VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

William H. Seals, Circuit Court Judge

ARTHUR L. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002201

APPENDIX

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STATEMENT OF THE CASE

For purposes of this brief, Respondent agrees Appellant's statement of the case is substantially correct.

STATEMENT OF FACTS

Deputy Ryan Blakeley was serving a warrant on David Tyrone Robinson. Blakeley found Robinson in a common area, sitting on a chair by a shed, as Blakeley pulled up in a marked police car. Deputy Blakeley also saw Appellant Rivers walking. Robinson and Rivers were the only two people in the vicinity. ROA. pp. 113-115.

Rivers did not see Deputy Blakeley at first, but then as he saw the Deputy, his eyes widened, he looked surprised, his whole body language changed. Rivers stealthily tossed an item to the ground, "as [if] he didn't want [Blakeley] to notice it" and continued walking. ROA pp. 115, lines 14-24. Blakeley was suspicious of narcotic activity, but Blakeley felt that if he approached Rivers at that point, Rivers would run. So Blakeley proceeded to serve the warrant on Robinson, who was cooperative. Blakeley put Robinson in handcuffs. ROA. pp. 116-117.

Then Blakeley approached Rivers, who had been walking towards the shed, told Rivers that he noticed Rivers throw an object down, and asked for Rivers's license for a warrants check. It came back clear, at which point, Blakeley asked Rivers if he had any problem with Blakeley patting him down and searching him for narcotics. Rivers consented. Blakeley testified that he wanted to search Rivers for weapons – they were in a high crime area and high drug area. Blakeley did not find anything from the pat-down search. At that point, Blakeley grabbed Rivers' hand to detain him while he checked out the item Rivers dropped. Rivers yanked his hand away and asked what Blakeley was doing. Blakeley explained that he was detaining Rivers to investigate the item Rivers littered. Rivers pulled away a second time and pushed Blakeley in the chest. Then Rivers ran. ROA. pp. 116-120.

Blakeley pursued Rivers and tried to taser Rivers. The taser managed to cause Rivers

to fall, but did not immobilize him. When Blakeley caught up to Rivers, they struggled. Rivers threw the handcuffs into the woods. Blakeley told Rivers he was under arrest, to quit resisting. Blakeley at this point was going to arrest Rivers for assaulting police. The struggle continued, Rivers continued to try and break away from Blakeley, Blakeley used brachial stuns, knees to the groin, and eventually brought Rivers under his control, and then Blakeley hit the emergency button on his shirt while he waited for backup to arrive. Rivers was under arrest for assaulting a police officer and resisting arrest. ROA. pp. 121-129.

Blakeley read Rivers his Miranda rights. Rivers was taken to the police cruiser. Then Blakeley went back to retrieve the items Rivers dropped. Deputy Summersell found the items – a pill bottle with over 10 grams of crack cocaine inside and a clear plastic bag with 22 grams of cocaine powder. ROA. pp. 130-134; pp. 223-224.

Rivers then tried to get the officers' attention by banging his head against the police car window. Blakeley opened the door to see what Rivers wanted. Rivers was trying to talk about the incident that occurred, but Blakeley read Rivers his Miranda rights a second time. Then Rivers told Blakeley that the coke was his, but not the crack. ROA. pp. 134-141.

ARGUMENT

I.

The trial court did not err in denying Appellant's motion for directed verdict where Appellant resisted arrest for assaulting a police officer.

Appellant argues that the trial court erred in denying Appellant's motion for directed verdict for the resisting arrest charge because Appellant was resisting an unlawful arrest. The trial court did not err. Appellant was being lawfully detained so that Blakeley could investigate the abandoned item. Appellant assaulted Blakeley by pushing him, and then fled. Blakeley pursued Appellant to arrest him for assaulting a police officer. Appellant resisted, even after Blakeley advised Appellant that Blakeley was arresting Appellant. Further, Appellant did not have the right to resist arrest, as the legislature amended the underlying statute in 1990 to proscribing resisting all arrests where the person resisting knows or should know he is being arrested by a law enforcement officer.

Resisting arrest, proscribed under S.C. Code Ann. § 16-9-320(B) (Supp. 2009) is defined in relevant part as follows:

> It is unlawful for a person to knowingly and willfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must put the evidence in the light most favorable to the State. Id. "If there is any direct evidence

or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Appellant argues that a directed verdict should have been granted because Appellant was illegally detained or alternatively that Appellant was resisting an investigatory detention and not an arrest.[1] Appellant relies heavily on State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008), which was affirmed in result, but with a very different analysis by the Supreme Court after Appellant filed his brief. State v. Ricky Brannon, Op. No. 26855 (S.C. Sup. Ct. filed August 9, 2010). In Brannon, law enforcement responded to a call from a women who observed an individual breaking into her car from her apartment window. Officers arrived on the scene and saw Brannon in the parking lot. They shouted, "stop, police!" and Brannon fled. Brannon was then apprehended and charged and convicted for breaking into a motor vehicle and resisting arrest. The Court of Appeals reversed finding no arrest occurred when Brannon was told to stop, but fled, since Brannon was not seized. The Supreme Court disagreed with this analysis since seizure and arrest are not synonymous terms. However, the Supreme Court did agree that a directed verdict was warranted because there was no evidence of an arrest being made.

In determining if an arrest occurs, the Supreme Court advises that focus must rest with the intent of the police officer and suspect. Brannon, supra (citing State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860-61 (1960)). In Brannon, the Supreme Court found

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[1] Although not placed on the record until after the verdict, it appears that Appellant renewed the motion for directed verdict after the close of the defendant's case. See ROA. pp. 342-343; State v. Adams, 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998) (requiring defendant to renew motion for directed verdict at the close of all evidence in order to preserve the issue for review).

that where the officer does not manually touch the suspect, then the subjective intent of the officers and suspect must be analyzed. Brannon, supra. The instant case differs somewhat in that the confrontation began with a touching, but under the unique circumstances of this case, the analysis remains essentially the same. Initially, Officer Blakeley was attempting to place Rivers in handcuffs during an investigatory detention. Officer Blakeley informed Rivers at that point that he was not under arrest, but that Blakeley was placing Rivers in handcuffs until Blakeley could check on the dropped items.[2] ROA. p. 119, lines 1-7. At this point in time, Blakeley did not have the subjective intent of arresting Rivers.

However, once Appellant pushed Blakeley, Blakeley formed the subjective intent to arrest Appellant for assaulting a police officer, and pursued Appellant for this purpose. As they struggled, Blakeley informed Appellant he was arresting Appellant for assault, yet Appellant continued resisting by force. Accordingly, evidence supports that Appellant was resisting a lawful arrest.

Appellant argues that he was resisting an unlawful arrest. However, Blakeley was, prior to being pushed by Appellant, lawfully detaining Appellant in an investigatory stop. "For 'what the constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'" Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968) (citations omitted).

"The Fourth amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow

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[2] The Court of Appeals in Brannon found that the resisting arrest statute did not apply to Terry stop encounters. The Supreme Court did not squarely address the issue, although its opinion seems consistent with that interpretation. In the instant case, it is unnecessary to examine that issue.

a crime to occur or a criminal to escape. On the contrary, [Terry v. Ohio] recognizes that it may be the essence of good police work to adopt an intermediate response." Adams v. Williams, 407 U.S. 143, 145-46, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) (citation omitted). Nor are police officers required to ignore the relevant characteristics of a location. Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). Nervous, evasive behavior is considered a pertinent factor when determining reasonable suspicion. Wardlow, 528 U.S. at 124, 120 S.Ct. 673. Evasion also can contribute to reasonable suspicion. United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993).

The following commentary was quoted by the United States Supreme Court, with approval, in Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981):

> It is clear that there are several investigative techniques which may be utilized effectively in the course of a Terry-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification of determine whether a person of that identity is otherwise wanted. **Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect**, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale.

Michigan v. Summers, 452 U.S. at 701, 101 S.Ct. at 2593 n. 12 (quoting with approval 3 W.LaFave, Search and Seizure § 9.2, pp. 36-37 (1978)) (emphasis added).

"Inherent in Summers' authorization to detain an occupant of the place to be searched

is the authority to use reasonable force to effectuate the detention." Muehler v. Mena, 544 U.S. 93, 99, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) citing Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham, supra.

United States v. Lee, 372 F.Supp. 591 (W.D. Penn. 1974), *aff'd without opinion by* U.S. v. Lee, 505 F.2d 731 (3d Cir. 1974) *cert. denied by* Lee v. U.S., 420 U.S. 933, 96 S.Ct. 1138, 43 L.Ed.2d 407 (1975) is instructive. In that case, a bank manager saw two men outside the bank, after it had just opened, bobbing in and out from a building near the bank. The bank was next to a large Westinghouse plant where it was payday, and customarily couriers traversed between the bank and the plant to cash checks. The bank manager called the police station, and the police chief, unaccompanied, approached the scene to find the two suspicious men. One man ran, but the chief grabbed the other man, Lee, by the arm; and told him "I want to talk to you." The chief put Lee in the cruiser so he could not get away, then started to drive to search for the other man. Lee started to pull something out of his jacket, prompting the chief to remove Lee and search him, finding a sawed-off shotgun. Id. at 592-593.

The district court found the initial detention reasonable under the circumstances, citing Terry and Adams v. Williams. The district court opined as follows:

> That the Chief grabbed the defendant by the arm, stated 'I want to talk to you', and placed him in the police car, all apparently without protest, was, we believe, reasonable police conduct under the circumstances and reasonably calculated to maintaining the status quo between the Chief and the suspects pending further developments and investigation. Obviously,

> the Chief had a duty to attempt to apprehend and question the defendant's companion, who had fled at his approach, without letting the defendant, who was also acting suspiciously, remain at large. The Chief was alone and confronted by two individuals whose conduct gave rise to a well-founded suspicion that they were contemplating a daylight robbery of either the bank itself or a courier, the obvious exigencies of this situation authorized by the Chief by a show of authority and limited physical force to temporarily seize the defendant and restrain his freedom of movement by placing him in the back seat of the cruiser until the situation stabilized and he could determine if a full custodial arrest and further detention were necessary. We believe the seizure of the defendant and temporarily placing him in the back of the police cruiser was a legitimate option available to [the Chief] and was appropriate action for him to take under the circumstances.

Id. at 593 (citation omitted).

In United States v. Purry, 545 F.2d 217 (D.C. Cir. 1976), in light of suspicious characteristics of Purry that Officer Swygert observed as Purry was walking three blocks away from where bank robbers had just abandoned their car, Officer Swygert approached Purry and asked for identification. Purry did not have any. Officer Swygert advised Purry of a bank robbery and that he was going to take Purry back to the bank for a showup identification. Purry attempted to pull away when Swygert put his arm on Purry, but Swygert and another officer put Purry in handcuffs. Shortly afterwards, another officer through dispatch, confirmed a description of one of the suspects which matched Purry. He was brought back to the bank for a show-up identification where he was positively identified as a robber.

Purry argued that he was arrested without probable cause. The D.C. Circuit disagreed:

> Having lawfully stopped Purry, Officer Swygert was entitled "to maintain the status quo momentarily while obtaining more information", Adams v. Williams, supra at 146, 92 S.Ct. at

> 1923, and in maintaining the status quo he was entitled to use reasonable force. We think the handcuffing of Purry was reasonable, as a corollary of the lawful stop. See Terry v. Ohio, supra, 392 U.S. at 27, 28, 88 S.Ct. 1868. Given Swygert's suspicions he was entitled to obtain more information about Purry's possible implication in the holdup; and when Purry attempted to frustrate further inquiry Swygert was not required to shrug his shoulders and allow the suspected criminal to walk away. Adams v. Williams, supra at 145, 92 S.Ct. 1921. The handcuffing was an appropriate method of maintaining the status quo while further inquiry was made.

Id. at 220.

The Eighth Circuit cited Lee favorably, finding that an investigatory stop did not evaporate after the defendant provided his license and was frisked by the police officer, who thereafter thought it safest to place the defendant in the police car while she checked for outstanding warrants. United States v. Lego, 855 F.2d 542, 545 (8th Cir. 1988). The Eighth Circuit rejected the contention that placing defendant in the patrol car was tantamount to arrest. "The obvious exigencies of the situation authorized [the police officer] to continue her investigatory stop until the situation stabilized and she could determine if full custodial arrest and detention were warranted." Id. The Court concluded: "we are sensitive to the possibility that the latitude given police officers to conduct investigatory stops may be subject to abuse, we do not believe that [the police officer] acted to harass or intimidate Lego by placing him in the rear of her patrol car." Id.

Deputy Blakeley testified as follows concerning his initial attempt to handcuff Rivers:

> Q: – what were you attempting to do?
>
> A: I was attempting to detain him on the fact to perform an investigation for what he threw down, what I saw him litter on the ground before.

> Q: If you would have gotten the cuffs on him, what would you have done?
>
> A: I would have sat him down with Mr. Robinson. I would have waited for my backup to arrive. I would have let whoever responded for backup watch over the two subjects that were there, to have control over them. At that point I would have gone back to where I saw him toss, or discard the items. I would have tried to locate the items, and at that point, being if the items were trash or a bag of Doritos or a brick or whatever, he would have been released, and if it would have been contraband, like we found, he would have been placed under arrest.

ROA. p. 198, line 12 - p. 199, line 3.

In Summers, when police executed a warrant on Summers' residence, they encountered Summers walking down the steps. They required Summers to assist them in gaining entry to the premises and detained him as they searched the premises, and after finding narcotics in the residence, they searched Summers and found heroin in his coat. Summers, 452 U.S. at 693, 101 S.Ct. at 2589. Summers argued that his initial detention was unlawful. The United States Supreme Court found the detention lawful, based in part, on the basis that "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." Id., 452 U.S. at 701, 101 S.Ct. at 2593-2594. Likewise, in the instant case, the detention was not for the purpose of gathering evidence from Rivers himself, but for him to remain while the dropped items were retrieved – it was not a detention designed to exploit Rivers or unduly prolong his detention.

In detailing the potential justifications for detaining the occupant of a premises being searched for contraband under a warrant, the Summers court noted the most obvious law

enforcement interest "is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." Id., 452 U.S. at 702, 101 S.Ct. at 2594. In the instant case, Blakeley was not required to race to the litter while Rivers was given the opportunity to make his escape.

Summers also noted the danger for police in executing a warrant in a search for narcotics as "it is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." Id. "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." Id., 452 U.S. at 703, 101 S.Ct. at 2594. In the instant case, Blakeley was handcuffing Rivers and waiting for backup to watch over Rivers and Robinson before he proceeded to investigate the dropped item – "to have control over them". As in Summers, Blakeley needed to exercise "unquestioned command of the situation" for safety purposes in executing a lawful investigation of the crime he reasonably suspected of being in progress.

In the instant case, it can hardly be said that Deputy Blakeley was acting to harass or intimidate Appellant. Blakeley testified he intended to put Rivers in handcuffs while Blakeley waited for backup to watch Rivers and Robinson so Blakeley could check the thrown items, left in close proximity, to see whether or not they were, as he reasonably suspected, narcotics. If the litter was mere trash as opposed to contraband, Blakeley would have promptly removed the handcuffs from Rivers. Blakeley was only placing the handcuffs on Rivers to preserve the status quo for the briefest time necessary to check on the item Rivers surreptitiously dropped. ROA. pp. 198-199.

This brief investigatory detention was not an illegal arrest. Blakeley was not required to shrug his shoulders and give Appellant the opportunity to leave before Blakeley could

retrieve the discarded items. Putting handcuffs on Appellant so he would not flee was permissible to preserve the status quo for the brief time it would take for backup to arrive and to retrieve the item to determine if a more formal custodial arrest would become necessary. Lego, supra; Lee, supra. It did not entitle or excuse Rivers in pushing Blakeley to make his getaway. So when Blakely captured Rivers and Rivers attempted to fight him off, even after Rivers was advised he was under arrest, Rivers was resisting arrest.

Further, the statute clearly proscribes resisting "an arrest", not resisting a lawful arrest. As originally enacted in 1980, S.C. Code Ann. § 16-9-320 proscribed resisting a "lawful arrest" and also the assaulting, beating, or wounding an officer while resisting a "lawful arrest". 1980 Act No. 511, § 3. Then in 1990, the term "lawful" was omitted from the language of the statute. 1990 Act No. 598 § 2.[3]

Our courts "have long acknowledged the presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law." Key Corporate Capital, Inc. v. County of Beaufort , 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2006). "Because the amendment materially changed the terminology of the statute, a departure from existing law clearly was intended, rather than a clarification of original intent." Id., 373 S.C. at 61, 644 S.E.2d at 678. The words of a statute will be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Hitachi Data

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[3] Appellant cites State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001) and State v. Wiliams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005) to argue that South Carolina law is "clear" that an individual may legally resist an unlawful arrest. However, McGowan dealt with the application of S.C. Code § 16-3-625, which specifically applies to resisting the "lawful efforts of a law enforcement officer to arrest" by use of a deadly weapon. Williams considered and found that a defendant has a right to resist a lawful arrest made with excessive or unlawful force, and that this should have been charged to the jury – it did not address the legality of resisting an unlawful arrest made without excessive force.

Sys. Corp., v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992).

The change is consistent with the trend away from an antiquated self-help remedy to a law consistent with the needs of modern urbanized society:

> Under common law, a citizen generally is permitted to use reasonable force to resist an illegal arrest. However many states have abrogated the common law by statute, or through court holdings, reasoning the common-law rule is no longer consistent with the needs of modern society. . . .

5 Am. Jur. 2d Arrest § 89.

The policy behind such a change is well articulated by the Alaskan Supreme Court in Miller v. State, 462 P.2d 421 (Alaska 1969) as follows:

> The weight of authoritative precedent supports a right to repel an unlawful arrest with force. . . . this was the rule at common law. It was based upon the proposition that every-one should be privileged to use reasonable force to prevent an unlawful invasion of his physical integrity and personal liberty.
>
> But certain imperfections in the functioning of the rule have brought about changes in some jurisdictions. A new principle of right conduct has been espoused. It is argued that if a peace officer is making an illegal arrest but is not using force, the remedy of the citizen should be that of suing the officer for false arrest, not resistance with force. The legality of a peaceful arrest may frequently be a close question. It is a question more properly determined by courts than by the participants in what may be a highly emotional situation. Because officers will normally overcome resistance with necessary force, the danger of escalating violence between the officer and the arrestee is great. What begins as an illegal misdemeanor arrest may culminate in serious bodily harm or death.
>
> The control of man's destructive and aggressive impulses is one of the great unsolved problems of our society. Our rules of law should discourage the unnecessary use of physical force between man and man. Any rule which promotes rather than inhibits violence should be re-examined. Along with increased sensitivity to the rights of the criminally accused there should be a corresponding awareness of our need to develop rules which facilitate decent and peaceful

behavior by all.

Miller, at 426.

The present case presents justification for the legislature's abrogation of the common law rule in its 1990 amendment. Deputy Blakeley was attempting a peaceable detention, and whether it was a permissible investigatory detention or, as Rivers would claim, an illegal arrest, the record indicates Deputy Blakeley was acting in good faith. What should have been a peaceable transaction turned into a violent episode leaving both parties bruised and tattered. Accordingly, "the legality of a peaceful arrest should be determined by courts of law and not through a trial by battle in the streets." Miller, at 427.

Since Rivers had no right to resist a lawful detention by assaulting Blakeley, Rivers had no right to resist his subsequent arrest following his frantic flight. Rivers also did not have a right to resist an unlawful arrest pursuant to the plain language of S.C. Code §16-9-320(B). Accordingly, the trial court did not err in denying the motion for directed verdict.

