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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Aiken County
Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2020-000653

The State, Respondent,

v.

Kelvin Jones, Petitioner.

PETITION FOR REHEARING

On December 8, 2021, this Court Affirmed in Result Petitioner's conviction and sentence. In doing so, this Court altered long-standing preservation rules in an unnecessary manner and completely ignored the fact Petitioner's trial counsel expressly abandoned any objection to the admission of items being admitted at trial which are now contested on appeal.[1] Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the issue not properly preserved based on long-standing preservation requirements, find the issue waived by counsel's repeated statement of "No objection" and the admission of the evidence "without objection", and affirm Petitioner's conviction and sentence.

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[1] The State asserts this Court correctly applied Fourth Amendment law and found probable cause clearly existed to support the issuance of the search warrant of Petitioner's home. In the event this Court does not alter its findings regarding preservation and waiver, the State asks the Court to affirm the conviction and sentence on the merits.

Waiver/Forfeiture

Initially, this Court overlooked the State's argument that any issue related to the admission of evidence related to the search of Petitioner's home was expressly waived or forfeited by Petitioner's trial counsel. As a result, it was unnecessary for this Court to even consider the preservation requirements or to amend long-standing preservation requirements which make trial practice more of a "gotcha game" for trial judges.

It is important to consider the actual colloquy that occurred between the trial court and Petitioner's trial counsel when photos of the search warrant scene, the sling bag worn by Petitioner entering the residence, a gun located during the search warrant, and the drugs were admitted into evidence.

Photos

When the State sought to admit the photos of the house taken during the search warrant the following colloquy took place:

> THE COURT: Counsel, have you stipulated to the admission of any exhibits?
>
> MR. SELLERS: No, sir, we have not had a chance, Your Honor.
>
> THE COURT: Okay. That's fine.
>
> **MS. BENEVENTO: No objections, Your Honor.**
>
> THE COURT: Thank you. You can publish those numbers please.
>
> MR. ROSS: Your Honor?
>
> **THE COURT: She said they are admitted without objection.**

(R.134)(emphasis added).

The Court gave counsel for Petitioner an opportunity to review the photos, and to place any continuing objection on the record. Petitioner's counsel indicated "No, objections, Your Honor." Significantly, the trial court indicated: "She said they are admitted without objection" and neither counsel for Petitioner renewed or mentioned any previous objection. The trial court certainly did not understand the admission was consistent with a prior ruling or was subject to the prior objection because that fact would have been noted as it often is for the record. Instead, the circuit court indicated that Petitioner's counsel allowed them to be admitted without objection. As a result, any objection previously raised to the photos of the house taken during the search warrant was forfeited or waived by Petitioner's counsel and no issue could be raised on appeal.

Sling Bag

When the State sought to admit the sling bag Petitioner carried into the home immediately prior to the search warrant being executed the following colloquy occurred:

> MR. ROSS: Your Honor, at this time, we move No. 20 into evidence.
>
> THE COURT: Any Objection?
>
> **MS. BENEVENTO: No objection, Your Honor.**
>
> **THE COURT: In without objection.**

(R.144)(emphasis added).

Again, the Court gave Petitioner the opportunity to raise any objection, including renewing prior objections. Instead of indicating no further objection or no additional objections or mentioning the prior objections and motions *in limine*, counsel instead indicated "No objection, Your Honor." The trial court took counsel at their word, and again did not believe any prior objection was being continued because he indicated "In without objection" instead of

noting or referencing the objection being pursuant to that raised previously. Counsel for Petitioner did not contest the circuit court's statement or note the prior objection. As a result, any issue related to the admission of the sling bag and discussion of its relevance in the search is not properly raised on appeal because it was forfeited or waived.

Gun

Later, the State sought to admit the gun located at the scene of the search warrant. When the State sought to admit Exhibit 23, the following colloquy occurred:

> MS. BURCHSTEAD: Your Honor, we move State's Exhibit 23 into evidence . . . .
>
> THE COURT: Any objection?
>
> **MR. SELLERS: No, sir, Your Honor.**
>
> **THE COURT: Admitted without objection.**

(R.245)(emphasis added). Again, the circuit court gave counsel every opportunity to renew the objections raised in the pre-trial hearing and to state that Petitioner was continuing his objection throughout the trial to the admission of the various pieces of evidence seized during the search warrant. Instead, counsel again indicated no objection and did not correct the circuit court when he indicated the gun was "[a]dmitted without objection." As a result, Petitioner waived or forfeited any right to raise an issue on appeal related to the admission of the gun into evidence.

Drugs

Finally, the State sought to admit the drugs seized during the search warrant, arguably the most significant piece of evidence related to the motion to suppress. During its admission, the following colloquy took place:

> MR. ROSS: Your Honor, at this point, we would offer State's No. 22 into evidence.

THE COURT: Any objection?

MR. SELLERS: No objection, Your Honor.

THE COURT: Admitted without objection.

