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Court Administration Update

Renee Lipson, Esquire

Order of Presentation

- Case Law Update
- Legislative Update
- AG Opinion
- Disposition of UTTs/Warrants and the Right to Counsel
- Questions

Case Law Update

Doe v. State: SC Supreme Court 11/17/17

- The Supreme Court declared that the definitions of "household member" in S.C. Code Ann. § 16-25-10(3)(d) (effective June 4, 2015), of the Domestic Violence Reform Act, and S.C. Code Ann. § 20-4-20(b)(iv) (effective June 4, 2015), of the Protection from Criminal Domestic Violence Act, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as applied to deny an Order of Protection to an unmarried person whose request arises from a same-sex relationship.
- The Court stated, "Therefore, the [trial] court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection."

State v. Johnson: SC Court of Appeals 1/31/18

- One issue was the propriety of permitting a LEO who had been present at the defendant's confession to testify at trial via Skype over the defendant's objection that such testimony violated his 6th Amendment Confrontation Clause rights.
- SC has not specifically addressed the tension between two-way video testimony and a defendant's rights under the Confrontation Clause. The court declined "to adopt a specific test for the admission of two-way closed circuit testimony" but noted that such testimony was admissible if the parties consented.
- In this particular case, however, the court held the admission of the Skype testimony as a matter of convenience and expediency was error, holding "[I]n the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment via in-person confrontation is inappropriate." The court concluded, however, that the error in this case was harmless beyond a reasonable doubt.

Byrd v. United States: US Supreme Court

- The Court unanimously held the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.

Carpenter v. United States: US Supreme Court

- The Government's acquisition of cell-site location information (CSLI) relating to the location of the defendant's cell phone over a four-month period was a search within the meaning of the Fourth Amendment.
- The Court held that "the Government must generally obtain a warrant supported by probable cause before acquiring such records" and that while these records were obtained pursuant to a court order issued under the Stored Communication Act, the standard for such an order under that Act did not satisfy the Fourth Amendment.

Carpenter v. United States

- Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.

State v. Dill: SC Supreme Court

- Reversed Dill's conviction of manufacturing methamphetamine due to an invalid search warrant
- The Supreme Court found the affidavit and oral testimony before the magistrate provided to support a request for a search warrant were insufficient for the magistrate to conclude there was a fair probability that evidence of Dill's manufacturing of methamphetamine would be found at his residence.
- The Supreme Court must give "great deference" to a magistrate's finding of probable cause. However, given the totality of the circumstances, the Court found the magistrate lacked a substantial basis for concluding probable cause existed for a search of Dill's residence. Under the narrow facts of this case, the search warrant was therefore invalid.

State v. Dill

- The affidavit, as written, conveyed only that the informant informed law enforcement he saw "numerous items that are used in the manufacture of methamphetamine." The affidavit does not describe what those items were, nor does the affidavit describe what was being done with the items. It simply relates there were unnamed items that can be used in the manufacture of methamphetamine. Also, the affidavit, as written, supplies no information supporting the initial mere conclusory assertion that there was "an active methamphetamine lab . . . in operation." In particular, the affidavit does not relate who gave the affiant this crucial information. The affiant's oral testimony to the magistrate did not provide any information as to the source of the information that an active lab was in operation; therefore, there was nothing presented to the magistrate to support a finding of probable cause that there was an active lab in operation.

State v. Dill

- As to the informant's credibility, the affidavit noted the confidential informant was working in an undercover capacity with the Laurens County Sheriff's Office. The affiant's oral testimony before the magistrate that the informant was reliable and had been used twice before further bolstered the informant's credibility. Arguably, this information would give the magistrate sufficient basis to conclude that information attributed to the informant was likely true. However, the Court then looked specifically at the information in the affidavit that was attributed to the informant. Applying a common sense reading to the affidavit, the initial conclusory statement that an active methamphetamine lab was present at Dill's residence was not attributed to the informant, and law enforcement did not obtain independent verification of this particular information through surveillance or otherwise. The affidavit and oral testimony supported only a finding by the magistrate that "numerous [but unnamed] items that are used in the manufacturing of methamphetamine" were in Dill's residence. Many ingredients used in the manufacturing of methamphetamine, according to another officer, are common household items.

State v. Brown: SC Supreme Court 6/13/18

- Addressed whether the digital information stored on a cell phone may be abandoned such that its privacy is no longer protected by the Fourth Amendment.
- Under the facts of this case, D had no reasonable expectation of privacy in the info stored on the phone and the Fourth Amendment protections from unreasonable searches and seizures did not apply.

