holding the clerk at knife-point. The clerk, Martha McDonald, told the police the robber was the same person who had attempted to cash a two-party check at the store earlier that day. She stated the name on the check was Anthony Gueist or Gist. McDonald could not remember the exact spelling of the last name. McDonald also recalled the address on the check was for Berkeley Arms.

The investigating officer, Lewis Oliver, took a soda can and packs of cigarettes the robber left on the counter as evidence to

process for fingerprints. He also lifted the robber's fingerprints from the door (because the clerk had just cleaned the window before the robbery, the robber's fingerprints were the only ones on the window).

A few days after the robbery, McDonald told police she thought she saw the robber driving a red Chevrolet and

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provided a license plate number. A car matching the description was registered to Terry and Sandy Davis.

Oliver visited the home of an Anthony William Gist, who lived at the Berkeley Arms. Oliver obtained a picture of this Anthony Gist, which he showed to McDonald. McDonald stated the picture was not of the same person who robbed her.

Oliver later obtained appellant Gist's driver's license photograph. McDonald identified Gist as the person who robbed her. According to Oliver's notes, McDonald remarked the mustache and glasses on Gist's driver's license were different, but she was positive of her identification.

Oliver sought an arrest warrant for Gist. In his arrest warrant, Oliver reported the facts of the robbery. The affidavit does not contain any facts actually linking Gist to the crime. The magistrate issued the warrant in September, 1992.

When Gist learned about the outstanding warrant for his arrest approximately sixteen months after the warrant was issued, he turned himself in to the Richland County Sheriff's Office and was arrested for armed robbery. Gist hired an attorney to defend him on the criminal charges. Gist was held over to the next General Sessions term under bond after a preliminary hearing. Subsequent to the preliminary hearing, the Sheriff's Department completed a fingerprint analysis which indicated Gist's fingerprints did not match those of the robber. The charges against Gist were dismissed approximately two months later. On March 2, 1994, Gist obtained an order for the destruction of his arrest records.

Gist commenced the present action on September 20, 1995, alleging false arrest and imprisonment. The Sheriff's Department moved for summary judgment. The trial court granted the motion. The court ruled the Sheriff's Department could not be held liable for damages because there was a neutral and detached magistrate's determination of probable cause. The court held the Sheriff's Department was not grossly negligent in complying with the magistrate's order and that there was probable cause for the arrest as a matter of law. The court also found the Sheriff's Department was placed at a disadvantage because Gist secured an expungement of the arrest records prior to filing suit.

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LAW/ANALYSIS

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled

to judgment as a matter of law. *Etheredge v. Richland Sch. Dist.* 1, **330 S.C. 447**, **499 S.E.2d 238** (Ct.App. 1998); Rule 56 (c), SCRPC. Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law. *Tupper v. Dorchester County*, **326 S.C. 318**, **487 S.E.2d 187** (1997). When determining whether any triable issue of fact exists, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Pye v. Aycock*, **325 S.C. 426**, **480 S.E.2d 455** (Ct.App. 1997). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. *Staubes v. City of Folly Beach*, **331 S.C. 192**, **500 S.E.2d 160** (Ct. App. 1998), cert. granted, Mar. 3, 1999.

Probable cause

Gist argues the trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether there was probable cause for his arrest. We agree.

False imprisonment is "deprivation of a person's liberty without justification." *Caldwell v. K-Mart Corp.*, **306 S.C. 27**, **30**, **410 S.E.2d 21**, **23** (Ct.App. 1991). An action for false imprisonment may not be maintained where the plaintiff was arrested by lawful authority. *Jones v. City of Columbia*, **301 S.C. 62**, **389 S.E.2d 662** (1990).

The fundamental issue in determining the lawfulness of an arrest is whether there was "probable cause" to make the arrest. *Wortman v. Spartanburg*, **310 S.C. 1**, **425 S.E.2d 18** (1992). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Id.* at 4, 425 S.E.2d at 19. "In determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable, prudent and cautious men, not legal technicians, act." *Summersell v. South Carolina Dep't of Pub.*

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Safety, **334 S.C. 357**, **365**, **513 S.E.2d 619**, **623** (Ct.App. 1999). The issue of probable cause is a question of fact and ordinarily one for the jury. *Wortman*, **310 S.C. 1**, **425 S.E.2d 18**.