(R.286)(emphasis added). Again, just like the evidence before, Petitioner was given an opportunity to express any objection to the admission of the drugs, including as usually happens, renewing any objection raised at the pre-trial hearing. For the fourth time, counsel explicitly states there is "[n]o objection" and did not renew or mention the suppression motion or prior objections. The trial court took counsel at their word that they had no objection and asserted: "Admitted without objection." The court again did not note that it was subject to any prior objection or motion. As a result, Petitioner waived or forfeited his right to complain of the admission of the drugs on appeal.

This Court stated: "Their [preservation rules'] purpose is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned that Jones's counsel continued to object to the denial of his motion to suppress." However, the clear record and the actions of the circuit court completely belie this statement. The circuit court indisputably accepted counsel's statement that Petitioner had no objection to four pieces of evidence. In each case, the circuit court explicitly indicated the evidence was being admitted "without objection." It is incredulous that the circuit court believed and understood that Petitioner was continuing his objection, because if he had, he would not have said "admitted without objection" and, instead, would have noted the prior objection as has been done in many records which have appeared before this Court.

Justice Few, then Chief Judge Few, addressed a very similar situation in an appeal before the South Carolina Court of Appeals. In Burke v. AnMed Health, 393 S.C. 48, 710 S.E.2d 84

(Ct. App. 2011), AnMed moved to exclude evidence of expenses associated with the plaintiff's initial surgery. The trial court ruled *in limine* the evidence admissible. When the plaintiff attempted to enter the medical bills, including medical bills related to the initial surgery: "The trial court asked AnMed if it had any objection to Exhibit 8, and AnMed responded, 'No objection, Your Honor.'" Id. at 54, 710 S.E.2d at 87. Just as in this case where Petitioner moved *in limine* to exclude evidence and then when the State sought to admit that evidence, Petitioner indicated "No objection" multiple times.

In his opinion, then Chief Judge Few referred to State v. Dicapua, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007) and explained: "This court held that the statement 'no objection' constituted 'a waiver of any issue [the defendant] had with the videotape.'" Burke, 393 S.C. at 55, 710 S.E.2d at 88. In Chief Judge Few's opinion, the Court held: "When a party states to the trial court that it has no objection to the introduction of evidence, **even though the party previously made a motion to exclude the evidence,** the issue raised in the previous motion is not preserved for appellate review." This is precisely the holding the State asks this Court to make in this case based on the incredibly similar circumstances and Petitioner's repeated assertion of no objection to the admission of the previously challenged evidence.

Even if the trial court's actions are interpreted as indicating the pre-trial ruling was final, Petitioner's response waived the argument for appellate review. Other states agree. See Livingston v. Greyhound Lines Inc., 208 A.3d 1122, 1136 (Pa. Super. 2019) (citing Jones v. Ott, 191 A.3d 782, 791-92 (Pa. 2018)) ("Statements by a party's counsel that the party has no objection to a ruling constitute an affirmative waiver that bars the party from raising that issue in post-trial motions or on appeal, even if the party had previously fully raised and preserved the issue."); see also, Burns v. Taylor, 589 S.W.3d 614, 625 (Mo. Ct. App. 2019) (finding

affirmatively stating that there was no objection to the admission of an exhibit waived even plain error review); Thomas v. State, 408 S.W.3d 877, 884 (Tex. Crim. App. 2013)("Our case law makes it clear that a statement of 'no objection' when the complained-of evidence is eventually proffered at trial—at least, without more—will signal to the trial court an **unambiguous intent to abandon the claim of error that was earlier preserved for appeal.**") (emphasis added); Maness v. State, 285 S.E.2d 193, 194 (Ga. Ct. App. 1981) ("When defense counsel stated that he had no objection to the introduction of the evidence, he waived any objection which might have been urged including those contained in the motion to suppress.").

The Jones Court explained the rationale very clearly:

> Trial lawyers waive claims, objections, and issues all the time, and do so upon all sorts of rationales. These waivers may occur for countless strategic or tactical reasons, or may be based upon intervening developments in the trial record, or may reflect simple inadvertence or error. **Our trial courts must be free to accept such unequivocal statements of counsel as consequential and binding.** Thus, even if Jones had preserved her jury-charge issue in the first instance, her affirmative statement on the record that she no longer had any "issues with the charge" waived any available post-trial claim. When a trial judge directly asks for any objections, counsel must directly state them, explicitly or by reference to prior recorded objections, on pain of waiver.

Jones v. Ott, 191 A.3d 782, 791–92 (Pa. 2018) (emphasis added).

The trial court should be entitled to accept Petitioner's repeated statement of no objection as a definitive statement that Petitioner was not contesting the admissibility of the evidence. Additionally, the record makes it clear the trial court believed the statements and accepted the statements because for all four pieces of evidence admitted he noted that the admission was without objection. Finding a statement of "no objection" without more constitutes a waiver or forfeiture of the issue is not placing an additional or onerous burden on the defense attorney; it is merely entitling the trial judge to do his or her job and know when they need to consider or

reconsider an issue for possible error. It precludes a trial judge from being reversed based on a "gotcha moment" when he is specifically told there is no objection to the admission of evidence, but later on appeal, an objection is raised to that same evidence.[2] "The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done." Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970). In this case, the circuit court did exactly what Petitioner asked—admitted the evidence without objection. This Court should find Petitioner's response constituted a waiver or forfeiture of his ability to raise on appeal any issue related to the admission of evidence seized during the search warrant.