II.

Appellant was not entitled to have Appellant's voluntary statement which he initiated, or the cocaine and crack cocaine which he abandoned upon seeing a police car, suppressed as fruit of the poisonous tree.

Rivers claims that his confession and the drugs he abandoned both should be suppressed as tainted fruit of an illegal arrest. Rivers dropped the crack and cocaine upon first sight of Deputy Blakeley. The narcotics are abandoned items to which no Fourth Amendment rights attach. Hester v. United States, 265 U.S. 57, 58, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924) (finding that containers dropped by moonshiners while being pursued by law enforcement that did not have an adequate warrant were not protected under Fourth Amendment as there was no seizure of the containers, rather, the containers were abandoned). California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991) (finding crack cocaine thrown by defendant while being pursued by law enforcement was abandoned property). The present case differs from Hodari D and Hester only in that Rivers dropped his contraband well before Deputy Blakeley confronted or even approached Rivers.

As to the statement, this issue is not preserved as Rivers only challenged the voluntariness of the confession and never sought to suppress the confession as fruit of an illegal arrest. During the suppression hearing, Rivers argued that blows received while he resisted arrest and confinement in a small space while in the company of two police officers rendered his confession involuntary "in violation of my client's Fifth Amendment right to remain silent, the South Carolina constitution, and Miranda, Jackson versus Denno and its progeny." ROA. pp. 58-59. The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999). A party cannot argued one ground below then argue another

on appeal. State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-91 (1995) *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). Rivers moved to suppress the statement not as the fruit of an illegal seizure, but on the basis that it was involuntary. Accordingly, Rivers did not preserve the issue for appeal.

The investigatory detention and subsequent arrest were lawful, for the reasons articulated in Respondent's issue I, which Respondent incorporates. Further, even if the detention or arrest was improper, the confession is still admissible. The "fruit of the poisonous tree" doctrine holds that evidence produced by or directly derived from an illegal search is generally inadmissible against the defendant due to its original taint. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). However, in Wong, "the United States Supreme Court has declined to hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999).

In Kraup v. Texas, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003), the United States Supreme Court held that merely giving a defendant warnings pursuant to Miranda v. Arizona did not automatically remove the taint of an illegal arrest.[4] However, regardless of the legality of the arrest, a confession will become admissible "that was an act of free will [sufficient] to purge the primary taint of the unlawful invasion." Kraup, 538 at 632-633, 123 S.Ct. at 1847 (citations and internal quotations omitted). "Relevant considerations include observance of Miranda, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Id., 538 at 633, 123 S.Ct. at 1847.

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[4] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In the instant case, Rivers initiated the conversation, itching to give his version of events. Deputy Blakely paused Rivers long enough to give Rivers his Miranda warnings, the second time Blakely read him his rights. Rivers emphatically offered his partly exculpatory version of events without prompting. See ROA. pp. 138-141, pp. 204-206. Further, Deputy Blakely's conduct was hardly flagrant misconduct and his actions cannot be said to be made in bad faith. Deputy Blakely merely was attempting to preserve the status quo momentarily to verify that Lee did in fact drop narcotics. Further, the temporal proximity does not deflate the voluntary nature of Rivers's statement. Rivers was placed in an air conditioned police vehicle and enjoyed a cooling-off period. Rivers banged his head against the car window to get officers attention and initiated the conversation himself. Any purported taint was removed by these clearly free and voluntary actions.

Additionally, under State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999), if this Court were to find that the initial detention of Rivers constituted an illegal arrest or seizure, Rivers's new and distinct crimes of assault and then resisting arrest provided independent grounds for arrest.

III.

The trial court did not err in denying the directed verdict on the drug charges.

Intertwined with Rivers' arguments that the statement should have been suppressed is the argument that a directed verdict should have been granted on the drug charges. However, the trial court would need to impermissibly weigh the evidence to grant a directed verdict.

It is axiomatic, that in ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983). The trial court must submit the case for the jury's consideration if any evidence, direct or circumstantial, tends to prove the guilt of the accused or from which his built may be fairly and logically deduced. State v. Irvin, 270 S.C. 539, 243 S.E.2d 44 (1982). Only when there is a complete lack of competent evidence should the trial court refuse a motion for directed verdict. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). Upon a motion for directed verdict, the evidence is viewed in the light most favorable to the State. State v. Creech, 314 S.C. 76, 441 S.E.2d 635, 638 (Ct. App. 1994).

In the instant case, Blakely testified Rivers surreptitiously dropped item after Rivers seemed unduly startled by the sight of Blakely in his police cruiser. Shortly afterwards, a fellow officer recovered cocaine and crack cocaine from the same area. This evidence alone is sufficient for the case to go to the jury. Further, Rivers gave a statement that the cocaine was his and not the crack cocaine. This is further bolstered by the fact that Rivers would not have seen the narcotics that were recovered after he was put inside the police cruiser. Flight is further evidence of guilt. Accordingly, Rivers was not entitled to a directed verdict.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 28, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

THE STATE, Respondent,

vs.

ARTHUR LEE RIVERS, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b, SCACR.

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ATTORNEYS FOR RESPONDENT

October 28, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

THE STATE,

Respondent,

vs.

ARTHUR LEE RIVERS,

Appellant.

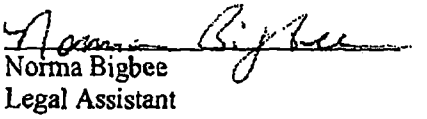
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite D
Columbia, SC 29204

I further certify that all parties required by Rule to be served have been served.

This 28th day of October, 2010.



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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

The Honorable Roger M. Young

Case No. 2008-GS-10-7788, 7795, 7796

STATE OF SOUTH CAROLINA,

RESPONDENT

vs.

ARTHUR LEE RIVERS,

APPELLANT.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

In its Brief, the Respondent argues that the lower court properly denied the Appellant's motion for a directed verdict on the resisting arrest charge because

> [O]nce Appellant pushed [Deputy] Blakely [sic[1]], Blakely formed the subjective intent to arrest Appellant for assaulting a police officer, and pursued Appellant for this purpose. As they struggled, Blakeley informed Appellant he was arresting Appellant for assault, yet Appellant continued resisting by force. Accordingly, evidence supports that Appellant was resisting a lawful arrest.

Brief of Respondent at 7. The Appellant respectfully asserts that Deputy Blakeley's own testimony belies the Respondent's position and that Deputy Blakeley did not have "the subjective intent to arrest Appellant for assaulting a police officer."

In State v. Brannon, Op. No. 26855 (S.C. Sup. Ct. filed August 9, 2010) (Davis Adv. Sh. No. 31 at 105, 110), the Supreme Court held that the resisting arrest statute only criminalizes a defendant's resistance of a police officer when the police officer had the "subjective intent[]" to arrest that defendant. While the Respondent states that Deputy Blakeley had "the subjective intent to arrest Appellant for assaulting a police officer," Deputy Blakeley's own testimony disputes that contention. Although Deputy Blakeley initially testified that he "was going to arrest [the Appellant] for assaulting police," see ROA p. 123, lines 6-7, he later clarified that testimony and explicitly stated that he was only arresting the Appellant for resisting arrest:

> Q: When you got him—when you got control of him and you arrested him, what did you arrest him for that first time?
> A: For assaulting police and resisting arrest.
> Q: For assaulting police while resisting arrest?
> A: Yes, sir.

[1] Deputy Blakeley's last name is spelled "Blakeley" in the transcript. See generally ROA p. 112, line 1. The Respondent's Brief refers to him as "Blakely."

ROA p. 129, lines 17-22. Instead of arresting the Appellant for *both* assault and resisting arrest, as two separate offenses, Deputy Blakeley arrested the Appellant *only* for assault while resisting arrest, which is one offense. Thus, it was not Deputy Blakeley's subjective intent to arrest the Appellant for assault as the Respondent posits; to the contrary, it was Deputy Blakeley's subjective intent to arrest the Appellant only for resisting arrest. Under the facts set forth by Deputy Blakeley, he could have ostensibly arrested the Appellant for assault and battery or assault and battery of a high and aggravated nature. He did not arrest the Appellant for either of these crimes. Consequently, despite Deputy Blakeley's statement, made during the altercation, that he was placing the Appellant under arrest for assault, there is in actuality no evidence that the Appellant was ever formally arrested or otherwise charged with assault apart from the assault component of the resisting arrest charge. See State v. Dowd, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991) ("an arrest is an ongoing process, finalized only when the defendant is properly confined").

The fact remains that the crime of assaulting a police officer while resisting arrest requires that the defendant must be resisting an underlying arrest for another crime. See Brief of Appellant at 9. Deputy Blakeley did not have the subjective intent to arrest the Appellant for another crime. He only possessed the subjective intent to arrest the Appellant for resisting arrest. Consequently, the Appellant could not be convicted of assaulting a police officer while resisting arrest, and his conviction under S.C. Code Ann. §16-9-320(B) should be reversed.

With regard to the other arguments advanced by the Respondent as to why the Appellant's sentences should be affirmed, the Appellant would rely upon the arguments raised in his Brief of Appellant.

CONCLUSION

The Appellant's convictions should be reversed. Alternatively, the Appellant's convictions should be reversed and this case should be remanded for a new trial.

Respectfully submitted,

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ATTORNEY FOR THE APPELLANT.

This 2nd day of November, 2010.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Case No. 2008-GS-10-7788, 7795, 7796

STATE OF SOUTH CAROLINA,

RESPONDENT.

v.

ARTHUR LEE RIVERS,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that certificate that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief is in compliance with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the inclusion of personal data identifiers and other sensitive information in documents.

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ATTORNEY FOR APPELLANT.

This 3rd day of November, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Arthur Lee Rivers, Appellant.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Unpublished Opinion No. 2011-UP-495
Heard October 4, 2011 – Filed November 7, 2011

AFFIRMED

Tara Shurling, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David Spencer, all of Columbia;

and Solicitor Scarlett A. Wilson, of Charleston, for Respondent.

PER CURIAM: Arthur Lee Rivers appeals his convictions of trafficking powder cocaine, third offense; possession of crack cocaine, third offense; and assaulting a police officer while resisting arrest, as well as his sentences of twenty-five years' imprisonment for the trafficking charge, fifteen years' imprisonment for the possession charge, and ten years' imprisonment for the resisting arrest charge, with the sentences running concurrently. He contends (1) the trial court erred in denying his motion for a directed verdict on the resisting arrest charge because the relevant statute does not extend to investigatory stops and there must be an attempted arrest before a defendant can be convicted of resisting arrest. Rivers also argues (2) because his initial detention violated his Fourth Amendment rights, his subsequent statement to police should have been suppressed. Additionally; he maintains (3) because the drugs found at the scene should have been suppressed as a result of the illegal initial detention, he was entitled to a directed verdict on the drug charges. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to the directed verdict on assaulting a police officer while resisting arrest: State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990) (holding that in reviewing a denial of a motion for a directed verdict, an appellate court must review the evidence in the light most favorable to the State); State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006) (noting that if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury); S.C. Code Ann. § 16-9-320(B) (2003) ("It is unlawful for a person to knowingly and wilfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not."); State v. Tyndall, 336 S.C. 8, 18, 518 S.E.2d 278, 283 (Ct. App. 1999) ("Section 16-9-320, the resisting arrest

statute, does not mandate the underlying arrest be prosecuted as a prerequisite for the indictment, prosecution, or conviction of resisting arrest.").

2. As to the suppression of his statement: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding appellant's argument testimony was improper character evidence unpreserved when appellant objected to the testimony only on basis of relevancy); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (finding an argument in support of a jury charge on one ground was not preserved because appellant had argued for the charge based on a different ground at trial).

3. As to the suppression of the drugs and his directed verdict motion on the drug charges: State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 (2003) ("The appropriate vehicle for challenging the admissibility of evidence based on a search and seizure violation is a motion to suppress. A motion for directed verdict, on the other hand, challenges the sufficiency of the properly admitted evidence." (internal quotation marks and citations omitted)); id. at 265-66, 589 S.E.2d at 9 (finding when the defendant did not make a motion in limine nor did he timely move to suppress the evidence, and instead, only raised the propriety of the search in a motion for a directed verdict, the evidence was properly admitted); id. at 266, 589 S.E.2d at 9 (noting the general rule is that the failure to object to or the failure to move to strike evidence renders such evidence competent and entitled to consideration to the extent it is relevant).

AFFIRMED.

FEW, C.J., and THOMAS and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Case No. 2008-GS-10-7788, 7795, 7796

Arthur Lee Rivers, 254993,

Appellant.

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR REHEARING

TARA DAWN SHURLING
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ATTORNEY FOR APPELLANT.

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, seeking rehearing on this Court's unpublished opinion in this matter. (The State v. Arthur Lee Rivers, 2011-UP-495 (S.C. Ct. App. dated Nov. 7, 2011). Pursuant to Rule 221(a), SCACR, the Appellant petitions for rehearing on the ground that certain issues of material fact or law have either been overlooked or misapprehended by the Court in the Opinion in question. In support of this position, the Appellant would show unto this Honorable Court the following:

Issue One

Denial of Directed Verdict on the Resisting Arrest Charge

At the Appellant's trial, the lower court erred in denying the Appellant's motion for a directed verdict on the charge of assaulting a police officer while resisting arrest. As argued in the oral arguments and the brief filed in this matter, the Appellant was not under "arrest" when he committed the actions that became the basis of the resisting arrest conviction. The Appellant had been temporarily detained, and according to the officer's testimony, the reason for attempting to handcuff or restrain the Appellant was that he had littered by tossing an item to the ground. ROA p. 118, ll. 18-23. Prior to that point in time, the Appellant had complied with the officer's request that he produce identification and had consented to a pat-down search of his person. ROA p. 117, ll. 15-25. Neither of those actions led to a basis for the Appellant's arrest. ROA p. 118, ll. 1-17. In his trial testimony, the officer admitted that he expressly advised the Appellant that he *was not* under arrest. ROA p. 119, ll. 1-2. Next, the officer reached for the Appellant in an apparent attempt to handcuff him, and the Appellant shook off the officer and fled. The Appellant was subdued by the officer's taser, and a struggle ensued. ROA p. 118, l. 18-p. 122, l. 25.

When ruling on a motion for a directed verdict, the trial court is concerned solely with the existence or nonexistence of evidence and not with the weight of the evidence. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). A criminal defendant is entitled to a directed verdict when the State fails to produce any evidence of the offense charged. State v. Cherry, 361 S.C. 558, 606 S.E.2d 475 (2004).

In interpreting §16-9-320(A),[1] which criminalizes resisting arrest, the Supreme Court in affirming a decision of this Court, held that "the State must demonstrate that the accused knowingly and willfully resisted *an arrest being made*." State v. Brannon, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010) (emphasis added).[2] The Court proceeded to differentiate between the concept of an "arrest" and a "seizure," explaining that they are legal creations requiring separate analyses.

In the State's Final Brief, it noted that the determination of whether an arrest was being made was based on subjective analysis, examining the intent of the officer to arrest and the intent of the suspect. Final Brief of Respondent at 6; Id. at 505, 597. When the officer initially attempted to restrain or handcuff the Appellant, the only conduct that he had noted was potential littering, as is evidenced by his testimony at trial. At that time, the officer clearly stated that the Appellant *was not under arrest*. The Appellant, upon hearing this statement, was entitled to act in reliance upon the officer's assertion that he *was not under arrest*. Since the subjective intents of both parties belies an arrest, the Appellant was not in the act of "resisting arrest" when he shook off the officer's attempts to handcuff him and attempted to get away. A careful review of

[1] S.C. Code Ann. § 16-9-320(A). The only significant difference in the text of subsection (A) as compared to subsection (B) is that subsection (B) requires that the defendant "assault, beat, or wound" a law enforcement officer whereas subsection (A) only requires a defendant to "oppose or resist" a law enforcement officer's arrest.
[2] In his Final Brief, the Appellant cited to the appellate opinion of State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (2008), which was clarified by the subsequent Supreme Court opinion referenced above. The Supreme Court of South Carolina affirmed the decision of the Court of Appeals.

the officer's testimony conclusively establishes that the Appellant *was not* being *arrested* at the point in time he allegedly shoved the officer just before bolting in an attempt to get away. ROA p. 118 l. 25- p. 119 l. 18.

At that point in time, the Appellant's actions were those of one who is resisting an unlawful arrest, and his conduct was accordingly justified. State v. McGowan, 347 S.C. 618, 623, 557 S.E.2d 657, 660 (2001) (A person unlawfully arrested, or against whom an unlawful arrest is attempted, does not have to submit and may resist with proportionate force).

In oral arguments heard in this matter on October 4, 2011, counsel for the Appellant urged this Court to find that evidence did not exist to support the submission of the resisting arrest charge to the jury. The Appellant argued that the lower court erred in denying the Appellant's directed verdict motion on that charge.

Issues Two and Three

Failure to Suppress the Appellant's Statement to Police

Denial of Directed Verdict on Drug Charges

At the outset of the trial, the Appellant moved to exclude evidence of any statements that he made to the arresting officer. ROA p. 2, ll. 19-21; p. 57, l. 18-p. 59, l. 4. The trial court denied this motion. ROA p. 60, l. 21-p. 61, l. 10. The Appellant renewed this objection at every opportunity when the evidence of the Appellant's statement was admitted; each objection was overruled by the trial court. ROA p. 139, ll. 15-17; p. 207, ll. 6-8; p. 247, ll. 6-10. Due to the trial court's rulings, the jury heard two police officers testify that the Appellant claimed possession of the cocaine but not the crack cocaine. ROA p. 141, ll. 12-20; p. 207, ll. 3-10.

At the close of the State's evidence, the Appellant moved for a directed verdict on the two drug charges against him. ROA p. 250, l. 11-p. 251, l. 14. This motion was denied by the

trial court. ROA p. 256, l. 8-p. 257, l. 3. The motion was renewed at the close of the case and was denied again by the trial court. ROA p. 342, l. 1-p. 343, l. 3.

As argued in the Appellant's Final Brief, even if the initial stop was valid under Terry v. Ohio,[3] the continued detention resulting in the Appellant's statement to police and the recovery of drug evidence was unlawful. Prior to attempting to place the Appellant in handcuffs, the Officer ran an outstanding warrants check on the Appellant and conducted a pat-down of the Appellant's person. ROA p. 117, l. 15-p. 118, l. 17. The Appellant argued that at the time the pat-down and warrant check was concluded, any reasonable suspicion that may have existed to stop and search him, assuming that reasonable suspicion had ever existed, had ended. By further attempting to handcuff the Appellant, Deputy Blakeley unconstitutionally extended the Terry stop. At that point, any further action taken by Deputy Blakeley was tainted by the unconstitutional detention.

As regards Issue Two, this Court's unpublished Opinion cites authority for the position that an issue cannot be argued on one ground below, and presented to the appellate court on a different ground. At trial, the Appellant's counsel argued that the statement should be suppressed because it was not freely, knowingly, voluntarily given when client had just emerged from a physical struggle with the law enforcement officer. ROA p. 57, l. 18-p. 59, l. 3. While trial counsel may not have clearly articulated the exact ground supporting the motion to suppress as was argued on appeal, the Appellant contends that the entirety of the record adequately preserves this issue for appellate review. In support of the Motion to Suppress this statement trial counsel argued, "My client obviously had been subject to an attack by the deputy." (ROA p. 97 l. 3-4). During the Appellant's directed verdict motion on the resisting arrest charge, Trial Counsel argued that the detention and arrest, which led to the Appellant's statement and the recovery of

[3] 392 U.S. 1 (1968)

drug evidence, was unlawful for the same reasons contained in the Appellant's Brief and argument. ROA p. 248, l. 13-p. 251, l. 14. If the Appellant's detention was unlawful, then any evidence flowing there from, including his alleged statement to law enforcement, logically would be inadmissible as the fruit of that unconstitutional detention.