"All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." S.C. Code Ann. § **22-3-710** (1976). A warrant affidavit that is "insufficient in itself to establish probable cause may be supplemented before a magistrate by sworn oral testimony." *State v. Crane*, **296 S.C. 336**, **338**, **372 S.E.2d 587**, **588** (1988). However, a warrant issued upon a statement of facts not sworn to is unconstitutional. *State v. Wimbush*, 9 S.C. 309 (1878).

In this case, the warrant's affidavit does not state the facts

upon which probable cause was based. It does not contain any facts actually linking Gist to the crime. As the Sheriff's Department conceded at oral argument, the affidavit, standing alone, was insufficient to establish probable cause. See *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)) ("An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. [citations omitted] Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.").

At his deposition, Oliver, the investigating officer for the Sheriff's Department, testified he sought the arrest warrant for Gist based on McDonald positively identifying Gist in a photographic lineup. He further testified that, although the warrant does not reference the photographic lineup, he told the judge about it orally. The record does not contain any evidence as to whether the affidavit was accompanied by sworn, oral testimony before the judge.

Furthermore, there is an issue of material fact concerning whether a photographic lineup occurred. In her deposition, McDonald said Oliver showed her four or five different photos. Because she gave her deposition over five years after the robbery, her memory was sketchy. She could not remember if the photos were head shots or family pictures. She remembered telling Oliver one of the photos may have been the

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robber, but she could not remember whether the robber wore glasses. She recalled Oliver telling her to picture the person in the photograph with or without glasses.

Oliver said he showed McDonald six photographs from which she identified Gist. The file, however, does not reference a photographic lineup, nor does it contain the other photographs. The file only contains a supplemental report in which Oliver wrote:

On 5-28-92 I met with the victim McDonald, Martha. Ms. McDonald was shown a copy of a S.C. Drivers licence and asked if she new (sic) the subject. Ms. McDonald stated, "Thats (sic) the guy who robbed me." I asked Ms. McDonald if she was positive, she stated yes. The only thing different was the mustash (sic) and the glasses, But she was positive that the person in the photo was and is the same person who robbed her at knife point. Investigation to continue.

According to Oliver, this report refers to another identification subsequent to the photographic lineup. Oliver testified McDonald came to see him at his office on May 28. She saw the picture of Gist in the file on his desk and identified Gist as the robber. Oliver testified the report referencing the photographic lineup was missing from the file. The officer who testified at the preliminary hearing, however, stated nothing in the file mentioned a photo lineup having been used.

Viewing the evidence in the light most favorable to Gist, we find a genuine issue of material fact exists as to whether the magistrate was presented sworn, oral testimony concerning a photographic lineup when the probable cause determination was made. There is also an issue of material fact concerning whether McDonald's identification of Gist was based on a proper photographic lineup or on a presentation of Gist's driver's license. Accordingly, we find the trial court erred in finding, as a matter of law, probable cause existed for Gist's arrest. Because issues of material fact exist, we reverse the trial court's grant of summary judgment to the Sheriff's Department. In so doing, we express no opinion on the merit of Gist's claim.

The trial court also held the Sheriff's Department could not be held liable for damages for false arrest because a

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magistrate issued a warrant for Gist's arrest. This holding is erroneous. The Tort Claims Act states a governmental entity is not liable for a loss resulting from the "execution, enforcement, or implementation of the orders of any court or execution, enforcement or lawful implementation of any process. . . ." S.C. Code Ann. § 15-78-60 (3) (Supp. 1998). In this case, however, the Sheriff's Department's liability does not arise from the "execution, enforcement, or implementation" of the magistrate's order. It arises from allegedly securing the warrant without probable cause. Therefore, the Sheriff's Department is not shielded from liability by the arrest warrant.

Expungement order

Gist argues the trial court erred in finding the Sheriff's Department was disadvantaged in defending its case because Gist had obtained an expungement order. We agree.