Spalt v. SCDMV: SC Supreme Court 6/27/18

- Addresses the issue of scheduling conflicts in court appearances under Rule 601, SCACR
- Provided guidance in handling scheduling conflicts under Rule 601 and stated that "we recommend attorneys, trial judges, and hearing officers employ the following approach to accommodate the scheduling conflicts addressed by Rule 601:

Spalt v. SCDMV

- First, attorneys and courts should work together as far as practicable to avoid scheduling conflicts in the first place.
- Second, when potential scheduling conflicts do arise, attorneys should notify all affected tribunals reasonably promptly. In instances where the attorney recognizes a reasonable possibility the conflict may resolve itself, the attorney should consider communicating that fact to the tribunal. This information will alert the lower priority tribunal that a hearing may have to be rescheduled, but permit the hearing to go forward as scheduled if the conflict resolves.

Spalt v. SCDMV

- Third, attorneys and tribunals should show flexibility. In some instances, attorneys should consider asking the higher priority tribunal to be flexible. For example, our experience is that family courts hearing matters that will be short in duration (Rule 601(a)(4) or (a)(7)), general sessions courts hearing guilty pleas (Rule 601(a)(5)), common pleas courts hearing motions (Rule 601(a)(8)), and others, are willing to move a scheduled hearing around in a day or a week to accommodate an attorney who is simultaneously called to appear in a lower priority tribunal such as the ALC (Rule 601(a)(9)) or magistrates court (Rule 601(a)(12)) when rescheduling the proceeding in the lower priority tribunal poses problems.
- These suggestions are not intended to be mandatory nor to be exclusive. We are confident attorneys and tribunals will devise additional ways to minimize scheduling problems and accomplish the purposes of Rule 601. In all instances, attorneys and tribunals should attempt to resolve conflicts without significant delays in any proceedings.

Spalt v. SCDMV

- The Court stated remedies to deal with attorneys who do not comply with Rule 601(c) or who otherwise abuse privileges Rule 601(a) provides, including confronting the suspected abuse by contacting the attorney "within the limits of ex parte communications". If a judge "receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct", the judge "should take appropriate actions" as set forth in Canon 3D(2) in Code of Judicial Conduct, Rule 501 SCACR. Finally, "in extreme cases—and only where appropriate under the law—a judicial branch may use its contempt power after notice and an opportunity to be heard."

Legislative Update

S. 131 – Disturbing Schools

- Restructures Disturbing Schools by providing a delineated list of the actions which involve disturbing schools
- Committed by a "person who is not a student" – defined in statute as a person who is not enrolled in, or who is suspended or expelled form, the school or college that the person interferes with, disrupts, or disturbs at the time the interference, disruption, or disturbance occurs
- Penalty: misdemeanor, fine up to $2000 and/or one year imprisonment
- Out of summary court jurisdiction
- Signed and effective 5/17/18

S. 131 – Disturbing Schools

- Section 16-17-420. (A) It is unlawful for a person who is not a student to wilfully interfere with, disrupt, or disturb the normal operations of a school or college in this State by:
  - (1) entering upon school or college grounds or property without the permission of the principal or president in charge;
  - (2) loitering upon or about school or college grounds or property, after notice is given to vacate the grounds or property and after having reasonable opportunity to vacate;
  - (3) initiating a physical assault on, or fighting with, another person on school or college grounds or property;
  - (4) being loud or boisterous on school or college grounds or property after instruction by school or college personnel to refrain from the conduct;
  - (5) threatening physical harm to a student or a school or college employee while on school or college grounds or property; or
  - (6) threatening the use of deadly force on school or college property or involving school or college grounds or property when the person has the present ability, or is reasonably believed to have the present ability, to carry out the threat.
- (B) For the purpose of this section, 'person who is not a student' means a person who is not enrolled in, or who is suspended or expelled from, the school or college that the person interferes with, disrupts, or disturbs at the time the interference, disruption, or disturbance occurs.
- (C) Any person who violates a provision of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand dollars or imprisoned for not more than one year, or both.