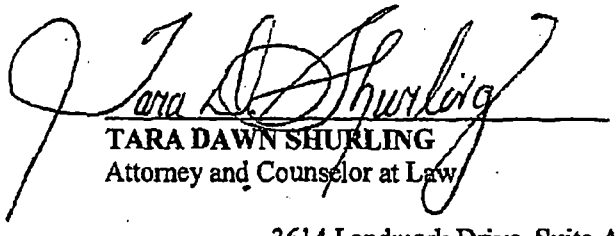
As regards Issue Three, this Court's unpublished Opinion cites authority for the position that the proper method for challenging the admissibility of evidence is a motion to suppress, rather than a directed verdict motion. It is the Appellant's position that the denial of the directed verdict motion was improper even absent a motion to suppress the drug evidence. There were two major problems with the drug evidence: the first being that it was the product of an unlawful detention; the second problem was that the drugs were never connected with the Appellant. The Officer that initially detained the Appellant testified that these events occurred in a very high drug crime area. ROA p. 113, ll. 14-22. The drugs were not recovered on the Appellant, but on the ground nearby. ROA p. 133, l. 14-p. 200, l. 1. Hence, as argued by trial counsel below, the evidence did not establish that the drugs recovered at the scene belonged to the Appellant, and the directed verdict motion should have been granted on the drug charges inasmuch as there was no direct evidence, or substantial circumstantial evidence, establishing that the Appellant had ever had either direct or constructive possession of the drugs attributed to him. Thus, regardless of whether the drugs were admitted without a Motion to Suppress being filed by the Appellant, the fact remains that, with the exception of Appellant's statement which should have been excluded from evidence, the State failed to introduce evidence sufficient to establish that the drugs belonged to the Appellant at any point in time. ROA p. 250, l. 11-p. 251.

For all the foregoing reasons, this Court's affirmation of Appellant's convictions and sentences was the result of material items of law or fact being overlooked or misapprehended.

CONCLUSION

WHEREFORE, having set forth his grounds, the Appellant, Arthur Lee Rivers, asks that this Court rehear his appeal and grant his relief.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 22nd day of November, 2011.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Case No. 2008-GS-10-7788, 7795, 7796

Arthur Lee Rivers, 254993,

Appellant.

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, David Spencer, Senior Assistant Attorney General, P O Box 11549, Columbia, SC 29211, by depositing in the U.S. Mail, postage prepaid, postage prepaid, this 22nd th day of November, 2011.

Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 22nd day of November, 2011.

Durranne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 3/12/2013

The South Carolina Court of Appeals

The State, Respondent,

v.

Arthur Lee Rivers, Appellant.

The Honorable Roger M. Young
Charleston County
Trial Court Case No. 2008-GS-10-07788

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

C.J.

J.

J.

Columbia, South Carolina

FILED

December 2011

cc: Tara Shurling, Esquire
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General David Spencer
Scarlett Anne Wilson, Esquire

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable Roger M. Young

Case No. 2008-GS-10-7788, 7795, 7796

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR LEE RIVERS,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies, pursuant to Rule 242(d)(1), SCACR, that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on December 19, 2011.

QUESTIONS PRESENTED

I.

Did the Court of Appeals err in affirming the Petitioner's judgment and sentence for Resisting Arrest where the lower court improperly denied the Petitioner's motion for a directed verdict on the resisting arrest charge?

II.

Did the Court of Appeals err in affirming the Petitioner's judgments and sentences where the record below demonstrates that the lower court improperly denied the Petitioner's motion to suppress the statement he allegedly made to the arresting officer following his unconstitutional arrest?

III.

Did the Court of Appeals err in affirming the Petitioner's judgments and sentences where the lower court improperly failed to grant a directed verdict on the Petitioner's drug charges?

STATEMENT OF THE CASE

Arthur Lee Rivers, the Petitioner herein, was charged with Trafficking Powder Cocaine, 10-28 Grams, Third Offense, Possession of Crack Cocaine, Third Offense, and Assaulting a Police Officer while Resisting Arrest in Charleston County. On September 15-17, 2009, the Petitioner proceeded to trial by jury. The Honorable Roger M. Young, Sr. presided over this proceeding. The Petitioner was found guilty as charged. Judge Young sentenced the Petitioner to twenty-five years imprisonment on the trafficking charge, fifteen years imprisonment on the possession charge, and ten years on the resisting arrest charge, with the sentences to run concurrently.

On September 23, 2009, the Petitioner timely served his Notice of Appeal, announcing his intent to appeal his convictions and sentences. The Notice was filed with this Court on September 30, 2009. Notice of appeal was timely served and filed. The South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Rivers, Op. No. 2011-UP-495 (S.C. Ct. App. filed November 7, 2011. The Petitioner filed a timely Petition for Rehearing on November 22, 2011, which was denied by Order of the Court of Appeals dated December 19, 2011.

STATEMENT OF FACTS

At the Petitioner's trial, the lower court erred in denying the Petitioner's motion for a directed verdict on the charge of assaulting a police officer while resisting arrest. As argued in the oral arguments and the brief filed in this matter, the Petitioner was not under "arrest" when he committed the actions that became the basis of the resisting arrest conviction. The Petitioner had been temporarily detained, and according to the officer's testimony, the reason for attempting to handcuff or restrain the Petitioner was that he had

littered by tossing an item to the ground. ROA p. 118, ll. 18-23. Prior to that point in time, the Petitioner had complied with the officer's request that he produce identification and had consented to a pat-down search of his person. ROA p. 117, ll. 15-25. Neither of those actions led to a basis for the Petitioner's arrest. ROA p. 118, ll. 1-17. In his trial testimony, the officer admitted that he expressly advised the Petitioner that he *was not* under arrest. ROA p. 119, ll. 1-2. Next, the officer reached for the Petitioner in an apparent attempt to handcuff him, and the Petitioner shook off the officer and fled. The Petitioner was subdued by the officer's taser, and a struggle ensued. ROA p. 118, l. 18-p. 122, l. 25. The Petitioner was subsequently arrested for Resisting Arrest. A search of the area yielded drugs. The statements attributed to the Petitioner were allegedly made after the drugs were found.

ARGUMENT

I.

Did the Court of Appeals err in affirming the Petitioner's judgment and sentence for Resisting Arrest where the lower court improperly denied the Petitioner's motion for a directed verdict on the resisting arrest charge inasmuch as the Petitioner was illegally detained by Deputy Blakeley?

A. How the Issue Arose Below

Following the conclusion of the State's presentation of evidence, the Petitioner moved for a directed verdict on the resisting arrest charge. In particular, the Petitioner argued that he "was lawfully resisting an unlawful rearrest" because he was "free to leave" when Deputy Blakely attempted to handcuff him. ROA p. 248, lines 4-5; 16. The trial court denied this motion because

> [W]hen [the Appellant] pushed him away, instead of fleeing, I think that the officer then had probable cause to arrest him for assault, even though he didn't subsequently arrest him for assault.
>
> So I'm denying a motion for a directed verdict on that as well.

ROA p. 258, line 25-p. 258, line 5.[1] The Petitioner now contends that this ruling was in error.

B. The Decision of the Court of Appeals

In affirming the Petitioner's conviction for Assaulting a Police Officer While Resisting Arrest, the Court of Appeals, without comment or analysis, relied upon State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990), for the general proposition that "in

[1] The Petitioner renewed this motion at the close of his case, and the trial court denied the motion again. See ROA p. 342, line 1-p. 343, line 3.

reviewing a denial of a motion for a directed verdict, an appellate court must review the evidence in the light most favorable to the State." Likewise they cited to State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006), for the basic principal that "if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." In addition to referencing S.C. Code Ann. § 16-9-320(B) (2003), for the definition of the offense in question, the Court of Appeals relied upon State v. Tyndall, 336 S.C. 8, 18, 518 S.E.2d 278, 283 (Ct. App. 1999), for the proposition that "Section 16-9-320, the resisting arrest statute, does not mandate the underlying arrest be prosecuted as a prerequisite for the indictment, prosecution, or conviction of resisting arrest."

C. Why the Court of Appeals decision is in error.

When ruling on a motion for a directed verdict, the trial court is concerned solely with the existence or nonexistence of evidence and not with the weight of the evidence. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). A criminal defendant is entitled to a directed verdict when the State fails to produce any evidence of the offense charged. State v. Cherry, 361 S.C. 558, 606 S.E.2d 475 (2004).

On appeal from the denial of a directed verdict motion, an appellate court views evidence and all reasonable inferences in the light most favorable to the State. State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008), certiorari granted July 10, 2009. On appeal the reviewing court may reverse the trial court's denial of a directed verdict motion only if there is no evidence to support the trial court's ruling. Id.

The Petitioner was convicted of violating S.C. Code Ann. §16-9-320(B), which reads in relevant part:

> It is unlawful for a person to knowingly and willfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

In interpreting §16-9-320(A), which criminalizes resisting arrest,[2] this Court has held that "there must be an arrest before there can be a conviction of resisting arrest." Brannon at 519, 666 S.E.2d at 288 (Ct. App. 2008). "The [resisting arrest] statute does not extend to investigatory stops or detentions." Id. at 519, 666 S.E.2d at 289. In other words, "[t]he [resisting arrest] statute does not criminalize fleeing from officers attempting to conduct a Terry[3] stop." Id. at 510, 666 S.E.2d at 284.

According to the testimony given by Deputy Blakeley the following sequence of events occurred. Deputy Blakeley wanted to handcuff the Petitioner in order to temporarily detain him while he investigated the item he saw the Petitioner throw on the ground. Deputy Blakeley made very certain to tell the Petitioner that he was not under arrest at that time. See ROA p. 119, lines 1-2. It was at that point that the Petitioner shook off Deputy Blakeley's attempt to handcuff him and fled. Deputy Blakeley then used his taser to knock the Petitioner to the ground and began struggling with him. While

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[2] The only significant difference in the text of subsection (A) as compared to subsection (B) is that subsection (B) requires that the defendant "assault, beat, or wound" a law enforcement officer whereas subsection (A) only requires a defendant to "oppose or resist" a law enforcement officer's arrest.

[3] Terry v. Ohio, 392 U.S. 1 (1968).

he was struggling with the Petitioner, Deputy Blakeley told the Petitioner that he was under arrest for resisting arrest.

The Petitioner respectfully contends that a criminal defendant cannot be convicted of a resisting arrest offense when there is no predicate arrest. There must be an attempted arrest that the defendant is resisting before the defendant can be convicted of resisting arrest. In other words, a resisting arrest charge cannot stand independently; there must be some reason why the police officer was attempting to arrest a defendant, other than for resisting arrest, in order for a defendant to commit the offense of resisting arrest. The Court of Appeals' own opinion in Brannon makes this point clear. In that case, the criminal defendant was suspected of breaking into vehicles in Gaffney, South Carolina. 379 S.C. at 492, 666 S.E.2d at 274. The police arrived and told the defendant to stop. Id. However, the defendant took off running and was not placed under arrest until he was apprehended by the police. Id. On those facts, the Court of Appeals held that the defendant had not committed the offense of resisting arrest by fleeing the police because

> [T]here must an arrest before there can be a conviction of resisting arrest. The videlicet of the statutory offense of resisting arrest is the existence of a lawful arrest. Prefatorily, a prosecution for resisting arrest fails if there is no arrest of the offender.
>
> ...
>
> *The statute does not extend to investigatory stops or detentions, and such inclusions cannot be implied by this court.*

Id. at 519, 666 S.E.2d at 288-289 (emphasis added).

Similarly, in this case, the Petitioner's act of resistance was to resist against an admitted investigative Terry stop. Since the resisting arrest statute does not criminalize resisting against "investigatory stops or detentions," the Petitioner could not be convicted of resisting Deputy Blakeley's attempted Terry stop. Brannon, *supra*, at 519, 666 S.E.2d at 289.[4] Accordingly, the Petitioner respectfully submits, the Court of Appeals erroneously concluded that the lower court was correct in refusing to grant the Petitioner's motion for a directed verdict on this ground.

In interpreting §16-9-320(A),[5] which criminalizes resisting arrest, this Honorable Court in affirming Brannon, *supra*, held that "the State must demonstrate that the accused knowingly and willfully resisted *an arrest being made*." State v. Brannon, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010) (emphasis added).[6] In so ruling, this Court recognized the distinction between the concept of an "arrest" and a "seizure," explaining that they are legal creations requiring separate analyses.

In the State's Final Brief, it noted that the determination of whether an arrest was being made was based on subjective analysis, examining the intent of the officer to arrest and the intent of the suspect. Final Brief of Respondent at 6; Id. at 505, 597. When the officer initially attempted to restrain or handcuff the Petitioner, the only conduct that he

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[4] Additionally, the Petitioner could not have been arrested for an assault against Deputy Blakeley, independent of any resisting arrest charge, because the law of this State is clear that an individual may legally resist an unlawful arrest, even to the point of killing the officer if necessary. See generally State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001); State v. Williams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005).

[5] S.C. Code Ann. § 16-9-320(A). The only significant difference in the text of subsection (A) as compared to subsection (B) is that subsection (B) requires that the defendant "assault, beat, or wound" a law enforcement officer whereas subsection (A) only requires a defendant to "oppose or resist" a law enforcement officer's arrest.

[6] In his Final Brief, the Petitioner cited to the appellate opinion of State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (2008), which was clarified by the subsequent Supreme Court opinion referenced above.

had noted was potential littering, as is evidenced by his testimony at trial. At that time, the officer clearly stated that the Petitioner *was not under arrest.* The Petitioner, upon hearing this statement, was entitled to act in reliance upon the officer's assertion that he *was not under arrest.* Since the subjective intents of both parties belies an arrest, the Petitioner was not in the act of "resisting arrest" when he shook off the officer's attempts to handcuff him and attempted to get away. A careful review of the officer's testimony conclusively establishes that the Petitioner *was not* being *arrested* at the point in time he allegedly shoved the officer just before bolting in an attempt to get away. ROA p. 118 l. 25- p. 119 l. 18. At that point in time, the Petitioner's actions were those of one who is resisting an unlawful arrest, and his conduct was accordingly justified. State v. McGowan, 347 S.C. 618, 623, 557 S.E.2d 657, 660 (2001) (A person unlawfully arrested, or against whom an unlawful arrest is attempted, does not have to submit and may resist with proportionate force).

For all the reasons set forth above, the Petitioner very respectfully submits that the Court of Appeals erred in finding that the evidence adduced at trial required the submission of this charge to the jury at the Petitioner's trial; his motion for a Directed Verdict of Acquittal on the resisting charge should have been granted.

II.

Did the Court of Appeals err in affirming the Petitioner's judgments and sentences where the record below demonstrates that the lower court improperly denied the Petitioner's motion to suppress the statement he allegedly made to the arresting officer following his unconstitutional arrest?

A. How the Issues Arose Below

At the outset of the trial, the Petitioner moved to exclude evidence of any statements that he made to Deputy Blakeley. See ROA p. 2, lines 19-21; p. 57, line 18-p. 59, line 4. The trial court denied this motion. See ROA p. 60, line 21-p. 61, line 10. The Petitioner renewed this objection at every opportunity when the evidence of the Petitioner's statement was admitted; each objection was overruled by the trial court. See ROA p. 139, lines 15-17; p. 207, lines 6-8; p. 247, lines 6-10. Due to the trial court's rulings, the jury heard two police officers—Deputy Blakeley and Investigator Robert Tague—testify that the Petitioner claimed possession of the cocaine but not the crack cocaine. See ROA p. 141, lines 12-20; p. 207, lines 3-10.

B. The Decision of the Court of Appeals

With regard to this issue, the Court of Appeals cited to State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003), for the general proposition that "A party may not argue one ground at trial and an alternate ground on appeal." The Court also referenced State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003), in which in was found that a challenge to improper character evidence was unpreserved when the Petitioner objected to the testimony only on basis of relevancy. The Court of Appeals likewise relied upon State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000), in which it was held that an argument in support of a jury charge on one ground was not preserved

where the Petitioner had argued for the charge based on one ground on appeal and a different ground at trial.

C. Why the Court of Appeals decision is in error

In the present case, the Petitioner contends that his initial detention by Deputy Blakeley violated his Fourth Amendment right to be free from unreasonable searches and seizures, and that the evidence that was the product of that unreasonable detention—the statement made by the Petitioner and the drugs that were found at the scene—should have been suppressed. Accordingly, the Petitioner contends that the lower court erred in denying his motions to suppress his statement to the police and for a directed verdict on the drug charges.

Pursuant to Terry v. Ohio, *supra*, a police officer may make "'reasonable inquiries' aimed at confirming or dispelling his suspicions" that criminal activity is afoot. Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (quoting Terry at 30). If the Terry stop and search "goes beyond what is necessary" to determine if there has been criminal activity, then the stop and search are "no longer valid under Terry and [the] fruits [of the stop and search] will be suppressed." Dickerson at 373 (citing Sibron v. New York, 392 U.S. 40, 65-66 (1968)). The fruits of an illegal arrest include statements made by a criminal defendant, even if they were given voluntarily after receiving Miranda[7] warnings. Brown v. Illinois, 422 U.S. 590 (1975).

Prior to attempting to place the Petitioner in handcuffs, Deputy Blakeley ran an outstanding warrants check on the Petitioner and conducted a pat-down of the Petitioner's

[7] Miranda v. Arizona, 384 U.S. 436 (1966).

person. The Petitioner respectfully submits that at the time the pat-down was concluded, any reasonable suspicion that may have existed to stop and search him, assuming that reasonable suspicion had ever existed, had ended. By further attempting to handcuff the Petitioner, Deputy Blakeley unconstitutionally extended the Terry stop. At that point, any further action taken by Deputy Blakeley was tainted by the unconstitutional detention. Consequently, the Petitioner respectfully submits that the drugs and his statement should have been suppressed by the lower court as the fruit of the unconstitutional detention. Accordingly, the Petitioner argues that his convictions should be reversed.

Assuming, *arguendo*, that the seizure of the drugs was not tainted by this unconstitutional detention, there can be no question that the Petitioner's statements to the police were the fruit of the poisonous tree. The error in admitting these statements was prejudicial. As stated above, the Petitioner put forward an extensive defense, which included his vociferous testimony that he did not possess the drugs. Furthermore, since Deputy Blakeley testified that these events occurred in a very high drug area, see ROA p. 113, lines 14-22, the discovery of drugs in the area does not necessarily mean that these drugs belonged to the Petitioner. Improperly presenting testimony that he admitted to possessing at least some of the drugs is unquestionably prejudicial and this error warrants a new trial.

At the outset of the trial, the Petitioner moved to exclude evidence of any statements that he made to the arresting officer. ROA p. 2, ll. 19-21; p. 57, l. 18-p. 59, l. 4. The trial court denied this motion. ROA p. 60, l. 21-p. 61, l. 10. The Petitioner renewed this objection at every opportunity when the evidence of the Petitioner's

statement was admitted; each objection was overruled by the trial court. ROA p. 139, ll. 15-17; p. 207, ll. 6-8; p. 247, ll. 6-10. Due to the trial court's rulings, the jury heard two police officers testify that the Petitioner claimed possession of the cocaine but not the crack cocaine. ROA p. 141, ll. 12-20; p. 207, ll. 3-10.