Preservation

Even if this Court ignores the clear statements of no objection by Petitioner, this Court should find the issues raised not preserved for review on appeal and should issue a new opinion reinstating the long-standing preservation requirements instead of instituting a confusing and arbitrary system of determining when issues are preserved for review on appeal. Petitioner failed to preserve his motion to suppress by failing to raise an objection when the evidence was actually admitted.

Over thirty years ago, this Court stated: "The purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury. A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial." State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988) (internal citations omitted). Even longer, it has been the rule that a contemporaneous objection is

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[2] Additionally, the State notes that ignoring the waiver or forfeiture of the issue will not preclude inevitable review in Post-Conviction Relief when the parties will be able to better establish whether the "no objection" statements were intentional and strategic or if they were inadvertent and error by the trial attorneys.

required in order to preserve an issue for appeal. See State v. Vanderbilt, 287 S.C. 597, 340 S.E.2d 543 (1986) (contemporaneous objection must be made to preserve issue for appellate review); State v. Newton, 274 S.C. 287, 293, 262 S.E.2d 906, 910 (1980) ("Questions which are not presented to or passed upon by the trial judge cannot be raised for the first time on appeal and are consequently waived.").

This Court, in an attempt to clarify and simplify the preservation requirements, has instead created an entirely arbitrary exception to preservation rules that still remain applicable in other cases. The Court makes it clear the rule only applies in criminal cases. Attorneys in civil cases will operate under an entirely different set of rules and will have different responsibilities in order to have their issues heard on appeal than those in criminal law.[3] This Court goes even further and arbitrarily limits its exclusion to pre-trial hearings on constitutional issues.

After this Court's opinion, the law is even less clear for attorneys. They must determine whether the issue raised constitutes a "constitutional issue" or whether it is based on something else.[4] Only if it is a constitutional issue may they remain silent; any other issue they must still raise the contemporaneous objection that has been the requirement since plain error was abolished. The law as it existed was perfectly clear. If you get a pre-trial ruling, you need to renew it—even if it means only saying one or two additional words—in order to continue to raise that issue on appeal. Now the determination will be different in every case based on the type of case and the type of issue raised on appeal.

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[3] As mentioned above, the criminal defendant has a remedy for any failure to properly preserve an issue—Post-Conviction Relief—while the civil party has no similar relief. Yet, this Court's opinion holds the civil attorney to the existing standard while giving the criminal defendant additional recourse, even though recourse already existed in PCR and still exists as the sole recourse for any issue raised which is not of a constitutional nature.

[4] This can be an interesting question with defense counsel frequently citing due process concerns as a basis for almost every motion.

Additionally, this Court indicates: "Under those circumstances, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review." This is merely encouraging a motions practice in criminal cases in which all pre-trial hearings will be handled prior to trial by one judge with a second trial judge unaware of the full basis for the ruling and no need for either counsel to explain. The logical conclusion of the Court's opinion is that counsel does not even have to make the trial court aware of the prior suppression hearing or other hearing and its ruling. Requiring a contemporaneous objection allows the current judge the opportunity to review the evidence presented and determine whether the judge agrees with the ruling of the first judge. Instead, we will have trials being reversed based on something never presented to the trial judge—and of which he may have never even been informed—even though the trial judge is in a clear position to correct any error. This Court's ruling is reinstating sandbagging that was eliminated previously by this Court. See State v. Rocheville, 310 S.C. 20, 24, 425 S.E.2d 32, 35 (1993)("a defendant would be encouraged to purposely refrain from raising the issue . . . in the record. This incentive to 'sandbag' was cited by Torrence to be the primary danger associated with *in favorem vitae*."). The defendant has no reason to raise a potential issue with a pre-trial ruling during trial because either he will get an acquittal, or he will have a built-in reversal from an incorrect pre-trial ruling. Instead, this Court should continue the practice of requiring the contemporaneous objection which allows the second judge to review the ruling based on the evidence presented and any arguments the judge wishes to entertain from counsel, and ultimately, allows the judge to correct an error at trial where it can still be cured prior to the expenditure of the judicial resources of an appeal.

Accordingly, the State asks this Court to find a contemporaneous objection is still required, even in criminal cases and even for constitutional issues, when the defendant obtained a pre-trial *in limine* ruling which was not final and did not meet the very limited exception articulated in State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). As a result, the State asks this Court to continue to affirm Petitioner's conviction and sentence but do so without altering the landscape of preservation rules and by acknowledging the trial court did exactly what was asked of him by admitting the evidence into the record without objection.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the issues raised either not preserved or waived by Petitioner, and affirm Petitioner's conviction and sentence.

Respectfully submitted,

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