Oliver testified the file was missing several reports. The officer who testified at the preliminary hearing stated he had the entire file with him, which contained an incident report, supplemental reports, and the victim's statement. He did not have any record of a photo lineup being presented to McDonald. In addition, Gist's criminal defense attorney stated he obtained copies of the incident report and supplemental reports prior to the order for destruction of the arrest records. The attorney asserted there was no mention in the records he received of a photographic lineup.

Viewing the evidence in the light most favorable to Gist, we find a genuine issue exists as to whether a record of a photographic lineup ever existed. The destruction of the record in this case prejudices Gist's case as much as it prejudices the Sheriff's Department's case. Therefore, the trial court erred in holding that the destruction of the record prejudiced the Sheriff's Department alone.

South Carolina Tort Claims Act

Finally, Gist argues the trial court erred in holding Gist must prove gross negligence on the part of the Sheriff's Department to prevail on his claim for false arrest. We agree.

In order to prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the
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plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful. *Andrews v. Piedmont Air Lines*, **297 S.C. 367, 377 S.E.2d 127** (Ct.App. 1989). False imprisonment is an intentional tort; negligence is not an element. See *Jeffcoat v. Caine*, **261 S.C. 75, 198 S.E.2d 258** (1973).

The Tort Claims Act provides:

The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exceptions from liability and damages contained therein.

S.C. Code Ann. § **15-78-40** (Supp. 1998).

None of the exceptions from liability impose a standard of gross negligence on the torts of false arrest and imprisonment. See S.C. Code Ann. § **15-78-60** (Supp. 1998). *Wortman*, the case decided under the Tort Claims Act, did not include gross negligence as an element of the torts. See *Wortman v. Spartanburg*, **310 S.C. 1, 425 S.E.2d 18** (1992). We find the gross negligence standard is not applicable to the present case.

For the foregoing reasons, the trial court's grant of summary judgment is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED.

CURETON, ANDERSON and STILWELL, JJ., concur.

[fn1] Gist also sued the Richland County Sheriff's Office. The claim against the Richland County Sheriff's Office was dismissed by consent.

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Eleventh Judicial Circuit



Counties

Edgefield / Lexington
McCormick / Saluda

Contact Numbers

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Donald V. Myers,
Solicitor

Ann Davidson Hubbard,
Director

Davant C. Keenan,
Expungement Coordinator

Expungement Services
Marc H. Westbrook Judicial Center
205 E. Main St. Suite 105
Lexington, SC 29072

PLEASE READ CAREFULLY

You **MUST** apply for an expungement in the County where the arrest took place. You may apply directly to the Lexington Solicitor's Office for an Expungement Order for Edgefield, Lexington, McCormick or Saluda Counties. The Solicitor's Office will prepare and process the expungement order. You may also hire an attorney to prepare and process your expungement request. If you need a copy of your criminal history please go to www.sled.sc.gov to run your SLED Catch. **If you completed Pretrial Intervention (PTI) or Alcohol Education Program (AEP) you need to contact your case manager for instructions on expungement.** In order to request an expungement from the Solicitor's Office, the following requirements must be met:

- 1) You must make sure that the charge that you are requesting be expunged can legally be expunged. See the attached *Charges Subject to Expungement* for the statutes that can be legally expunged and the requirements for each charge. **For dismissed, nol prossed or not guilty charges in Magistrate or Municipal court you must contact the jurisdictional court for an expungement.** For all juvenile charges, you must provide documentation (driver's license) to show proof of age. You must be over 18 to request an expungement on juvenile charges.
- 2) You must obtain a **CERTIFIED** copy of the warrant/ticket/ indictment showing each charge against you, your date of arrest, and the disposition of each charge. For Magistrate/Municipal cases this can be received from the Judge's Office that presided over your case. For General Sessions cases, this can be received from the Clerk of Court's Office in the county that you were arrested. If this is a Conditional Discharge expungement you must provide documentation from the Judges Office or the Clerk of Court's Office that all requirements have been met.
- 3) You must complete all of the paperwork requested by the Solicitor's Office and comply with all requirements of the Solicitor (complete pages 5-6 of this document).
- 4) All expungement fees are to be paid by separate US Postal Money Orders or Cashier's Checks. **For expungement fee information please see page 4 of this document.** There will be no charge for dismissed, nol prossed and not guilty charges in General Session Court unless the dismissal is part of a plea agreement then the \$250.00 expungement fee is applicable.(ie: conviction on related charge from same incident or conviction on the same day)
- 5) Charges may be considered to be combined on one order when the arrest date and/or the disposition date are the same.
- 6) You will receive a true copy of your filed expungement order in the mail within six (6) months of the date of the initial request. If your address or any other information changes before you receive your filed expungement order you **MUST** contact this office.
- 7) The completed requirement packet may be mailed or submitted to this office between the hours of 8:30 and 5:00 Monday thru Friday. **An expungement representative is available for questions on Tuesday and Wednesday between the hours of 10:00 a.m. and 4:00 p.m. only.**