At the close of the State's evidence, the Petitioner moved for a directed verdict on the two drug charges against him. ROA p. 250, l. 11-p. 251, l. 14. This motion was denied by the trial court. ROA p. 256, l. 8-p. 257, l. 3. The motion was renewed at the close of the case and was denied again by the trial court. ROA p. 342, l. 1-p. 343, l. 3.

As argued in the Final Brief of Appellant, even if the initial stop was valid under Terry v. Ohio,[8] the continued detention resulting in the Petitioner's statement to police and the recovery of drug evidence was unlawful. Prior to attempting to place the Petitioner in handcuffs, the Officer ran an outstanding warrants check on the Petitioner and conducted a pat-down of the Petitioner's person. ROA p. 117, l. 15-p. 118, l. 17. The Petitioner argued that at the time the pat-down and warrant check was concluded, any reasonable suspicion that may have existed to stop and search him, assuming that reasonable suspicion had ever existed, had ended. By further attempting to handcuff the Petitioner, Deputy Blakeley unconstitutionally extended the Terry stop. At that point, any further action taken by Deputy Blakeley was tainted by the unconstitutional detention.

As regards this issue, the unpublished opinion of the Court of Appeals cites authority for the position that an issue cannot be argued on one ground below, and presented to the appellate court on a different ground. At trial, the Petitioner's counsel

[8] 392 U.S. 1 (1968)

argued that the statement should be suppressed because it was not freely, knowingly, voluntarily given when client had just emerged from a physical struggle with the law enforcement officer. ROA p. 57, l. 18-p. 59, l. 3. While trial counsel may not have clearly articulated the exact same ground supporting the motion to suppress as was argued on appeal, the Petitioner contends that the entirety of the record adequately preserves this issue for appellate review and therefore, respectfully asserts that the Court of Appeals should not have found this issue to present plain error unpreserved for appellate review. In support of the Motion to Suppress this statement trial counsel argued, "My client obviously had been subject to an attack by the deputy." (ROA p. 97 l. 3-4).

During the Petitioner's directed verdict motion on the resisting arrest charge, Trial Counsel argued that the detention and arrest, which led to the Petitioner's statement and the recovery of drug evidence, was unlawful for the same reasons contained in the Petitioner's Brief and argument. ROA p. 248, l. 13-p. 251, l. 14. If the Petitioner's detention was unlawful, then any evidence flowing there from, including his alleged statement to law enforcement, logically would be inadmissible as the fruit of that unconstitutional detention. The Petitioner would respectfully submit that, while perhaps not as narrowly defined as one might hope, the objections articulated by defense counsel made clear the Petitioner's position that the statements in question were the product of an unconstitutional detention and arrest and therefore, that they should have been excluded from evidence. For this reason, the Petitioner very respectfully submits that the Court of Appeals erred in holding that this issue was not sufficiently preserved for appellate review and now asks that this Court afford him the opportunity to have the merits of this issue addressed in full by this Honorable Court.

III.

Did the Court of Appeals err in affirming the Petitioner's judgments and sentences where the lower court improperly failed to grant a directed verdict on the Petitioner's drug charges?

A. How the Issues Arose Below

At the close of the State's evidence, the Petitioner moved for a directed verdict on the two drug charges against him. See ROA p. 250, line 11-p. 251, line 14. This motion was denied by the trial court. See ROA p. 256, line 8-p. 257, line 3. The motion was renewed at the close of the case and was denied again by the trial court. See ROA p. 342, line 1-p. 343, line 3. The Petitioner now contends that these rulings were in error.

B. The Decision of the Court of Appeals

With regard to the Petitioner's arguments concerning the suppression of the drugs seized in this case, and the Petitioner's request for directed verdicts on his drug charges, the Court of Appeals correctly cited authority for the proposition that "[t]he appropriate vehicle for challenging the admissibility of evidence based on a search and seizure violation is a motion to suppress. A motion for directed verdict, on the other hand, challenges the sufficiency of the properly admitted evidence." State v. Burton, 356 S. C. 259, 265, 589 S.E.2d 6, 9 (2003) (internal quotation marks and citations omitted).

C. Why the Court of Appeals decision is in error.

The Petitioner does not dispute the fact that defense counsel should have made an appropriate Motion to Suppress the drugs found in the area following this arrest in addition to the Motion to Suppress the statements challenged argued by the Petitioner at trial. It is the Petitioner's position however, that the denial of directed verdicts on the

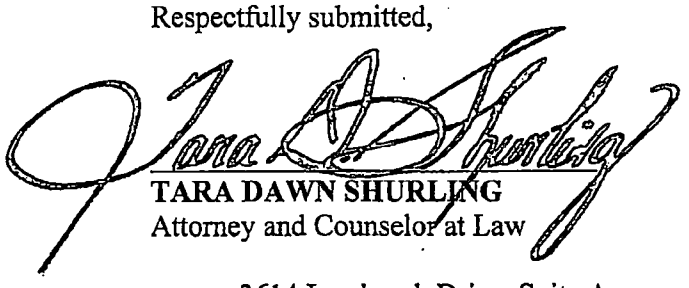
drug charges was nevertheless improper on the facts of this case.

There were two major problems with the drug evidence presented in the Petitioner's trial: the first being that it was the product of an unlawful detention; the second problem was that the drugs were never connected with the Petitioner. The Officer that initially detained the Petitioner testified that these events occurred in a very high drug crime area. ROA p. 113, ll. 14-22. The drugs were not recovered on the Petitioner, but on the ground nearby. ROA p. 133, l. 14-p. 200, l. 1. Hence, as argued by trial counsel below, the evidence did not establish that the drugs recovered at the scene belonged to the Petitioner, and the directed verdict motion should have been granted on the drug charges inasmuch as there was no direct evidence, or substantial circumstantial evidence, establishing that the Petitioner had ever had either direct or constructive possession of the drugs attributed to him. Thus, regardless of whether the drugs were admitted without a Motion to Suppress being filed by the Petitioner, the fact remains that, with the exception of Petitioner's statement which should have been excluded from evidence, the State failed to introduce evidence sufficient to establish that the drugs belonged to the Petitioner at any point in time. ROA p. 250, l. 11-p. 251. Accordingly, the Petitioner asserts that he should have been granted a new trial on all counts, including the drug charges which would never have been made if the arresting officer had not blatantly exceeded the scope of his authority prior to the search which lead to the drugs in question being found and attributed to the Petitioner.

CONCLUSION

For the reasons stated herein, the Petitioner very respectfully asks this Honorable Court to grant the writ and allow full briefing on the issues summarized herein.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 18th day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUN 21 2012
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable Roger M. Young

Case No. 2008-GS-10-7788, 7795, 7796

STATE OF SOUTH CAROLINA,

RESPONDENT

v.

ARTHUR LEE RIVERS,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari in the above-entitled case have been served upon opposing counsel, David Spencer, Assistant Attorney General, by depositing in the U.S. Mail, postage prepaid, this 18th day of June, 2012.

Tara Dawn Shurling
Attorney and Counselor at Law

Attorney for Petitioner.

SWORN TO BEFORE me this 18th day of June, 2012.

[redacted] (L.S.)

My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

THE STATE,

Respondent,

vs.

ARTHUR LEE RIVERS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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III.

The trial court did not err in denying the directed verdict on the drug charges.

STATEMENT OF THE CASE

Petitioner Rivers was tried before a jury and the Honorable Roger M. Young, Sr., for trafficking 10-28 grams of cocaine, third offense, possession of crack cocaine, third offense, and assaulting a police officer while resisting arrest. The jury found Rivers guilty of all charges. Judge Young sentenced Rivers to concurrent sentences of twenty-five years imprisonment for the trafficking charge, fifteen years imprisonment for the possession charge, and ten years imprisonment for the resisting arrest charge.

Rivers appealed. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Rivers, Op. No. 2011-UP-495 (S.C. Ct. App., filed November 7, 2011). Rivers' petition for rehearing was denied by the Court of Appeals on December 19, 2011. Rivers filed a petition for writ of certiorari. This return follows.

STATEMENT OF FACTS

Deputy Ryan Blakeley was serving a warrant on David Tyrone Robinson. Blakeley found Robinson in a common area, sitting on a chair by a shed, as Blakeley pulled up in a marked police car. Deputy Blakeley also saw Petitioner Rivers walking. Robinson and Rivers were the only two people in the vicinity. ROA. pp. 113-115.

Rivers did not see Deputy Blakeley at first, but then as he saw the Deputy, his eyes widened, he looked surprised, his whole body language changed. Rivers stealthily tossed an item to the ground, "as [if] he didn't want [Blakeley] to notice it" and continued walking. ROA pp. 115, lines 14-24. Blakeley was suspicious of narcotic activity, but Blakeley felt that if he approached Rivers at that point, Rivers would run. So Blakeley proceeded to serve the warrant on Robinson, who was cooperative. Blakeley put Robinson in handcuffs. ROA. pp. 116-117.

Then Blakeley approached Rivers, who was walking towards the shed, told Rivers that he noticed Rivers throw an object down, and asked for Rivers's license for a warrants check. It came back clear, at which point, Blakeley asked Rivers if he had any problem with Blakeley patting him down and searching him for narcotics. Rivers consented. Blakeley testified he wanted to search Rivers for weapons – they were in a high crime area and high drug area. Blakeley did not find anything from the pat-down search. At that point, Blakeley grabbed Rivers' hand to detain him while he checked out the item Rivers dropped. Rivers yanked his hand away and asked what Blakeley was doing. Blakeley explained that he was detaining Rivers to investigate the item Rivers littered. Rivers pulled away a second time and pushed Blakeley in the chest. Then Rivers ran. ROA. pp. 116-120.

Blakeley pursued Rivers and tried to taser Rivers. The taser managed to cause Rivers to fall, but did not immobilize him. When Blakeley caught up to Rivers, they struggled. Rivers threw the handcuffs into the woods. Blakeley told Rivers he was under arrest, to quit resisting. Blakeley at this point was going to arrest Rivers for assaulting police. The struggle continued, Rivers continued to try and break away from Blakeley, Blakeley used brachial stuns, knees to the groin, and eventually brought Rivers under his control, and then Blakeley hit the emergency button on his shirt while he waited for backup to arrive. Rivers was under arrest for assaulting a police officer and resisting arrest. ROA. pp. 121-129.

Blakeley read Rivers his Miranda[1] rights. Rivers was taken to the police cruiser. Then Blakeley went back to retrieve the items Rivers dropped. Deputy Summersell found the items – a pill bottle with over 10 grams of crack cocaine inside and a clear plastic bag with 22 grams of cocaine powder. ROA. pp. 130-134; pp. 223-224.

Rivers then tried to get the officers' attention by banging his head against the police car window. Blakeley opened the door to see what Rivers wanted. Rivers was trying to talk about the incident that occurred, but Blakeley read Rivers his Miranda rights a second time. Then Rivers told Blakeley that the coke was his, but not the crack. ROA. pp. 134-141.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 313 (1966).

ARGUMENT

I.

The trial court did not err in denying Petitioner's motion for directed verdict where Petitioner resisted arrest for assaulting a police officer.

Petitioner Rivers argues that the trial court erred in denying Rivers's motion for directed verdict for the resisting arrest charge because Rivers was resisting an unlawful arrest. The trial court did not err. Rivers was being lawfully detained so that Blakeley could investigate the abandoned item. Rivers assaulted Blakeley by pushing him, and then fled. Blakeley pursued Rivers to arrest him for assaulting a police officer. Rivers resisted, even after Blakeley advised Rivers that Blakeley was arresting Rivers. Further, Rivers did not have the right to resist arrest, as the legislature amended the underlying statute in 1990 to proscribing resisting all arrests where the person resisting knows or should know he is being arrested by a law enforcement officer.

Resisting arrest, proscribed under S.C. Code Ann. § 16-9-320(B) (Supp. 2009) is defined in relevant part as follows:

> It is unlawful for a person to knowingly and willfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must

put the evidence in the light most favorable to the State. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Rivers argues that a directed verdict should have been granted because Rivers was illegally detained or alternatively that Rivers was resisting an investigatory detention and not an arrest.[2] Rivers relies heavily on State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008), which was affirmed in result, but with a very different analysis by the Supreme Court after Rivers filed his brief. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010). In Brannon, law enforcement responded to a call from a women who observed an individual breaking into her car from her apartment window. Officers arrived on the scene and saw Brannon in the parking lot. They shouted, "stop, police!" and Brannon fled. Brannon was then apprehended and charged and convicted for breaking into a motor vehicle and resisting arrest. The Court of Appeals reversed, finding no arrest occurred when Brannon was told to stop, but fled, since Brannon was not seized. The Supreme Court disagreed with this analysis since seizure and arrest are not synonymous terms. However, the Supreme Court did agree that a directed verdict was warranted because there was no evidence of an arrest being made.

In determining if an arrest occurs, the Supreme Court advises that focus must rest

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[2] Although not placed on the record until after the verdict, it appears that Rivers renewed the motion for directed verdict after the close of the defendant's case. See ROA. pp. 342-343; State v. Adams, 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998) (requiring defendant to renew motion for directed verdict at the close of all evidence in order to preserve the issue for review).

with the intent of the police officer and suspect. Brannon, supra (citing State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860-61 (1960)). In Brannon, the Supreme Court found that where the officer does not manually touch the suspect, then the subjective intent of the officers and suspect must be analyzed. Brannon, supra. The instant case differs somewhat in that the confrontation began with a touching, but under the unique circumstances of this case, the analysis remains essentially the same. Initially, Officer Blakeley was attempting to place Rivers in handcuffs during an investigatory detention. Officer Blakeley informed Rivers at that point that he was not under arrest, but that Blakeley was placing Rivers in handcuffs until Blakeley could check on the dropped items.[3] ROA. p. 119, lines 1-7. At this point in time, Blakeley did not have the subjective intent of arresting Rivers.

However, once Rivers pushed Blakeley, Blakeley formed the subjective intent to arrest Rivers for assaulting a police officer, and pursued Rivers for this purpose. As they struggled, Blakeley informed Rivers he was arresting Rivers for assault, yet Rivers continued resisting by force. Accordingly, evidence supports that Rivers was resisting a lawful arrest.

Rivers argues that he was resisting an unlawful arrest. However, Blakeley was, prior to being pushed by Rivers, lawfully detaining Rivers in an investigatory stop. "For 'what the constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'" Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968) (citations omitted).

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[3] The Court of Appeals in Brannon found that the resisting arrest statute did not apply to Terry stop encounters. The Supreme Court did not squarely address the issue, although its opinion seems consistent with that interpretation. In the instant case, it is unnecessary to examine that issue.

"The Fourth amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, [Terry v. Ohio] recognizes that it may be the essence of good police work to adopt an intermediate response." Adams v. Williams, 407 U.S. 143, 145-46, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) (citation omitted). Nor are police officers required to ignore the relevant characteristics of a location. Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). Nervous, evasive behavior is considered a pertinent factor when determining reasonable suspicion. Wardlow, 528 U.S. at 124, 120 S.Ct. 673. Evasion also can contribute to reasonable suspicion. United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993).

The following commentary was quoted by the United States Supreme Court, with approval, in Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981):

> It is clear that there are several investigative techniques which may be utilized effectively in the course of a Terry-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification of determine whether a person of that identity is otherwise wanted. **Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect,** or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving

the suspect to another locale.

Summers, 452 U.S. at 701, 101 S.Ct. at 2593 n. 12 (quoting with approval 3 W.LaFave, Search and Seizure § 9.2, pp. 36-37 (1978)) (emphasis added).

"Inherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." Muehler v. Mena, 544 U.S. 93, 99, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) citing Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham, supra.

United States v. Lee, 372 F.Supp. 591 (W.D. Penn. 1974), *aff'd without opinion by* U.S. v. Lee, 505 F.2d 731 (3d Cir. 1974) *cert. denied by* Lee v. U.S., 420 U.S. 933, 96 S.Ct. 1138, 43 L.Ed.2d 407 (1975) is instructive. In that case, a bank manager saw two men outside the bank, after it had just opened, bobbing in and out from a building near the bank. The bank was next to a large Westinghouse plant where it was payday, and customarily couriers traversed between the bank and the plant to cash checks. The bank manager called the police station, and the police chief, unaccompanied, approached the scene to find the two suspicious men. One man ran, but the chief grabbed the other man, Lee, by the arm, and told him "I want to talk to you." The chief put Lee in the cruiser so he could not get away, then started to drive to search for the other man. Lee started to pull something out of his jacket, prompting the chief to remove Lee and search him, finding a sawed-off shotgun. Id. at 592-593.

The district court found the initial detention reasonable under the circumstances, citing Terry and Adams v. Williams. The district court opined as follows:

> That the Chief grabbed the defendant by the arm, stated 'I want to talk to you', and placed him in the police car, all apparently without protest, was, we believe, reasonable police conduct under the circumstances and reasonably calculated to maintaining the status quo between the Chief and the suspects pending further developments and investigation. Obviously, the Chief had a duty to attempt to apprehend and question the defendant's companion, who had fled at his approach, without letting the defendant, who was also acting suspiciously, remain at large. The Chief was alone and confronted by two individuals whose conduct gave rise to a well-founded suspicion that they were contemplating a daylight robbery of either the bank itself or a courier, the obvious exigencies of this situation authorized by the Chief by a show of authority and limited physical force to temporarily seize the defendant and restrain his freedom of movement by placing him in the back seat of the cruiser until the situation stabilized and he could determine if a full custodial arrest and further detention were necessary. We believe the seizure of the defendant and temporarily placing him in the back of the police cruiser was a legitimate option available to [the Chief] and was appropriate action for him to take under the circumstances.

Id. at 593 (citation omitted).

In United States v. Purry, 545 F.2d 217 (D.C. Cir. 1976), in light of suspicious characteristics of Purry that Officer Swygert observed as Purry was walking three blocks away from where bank robbers had just abandoned their car, Officer Swygert approached Purry and asked for identification. Purry did not have any. Officer Swygert advised Purry of a bank robbery and that he was going to take Purry back to the bank for a showup identification. Purry attempted to pull away when Swygert put his arm on Purry, but Swygert and another officer put Purry in handcuffs. Shortly afterwards, another officer through

dispatch, confirmed a description of one of the suspects which matched Purry. He was brought back to the bank for a show-up identification where he was positively identified as a robber.

Purry argued that he was arrested without probable cause. The D.C. Circuit disagreed:

> Having lawfully stopped Purry, Officer Swygert was entitled "to maintain the status quo momentarily while obtaining more information", Adams v. Williams, supra at 146, 92 S.Ct. at 1923, and in maintaining the status quo he was entitled to use reasonable force. We think the handcuffing of Purry was reasonable, as a corollary of the lawful stop. See Terry v. Ohio, supra, 392 U.S. at 27, 28, 88 S.Ct. 1868. Given Swygert's suspicions he was entitled to obtain more information about Purry's possible implication in the holdup; and when Purry attempted to frustrate further inquiry Swygert was not required to shrug his shoulders and allow the suspected criminal to walk away. Adams v. Williams, supra at 145, 92 S.Ct. 1921. The handcuffing was an appropriate method of maintaining the status quo while further inquiry was made.

Id. at 220.

