THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Appellate Case No.: 2017-000270
Trial Court Case No.: 2016-ALJ-20-0287-CC

Shawn Bethea, ... Appellant,

v.

South Carolina Law Enforcement Division, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS AND OF THE CASE

The Appellant was convicted of criminal domestic violence in violation of S.C. Code Ann. § 16-25-20(1) in the Marion Municipal Court on May 17, 1993 (Tr. p. 24, line 2–p. 25, line 1) (R. p.). The Incident Report for that incident, which was admitted into the record at the trial court, states that on May 16, 1993, law enforcement officers with the City of Marion Police Department responded to the Appellant's residence in reference to a call from the Appellant's wife indicating that she and the Appellant were involved in a domestic dispute. Incident Report (R. p.). Upon arrival, law enforcement noted that Appellant's wife had "a busted lip and a swollen nose" and that the Appellant's shirt was torn. *Id.* The Incident Report also indicates that the Appellant "stated he was upset when his wife came home drunk and pushed her down on the bed and they started fighting." *Id.* At the trial, the Appellant admitted to using physical force on his wife during this domestic violence incident. (Tr. p. 27, lines 10-20)(R. p.). The Marion Municipal Court "Disposition Sheet" indicates that the Petitioner was duly sentenced by the Marion Municipal Court to either the payment of a $248.25 fine or the service of 30 days in jail for violating S.C. Code Ann. § 16-25-0020(1). Disposition Sheet (R. p.). At the time of this conviction, S.C. Code Ann. § 16-25-20 (1984) stated: "[i]t is unlawful to: (1) cause physical harm or injury to a person's own household member....".

Despite this conviction, the Appellant applied for a CWP from Respondent in 2009. However, this application was denied and the Appellant did not appeal this denial. (Tr. p. 48, line 19-p. 49, line 4) (R. p.). Nevertheless, Appellant applied for a CWP again in 2016. After conducting the required state and federal background checks set forth in S.C. Code Ann. § 23-31-215(B) ("215(B)") on the Appellant, the Respondent denied Appellant's application. The ground for this denial was the Petitioner's conviction for criminal domestic violence in 1993, which conviction constitutes a prohibition to the Appellant's ability to lawfully possess a firearm in accordance with 18 U.S.C. § 922(g)(9).

Appellant appealed this decision internally to Respondent; however, this appeal was also denied. The ground for this denial was the same unfavorable federal background check based the Appellant's conviction from criminal domestic violence.

Petitioner appealed this decision to the ALC and a contested case hearing followed. During this hearing, the Appellant offered two arguments in support of his case: 1.) that the Respondent is prohibited from applying the federal firearms prohibitions to deny South Carolina CWP applications (Tr. p. 4, line 18-p. 9 line 15) and 2.) that Appellant's guilty plea was unconstitutional based on Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). (Tr. p. 16, line 16-Tr. p. 79, line 1). Respondent's decision was affirmed by the trial court. This appeal follows. Notably however, Appellant's argument Number 1 set forth in the Initial Brief of Appellant was not raised in the lower court proceeding. *Id.*

ARGUMENT

I. The trial court did not err in upholding Respondent's denial of the Appellant's concealed weapons permit ("CWP") application.

The trial court was correct to uphold Respondent's denial of Appellant's CWP application based on the following.

As a threshold matter, the Appellant failed to properly preserve his argument number 1 on this issue as it was not raised to the trial court. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). South Carolina law is clear, "an appellant court cannot address an issue unless it was raised to, and ruled upon by, the trial court." Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (per curiam). This holds true for administrative appeals. Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) ("As in other appellate matters, we require issue preservation in administrative appeals"); Brown v. S.C. Dep't of Health & Envtl Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the agency are not preserved for judicial consideration.")

South Carolina jurisprudence regarding the requirements for issue preservation states, "[t]here are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004) (citing Jean Hoefer Toal et al., Appellate Practice in South Carolina, 57 (2d ed.2002)). In this instance, Appellant's current argument numbered 1 was absolutely not raised to the

trial court at all, much less raised with sufficient specificity, and was not ruled on by the trial court. *See generally* Transcript. Furthermore, South Carolina courts have repeatedly observed that "issue preservation rules 'prevent... 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.'" Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 406, 526 S.E.2d 716, 724 (2000)). In this case, Appellant did not properly preserve his argument number 1 and this Court cannot entertain such argument.