CHARGES SUBJECT TO EXPUNGEMENT

If you have a General Sessions conviction with a sentence that is more than 30 days or a fine of \$1,000 or both then that charge is not eligible for expungement, unless otherwise specified by SC law. **For dismissed, nol prossed or not guilty charges in Magistrate or Municipal court you must contact the jurisdictional court for an expungement.**

§17-1-40 Dismissal, Not guilty or Nol Prossed

Charges that have been dismissed, nol prossed or of which you were found not guilty, may be expunged as long as the charge is eligible for expungement.

§17-22-150(a) Pretrial Intervention Program

Anyone successfully completing the Pretrial Intervention program may have the charge expunged. Expungement fees apply and are in addition to the Pretrial Intervention fees.

§17-22-530(A) Alcohol Education Program

Anyone successfully completing the Alcohol Education Program may have the charge expunged. Expungement fees apply and are in addition to the Alcohol Education Program fees.

§34-11-90(e) Fraudulent Check Law

First offense misdemeanor conviction under the Fraudulent Check Law may be expunged, provided that no additional criminal conviction has taken place one year from the date of the first conviction. This may include all fraudulent checks occurring on the same arrest date and conviction date.

§44-53-450(b) Conditional Discharge.[§44-53-370 (c)(d) and §44-53-375 (A)]

Conviction of a first offense for charges under statute codes §44-53-370 (c)(d) and §44-53-375 (A) where a conditional discharge was received and the defendant successfully complied with the terms of the sentence may be expunged

§22-5-910 First Offense Conviction Penalty of not more than Thirty Days or a Fine of \$1,000

First offense conviction for a crime with a penalty of not more than thirty days or a fine of \$1,000 or both may be expunged, provided no additional conviction has taken place for three years from the date of that conviction. If the first offense conviction is for Criminal Domestic Violence, no additional conviction can have taken place for five years from the date of that conviction. Please note Wildlife/game offense convictions and certain traffic offenses cannot be expunged.

§22-5-920 Youthful Offender Conviction

Conviction of a first offense under the Youthful Offender Act (YOA) may be expunged, provided no additional conviction has taken place for five (5) years after completion of the sentence, including probation and parole. Convictions classified as a violent crime cannot be expunged.

CHARGES SUBJECT TO EXPUNGEMENT

§56-5-750(F) Failure to Stop Motor Vehicle

Conviction of a misdemeanor first offense for failure to stop for a blue light may be expunged, provided no additional conviction has taken place for three (3) years from the completion of the sentence.

§63-19-2050 Destruction Of Juvenile Records

Code of Laws of South Carolina (1976) allows the destruction of a person's juvenile records in the following cases:

- (1) Juveniles charged with, but not adjudicated for, a delinquent act, and
- (2) Juvenile offenders adjudicated delinquent for a status or non-violent offense.

In order to destroy a person's juvenile records, the Court must find that:

1. The person is 18 years of age or older, and
2. The person does not have a prior adjudication for an offense that would carry a maximum term of five years imprisonment if committed by an adult; and
3. If adjudicated, the person has successfully completed any dispositional sentence imposed by the Court; and
4. If adjudicated, the person has not been subsequently charged with committing any other delinquent or criminal acts.