The Eighth Circuit cited Lee favorably, finding that an investigatory stop did not evaporate after the defendant provided his license and was frisked by the police officer, who thereafter thought it safest to place the defendant in the police car while she checked for outstanding warrants. United States v. Lego, 855 F.2d 542, 545 (8th Cir. 1988). The Eighth Circuit rejected the contention that placing defendant in the patrol car was tantamount to arrest. "The obvious exigencies of the situation authorized [the police officer] to continue her investigatory stop until the situation stabilized and she could determine if full custodial arrest and detention were warranted." Id. The Court concluded: "we are sensitive to the

possibility that the latitude given police officers to conduct investigatory stops may be subject to abuse, we do not believe that [the police officer] acted to harass or intimidate Lego by placing him in the rear of her patrol car." Id.

The Eighth Circuit Court of Appeals found that when an officer found an individual acting suspiciously and matching the description of a gun-brandishing suspect from a freshly committed armed robbery, the officer acted reasonably in handcuffing the individual. United States v. Martinez, 462 F.3d 903, 907 (8th Cir. 2006). The Eighth Circuit held as follows: "Placing Martinez in handcuffs was a reasonable response to the situation in order to protect the officers' personal safety and to maintain the status quo. As such, the use of handcuffs did not convert this Terry stop into an arrest." Id., at 907.

Deputy Blakeley testified as follows concerning his initial attempt to handcuff Rivers:

> Q: – what were you attempting to do?
>
> A: I was attempting to detain him on the fact to perform an investigation for what he threw down, what I saw him litter on the ground before.
>
> Q: If you would have gotten the cuffs on him, what would you have done?
>
> A: I would have sat him down with Mr. Robinson. I would have waited for my backup to arrive. I would have let whoever responded for backup watch over the two subjects that were there, to have control over them. At that point I would have gone back to where I saw him toss, or discard the items. I would have tried to locate the items, and at that point, being if the items were trash or a bag of Doritos or a brick or whatever, he would have been released, and if it would have been contraband, like we found, he would have been placed under arrest.

ROA. p. 198, line 12 - p. 199, line 3.

In Summers, when police executed a warrant on Summers' residence, they encountered Summers walking down the steps. They required Summers to assist them in gaining entry to the premises and detained him as they searched the premises; and after finding narcotics in the residence, they searched Summers and found heroin in his coat. Summers, 452 U.S. at 693, 101 S.Ct. at 2589. Summers argued that his initial detention was unlawful. The United States Supreme Court found the detention lawful, based in part, on the basis that "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." Id., 452 U.S. at 701, 101 S.Ct. at 2593-2594. Likewise, in the instant case, the detention was not for the purpose of gathering evidence from Rivers himself, but for him to remain while the dropped items were retrieved – it was not a detention designed to exploit Rivers or unduly prolong his detention.

In detailing the potential justifications for detaining the occupant of a premises being searched for contraband under a warrant, the Summers court noted the most obvious law enforcement interest "is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." Id., 452 U.S. at 702, 101 S.Ct. at 2594. In the instant case, Blakeley was not required to race to the litter while Rivers was given the opportunity to make his escape.

Summers also noted the danger for police in executing a warrant in a search for narcotics as "it is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." Id. "The risk of harm to both the police and the

occupants is minimized if the officers routinely exercise unquestioned command of the situation." Id., 452 U.S. at 703, 101 S.Ct. at 2594. In the instant case, Blakeley was handcuffing Rivers and waiting for backup to watch over Rivers and Robinson before he proceeded to investigate the dropped item – "to have control over them". As in Summers, Blakeley needed to exercise "unquestioned command of the situation" for safety purposes in executing a lawful investigation of the crime he reasonably suspected of being in progress.

In the instant case, it can hardly be said that Deputy Blakeley was acting to harass or intimidate Rivers. Blakeley testified he intended to put Rivers in handcuffs while Blakeley waited for backup to watch Rivers and Robinson so Blakeley could check the thrown items, left in close proximity, to see whether or not they were, as he reasonably suspected, narcotics. If the litter was mere trash as opposed to contraband, Blakeley would have promptly removed the handcuffs from Rivers. Blakeley was only placing the handcuffs on Rivers to preserve the status quo for the briefest time necessary to check on the item Rivers surreptitiously dropped. Lego, supra; Lee, supra. Blakeley was not required to shrug his shoulders and give Rivers the opportunity to leave before Blakeley could retrieve the discarded items. It did not entitle or excuse Rivers in pushing Blakeley to make his getaway. So when Blakely captured Rivers and Rivers attempted to fight him off, even after Rivers was advised he was under arrest, Rivers was resisting arrest.

Further, the statute clearly proscribes resisting "an arrest", not resisting a lawful arrest. As originally enacted in 1980, S.C. Code Ann. § 16-9-320 proscribed resisting a "lawful arrest" and also the assaulting, beating, or wounding an officer while resisting a "lawful arrest". 1980 Act No. 511, § 3. Then in 1990, the term "lawful" was omitted from

the language of the statute. 1990 Act No. 598 § 2.[4]

Our courts "have long acknowledged the presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law." Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2006). "Because the amendment materially changed the terminology of the statute, a departure from existing law clearly was intended, rather than a clarification of original intent." Id., 373 S.C. at 61, 644 S.E.2d at 678. The words of a statute will be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp., v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992).

The change is consistent with the trend away from an antiquated self-help remedy to a law consistent with the needs of modern urbanized society:

> Under common law, a citizen generally is permitted to use reasonable force to resist an illegal arrest. However many states have abrogated the common law by statute, or through court holdings, reasoning the common-law rule is no longer consistent with the needs of modern society. . . .

5 Am. Jur. 2d Arrest § 89.

The policy behind such a change is well articulated by the Alaskan Supreme Court in Miller v. State, 462 P.2d 421 (Alaska 1969) as follows:

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[4] Rivers cites State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001) and State v. Wiliams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005) to argue that South Carolina law is "clear" that an individual may legally resist an unlawful arrest. However, McGowan dealt with the application of S.C. Code § 16-3-625, which specifically applies to resisting the "lawful efforts of a law enforcement officer to arrest" by use of a deadly weapon. Williams considered and found that a defendant has a right to resist a lawful arrest made with excessive or unlawful force, and that this should have been charged to the jury – it did not address the legality of resisting an unlawful arrest made without excessive force.

> The weight of authoritative precedent supports a right to repel an unlawful arrest with force. . . . this was the rule at common law. . It was based upon the proposition that everyone should be privileged to use reasonable force to prevent an unlawful invasion of his physical integrity and personal liberty.
>
> But certain imperfections in the functioning of the rule have brought about changes in some jurisdictions. A new principle of right conduct has been espoused. It is argued that if a peace officer is making an illegal arrest but is not using force, the remedy of the citizen should be that of suing the officer for false arrest, not resistance with force. The legality of a peaceful arrest may frequently be a close question. It is a question more properly determined by courts than by the participants in what may be a highly emotional situation. Because officers will normally overcome resistance with necessary force, the danger of escalating violence between the officer and the arrestee is great. What begins as an illegal misdemeanor arrest may culminate in serious bodily harm or death.
>
> The control of man's destructive and aggressive impulses is one of the great unsolved problems of our society. Our rules of law should discourage the unnecessary use of physical force between man and man. Any rule which promotes rather than inhibits violence should be re-examined. Along with increased sensitivity to the rights of the criminally accused there should be a corresponding awareness of our need to develop rules which facilitate decent and peaceful behavior by all.

Miller, at 426.

The present case presents justification for the legislature's abrogation of the common law rule in its 1990 amendment. Deputy Blakeley was attempting a peaceable detention, and whether it was a permissible investigatory detention or, as Rivers would claim, an illegal arrest, the record indicates Deputy Blakeley was acting in good faith. What should have been a peaceable transaction turned into a violent episode leaving both parties bruised and tattered. Accordingly, "the legality of a peaceful arrest should be determined by courts of law and not

through a trial by battle in the streets." Miller, at 427.

Since Rivers had no right to resist a lawful detention by assaulting Blakeley, Rivers had no right to resist his subsequent arrest following his frantic flight. Rivers also did not have a right to resist an unlawful arrest pursuant to the plain language of S.C. Code §16-9-320(B). Accordingly, the trial court did not err in denying the motion for directed verdict.

II.

Petitioner was not entitled to have petitioner's voluntary statement which he initiated, or the cocaine and crack cocaine which he abandoned upon seeing a police car, suppressed as fruit of the poisonous tree.

Rivers claims his confession and the drugs he abandoned both should be suppressed as tainted fruit of an illegal arrest. Rivers dropped the crack and cocaine upon first sight of Deputy Blakeley. The narcotics are abandoned items to which no Fourth Amendment rights attach. Hester v. United States, 265 U.S. 57, 58, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924) (finding that containers dropped by moonshiners while being pursued by law enforcement that did not have an adequate warrant were not protected under Fourth Amendment as there was no seizure of the containers, rather, the containers were abandoned). California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991) (finding crack cocaine thrown by defendant while being pursued by law enforcement was abandoned property). The present case differs from Hodari D and Hester only in that Rivers dropped his contraband well before Deputy Blakeley confronted or even approached Rivers.

As to the statement, this issue is not preserved as Rivers only challenged the voluntariness of the confession and never sought to suppress the confession as fruit of an illegal arrest. During the suppression hearing, Rivers argued that blows received while he resisted arrest and confinement in a small space while in the company of two police officers rendered his confession involuntary "in violation of my client's Fifth Amendment right to remain silent, the South Carolina constitution, and Miranda, Jackson versus Denno and its

progeny." ROA. pp. 58-59.[5] The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999). A party cannot argued one ground below then argue another on appeal. State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-91 (1995) *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). Rivers moved to suppress the statement not as the fruit of an illegal seizure, but on the basis that it was involuntary. Accordingly, Rivers did not preserve the issue for appeal.

The investigatory detention and subsequent arrest were lawful, for the reasons articulated in Respondent's issue I, which Respondent incorporates. Further, even if the detention or arrest was improper, the confession is still admissible. The "fruit of the poisonous tree" doctrine holds that evidence produced by or directly derived from an illegal search is generally inadmissible against the defendant due to its original taint. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). However, in Wong, "the United States Supreme Court has declined to hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999).

In Kraup v. Texas, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003), the United States Supreme Court held that merely giving a defendant warnings pursuant to Miranda v.

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[5] This contradicts Rivers' argument that his trial counsel was actually raising a Fourth Amendment, fruit of the poisonous tree, argument in an inarticulate manner; his trial counsel articulated clearly his argument that the statement should be suppressed because it was coerced under the Fifth Amendment.

Arizona did not automatically remove the taint of an illegal arrest.[6] However, regardless of the legality of the arrest, a confession will become admissible "that was an act of free will [sufficient] to purge the primary taint of the unlawful invasion." Kraup, 538 at 632-633, 123 S.Ct. at 1847 (citations and internal quotations omitted). "Relevant considerations include observance of Miranda, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Id., 538 at 633, 123 S.Ct. at 1847.

In the instant case, Rivers initiated the conversation, itching to give his version of events. Deputy Blakeley paused Rivers long enough to give Rivers his Miranda warnings, the second time Blakeley read him his rights. Rivers emphatically offered his partly exculpatory version of events without prompting. See ROA. pp. 138-141, pp. 204-206. Further, Deputy Blakeley's conduct was hardly flagrant misconduct and his actions were not made in bad faith. Deputy Blakeley merely attempted to preserve the status quo momentarily to verify that Rivers did in fact drop narcotics. Further, the temporal proximity does not deflate the voluntary nature of Rivers' statement. Rivers was placed in an air conditioned police vehicle and enjoyed a cooling-off period. Rivers banged his head against the car window to get officers attention and initiated the conversation himself. Any purported taint was removed by these clearly free and voluntary actions.

Additionally, under State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999), even if the initial detention of Rivers constituted an illegal arrest or seizure, Rivers's new and distinct crimes of assault and then resisting arrest provided independent grounds for arrest.

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[6] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

III.

The trial court did not err in denying the directed verdict on the drug charges.

Intertwined with Rivers' arguments that the statement should have been suppressed is the argument that a directed verdict should have been granted on the drug charges. However, the trial court would need to impermissibly weigh the evidence to grant a directed verdict.

In ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983). The trial court must submit the case for the jury's consideration if any evidence, direct or circumstantial, tends to prove the guilt of the accused or from which his built may be fairly and logically deduced. State v. Irvin, 270 S.C. 539, 243 S.E.2d 44 (1982). Only when there is a complete lack of competent evidence should the trial court refuse a motion for directed verdict. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). Upon a motion for directed verdict, the evidence is viewed in the light most favorable to the State. State v. Creech, 314 S.C. 76, 441 S.E.2d 635, 638 (Ct. App. 1994).

In the instant case, Blakeley testified Rivers surreptitiously dropped an item after Rivers seemed unduly startled by the sight of Blakeley in his police cruiser. Shortly afterwards, a fellow officer recovered cocaine and crack cocaine from the same area. This evidence alone is sufficient for the case to go to the jury. Further, Rivers gave a statement that the cocaine was his and not the crack cocaine. This is further bolstered by the fact that Rivers would not have seen the narcotics that were recovered after he was put inside the

police cruiser. Flight is further evidence of guilt. State v. Crawford, 362 S.C. 627, 635-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005) (flight from prosecution is evidence of guilt). Accordingly, Rivers was not entitled to a directed verdict.

Further, as the Court of Appeals aptly noted, a motion to suppress is the proper vehicle for challenging the admissibility of evidence based on a search and seizure violation, not a motion for directed verdict. State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 (2003). Rivers acknowledges that the Court of Appeals correctly stated the proposition of law and then tries to argue that directed verdict should be granted because the trial court relied on evidence that Rivers contends was the product of an unlawful detention. This turns the rule on its head. Further, Rivers abandoned the drugs and therefore, cannot move to suppress the drugs he dropped.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. If this Court should see fit to grant the petition, Respondent would request permission to more fully brief the issues herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 11, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
OCT 11 2012
S.C. Supreme Court

Certiorari to Charleston County

The Honorable Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ARTHUR LEE RIVERS

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tara Dawn Shurling, Esquire
3614 Landmark Dr., Ste. A
Columbia, SC 29204

This 11th day of October, 2012

Norma Bigbee
NORMA BIGBEE
LEGAL ASSISTANT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
NOV 02 2012
S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable Roger M. Young

Case No. 2008-GS-10-7788, 7795, 7796

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR LEE RIVERS,

PETITIONER.

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ARGUMENT IN REPLY

Question I

As set forth in his Petition for Writ of Certiorari, the Petitioner was convicted of violating S.C. Code Ann. §16-9-320(B), which reads in relevant part:

> It is unlawful for a person to knowingly and willfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

In interpreting §16-9-320(A), which criminalizes resisting arrest,[1] this Court has held that "there must be an arrest before there can be a conviction of resisting arrest." Brannon at 519, 666 S.E.2d at 288 (Ct. App. 2008). "The [resisting arrest] statute does not extend to investigatory stops or detentions." Id. at 519, 666 S.E.2d at 289. In other words, "[t]he [resisting arrest] statute does not criminalize fleeing from officers attempting to conduct a Terry[2] stop." Id. at 510, 666 S.E.2d at 284. The Respondent correctly notes in its Return that this Court affirmed the Court of Appeals decision in result after the Brief of Appellant was filed in the Court of Appeal in the matter before the Court. Ultimately this Court's decision in Brannon turned on the finding that where the officer does not manually touch the suspect, the subjective intent of the officers and the suspect must be analyzed to determine if an arrest was in progress at the time of the behavior that is alleged to constitute resisting arrest.

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[1] The only significant difference in the text of subsection (A) as compared to subsection (B) is that subsection (B) requires that the defendant "assault, beat, or wound" a law enforcement officer whereas subsection (A) only requires a defendant to "oppose or resist" a law enforcement officer's arrest.

[2] Terry v. Ohio, 392 U.S. 1 (1968).

In the present case, Deputy Blakeley claimed the following sequence of events occurred. Deputy Blakeley wanted to handcuff the Petitioner in order to temporarily detain him while he investigated the item he saw the Petitioner throw on the ground. Deputy Blakeley acknowledged that he expressly told the Petitioner that he *was not* under arrest at that time. See ROA p. 119, lines 1-2. It was at that point that the Petitioner shook off Deputy Blakeley's attempt to handcuff him and fled. Deputy Blakeley then used his taser to knock the Petitioner to the ground and began struggling with him. According to Deputy Blakely, while he was struggling with the Petitioner, he told him *he was under arrest* and to quit resisting.

The analysis presented by the Respondent overlooks two critical factors. First, when the physical contact between the Petitioner and Deputy Blakely began, the Petitioner had been expressly told he was not under arrest. The Respondent argues that once the Petitioner pushed the officer, "Deputy Blakely formed the subjective intent to arrest for assaulting a police officer, and pursued [the Petitioner] for that purpose." Return, pg. 7. Blakely's own testimony however, confirms that *he did not* tell the Petitioner he was under arrest until after he had used his Taser to knock the Petitioner to the ground. In Brannon, in the absence of physical in the absence of physical contact between Brannon and law enforcement, this Court looked to the subjective intent of the officers and the suspect to determine whether Brannon was indeed under arrest at the time of the offending conduct. Here, no such analysis is necessary where the officer admitted expressly informing the Petitioner that he was not under arrest.

The Respondent claims that the Petitioner continued to struggle with the officer after he was told he was under arrest and therefore, that it was that behavior which justifies the charge of resisting arrest. Which leads to the Petitioner's second point in Reply? The Respondent's analysis is flawed where the Petitioner's act of pushing the officer took place when the Petitioner

was, admittedly, not under arrest. The Respondent states that "as they struggled, Blakely informed [the Petitioner] that he was arresting [him] *for assault,* yet [the Petitioner] continued resisting by force." Return, pg. 7. The testimony of Deputy Blakely does not indicate that he told the Petitioner he was arresting him for assault. He testified that he told the Petitioner he was "*under arrest*" but, did not claim to have told the Petitioner what he was under arrest for. While the officer testified that it was his intent to place the Petitioner under arrest for "assaulting police", he never claimed to have told the Petitioner that this was his intent. ROA. p. 123, lines 2-7. Further, the Respondent's analysis neglects to take into consideration that the Petitioner, who had been told he was not under arrest, had just been knocked to the ground with a Taser when the officer says he advised him that he was under arrest. Under these circumstances, the Petitioner would respectfully submit it is unreasonable for the Petitioner to have clearly understood that the Deputy was attempting to make any sort of lawful arrest for assault.

The Respondent further asserts that the 1990 amendment to S.C. Code Ann *16-9-320, omitting the term "lawful" from the statute, constituted an abrogation of the common law rule allowing a citizen to use reasonable force to resist an illegal arrest. This Honorable Court has yet to support such a conclusion and the Petitioner prays that the Court will not take this opportunity to do so.

CONCLUSION

Based upon the arguments and authority presented herein, as well as in the Petition for Writ of Certiorari previously submitted, the Petitioner most respectfully asserts that the decision of the South Carolina Court of Appeals in his case should be reversed.

Respectfully submitted,

[redacted]

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ATTORNEY FOR PETITIONER

This 31st day of October 31, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
NOV 02 2012
S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable Roger M. Young

Case No. 2008-GS-10-7788, 7795, 7796

STATE OF SOUTH CAROLINA,

RESPONDENT

v.

ARTHUR LEE RIVERS,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Reply to Return to Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, David Spencer, Assistant Attorney General, by depositing in the U.S. Mail, postage prepaid, this 31st day of October, 2012.

[redacted]

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 31ST day of October, 2012.