S. 131 – Disturbing Schools

- "Section 16-17-425. (A) It is unlawful for a student of a school or college in this State to make threats to take the life of or to inflict bodily harm upon another by using any form of communication whatsoever.
- (B) Nothing contained in this section may be construed to repeal, replace, or preclude application of any other criminal statute."
- CDR code 3554

S. 176 – Aerial Vehicle

- Makes it unlawful to operate an unmanned aerial vehicle within a certain distance of a SCDC facility or local detention facility without written consent and provides penalties for the violation
- Summary court jurisdiction
- Signed and effective 5/17/18

S. 810 – Pawn Transactions

- Amends 40-39-145 regarding "hold orders" – removes existing provisions and provides:
- When an appropriate law enforcement official has probable cause to believe that property in the possession of a pawnbroker is misappropriated or stolen, he shall deliver to the pawnbroker the relevant police report or case number pertaining to the property, and the pawnbroker shall release the property to the appropriate law enforcement agency for use in a criminal investigation or return the property to the identified innocent owner. A pawnbroker who releases the property to law enforcement must be listed as a statutory victim on all transmitted reports and case files. If at the conclusion of the criminal investigation no identifiable innocent owner is found, the property must be returned to the pawnbroker by the appropriate law enforcement agency.

S. 810 – Pawn Transactions

- The release of the property to the custody of the appropriate law enforcement official is not considered a waiver or release of the pawnbroker's property rights or interest in the property. Upon completion of the criminal proceeding involving the property identified as stolen, the court additionally shall order the conveying customer to pay restitution to the pawnbroker in the amount received by the conveying customer for the property.
- When law enforcement seizes property pursuant to subsection (A), they shall hold the seized property for ten business days before releasing it to an innocent owner. During this ten business day period, a pawnbroker may file an action for claim and delivery of the seized property, provided it also shall serve notice of this action to the law enforcement agency. If no notice is received within this ten business day period, the law enforcement agency may release the property to an identified innocent owner. A law enforcement agency that receives notice shall hold the property during the pendency of the action.

S. 810 – Pawn Transactions

- Amends §40-39-160 to provide a pawnbroker who knowingly and intentionally violates the provisions of §40-39-90 (books to be kept open for inspection) is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than thirty days, or both. A violation of the provisions of this section is triable in magistrates or municipal court, as appropriate.
- Signed by Governor 5/17/18 – effective 90 days after approval by Governor

S. 959 – Graffiti Vandalism

- Amends §16-11-770(B) to reduce the penalty for a first offense – misdemeanor and must be fined not more than $1000 or imprisoned not more than 30 days.
- NOTE: Title of statute states it is in summary court, but actual language of statute does not.
- Signed and effective 5/17/18

S. 1041 – Vulnerable Adults

- Adds §37-6-119 to the Code of Laws so as to prohibit a person from soliciting or unlawfully obtaining the money, property, or personal identifying information of a vulnerable adult, to provide a civil remedy for the vulnerable adult, and to provide criminal penalties. Those criminal penalties place these charges in the Court of General Sessions.
- Signed by Governor and effective 5/3/18

H. 3209 – Expungement of Criminal Records

- Allows for a first offense simple possession or PWID drug conviction to be eligible for expungement three years after the date of conviction
- Provides for eligibility for expungement of offenses subsequently repealed when the elements of the offense are consistent with an existing similar offense which is subject to expungement
- Clarifies that these expungement provisions apply retroactively to the offenses delineated

H. 3209 – Expungement of Criminal Records

- Amends §22-5-910 to provide:
  - For the purpose of this section, any number of offenses for crimes carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, for which the individual received sentences at a single sentencing proceeding that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.
  - No person may have the person's record expunged under this section if the person has pending criminal charges of any kind unless the charges have been pending for more than five years; however, this five year time period is tolled for any time the defendant has been under a bench warrant for failure to appear. No person may have the person's records expunged under this section more than once. A person may have the person's record expunged even though the conviction occurred before the effective date of this section.

H. 3209 – Expungement of Criminal Records

- Amends §22-5-920 and §63-19-2050 re: YOA expungements
- Amends §17-22-940 re: payment to the solicitor's office
- Adds §17-22-960. Any employer that employs a worker who has had an expungement shall not, at any time, be subject to any administrative or legal claim or cause of action related to the worker's expunged offense. Except for criminal justice agencies, employers shall not use expunged information adversely against an employee. No information related to an expungement shall be used or introduced as evidence in any administrative or legal proceeding involving negligent hiring, negligent retention, or similar claims.