Expungement Fees and Process

The following chart specifies the non refundable fees associated with the expungement procedure as it relates to your specific order(s). All fees are to be paid for each order that is being processed. All expungement fees are to be paid by separate US Postal Money Orders or Cashier's Checks. There will be no charge for dismissed, nol prossed and not guilty charges in General Session Court unless the dismissal is part of a plea agreement then the \$250.00 expungement fee is applicable.

- A non refundable Administrative fee of **\$250.00** is to be made payable to the **11th Circuit Solicitor** in the form of an US Postal money order, if applicable.
- A non refundable fee of **\$35.00** is to be made payable to the **Clerk of Court** in the form of an US Postal money order, if applicable.
- A non refundable fee of **\$25.00** is to be made payable to **SLED** in the form of an US Postal money order. if applicable

Statute	Offense	Solicitor Fee	Sled Fee	Clerk Fee
§17-1-40	Dismissed, Nol Prossed, Not Guilty	no fee unless part of a plea agreement (conviction on related charge from same incident) then pay \$250.00	no fee	no fee
§17-22-150(a)	Pretrial Intervention Program	\$250.00	no fee	\$35.00
§17-22-530 (A)	Alcohol Education Program	\$250.00	no fee	\$35.00
§34-11-90(e)	Fraudulent Check Conviction	\$250.00	\$25.00	\$35.00
§44-53-450(b)	Conditional Discharge	\$250.00	no fee	\$35.00
§22-5-910	1 st Offense Conviction of a Crime Carrying Not More Than 30 Days or \$1,000	\$250.00	\$25.00	\$35.00
§22-5-920	1 st Offense Youthful Offender	\$250.00	\$25.00	\$35.00
§56-5-750(F)	1 st Offense Failure to Stop Motor Vehicle	\$250.00	\$25.00	\$35.00
§63-19-2050	Destruction of Juvenile Record	\$250.00	\$25.00	\$35.00

Process for Expungement

Applicant(or Attorney) requests application from the Solicitor's Office, completes and returns to Solicitor's Office.

The Solicitor's Office sends the application to SLED with the \$25 fee when applicable.

SLED sends application back to the Solicitor's Office granting or denying approval.

If SLED or the Solicitor denies the application, the process ends and the Solicitor notifies applicant of the denial and returns the \$35.00 money order (if applicable) made payable to the Clerk of Court back to the applicant.

If determined eligible, the Solicitor's Office obtains all other necessary signatures.

The Solicitor's Office files the signed order and mails the certified copies to all governmental agencies which must receive the expungement order and provides a copy to the applicant or applicant's retained counsel.

CHAPTER 22

UNIFORM EXPUNGEMENT OF CRIMINAL RECORDS

SECTION 17-22-940. Fees; establishment of expungement process; requirements and duties of solicitor and SLED.

(A) In exchange for an expungement service that is provided by the solicitor's office, the applicant is responsible for payment to the solicitor's office of an administrative fee in the amount of two hundred fifty dollars per individual order, which must be retained by that office and used to defray the costs associated with the expungement process, except as provided in subsection (B). The two hundred fifty dollar fee is nonrefundable, regardless of whether the offense is later determined to be statutorily ineligible for expungement or the solicitor or his designee does not consent to the expungement.

(B) Any person who applies to the solicitor's office for an expungement of general sessions charges pursuant to Section 17-1-40 is exempt from paying the administrative fee, unless the charge that is the subject of the expungement request was dismissed, discharged, or nolle prossed as part of a plea arrangement under which the defendant pled guilty and was sentenced on other charges.

(C) The solicitor's office shall implement policies and procedures consistent with this section to ensure that the expungement process is properly conducted. This includes, but is not limited to:

- (1) assisting the applicant in completing the expungement order form;
- (2) collecting from the applicant and distributing to the appropriate agencies separate certified checks or money orders for charges prescribed by this article;
- (3) coordinating with the South Carolina Law Enforcement Division (SLED) and, in the case of juvenile expungements, the Department of Juvenile Justice, to confirm that the criminal charge is statutorily appropriate for expungement;
- (4) obtaining and verifying the presence of all necessary signatures;
- (5) filing the completed expungement order with the clerk of court; and
- (6) providing copies of the completed expungement order to all governmental agencies which must receive the order including, but not limited to, the:
 - (a) arresting law enforcement agency;
 - (b) detention facility or jail;
 - (c) solicitor's office;
 - (d) magistrates or municipal court where the arrest warrant originated;
 - (e) magistrates or municipal court that was involved in any way in the criminal process of the charge sought to be expunged;
 - (f) Department of Juvenile Justice; and
 - (g) SLED.