[redacted] (L.S.)
South Carolina
My Commission Expires: 3/12/2013

The Supreme Court of South Carolina

The State, Respondent,

v.

Arthur Lee Rivers, Petitioner.

Appellate Case No. 2012-206388
Lower Court Case No. 2008GS1007788;
2008GA1007796; 2088GS2007795

ORDER

This matter is before the Court upon petition for a writ of certiorari to review the Court of Appeals' decision *State v. Rivers*, Op. No. 2011-UP-495 (S.C. Ct. App. filed Nov. 7, 2011). The petition is denied.

C.J.

FOR THE COURT

Columbia, South Carolina

February 6, 2014

cc:
The Honorable Jenny Kitchings
David A. Spencer, Esquire
Tara Dawn Shurling, Esquire
The Honorable Julie J. Armstrong

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
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www.sccourts.org

February 18, 2014

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: The State v. Rivers, Arthur
Lower Court Case No. 2008GS1007788
Appellate Case No. 2009-141387

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Jenny A. Kitchings

CLERK

Enclosure

cc: David A. Spencer, Esquire
Tara Dawn Shurling, Esquire

FORM 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	2015-CP-10-1003
ARTHUR LEE RIVERS, # 254993	)	**APPLICATION FOR**
	)	**POST-CONVICTION RELIEF**
v.	)	
STATE OF SOUTH CAROLINA	)	

FILED
2015 FEB 17 PM 3:07
JULIE J. ARMSTRONG
CLERK OF COURT
BY

INSTRUCTIONS READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution, 136 Wilborn Avenue, Ridgeville, SC 29472

2. Name and location of Court which imposed sentence Charleston County Court of General Sessions, 100 Broad Street, Charleston, SC 29401 .

3. Name(s) of co-defendant(s) (if any) n/a

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2008-GS-10-7788 Trafficking Cocaine 3rd Offense

   (b) 2008-GS-10-7795 Possession Cocaine Base 3rd Offense

   (c) 2008-GS-10-7796 Assault Police Officer Resisting Arrest

5. The date upon which sentence was imposed and the terms of the sentence:

   (a) September 17, 2009 - 25 years concurrent

Revised 3/2003

(b) September 17, 2009 – 15 years concurrent

(c) September 17, 2009 – 10 years concurrent.

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ____

(b) after a plea of not guilty Yes

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered yes to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. Supreme Court of South Carolina

iii. N/A

(b) the result in each such Court to which you appealed:

i. Judgments and Sentences Affirmed

ii. Petition for Writ of Certiorari Denied

iii. _____

(c) the date of each such result:

i. November 7, 2011 ___

ii. Certiorari Denied 2/6/2014, Remittitur Returned 2/18/2014

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Opinion No. 2011-UP-495 ___

ii. Appellate Case No. 2009-141387

iii. _____

9. If you answered **no** to (7), state your reasons for not so appealing:

(a) N/A

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Applicant's Trial Attorneys failed to provide Applicant effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution where they failed to make and fully argue an appropriate objection to improper character evidence introduced during Applicant's trial.

(b) Applicant's Trial Attorneys failed to provide Applicant effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution where they limited their objection to improper character evidence introduced during Applicant's trial to an objection concerning the relevance of the testimony in question.

(c) Applicant's Trial Attorneys failed to provide Applicant effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution where they failed to make a Motion *in limine*, or any other motion during Applicants trial, for the suppression of drug evidence which was seized in violation of his Fourth Amendment right against unlawful searches and seizures as protected by the Fourth and Fourteenth Amendments to the United States Constitution.

(d) Applicant's Trial Attorneys failed to provide Applicant effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution where they was an effective for raising the propriety of the search and seizure conducted in this case for the first time at the directed verdict stage of Applicant's trial as opposed to properly preserving this issue through a motion *in limine* or other motion made contemporaneously with the introduction of this evidence.

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

(a) During Applicant's trial the State was permitted to introduce improper character evidence over the objection of Applicant's Trial Attorneys. The objection made by Trial Counsel, however, was limited to an argument that the evidence in question was not relevant. Trial Counsel's failure to make a proper objection addressing the fact that the testimony in question constituted improper character evidence resulted in Applicant's inability to have his objection fully and properly considered at trial and resulted in this issue not being properly preserved for appellate review. *See*, Opinion of the South Carolina Court of Appeals.

(b) During Applicant's trial the State was permitted to introduce improper for character evidence over the objection of Applicant's Trial Attorneys. The objection made by Trial Counsel, however, was limited to an argument that the evidence in question was not relevant. Trial Counsel's failure to make a proper

objection addressing the fact that the testimony in question constituted improper character evidence resulted in Applicant's inability to have his objection fully and properly considered at trial and resulted in this issue not being properly preserved for appellate review. *See*, Opinion of the South Carolina Court of Appeals.

(c) Applicant's Trial Attorneys did not make a Motion *in limine* challenging the admissibility of evidence seized in violation of Applicant's Fourth Amendment right against unlawful searches and seizures. Having failed to address this issue *in limine*, Trial Counsel additionally failed to make a Motion to Suppress the evidence in question at an inappropriate time during applicants trial. Trial Counsel attempted to raise this issue for the first time in the context of his argument for a directed forward it. Counsel's failure to timely raise proper arguments concerning the admissibility of this evidence on Fourth Amendment grounds resulted in Applicant's inability to have this issue thoroughly addressed in the trial court and resulted in the issue not being properly preserved for appellate review. *See*, Opinion of the South Carolina Court of Appeals.

(d) Applicant's Trial Attorneys did not make a Motion *in limine* challenging the admissibility of evidence seized in violation of Applicant's Fourth Amendment rights against unlawful searches and seizures. Having failed to address this issue *in limine*, Trial Counsel additionally failed to make a Motion to Suppress the evidence in question at an inappropriate time during Applicant's trial. Counsel attempted to raise this issue for the first time in the context of his argument for a directed forward it. Counsel's failure to timely raise proper arguments concerning the admissibility of this evidence on Fourth Amendment grounds resulted in Applicant's inability to have this issue thoroughly addressed in the trial court and resulted in the issue not being properly preserved for appellate review. *See*, Opinion of the South Carolina Court of Appeals.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

13. If you answered yes to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. ___

iii. ___

iv. ____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. ___

iii. ___

iv. ___

(c) the disposition thereof:

i. N/A

ii. ___

iii. ___

iv. ___

(d) the date of each such disposition:

i. N/A

ii. ___

iii. ___

iv. ___

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. ____

iii. ____

iv. ____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. ____

iii. ____

(b) the proceedings in which each ground was raised:

i. N/A

ii. ____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Allegations raised herein could not have been properly raised on direct appeal. Collateral review through PCR presented the first appropriate opportunity to address these collateral claims.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? ____

(b) your trial, if any? __X__

(c) your sentencing? __X__

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? __X__

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? n/a

18. If you answered yes to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. James W. Smiley, IV, 178 ½ King Street, Charleston, SC 29401
Laree Anne Hensley, 1495 Remount Road, N. Charleston, SC 29406

ii. Tara Dawn Shurling, 3614 Landmark Drive, Suite A, Columbia, SC 29204

(b) the proceedings at which each such attorney represented you:

i. Trial and sentencing

ii. Direct Appeal.

iii. _____

iv. _____

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

Reversal of Applicant's judgments and sentences and remand for a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No____

Revised 3/2003

15-CP-10-1003

STATE OF SOUTH CAROLINA)
)
County of Charleston)

VERIFICATION

I, Tara Dawn Shurling, counsel for the Applicant*, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Tara D Shurling *

Tara Dawn Shurling
S.C. Bar No. 5099
3614 Landmark Drive
Suite A
Columbia, SC 29204
(803) 738-8622
Fax (803) 738-1600
tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

FILED
2015 FEB 17 PM 3:07
JULIE J. ARMSTRONG
CLERK OF COURT
BY

SWORN to and subscribed before me this 17th day of February, 2015.

Suzanne Graham (L.S.)
Notary Public for the State of South Carolina

My Commission Expires: 2/28/24

*Counsel represented Applicant on Direct Appeal to the South Carolina Court of Appeals and the Supreme Court of South Carolina. Counsel is filing this Application for Post-Conviction Relief in order to preserve the Applicant's right to collateral review. Counsel has not been retained for a Circuit Court PCR action. Applicant will advise the Court concerning his choice of PCR counsel in the immediate future. Alternatively, Applicant may file a request with this Court for court-appointed PCR counsel.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Arthur Lee Rivers, #254993, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-10-1003 **RETURN**

In response to the post-conviction relief (PCR) application filed on February 17, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. The Applicant was indicted by the October 2007 term of the Charleston County Grand Jury for Trafficking Cocaine (2008-GS-10-7788), Trafficking Cocaine Base (2008-GS-10-7795) and Assault on a Police Officer while Resisting Arrest (2008-GS-10-7796). James Smiley, Esquire, and Laree Hensley, Esquire, represented him. On September 17, 2009, the Applicant proceeded to a jury trial pursuant to which he was found guilty of all charges as indicted. The Honorable Roger M. Young, Sr., sentenced the Applicant to confinement for twenty-five (25) years for Trafficking Cocaine, fifteen (15) years for Trafficking Cocaine Base, and ten (10) years for Assault on a Police Officer while Resisting Arrest. These sentences were to be served concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. Tara Shurling, Esquire, represented the Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Rivers, Op. No. 2011-UP-495 (S.C. Ct.

App. filed November 7, 2011). The Applicant appealed this Order to the South Carolina Supreme Court but certiorari was denied on February 6, 2014. The Remittitur was issued on February 18, 2014.

II.

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
    a. "[Counsel] failed to make and fully argue an appropriate objection to improper character evidence introduced during Applicant's trial"
    b. "[Counsel] limited their objection to improper character evidence introduced during Applicant's trial to an objection concerning the relevance of the testimony in question"
    c. "[Counsel] failed to make a motion in limine, or any other motion during Applicant's trial, for the suppression of drug evidence"
    d. "[Counsel] was an effective for raising the propriety of the search and seizure conducted in this case for the first time at the directed verdict stage of the Applicant's trial as opposed to properly preserving this issue through a motion in limine or other motion made contemporaneously with the introduction of this evidence.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject conviction, the Applicant's application, the Record on Appeal and the Order from the South Carolina Court of Appeals. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel.

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 8, 2015

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
	2015-CP-10-1003
ARTHUR LEE RIVERS, #254993, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esq.
Law Office of Tara Dawn Shurling, P.A.
3614 Landmark Dr. Ste A
Columbia, SC 29204

DATED this 8th day of July, 2015.

Elizabeth McLellan, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)	
)	Court of Common Pleas
COUNTY OF CHARLESTON)	Case No. 2015-CP-10-1003
)	
ARTHUR LEE RIVERS,)	
)	
Applicant,)	
)	
vs.)	Transcript of Record
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	DATE: January 9, 2017
)	

B E F O R E:

THE HONORABLE WILLIAM SEALS

A P P E A R A N C E:

CHRISTOPHER L. MURPHY
Attorney for the Applicant

ALICIA A. OLIVE
Attorney for the Respondent

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

INDEX

EXAMINATION

MS. OLIVE: The next case is Arthur Lee Rivers. And Mr. Murphy is here on behalf of Mr. Rivers. I believe he has a matter to address with the Court.

MR. MURPHY: Yes, Your Honor. Just by way of background, Mr. Rivers was convicted at trial of trafficking drugs. He received a 25-year sentence. There was an appeal that was affirmed. And this court -- basically, the appellate court raised -- there were two issues that were raised. And the appellate court said, procedurally, it was improper procedure, thus, they could not -- the court did not address those two issues.

Mr. Rivers tells me he's been in lockdown for the last two to three months. I'm appointed in this case. His family has retained new counsel. And he would like to go with new counsel and asked that this matter be continued. It is his first request at a continuance. And as you know, Judge, this is his last bite at the apple.

I have no problem going forward today. However, I always say I want the client to feel comfortable. And if the Court would grant the continuance, give him one more shot to get new counsel, he'll be ready next time. And if not, I'm ready to go next time. So he understands that, if Your Honor would be so willing to do so.

THE COURT: Who did he hire?

MR. MURPHY: He does not know. His family went

out -- I will let him talk.

MR. RIVERS: Yes. Good morning, Your Honor. My family went out and got a new attorney. But, supposedly, it's been posted already, beginning the paperwork from my understanding.

MR. MURPHY: I will say, I have not received any word and Ms. Olive has not received anything yet.

THE COURT: Is that correct, Ms. Olive?

MS. OLIVE: That's correct, Your Honor. I have not heard anything about him retaining new counsel. I will note for the Court that we did file our return in this case July 8th of 2015. So it has been pending for a while. It was continued the last term for other reasons. I think we did have an incomplete record. We just had the record on appeal. So we obtained the full transcript for that.

Again, Your Honor, I have heard nothing about him retaining new counsel. We would just leave it in your discretion. The State is prepared and ready to go forward.

THE COURT: I would assume if he's hired new counsel, you would have heard about it. Ms. Olive would have heard about it and I would have heard about it. Maybe there would be something in the file. Why don't we go ahead and go with it, since you are prepared to.

MR. MURPHY: Thank you, Your Honor.

MS. OLIVE: Thank you, Your Honor. May it please

the Court. This is Arthur Lee Rivers, 2015-CP-10-1003. Mr. Rivers was indicted in 2007 for trafficking cocaine, trafficking cocaine base, and assaulting a police officer while resisting arrest.

He was represented on those charges by James Smiley on September 17th, 2009. He proceeded to a jury trial where he was found guilty of all charges as indicted. The Honorable Roger Young sentenced him to confinement for 25 years for trafficking cocaine, 15 years for trafficking cocaine base, and 10 years for assault on a police officer while resisting arrest. The sentences were to be served concurrently.

Notice of appeal was filed on his behalf and the appeal was perfected. Tara Shurling represented him on appeal. South Carolina Court of Appeals affirmed his conviction sentence in an unpublished opinion dated November 7th, 2011.

The remittitur was returned -- excuse me. He appealed the order to the South Carolina Supreme Court. The tertiary was denied on February 6th, 2014. Remittitur was returned February 18th, 2014. He filed this application for post-conviction relief on February 17th, 2015 alleging various grounds of significant of counsel.

Your Honor, he is present and represented today by Chris Murphy. I will turn it to Mr. Murphy at this time.

MR. MURPHY: Thank you, Your Honor. We call Mr. Rivers to the stand.

ARTHUR LEE RIVERS,

having been duly sworn, testifies as follows:

THE CLERK: Sir, if you will please state your name, spelling your last name.

THE WITNESS: Arthur, R-i-v-e-r-s.

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Mr. Rivers, you were convicted in Charleston County of various crimes; is that correct?

A. Yes, sir.

Q. And of those crimes, you were sentenced to 25 years?

A. Yes, sir.

Q. And that was concurrent with a ten-year sentence and a 15-year sentence, I believe?

A. Yes, sir, I believe, yeah.

Q. And that was -- you were represented by Mr. Smiley?

A. Yes, sir.

Q. And you've known Mr. Smiley for quite some time, correct?

A. Yes, sir.

Q. Now, do you recall being offered a plea deal in

these cases?

A. Yes, sir.

Q. What was that plea deal that was offered?

A. Five years.

Q. Okay. And then there was a second plea deal right before trial for 15 years, I believe?

A. Yes, sir.

Q. And did you talk with Mr. Smiley about those deals that were offered?

A. Yes, sir.

Q. And what did ultimately happen?

A. Well, the plea deal for five was while I was on the street. So I never did know I was going to trial. So the day I got called to come to court, I thought I was pleading to the five years. Actually, I turned up there to pick a jury.

Q. And did you have discussions or did you turn down the plea deal for five years, that you recall?

A. No, sir.

Q. You thought you were going to be able to plead to that?

A. Yes, sir.

Q. And do you recall a plea deal for 15 years?

A. That's during the court sessions.

Q. Okay.

A. When we came to court.

Q. And then did you make a decision whether to accept or reject that plea deal?

A. No, sir.

Q. You didn't -- did you talk to Mr. Smiley about that plea deal?

A. I mean, he mentioned it, but after the fact. He just came and said it was ready to go to trial.

Q. And when you went to trial, how many times did you meet with Mr. Smiley to discuss your trial?

A. No time.

Q. Did you meet at all?

A. Just the day of the trial.

Q. And how long did you meet the day of the trial?

A. Was there just to pick the jury.

Q. When I say "meet", I'm talking about outside the presence of the jury or outside the courtroom, just you and Mr. Smiley.

A. No.

Q. Did you meet at all with him privately?

A. No.

Q. Did you understand what your strategy was in this case at all?

A. From my understanding, it was -- when it was time for me to go to court, I would be pleading to five years.

Q. All right. Now, you ended up going to trial. There was opening arguments, right?

A. Yes, sir.

Q. And both Mr. Smiley and the State did arguments, correct?

A. Yes, sir.

Q. And at some point, there were some issues that were raised at trial, correct?

A. Yes, sir.

Q. Now, the first issue is, you allege in your PCR application that there was improper character evidence, correct?

A. Yes, sir.

Q. And what you mean by that is that there was a statement that was admitted over your attorney's objection, correct?

A. Yes, sir.

Q. And that statement was to the effect that: The crack is not mine, the cocaine is mine, but the crack is not. Is that correct?

A. Yes, sir.

Q. And there was a motion to exclude that statement, correct?

A. Yes, sir.

Q. All right. And, ultimately, the judge allowed the

statement in, the trial judge, right?

A. Say that again.

Q. The trial judge allowed that statement into evidence, correct?

A. Yes, sir.

Q. And then that was also one of the issues that you filed for your direct appeal, correct?

A. Yes, sir.

Q. And then the appellate court made a ruling on that issue, correct?

A. Yes, sir.

Q. Now, the second issue that was raised, that you raised, was the improper filing to suppress the drugs that were obtained, correct? And if I recall correctly, your attorney made a motion at the directed verdict stage to suppress the drugs, correct?

A. Yes, sir.

Q. All right. And then that was the second issue on appeal, correct?

A. Yes, sir.

Q. All right. Now, the appellate court said -- issued an opinion that a motion in limine was the proper avenue to suppress those drugs, correct?

A. Yes, sir.

Q. And the two grounds that you raise in your PCR

application are identical to the two grounds that were raised on the direct appeal, correct?

A. Yes, sir.

Q. And other than that, are there any other issues that you allege that Mr. Smiley was defective in representing you?

A. Just besides me not knowing I was going to trial.

Q. Okay. So a lack of communication or improper communication, correct?

A. Yes.

Q. All right. And is there any other issue that you believe that should be raised at this time? You have three issues right now, correct?

A. Right.

Q. And the first is the improper objection for the statement being admitted, right?

A. Yes, sir.

Q. And the second is the improper motion to exclude the drugs, correct?

A. Yes, sir.

Q. And the third is the lack of communication about the plea offers, right?

A. Yes.

MR. MURPHY: That's all I have. Thank you, Your Honor.

THE COURT: Thank you.

Cross-examination.

MS. OLIVE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. OLIVE:

Q. Mr. Rivers, is it your testimony today you wish to receive another trial in this case?

A. Ma'am?

Q. Do you want to go back and have another trial in this case?

A. Yes.

Q. Okay. That's why you are here today?

A. Yes.

Q. Your testimony today is that you thought that you were going to court to accept a five-year plea?

A. Yes, sir (sic), that's what I was told.

Q. Okay. But didn't you turn down an offer at court that day?

A. For 15.

Q. And you heard your attorney tell the judge that -- or you heard it told to the judge that you had previously turned down a plea offer for 5 to 30 years?