H. 3209 – Expungement of Criminal Records

- Section 22-5-930. (A) Following a first offense conviction for either simple possession of a controlled substance under Article 3, Chapter 53, Title 44 or unlawful possession of a prescription drug under Section 40-43-86(EE), including those charges for which the person would now be eligible for a conditional discharge pursuant to Section 44-53-450, the defendant after three years from the date of the completion of the sentence, including probation and parole, for this conviction, and including a conviction in magistrates or general sessions court, may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction and any associated bench warrant.
- (B) Following a first offense conviction for possession with intent to distribute a controlled substance under Article 3, Chapter 53, Title 44, the defendant after twenty years from the date of the completion of any sentence, including probation and parole, for a drug conviction or any felony conviction may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction and any associated bench warrant.
- (C) If the defendant had no other convictions, to include out-of-state convictions, during the three-year period as provided in subsection (A) or no other drug conviction or felony conviction during the twenty-year period as provided in subsection (B), the circuit court may issue an order expunging the records including any associated bench warrant.

H. 3209 – Expungement of Criminal Records

- (D) No person may have the person's record expunged under this section if the person has pending criminal charges of any kind unless the charges have been pending for more than five years; however, this five year time period is tolled for any time the defendant has been under a bench warrant for failure to appear. No person may have the person's records expunged under this section more than once. No person may have the person's records expunged pursuant to this section if the person has had a conditional discharge within the five years prior to the date of arrest for the charge sought to be expunged if the charge sought to be expunged is simple possession of marijuana, or within the ten years prior to the date of arrest for the charge sought to be expunged if the charge sought to be expunged is for the simple possession of any other controlled substance or the unlawful possession of a prescription drug under Section 40-43-86(EE). A person may have the person's record expunged even though the conviction occurred before the effective date of this section; however, the expungement will not affect a subsequent enhanced conviction or sentence that occurred before the effective date of this section.
- (E) After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of expungement to ensure that no person takes advantage of the rights of this section more than once. This nonpublic record is not subject to release pursuant to Section 34-11-95, the Freedom of Information Act, or any other provision of law except to those authorized law or court officials who need to know this information in order to prevent the rights afforded by this section from being taken advantage of more than once.
- (F) As used in this section, 'conviction' includes a guilty plea, a nolo contendere, or the forfeiting of bail. For the purpose of this section, any number of offenses for which the individual received sentences at a single sentencing proceeding for offenses that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.

H. 3209 – Expungement of Criminal Records

- All of these expungements would go through the solicitor's office
- Ratified 5/14/18 – effective six months after approval by the Governor
- Vetoed by Governor 5/19/18
- Overruled by Legislature 6/27/18

H. 3329 – Human Trafficking

- Amends §16-3-2010 relating to definitions for the article on trafficking in persons so as to delete the definition of "trafficking in persons"
- Amends §16-3-2020 relating to the offense of trafficking in persons so as to restructure the offense and provide a penalty when the victim is a minor under the age of 18, and to further ensure the protection of minor victims
- Signed and effective 5/17/18

H. 4458 – Littering

- Amends 16-11-700 relating to the dumping of litter on private or public property and its penalties so as to restructure the offenses to ensure cigarette butts and cigarette component litter and deceased animals are included in the purview of the statute and to restructure the penalties.
- Summary courts have jurisdiction to try violations of subsections (A), (B), (C), (D), (E), and (F).
- Signed and effective 5/18/18

H. 4628 – Telemarketing

- Creates the SC Telephone Privacy Protection Act
- Prohibits "spoofing" and other acts
- Section 37-21-80. (A) A person who is aggrieved by a violation of this chapter is entitled to initiate an action to enjoin the violation and to recover actual losses in addition to damages in the amount of one thousand dollars for each violation.
  - (B) If the court finds a wilful violation, the court may, in its discretion, increase the amount of the award to an amount not exceeding five thousand dollars for each violation.
  - (C) Notwithstanding another provision of law, in addition to any damages awarded, the person initiating the action for a violation of this chapter may be awarded reasonable attorneys' fees and court costs.
  - (D) An action for damages, attorneys' fees, and costs brought pursuant to this section may be filed in an appropriate circuit court or municipal or magistrates court so long as the amount claimed does not exceed the jurisdictional limits as applicable. An action brought pursuant to this section that includes a request for an injunction must be filed in an appropriate circuit court.
  - (E) It must be a defense to any action brought under this section that the violation was not intentional and resulted from a bona fide error.
- Signed and effective 5/18/18

H. 4676 – Beginner Permits

- Expands the list of persons who may accompany persons driving with a beginner's permit, conditional license, or special restricted license
- Enrolled for ratification 5/10/18 – effective 11/19/18

Attorney General's Opinion

RE: authority of magistrate and municipal prosecutors and judges to defer prosecution of criminal or traffic cases w/ promises to dismiss upon the completion of requirements of the passage of time

July 3, 2018

- The Chief Justice previously issued an Order dated September 12, 2003 regarding the use of pretrial diversion programs in the summary courts. This Order is still in effect and binding.
- Our opinion of June 3, 1996 dealt only with an academic point of law and was not intended to suggest that local prosecutors may establish pre-trial diversion programs without express statutory authority. Indeed, the opinion pointed out that "no statute has been enacted concerning [such authority at the local level]" and thus caution was urged. Therefore, any suggestion otherwise is herein superseded by this opinion. In short, the earlier opinion may not be used for the purpose of establishing a pre-trial diversion program by local prosecutors in summary courts.