(D) The solicitor or his designee also must provide a copy of the completed expungement order to the applicant or his retained counsel.

(E) In cases when charges are sought to be expunged pursuant to Section 17-22-150(a), 17-22-530(a), 22-5-910, or 44-53-450(b), the circuit pretrial intervention director, alcohol education program director, or summary court judge shall attest by signature on the application to the eligibility of the charge for expungement before either the solicitor or his designee and then the circuit court judge, or the family court judge in the case of a juvenile, signs the application for expungement.

(F) SLED shall verify and document that the criminal charges in all cases, except in cases when charges are sought to be expunged pursuant to Section 17-1-40, are appropriate for expungement before the solicitor or his designee, and then a circuit court judge, or a family court judge in the case of a juvenile, signs the application for expungement. If the expungement is sought pursuant to Section 34-11-90(e), Section 22-5-910, Section 22-5-920, or Section 56-5-750(f), the conviction for any traffic-related offense which is punishable only by a fine or loss of points will not be considered as a bar to expungement.

(1) SLED shall receive a twenty-five dollar certified check or money order from the solicitor or his designee on behalf of the applicant made payable to SLED for each verification request, except that no verification fee may be charged when an expungement is sought pursuant to Section 17-1-40, 17-22-150(a), or 44-53-450(b). SLED then shall forward the necessary documentation back to the solicitor's office involved in the process.

(2) In the case of juvenile expungements, verification and documentation that the charge is statutorily appropriate for expungement must first be accomplished by the Department of Juvenile Justice and then SLED.

(3) Neither SLED, the Department of Juvenile Justice, nor any other official shall allow the applicant to take possession of the application for expungement during the expungement process.

(G) The applicant also is responsible to the clerk of court for the filing fee per individual order as required by Section 8-21-310(21), which must be forwarded to the clerk of court by the solicitor or his designee and deposited in the county general fund. If the charge is determined to be statutorily ineligible for expungement, this prepaid clerk of court filing fee must be refunded to the applicant by the solicitor or his designee.

(H) Each expungement order may contain only one charge sought to be expunged, except in those circumstances when expungement is sought for multiple charges occurring out of a single incident and subject to expungement pursuant to Section 17-1-40 or 17-22-150(a). Only in those circumstances may more than one charge be included on a single application for expungement and, when applicable, only one two hundred fifty-dollar fee, one twenty-five dollar SLED verification fee, and one thirty-five dollar clerk of court filing fee may be charged.

(I) A filing fee may not be charged by the clerk's office to an applicant seeking the expungement of a criminal record pursuant to Section 17-1-40, when the charge was discharged, dismissed, nolle prossed, or the applicant was acquitted.

(J) Nothing in this article precludes an applicant from retaining counsel to apply to the solicitor's office on his behalf or precludes retained counsel from initiating an action in circuit court seeking a judicial determination of eligibility when the solicitor, in his discretion, does not consent to the expungement. In either event, retained counsel is responsible to the solicitor or his designee, when applicable, for the two hundred fifty-dollar fee, the twenty-five dollar SLED verification fee, and the thirty-five dollar clerk of court filing fee which must be paid by retained counsel's client.

(K) The solicitor or his designee has the discretion to waive the two hundred fifty-dollar fee only in those cases when it is determined that a person has been falsely accused of a crime as a result of identity theft.

(L) Each solicitor's office shall maintain a record of all fees collected related to the expungement of criminal records, which must be made available to the Chairmen of the House and Senate Judiciary Committees. Those records shall remain confidential otherwise.

HISTORY: 2009 Act No. 36, Section 2, eff June 2, 2009.