A. You said I turned down a plea for 5 to 30?

Q. Right.

A. No, I never turned down no 5.

Q. Okay. You never turned down an offer previous to

the 15-year offer?

A. 15 was the one that during the trial was offered. I'm saying before, while I was on the street, he was telling me I was going to get a five-year plea. So I never had no knowingings of me even going to trial, period, until the day he called me. Being that I was already on the street for, like, 15 to 18 months on the street, and got a call saying it's time to go to court, so I'm thinking I'm going to court for five-year plea. When I get to court, I was actually there to pick a jury.

Q. Okay. So your testimony today is that you never turned down a prior plea offer?

A. Not no five.

Q. Okay. What offer did you turn down?

A. The 15.

Q. That's the only plea offer you ever turned down? Okay. Did you feel -- why did you turn down that plea offer?

A. I mean, well, it's my first time even going through this situation of being in prison. So the five was even long to me. So 15, so that's why I say, well, he offered the five, I would plead to that if he could get it over. But when I got there, like I say, we was there to pick a jury who I had no knowledge of. So we picked the jury.

The next day he came and said, well, they offered 15. And that's when I turned that down. There was no other

offer.

Q. You said you would have -- even five was a long time. You wanted him to get it lower?

A. Being that I never been to prison or nothing like that, coming from the streets, five seemed long. I've never been in jail or prison, nothing like that that long. But I said I would take the five-year plea. I'm just saying that it seemed -- that had seemed long to me at that time when he said it. But, I mean, I would have taken it. That is while I was on the street for 15 or 18 months on the street. I was just waiting to go to court for the five-year plea.

Q. And your testimony today is that you never met with your attorney except for once the day of trial?

A. Yes, ma'am.

Q. Y'all never had any discussions about going to trial?

A. No, ma'am.

Q. And your attorney did ask to exclude the statement where you claimed that some of the drugs were yours but some of them were not?

A. To exclude it, like, to take it out?

Q. Right.

A. Yes, ma'am.

Q. But, ultimately, that statement was allowed in?

A. Yes, ma'am.

MS. OLIVE: Thank you. That's all the questions I have.

THE COURT: Redirect?

MR. MURPHY: Nothing further, Your Honor.

THE COURT: You may step down. Thank you.

Call your next witness.

MR. MURPHY: Your Honor, we would rest. And we would do two things, move the application to conform to the testimony, specifically it would also include his issue about lack of communication with the plea agreements; and then, number two, Your Honor, make sure that in the record, and I believe it already is, that his appellate briefs are included as well as the appellate opinion.

And what the -- we would rely on the appellate opinion. What it says is -- there are two issues. The statement, which there was an objection at trial, and then the appellate attorney did a different objection, argued a different objection. And the appellate court didn't touch it, saying you just can't do that, which I believe would be error either of trial counsel or appellate counsel.

And that, number two, they said that they tried to move, suppress the drugs. And the court said -- what happened was, they moved at a directed verdict motion to suppress the drugs. And the appellate court said, you can't do that, you've got to move in limine. They didn't touch the

issue. So we believe that would be an error by trial counsel as well.

THE COURT: Ms. Olive, any reply to that?

MS. OLIVE: Well, Your Honor, the State does intend to call James Smiley to testify. But as far as -- and, Your Honor, you do not have the briefs from the appeal. I'm happy to provide those to you, however, not a problem at all. It's our position that, really, the Court's ruling on his appeal has nothing to do with the ineffective assistance of counsel claim. Mr. Smiley did make a motion to suppress the statement based on voluntariness. The court made its ruling.

And, frankly, without having the briefs in front of me, I don't know what arguments counsel made on appeal. Ineffective assistance of appellate counsel was not raised as a ground in this post-conviction relief matter. I think that the fact that she made a different argument on appeal really has no effect in this matter.

As far as motion to suppress the drugs, I believe the court's ruling on that, the Court of Appeals ruling on that was that that was just simply not preserved. And it's our position that there was no grounds to move to suppress the drugs because the testimony at trial was that Mr. Rivers threw the drugs on the ground. So he had discarded them. It wasn't search incident to arrest or search and seizure.

So it's our position there was no reason for him to

move to suppress those drugs. Rather, at the directed verdict stage, he simply made the argument, not that they should be suppressed, but that the State had failed to meet its burden by showing he was in possession of drugs at all.

So it wasn't that the motion to suppress was made at the inappropriate time. It was simply that he made a different argument at directed verdict motion that there was no grounds to suppress the drugs.

THE COURT: How do you feel about granting the applicant's testimony to conform that to the application?

MS. OLIVE: Your Honor, I have no objection to that.

THE COURT: I'm going to grant that part of it at this time.

Go ahead. Call your witness.

MS. OLIVE: Thank you, Your Honor. We would call James Smiley.

JAMES SMILEY,

having been duly sworn, testifies as follows:

THE CLERK: If you will please state your name, spelling your last name.

THE WITNESS: James Watson Smiley, IV, S-m-i-l-e-y.

DIRECT EXAMINATION

BY MS. OLIVE:

Q. Thank you, Mr. Smiley, for being here with us today.

Mr. Smiley, how long have you been practicing law?

A. Since 1993.

Q. And what portion of that have been criminal law?

A. All of it.

Q. And were you retained or appointed in this case?

A. Retained.

Q. Do you recall at what point you were retained to represent Mr. Rivers?

A. Fairly early on in this case.

Q. Do you recall how many times you met with Mr. Rivers prior to trial?

A. I spoke to Mr. Rivers quite often on the phone. We met in my office, by my recollection, two to three times before trial.

Q. And was he out on bond for most of the time awaiting trial?

A. He was.

Q. You heard Mr. Rivers's testimony that he was under the impression he was going to the courthouse that day to accept a five-year plea deal. Is that your recollection?

A. No, that's not my recollection.

Q. Was there a plea offer in place at the time that you went to trial?

A. At the time he went to trial, when he first showed up, there was not. One was made before we went forward, but

at that point, it was 15 years. That would have been, I believe, a 85 percenter too, as we spoke about that.

Q. So when you got -- the day that this trial started, he was offered a 15-year negotiated plea?

A. That's correct.

Q. And you said prior to trial, had he been -- was there ever a five-year offer on the table?

A. That's my understanding, is it was a five to 30 with a recommendation for the five. And he turned that down, is my recollection. I actually believe it was done on the record. I don't have that. But, typically, in my practice, when you turn down a deal, especially one that, after counsel, there's a disagreement about, I make sure it's put on the record. I don't specifically remember that, but I believe it was done.

It's Mr. Rivers's position, and I think it still is the position, is those weren't his drugs. And so it made a real difficult thing for him to be able to admit to something that wasn't his. And I think to this day, he maintains his innocence. And there were facts -- and why we went to trial -- that would support his claim at trial. The drugs weren't found on him. They were found quite some way away.

An officer made a claim that he saw Arthur throw the drugs. And at trial, there was great vigorous argument about whether it was possible for the officer even to see that at

trial. So our position and our trial strategy is that they weren't Arthur's drugs, that Arthur didn't throw the drugs, that Arthur shouldn't have been detained at all.

There was another person, another individual that the officer came up to arrest who had a bench warrant out. And Arthur was walking in that general direction. As the officer tried to detain Arthur, who didn't have anything to do with anything at that point in time, in our view, Your Honor, subsequent to that, the drugs were located about -- it was different argument at trial -- about some distance away, 30, 40 feet away on a different side of the lot.

Arthur and the officer got in a struggle, because the officer kept trying to detain Arthur. And Arthur did not understand why, when the person that he came to arrest with the bench warrant just sat there. So it was a chaotic kind of situation. It was very triable. Let's put it that way.

While my -- and forgive me for being narrative, but it's just a little bit easier, Judge. Arthur maintained from the very beginning those weren't his drugs, maintained he didn't say that "the cocaine is mine, not the crack." He maintains he didn't say that. And we challenged that best we could at trial.

He maintained he didn't try to fight the officer, that the officer got on him and he was trying to get away from the officer. And the struggle on the ground went on for

quite some time. If I remember right, it was pretty hot and they were both covered with sweat and grime from the wrestling on the ground. Then the officer went and said that he found these drugs and said he saw Arthur do it.

I went to the scene. Spent time at the scene to show that, thought I had shown, it wasn't possible for the officer to see what he saw.

I called Arthur's mother to the stand, because she had dropped him off just before this happened. And he walked down the street. He was going to visit an elderly gentleman that lives back there to check on him. And his mom knew that's why she dropped him off. So I had her testify to that. And it just wasn't -- the facts didn't add up.

Unfortunately, the jury didn't agree with us. But so it was hard to tell Arthur to take a plea when he maintained his innocence from the very beginning. We did turn down the five years. He may not have a recollection of it, but I'm quite certain we turned it down. Because even given that situation, I had advised him not to risk a mandatory minimum 25 years.

I understood his decision, but I always tell clients that at some point, the scale tips. And you've got to seriously consider it.

I had known Arthur before as Arthur. And I had a relationship. I thought highly of Arthur. I thought Arthur

was doing well in his life. And I understood why he didn't want to take a plea. But, unfortunately, Arthur is sitting there today.

Q. Mr. Smiley, do you recall how far in advance of trial the five-year offer was made?

A. I do not. It was sometime before. It wasn't like we turned down the plea offer and then a week later, we were in trial. It had shown up on the docket several times where it wasn't reached. And then it came up fairly quickly. I am not going to tell you that he had a lot of notice. He didn't. He had been on the docket.

It's a problem when you get put on the docket five or six or seven or eight times, and you just never get reached. You get lulled into a false sense that your case isn't coming up, even for me, because it just doesn't come up. And then the docket all falls apart, and you know your case is at trial, so it jumps to the front real quick. And that is what happened in this case.

So I'm not going to tell you Arthur had a whole bunch of notice that he had a trial. We were on the docket. We went from probably being six or seven on the docket that week to first. Because we were -- when the trial docket breaks down, Judge, as you know, you want something to get going. And our case at that point was -- because Arthur wanted a trial, was certainly a trial, and I was ready to go.

And I like to be first than sitting around waiting to be second.

THE COURT: I've gone from 50 to number 1.

THE WITNESS: That's right. Anyway, I'm not telling you I had a lot of notice. I can understand that he felt quite rushed that week, but I was prepared and ready to go to trial.

BY MS. OLIVE:

Q. And back to this offer, the initial offer that was made, did you communicate that offer to him?

A. I did.

Q. And what did you advise him concerning that offer?

A. Told him that innocent people don't plead guilty, but you have to consider the offer, in that going to trial was going to be very risky. That's all I could tell him. I told him I could not make that decision for him, that I would understand his choice either way. But we turned down that offer. And that was a five to 30 offer with a recommendation of five. So I couldn't promise him the five.

And that was a holdup. I remember that, because even at five, it was a long time, because it was an 85 percenter in Arthur's mind. And I couldn't even promise him 100 percent it was going to be five. I felt confident it would be, but I couldn't promise that.

Now, the day of trial, that was negotiated 15. That

was because the prosecutor didn't want me to get a chance to try to talk the judge into less at that point in time. She was prepared and ready to go.

Q. And you communicated that offer as well?

A. Yeah. We were sitting there ready to go to trial. It's like, are you sure you don't want to take 15? My advice at that point was 15-25, while it's a ten-year difference, it certainly changed -- either one would have changed his life forever. So at that point, the idea of going to trial was much more appealing than the 15-year sentence, if that makes sense.

Q. Do you feel that you had sufficient time to prepare for trial?

A. Yeah. I didn't need a lot of Arthur. This was more about going after what happened with the events at the scene. Arthur had explained to me his events. It was more trying to lay out where everybody was. And so I was certainly prepared. I had not planned on Arthur testifying. So there wasn't a lot of preparation at that point in time about what was going to go on.

Of course, Arthur -- anyway, I certainly was prepared and had enough time to be ready and had covered, from Arthur's perspective, his story, and done what I could to produce what I could to fight that.

Q. Mr. Rivers did end up testifying, did he not?

A. He did, but we didn't plan on him testifying at the beginning of the case. So we did not spend a lot of time prepping him to testify. There wasn't -- because of, I believe, some of his prior record, we looked at whether or not we were going to be able to get him on the stand to testify. And there was some question about whether that would be in his best interest. Ultimately, I believe he elected to testify, which turned out to be a pretty good move in a lot of ways, but not in the one that counted.

Q. Did you have discussions with Mr. Rivers prior to trial concerning your trial strategy?

A. Yep. Yeah. He provided what we were going to go after from his recollection and his description of the events, that he didn't have the drugs.

Q. Mr. Smiley, do you feel that you had any grounds to move to suppress the drugs?

A. No. The drugs weren't his. And so if we are arguing the drugs weren't his, it's sort of not -- not that it's not possible, but we are arguing they weren't his. We didn't try to suppress them, no. I argued that mere presence wasn't enough.

Q. Because, again, the drugs, they were found on the ground?

A. They were not found on Mr. Rivers. They were found some distance from Mr. Rivers, which was really the real

contention in the trial, was how did they get discovered and how did they get there.

MS. OLIVE: Thank you, Mr. Smiley. That's all the questions I have.

MR. MURPHY: Thank you, Your Honor. May it please the Court.

CROSS EXAMINATION

BY MR. MURPHY:

Q. Did you keep any time records of how many hours you spent on the case?

A. No.

Q. Are you able to estimate how many hours?

A. Yes.

Q. About how many?

A. In preparing for the case, I probably spent between 10 and 15 hours.

Q. And you testified you met with Mr. Rivers two to three times prior to trial?

A. Uh-huh.

Q. Do you have any notes of those meetings with him?

A. No longer, no.

Q. When you say no longer, I assume you don't have your file at all?

A. No.

Q. Where is your file?

A. It was destroyed. Not purposefully, it was destroyed as I lost about six months worth of files that were improperly stored and inadvertently destroyed.

Q. And if your file -- you also mentioned the offers that you discussed with him. Do you recall putting those offers in writing at all to Mr. Rivers?

A. No, they weren't in writing with Mr. Rivers. They were conveyed to him orally. They were done in court. And, again, I don't believe it would exist at this point in time because this happened so long ago, I believe -- I'm quite confident it was put on the record when he rejected it.

Q. And, Mr. Smiley, I will say you are correct. There was discussions on the record about the plea offers. But prior to that, did you have any notes or -- let me ask you this. How long do you recall meeting with Mr. Rivers on these two to three occasions?

A. 30, 45 minutes maybe, tops.

Q. And did you discuss alternatives, the possibility of getting convicted with him if he went to trial?

A. Oh, absolutely, because he knew if we went to trial and lost, that he would have to receive a 25-year sentence.

Q. And was there any doubt in your mind that he understood the ramifications of his decision to go to trial?

A. No doubt that I thought he understood it. It was Arthur's position from the beginning, and like I said, until

today, that they weren't his drugs. And it's hard to advise somebody who maintains their innocence and who you think have a good-faith basis to believe that could be true, to plead guilty. And so a lot of, if not all, of our discussion was about going to trial because they weren't his drugs.

MR. MURPHY: Nothing further, Your Honor.

MS. OLIVE: Nothing further from the State.

THE WITNESS: May I be excused, Your Honor? I have court upstairs.

MR. MURPHY: No objection.

THE COURT: Have a good day.

Any other witnesses from the State?

MS. OLIVE: No, Your Honor.

MR. MURPHY: Nothing further, Your Honor.

THE COURT: I'm going to think about it a few hours and let you know something by the end of the day. Have a good day.

(Whereupon, proceedings are adjourned.)

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter, Certified Realtime Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete Transcript of Record of the proceedings.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

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2015-CP-10-1003

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Arthur Lee Rivers, SCDC No. 254993, Applicant, v. State of South Carolina, Respondent.	Case No.: 2015-CP-10-1003 **ORDER OF DISMISSAL**

FILED
2017 SEP 20 PM 3:32
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed February 17, 2015, by Arthur Lee Rivers (Applicant), alleging ineffective assistance of counsel. Respondent made its Return on July 8, 2015, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened January 9, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Assistant Attorney General Alicia Olive from the South Carolina Attorney General's Office appeared on behalf of the State. Following the hearing, this Court denied the application. This order follows.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During it October 2008 term, the Charleston County Grand Jury indicted Applicant for assault on a police officer while resisting arrest, trafficking in cocaine (10-28 grams) (third offense), and trafficking in cocaine base (greater than 10 grams) (third offense). Applicant was represented by James W. Smiley, IV, Esquire. The case was prosecuted by

Assistant Solicitors Rutledge DuRant and Culver Kidd. On September 15, 2009, Applicant proceeded to a jury trial before the Honorable Roger M. Young, Sr. The jury convicted Applicant of assault on a police officer while resisting arrest, trafficking in cocaine (10-28 grams) (third offense) as indicted and possession of cocaine base (third offense) as a lesser-included offense. Judge Young sentenced Applicant to concurrent sentences of twenty five years imprisonment for the trafficking charge, fifteen years imprisonment for the possession charge, and ten years imprisonment for the resisting arrest charge.

Applicant filed a timely notice of appeal and retained Tara Dawn Shurling, Esquire, to represent him on appeal. Following briefing and argument, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Rivers, Op. No. 2011-UP-495 (Ct. App., filed November 7, 2011). Applicant's petition for rehearing was denied by the Court of Appeals on December 19, 2011. Applicant then sought certiorari from the South Carolina Supreme Court, which denied the petition. The Remittitur was returned to the circuit court on February 18, 2014.

FACTUAL HISTORY

Deputy Ryan Blakeley was serving a warrant on David Tyrone Robinson. Blakeley found Robinson in a common area, sitting on a chair by a shed, as Blakeley pulled up in a marked police car. Deputy Blakeley also saw Applicant walking. Robinson and Applicant were the only two people in the vicinity. (Trial Tr. 179-181)

Rivers did not see Deputy Blakeley at first, but then as he saw the Deputy, his eyes widened, he looked surprised, his whole body language changed. Applicant stealthily tossed an item to the ground, "as [if] he didn't want [Blakeley] to notice it" and continued walking. (Trial Tr. 181). Blakeley was suspicious of narcotic activity, but Blakeley felt that if he approached

Applicant at that point, Applicant would run. So Blakeley proceeded to serve the warrant on Robinson, who was cooperative. Blakeley put Robinson in handcuffs. (Trial Tr. 182-183).

Then Blakeley approached Applicant, who had been walking towards the shed, told Applicant that he noticed Applicant throw an object down, and asked for Applicant's license for a warrant check. It came back clear, at which point, Blakeley asked Applicant if he had any problem with Blakeley patting him down and searching him for narcotics. Applicant consented. Blakeley testified that he wanted to search Applicant for weapons—they were in a high crime area and high drug area. Blakeley did not find anything from the pat-down search. At that point, Blakeley grabbed Applicant's hand to detain him while he checked out the item Applicant dropped. Applicant yanked his hand away and asked what Blakeley was doing. Blakeley explained he was detaining Applicant to investigate the item Applicant littered. Applicant pulled away a second time and pushed Blakeley in the chest. Then Applicant ran. (Trial Tr. 182-186).