Nevertheless, the trial court's decision on this issue should be affirmed. There is no dispute that the Appellant was convicted of criminal domestic violence in 1993. (Tr. p. 24, line 2–p. 25, line 1) (R. p.). There is also no dispute that the Appellant's domestic violence conviction involved the Appellant using physical force on his spouse (i.e. a household member) and causing her physical injuries. (Tr. p. 27, lines 10-20)(R. p.). The responding law enforcement noted that the Appellant's wife suffered "a busted lip and a swollen nose" as a result of the Appellant's criminal acts. Incident Report (R. p.). For this conviction, the Appellant was duly sentenced by the Marion Municipal Court to either the payment of a $248.25 fine or the service of 30 days in jail for violating S.C. Code Ann. § 16-25-0020(1). The Appellant chose to resolve sentence by the payment of the fine. Disposition Sheet (R. p.). Based on this valid conviction of a misdemeanor crime of domestic violence involving the use of force on a household member, the trial court correctly found that the Appellant is federally prohibited from possessing a firearm in accordance with 18 U.S.C.A. § 922(g)(9).

The trial testimony also indicated unequivocally that the Appellant has been entered into the Federal Bureau of Investigation's NICS Index Database as a result of this conviction and that this entry renders the Appellant federally prohibited from possessing a firearm. (Tr. p. 41, lines 2-13; p. 51, lines 4-12) (R. p.). This entry is determinative in this matter. Furthermore, it is the jurisprudence of this State to afford agencies deference in interpreting the statutes and regulations that are applicable to the agency. *See* Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014); Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.").

Moreover, the Appellant's assertions that he was able to purchase a weapon as evidence of the lack of a federal prohibition unavailing. Federal law authorizes federal firearms dealers to complete a "delayed" transaction if there has not been a denial of such transaction within three (3) business days. *See* 18 U.S.C.A § 922(t) (Tr. p. 37, line 13-p. 38, line 19). This operation of federal law, which has been referred to as the "Charleston Loophole" because of its utilization by Dylan Roof, is not conclusive or persuasive evidence regarding the applicability of a federal firearms prohibition. Moreover, the testimony in this matter indicated that the entry in the NICS Index Database occurred after this purchase such that the same transaction would be denied outright if attempted today. (Tr. p. 41, lines 2-13; p. 51, lines 4-12) (R. p.).

Similarly, the Appellant's assertion that because neither the FBI nor the ATF have arrested him or retrieved his firearm is of no consequence. It is axiomatic that neither of these nationwide law enforcement agencies has the manpower or the resources to retrieve

all illegally possessed firearms or to effectuate arrests regarding the same. As such, this argument is simply without merit.

Accordingly, because the record in this matter indicates that the Appellant does not have a favorable background check required for the issuance of a CWP in accordance with 215(B), the trial court was correct to affirm Respondent's denial of such. Therefore, the trial court's decision in this matter should be affirmed and upheld in its entirety.

II. The trial court did not err in ruling that Respondent can consider the applicable federal law in denying Appellant's CWP application.

The trial court correctly rejected Appellant's argument that SLED must issue a CWP to all individuals who are not prohibited solely by state law from possessing a weapon, regardless of whether or not the individual is prohibited from possessing a firearm by federal law or by the laws of any other state. Simply put this argument is completely without merit. South Carolina law, and more specifically, 215(B) mandates that SLED "conduct or facilitate a local, state, **and federal** fingerprint review of" all applicants for a South Carolina CWP. (emphasis added). Further, 215(B) requires SLED to issue a CWP if, **but only if**, the "fingerprint review and background check are favorable." It naturally follows that should **either** background check come back unfavorable, SLED must deny the application. S.C. Code Ann. § 23-31-215(B). It is axiomatic that a South Carolina fingerprint review will only reveal South Carolina state law arrests and convictions and that such a state-only review will not reveal any out-of-state or federal arrests or convictions, even those federal convictions occurring inside the State of South Carolina. In addition, it is no less evident that a federal fingerprint review will in fact reveal any and all such out-of-state and all federal arrests and convictions for an individual. Had the South Carolina Legislature ("Legislature") intended to limit SLED's analysis to state law arrests, convictions, and prohibitions only, as suggested by the Appellant, a South Carolina fingerprint review would be all that is necessary and mandated to accomplish such. In that instance, there would be no conceivable reason for SLED to conduct an additional federal fingerprint review as this would be a completely superfluous and unnecessary act. The South Carolina Supreme Court has long held that statutes must be read as a whole and must be construed so "that no word, clause, sentence, provision or part shall be rendered

surplusage, or superfluous." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citing In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). Accordingly, there is remains no viable purpose for SLED to conduct a federal fingerprint review unless the Legislature intended to incorporate the federal firearms prohibitions set forth 18 U.S.C.A. § 922 into the determination of a CWP. *See* S.C. Code Ann. § 23-31-215(B).