Blakeley pursued Applicant and tried to Taser Applicant. The Taser managed to cause Applicant to fall, but did not immobilize him. When Blakeley caught up to Applicant, they struggled. Applicant threw the handcuffs into the woods. Blakeley told Applicant he was under arrest, to quit resisting. Blakeley at this point was going to arrest Applicant for assaulting police. The struggle continued. Applicant continued to try and break away from Blakeley, Blakeley used brachial stuns, knees to the groin, and eventually brought Applicant under his control, and then Blakeley hit the emergency button on his shirt while he waited for backup to arrive. Applicant was under arrest for assaulting a police officer and resisting arrest. (Trial Tr. 187-195).

Blakeley read Applicant his Miranda rights. Applicant was taken to the police cruiser. Then Blakeley went back to retrieve the items Applicant dropped. Deputy Summersell found the

items—a pill bottle with over 10 grams of crack cocaine inside and a clear plastic bag with 22 grams of cocaine powder. (Trial Tr. 196-200, 289-290).

Applicant then tried to get the officers' attention by banging his head against the police car window. Blakeley opened the door to see what Applicant wanted. Applicant was trying to talk about the incident that occurred, but Blakeley read Applicant his Miranda rights a second time. Then Applicant told Blakeley that the coke was his, but not the crack. (Trial Tr. 200-207).

ALLEGATIONS RAISED

In his application, Applicant alleged he is being held in custody unlawfully based on allegations of ineffective assistance of counsel for:

1. Failing to argue Applicant's statement to law enforcement was improper character evidence, thereby leaving this argument unpreserved for appellate review
2. Failure to make a motion *in limine* at the start of trial or a motion to suppress during trial to suppress the drug evidence

At the conclusion of Applicant's testimony, Applicant moved to conform his allegations to the testimony presented, including an additional allegation that trial counsel was ineffective for failing to properly communicate with him regarding plea offers. The State did not object to this motion, and the Court granted the motion and allowed Applicant to proceed forward on the allegation that counsel failed to adequately communicate with him as to plea offers.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he was represented by trial counsel, who he had known for "quite some time." (PCR Tr. 6). He testified the State made him an initial plea offer of five years imprisonment followed by a

subsequent plea offer of fifteen years imprisonment. (PCR Tr. 6-7). He testified he discussed these plea offers with counsel, including the five year plea offer that was made when he "was on the street." (PCR Tr. 7, 13). He testified he thought he was accepting the five year offer when he came to court for his trial. (PCR Tr. 7-8, 12). Applicant denied he ever turned down a plea offer for five to thirty years. (PCR Tr. 12). However, he testified the five year plea offer seemed "long" and he asked counsel to get him a lower plea offer. (PCR Tr. 13-14). He also recalled the fifteen year offer came "during the court session" but counsel said they were ready to go to trial. (PCR Tr. 7-8).He acknowledged he turned down the fifteen year plea offer. (PCR Tr. 13). He testified he did not speak with counsel privately before the trial began. (PCR Tr. 8). He testified he never met with counsel other than once on the day of trial. (PCR Tr. 14).

Applicant testified a statement to law enforcement that the cocaine was his but the crack was not was admitted during trial over counsel's objection. (PCR Tr. 9). He testified counsel should have also objected and move to exclude the statement as improper character evidence and this argument was found unpreserved on appeal because counsel failed to object on this ground. (PCR Tr. 9-10). Applicant also testified counsel failed to move *in limine* or during trial to suppress the drug evidence, thereby failing to preserve the issue for appellate review. (PCR Tr. 10-11).

Counsel also testified. He testified he has been practicing law since 1993 and he exclusively practices criminal defense. (PCR Tr. 18). He testified he was retained "fairly early on" and spoke with Applicant by phone frequently, as well as met with him "two to three times" before trial. (PCR Tr. 18, 26). Counsel estimated he spent ten to fifteen hours preparing for trial. (PCR Tr. 26). He testified his file for Applicant's case was inadvertently destroyed. (PCR Tr.

27). Counsel testified there was never a plea offer for five years, but there was an offer for a sentence range of five to thirty years and that the State would recommend five years. (PCR Tr. 18-19). He testified Applicant turned down this plea offer on the record. (PCR Tr. 19). He testified there was also a fifteen year plea offer the day trial started. (PCR Tr. 19). He testified Applicant was aware he would receive at least a twenty-five year sentence if convicted at trial. (PCR Tr. 27).

Counsel testified Applicant denied the drugs were his and noted the drugs were found down the street. (PCR Tr. 19). He testified his trial strategy was the drugs were not Applicant's, Applicant did not thrown them, and he should not have been detained by law enforcement. (PCR Tr. 19-20). He testified Applicant also denied making the statement that the cocaine was his but the crack was not and denied assaulting the officer. (PCR Tr. 20). Counsel testified he went to the scene, spent some time there, and formulated an argument that it was not possible for the officer to have seen Applicant throw the drugs. (PCR Tr. 21). He testified he also called Applicant's mother to the stand to testify she had dropped Applicant off down the street to visit an elderly gentleman. (PCR Tr. 21). Counsel testified despite his defense strategy, the jury did not agree and convicted Applicant. (PCR Tr. 21). He testified he advised Applicant that he should accept a plea offer rather than risk the mandatory minimum twenty-five year sentencing if convicted, but Applicant wanted to proceed to trial. (PCR Tr. 21). Counsel testified he was ready for trial and the case was on the docket for a while before it was tried. (PCR Tr. 22-24). He testified he had not planned on Applicant testifying at trial, but Applicant ended up electing to testify. (PCR Tr. 25). Counsel testified he did not have any grounds to suppress the drugs

because his trial strategy was the drugs were not Applicant's. (PCR Tr. 25). He elaborated he argued mere presence was not enough for a conviction. (PCR Tr. 25).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms."

Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry her burden in this action regarding any of his allegations of ineffective assistance of counsel. Below are this Court's specific finding regarding each of Applicant's allegations of ineffective assistance of counsel:

Allegation: Failure to argue Applicant's statement to law enforcement was improper character evidence, thereby leaving this argument unpreserved for appellate review

Applicant alleges counsel failed to argue his statement to law enforcement was inadmissible as improper character evidence. Additionally, Applicant argues since counsel failed to move to exclude his statement on this specific ground, the issue was unpreserved for appellate review.

At trial, counsel argued Applicant's statement to law enforcement should be suppressed because it was involuntary. During the suppression hearing, counsel argued that blows received while he resisted arrest and confinement in a small space while in the company of two police officers rendered his confession involuntary "in violation of my client's Fifth Amendment right to remain silent, the South Carolina constitution, and Miranda, Jackson versus Denno and itsprogeny." (Trial Tr. 97-100). The trial court ultimately denied this motion and allowed the statements to be introduced at trial. (Trial Tr. 100).

Initially, this Court finds counsel's decision to argue for suppression of Applicant's statement based on voluntariness was reasonable under the circumstances of this case. The mere fact that appellate counsel chose to raise a different argument on appeal than the one presented below does not make counsel's decision on what to argue at trial any less reasonable or prudent. See Strickland, 466 U.S. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.").

Additionally, this Court finds counsel is not ineffective for failing to raise this specific argument on appeal, as there is no reasonable likelihood such an argument would have prevailed on appeal. Our appellate courts have previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has

prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

Applicant alleges counsel should have moved to exclude his statement to law enforcement as improper character evidence. Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE. However, as the State was not seeking to introduce the statement as improper character evidence, but as a confession to the charged crimes. Therefore, this argument fails and would not have been successful on appeal. In conclusion, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: Failure to make a motion in limine at the start of trial or a motion to suppress during trial to suppress the drug evidence

Applicant alleges counsel was ineffective for failing to move to suppress the drug evidence introduced against him at trial based on a violation of Forth Amendment rights to unlawful searches and seizures. Trial counsel testified he did not move for suppression of the drug evidence based on Forth Amendment grounds because the drugs were not found near Applicant and his entire trial strategy focused on the drugs not belonging to Applicant. This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation.

In the present case, counsel set forth a reasonable trial strategy for not moving for suppression of the drugs—a defense that because the drugs were never found on Applicant, they clearly were not his drugs. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The

validity of counsel's strategy is viewed under an 'objective standard of reasonableness.' " Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)).

Moreover, had counsel moved for suppression based on Forth Amendment grounds, the trial court would have denied this motion because Applicant abandoned the drugs when he threw them on the ground and walked away. "[T]he Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy or unless the government commits a common-law trespass for the purpose of obtaining information." State v. Robinson, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (citation omitted). Whether such an expectation of privacy has been abandoned "is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner's subjective intent." State v. Brown, 414 S.C. 14, 23, 776 S.E.2d 917, 922 (Ct. App. 2015) (citing United States v. Tugwell, 125 F.3d 600, 602 (8th Cir.1997)); see also State v. Taylor, 401 S.C. 104, 119, 736 S.E.2d 663, 670–71 (2013) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of [an officer's] actions in light of the facts and circumstances confronting him at the time...." (alteration by court) (internal quotation marks omitted)). Moreover, in determining whether property has been abandoned in the Fourth Amendment context, the inquiry is not whether the owner of the property has relinquished his or her interest in it such that another, having acquired possession, may successfully assert a superior interest. Brown, 414 S.C. at 23, 776 S.E.2d at 922 (citing State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995). Rather, " 'the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In

essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein." Brown, 414 S.C. at 23, 776 S.E.2d at 922 (citations omitted). In the present case, Applicant threw down the drugs and walked away. Additionally, he denied any ownership of the drugs. Therefore, any Forth Amendment challenge would have failed. In conclusion, this Court finds this allegation is denied and dismissed with prejudice.

Allegation: Failure to adequately communicate with Applicant as to plea offers

Applicant alleges counsel was ineffective for failing to adequately confer and communicate with him regarding plea offers. Applicant testified he believed he was going to court to plead guilty in exchange for a five year plea offer, not pick a jury and begin his trial. In contrast, counsel testified there was never a plea offer for a negotiated five year sentence, but instead, there was an offer for Applicant to plead guilty and receive a sentence between five to thirty years and the State would recommend a five year sentence. Counsel testified Applicant turned down this offer on the record and insisted on going to trial throughout his representation of Applicant. This Court finds counsel's testimony to be credible and Applicant's testimony to be not credible as to this issue. This Court finds counsel adequately communicated with Applicant regarding plea offers, as well as all other aspects of Applicant's case, and that this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 14 day of Sept., 2017.

WILLIAM H. SEALS, JR.
Presiding Judge
Ninth Judicial Circuit

Mauldin, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

ARTHUR LEE RIVERS Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Christopher L. Murphy, Esquire
Murphy Law Offices, LLC
234 Seven Farms Drive, Suite 128
Charleston, SC 29492

This 27th day of September, 2017.

Jennifer Jennison
Legal Assistant for Respondent

SWORN to before me this 27th day of September, 2017.

Notary Public for South Carolina.
My Commission Expires:

NOTARY PUBLIC
CYNTHIA V. HAYES
SOUTH CAROLINA
EXP. April 21, 2018

GRD20080603699

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2008013485B

ARREST WARRANT NUMBER

K300862

DATE OF ARREST

June 16, 2008

ACTION OF GRAND JURY

Foreperson of Grand Jury *Date:* OCT 06 2008

VERDICT TRUE BILL

Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. 2008GS1007788

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

October Term 2008

08-3841-I

THE STATE

vs.

ARTHUR LEE RIVERS
DOB: [redacted]
B/M

Indictment for

Trafficking Cocaine

FILED

2008 OCT 10 PM 2:39

CLERK OF COURT

BY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on October 6, 2008 the Grand Jurors of Charleston County present upon their oath:

Trafficking Cocaine

That in Charleston County, South Carolina, on or about June 16, 2008, the Defendant, ARTHUR LEE RIVERS, unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: cocaine, in excess of ten grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

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

G. RUTLEDGE DURANT
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
ARTHUR LEE RIVERS)
AKA:)
Race: B Sex: M Age: 32)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
JOHNS ISLAND, SC 294550000)
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS1007788
A/W#: K300862
Date of Offense: 6/16/2008
S.C. Code § : 44-53-0370(e)(2)(a)1
CDR Code #: 0278

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was [X] CONVICTED OF or [X] PLEADS
TO: Trafficking in cocaine, 10--28 g, 3rd Offense

in violation of § 44-53-0370(e)(2)(a)3 of the S.C. Code of Laws, bearing CDR Code # 0147
[ ] NON-VIOLENT [X] VIOLENT [X] SERIOUS [ ] MOST SERIOUS [ ] Mandatory GPS(CSC w/minor 1st or Lewd Act) [ ] §17-25-45

The charge is: [X] As Indicted, [ ] Lesser Included Offense, [ ] Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: [X] Without Negotiations or Recommendation, [ ] Negotiated Sentence, [ ] Recommendation by the State.

ATTEST: _____ 73944 _____ _____ _____
DuRant, G. Rutledge SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the [X] State Department of Corrections, [ ] County Detention Center, for a determinate term of 25 ~~days/months/years~~ or [ ] under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ 50,000.00; provided that upon the service of _____ days/months/years and/or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

[X] CONCURRENT or [ ] CONSECUTIVE to sentence on: _____

[X] The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

[ ] The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

[ ]RESTITUTION: [ ] Deferred [ ] Def. Waives Hearing [ ] Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
[ ] set by SCDPPPS _____
Recipient: _____

*Fine:		$ 50,000.00
§ 14-1-206 (Assessments 107.5 %)		$ 53,750.00
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
§ 47.12 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$100	$ 100.00
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§ 90.7 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3,119.40
TOTAL		$107,099.40

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

[ ] Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Callah
Court Reporter: A. Haffeda
SCCA/217 (06/2009)

PRESIDING JUDGE _____
Judge Code: 21
Sentence Date: 9/17/09

GRD20080603699

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2008013485B

ARREST WARRANT NUMBER

K300863

DATE OF ARREST

June 16, 2008

ACTION OF GRAND JURY

Foreperson of Grand Jury *Date:* OCT 06 2008

VERDICT

TRUE BILL

Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. 2008GS1007795

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

October Term 2008

08-3841-2

FILED

2008 OCT 10 PM 2:39

JULIE J. ARMSTRONG
CLERK OF COURT

BY

THE STATE

vs.

ARTHUR LEE RIVERS
DOB: [redacted]
B/M

Indictment for

Trafficking Cocaine Base

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on October 6, 2008 the Grand Jurors of Charleston County present upon their oath:

Trafficking Cocaine Base

That in Charleston County, South Carolina, on or about June 16, 2008, the Defendant, ARTHUR LEE RIVERS, knowingly did sell, manufacture, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: cocaine base, in excess of ten grams; in violation of 44-53-375 of the South Carolina Code of Laws (1976) as amended.

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

G. RUTLEDGE DURANT
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
)
COUNTY OF Charleston)
STATE VS.) INDICTMENT/CASE#: 2008GS1007795
ARTHUR LEE RIVERS) A/W#: K300863
AKA:) Date of Offense: 6/16/2008
Race: B Sex: M Age: 32) S.C. Code § : 44-53-0375(C)(1)(a)
DOB: [redacted] SS#: [redacted]) CDR Code #: 0450
Address: [redacted])
JOHNS ISLAND, SC 294550000) SENTENCE SHEET
DL#: [redacted] SID#:)

In disposition of the said indictment comes now the Defendant who was [X] CONVICTED OF or [ ] PLEADS
TO: Possession of Cocaine Base/Meth, 3rd offense

in violation of § 44-53-0375 (A) of the S.C. Code of Laws, bearing CDR Code # 3016
[X] NON-VIOLENT [ ] VIOLENT [ ] SERIOUS [ ] MOST SERIOUS [ ] Mandatory GPS(CSC w/minor 1st or Lewd Act) [ ] §17-25-45

The charge is: [ ] As Indicted. [X] Lesser Included Offense. [ ] Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: [X] Without Negotiations or Recommendation. [ ] Negotiated Sentence. [ ] Recommendation by the State.

ATTEST: 73944
DuRan G. Rutledge | SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is committed to the [X] State Department of Corrections, [ ] County Detention Center,
for a determinate term of 15 ~~days/months/years~~ or [ ] under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____: plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

[X] CONCURRENT or [ ] CONSECUTIVE to sentence on: _____
[X] The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
[ ] The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,It is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

[ ] RESTITUTION: [ ] Deferred [ ] Def. Waives Hearing [ ] Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
[ ] set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
§ 47.12 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$100	$ 100.00
§ 50-21-114(DUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§ 90.7 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 6.90
TOTAL		$ 236.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

[ ] Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Callah
Court Reporter: A. Hoffman
PRESIDING JUDGE
Judge Code: 2 1 3 4
Sentence Date: 9/17/15

SCCA/217 (06/2009)

GRD20080603699

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2008013485B

ARREST WARRANT NUMBER

K300864

DATE OF ARREST

June 16, 2008

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: OCT 06 2008

VERDICT

TRUE BILL

Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. 2008GS1007796

The State of South Carolina

County of Charleston

FILED

2008 OCT 10 PM 2:39

CLERK OF COURT

BY_____

COURT OF GENERAL SESSIONS

October Term 2008

08-3841-3

THE STATE

vs.

ARTHUR LEE RIVERS
DOB: [redacted]
B/M

Indictment for

Assault on a Police Officer While Resisting Arrest

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on October 6, 2008 the Grand Jurors of Charleston County present upon their oath:

Assault on a Police Officer While Resisting Arrest

That in Charleston County, South Carolina, on or about June 16, 2008, the Defendant, ARTHUR LEE RIVERS, knowingly and willfully did assault, beat, or wound Officer Blakeley, a law enforcement officer of this State, while resisting the efforts of the officer to make a lawful arrest of the defendant, when heknew or reasonably should have known that Officer Blakeley, was a law enforcement officer, in violation of Section 16-9-320(B), of the South Carolina Code of Laws (1976) as amended.

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

G. RUTLEDGE DURANT
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston)
STATE VS.)
ARTHUR LEE RIVERS)
AKA:)

Race: B Sex: M Age: 32)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
JOHNS ISLAND, SC 294550000)
DL#: [redacted] SID#:)

INDICTMENT/CASE#: 2008GS1007796
A/W#: K300864
Date of Offense: 6/16/2008
S.C. Code § : 16-09-0320(B)
CDR Code #: 0256

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was [X] CONVICTED OF or [ ] PLEADS
TO: Assaulting a Police Officer While Resisting Arrest

in violation of § 16-09-0320(B) of the S.C. Code of Laws, bearing CDR Code # 0256
[X] NON-VIOLENT [ ] VIOLENT [ ] SERIOUS [ ] MOST SERIOUS [ ] Mandatory GPS(CSC w/minor 1st or Lewd Act) [ ] §17-25-45

The charge is: [X] As Indicted. [ ] Lesser Included Offense. [ ] Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: [X] Without Negotiations or Recommendation, [ ] Negotiated Sentence, [ ] Recommendation by the State.

ATTES:

DuRant G. Rutledge	73944			
	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the [X] State Department of Corrections, [ ] County Detention Center,
for a determinate term of 10 ~~days/months/years~~ or [ ] under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and/or payment
of $ _____ : plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

[X] CONCURRENT or [ ] CONSECUTIVE to sentence on: _____ _____
[X] The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
[ ] The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

[ ] RESTITUTION: [ ] Deferred [ ] Def. Waives Hearing [ ] Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
[ ] set by SCDPPPS _____

Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
§ 47.12 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/et	$
§ 90.7 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

Clerk of Court/ Deputy Clerk Called
Court Reporter: A. Heffel
SCCA/217 (06/2009)

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp, _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

[ ] ~~Appointed PD or appointed other counsel.~~ §47.12 requires $500 be paid to Clerk during probation.

PRESIDING JUDGE
Judge Code:
Sentence Date: 9/17/09