Therefore, the Legislature's requirement of a federal fingerprint review of all applicant's for South Carolina CWPs evidences a clear and unambiguous intent to incorporate all of the federal firearms prohibitions set forth in 18 U.S.C.A. § 922 into Respondent's determination as to whether an individual has a favorable background check for issuance of a CWP. To find otherwise would also lead to the manifestly absurd result that an individual committing a federally prohibiting felony offense in the State of Georgia would not be prohibited from receiving a South Carolina CWP when the same individual committing the same offense in South Carolina would be prohibited, so long as this offense was prosecuted in South Carolina's state courts. Further, individuals committing federally prohibiting federal felonies would not be prohibited in South Carolina under any circumstances as such convictions would not result in state-law prohibitions. This cannot be. The jurisprudence of this State advises that "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citing Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)). Requiring SLED to conduct a federal background check on all CWP applicants, yet prohibiting SLED from acting upon information acquired therefrom would clearly constitute an absurd result. Such a ruling

would also not comport with the subject matter and general purpose of South Carolina's CWP laws. *See* Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) ("In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose."). As such, the trial court correctly held that Respondent must deny the CWP application for any individual who has an unfavorable background check, including all individuals federally prohibited from possessing a firearm in accordance with 18 U.S.C.A § 922, like the Appellant. Therefore, the trial court's decision should be affirmed and upheld in its entirety.

III. The Appellant abandoned his constitutional claim in this matter.

At the lower court, Petitioner also attempted to attack the constitutionality of his 1993 conviction based on Alabama v. Shelton, 535 U.S. 654 (2002). (Tr. p. 16, line 16-Tr. p. 79, line 1). This argument appears to have been abandoned as it was not discussed on appeal. *See* State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011); State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009). However, this argument is nevertheless unavailing. Alabama v. Shelton,[1] was decided in 2002, subsequent to the Petitioner's conviction, and the rule espoused in Shelton has been held by the South Carolina Supreme Court not to apply retroactively. In Talley v. State, the Supreme Court specifically found that the rule announced in Shelton did not apply retroactively to a case resulting in the mere payment of a fine noting that a "fine for an uncounseled misdemeanor conviction is valid, and [that] Respondent did not have a constitutional right to counsel for this conviction." Talley v. State, 371 S.C. 535, 544, 640 S.E.2d 878, 882 (2007). In addition, the administrative law court venue was not the appropriate venue for such a constitutional challenge in any event. *See generally* Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 84–85, 529 S.E.2d 6, 9 (2000); Beaufort County Bd. of Educ. v. Lighthouse Charter School C'tee, 335 S.C. 230, 516 S.E.2d 655 (1999); South Carolina Tax Commission v. South Carolina Tax Board of Review, 278 S.C. 556, 299 S.E.2d 489 (1983). As such, despite the abandonment on appeal, the trial court was correct in rejecting this argument. Therefore, the trial court's decision should be affirmed and upheld in its entirety.

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[1] 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002)

CONCLUSION

In conclusion, based on the foregoing and the applicable laws and jurisprudence of the State of South Carolina, this Court should uphold and affirm the trial court's decision in its entirety.

Respectfully Submitted,

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June 12, 2017

THE STATE OF SOUTH CAROLINA
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John D. McLeod, Administrative Law Judge

Appellate Case No.: 2017-000270
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PROOF OF SERVICE

I hereby certify that I served the **Initial Brief of Respondent** and **Respondent's Designation of Matter to Be Included in the Record on Appeal** on appellant by depositing a copy of the same in the United States mail, postage prepaid, and addressed to his attorney as follows:

Thurmond Brooker, Esquire
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on June 12, 2017 from Columbia, South Carolina.

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June 12, 2017

The Honorable Jenny Abbott Kitchings
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Post Office Box 11629
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Re: Shawn Bethea v. South Carolina Law Enforcement Division
Appellate Case No.: 2017-000270

Dear Madam Clerk:

In accordance with Rules 208 and 209, SCACR, enclosed for filing are the original and one copy of the **Initial Brief of Respondent** and the **Respondent's Designation of Matter to Be Included in the Record on Appeal**. I would appreciate your filing the originals and returning the clocked copies at your convenience. I have also enclosed the original **Proof of Service** for the same.

If you should have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am
Sincerely,

Adam L. Whitsett
General Counsel

Enclosures – listed in text

Cc: Thurmond Brooker, Esquire

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