- Moreover, the Chief Justice's Order of September 12, 2003 superseded any suggestion in the 1996 Opinion that local prosecutors could create pre-trial diversion programs. The Chief Justice expressly stated in such Order that "only solicitors of this State are authorized to establish a pretrial intervention program." The Order added that "a magistrate, municipal or circuit judge has no authority to effect a non-criminal disposition of any charge based on the completion of a diversion program without the consent of the solicitor."
- Finally, the Solicitor is the chief prosecutor of his or her circuit and possesses the power to control every case, including all summary court cases. Any directive by the solicitor that a summary court (or circuit court) case or cases may not be subject to pre-trial diversion must be followed. Only the solicitor of the circuit may authorize pre-trial diversion in a particular case whether in circuit court or summary court.

Disposition of UTTs/Warrants and The Right to Counsel

Right to Counsel

Origin

Right to Counsel

U.S. Constitution: Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Made applicable to the states by the 14th Amendment

S.C. Constitution: Article I, Section 14

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

S.C. Code §17-23-60

Every person accused shall, at his trial, be allowed to be heard by counsel, may defend himself and shall have a right to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face.

Rule 602, SCACR: Defense of Indigents

(a) Every person arrested for the commission of a crime within the jurisdiction of the Court of General Sessions, every juvenile to be brought before any court on any charge for which he may be imprisoned, and every person charged with the violation of a probationary sentence shall be taken as soon as practicable before the Clerk of the Court of General Sessions in the county where the charges are preferred, or such other officer or officers as may be designated by the resident judge of the circuit, for the purpose of securing to the accused the right to counsel.

In cases involving criminal charges within the jurisdiction of magistrates' courts, municipal courts, or other courts with like jurisdiction, if a prison sentence is likely to be imposed following any conviction, the presiding judge of the court in which the matter is to be determined shall inform the accused as provided in Rule 2 when the case is called for disposition. The procedures concerning juveniles, as provided in Rule 1 and Rule 2 hereof, shall continue to be followed.

Rule 602, SCACR: Defense of Indigents

(b) The officer before whom the arrested person is taken shall:

- (1) Inform the accused of the charges against him and of the nature of the charges.
- (2) Advise the accused of his right to counsel and of his right to the appointment of counsel by the court, if the accused is financially unable to employ counsel.
- (3) If the accused represents that he is financially unable to employ counsel, take his application for the appointment of counsel or for the services of the Public Defender where the latter is available in the county.

Rule 602, SCACR: Defense of Indigents

Upon examination of a completed Affidavit of Indigency (Form II), the officer designated to make a determination of indigency shall determine if the accused is indigent. If that officer is unable to make this determination, the final determination whether the accused is indigent shall be made by a judge of the court in which the matter is to be heard.

Rule 602, SCACR: Defense of Indigents

For purposes of this rule, a person is indigent if that person is financially unable to employ counsel. In making a determination whether a person is indigent, all factors concerning the person's financial condition should be considered including income, debts, assets and family situation. A presumption that the person is indigent shall be created if the person's net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions required by law.

Case Law

Right to Counsel

Argersinger v. Hamlin, 407 U.S. 25 (1972)

No person may be imprisoned for any offense unless he was represented by counsel at trial or waived the right to counsel

Scott v. Illinois, 440 U.S. 367 (1979)

Under the 6th and 14th amendments to the U.S. Constitution, an indigent defendant cannot be sentenced to term of imprisonment unless State has afforded him right to appointed counsel

Alabama v. Shelton, 535 U.S. 654 (2002)

- Defendant given suspended or probated sentence has constitutional right to counsel
- A suspended sentence that may end up in actual deprivation of a person's liberty may not be imposed unless the defendant was accorded the guiding hand of counsel in the prosecution for the crime charged.

Waiver

Right to Counsel

By affirmative verbal request

Requires Faretta v. California, 422 U.S. 806 (1975) warnings (or a record demonstrating the defendant was aware of disadvantages of proceeding pro se) and a finding by the judge that the waiver was knowing and intelligent. E.g., State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003)

Faretta addresses the right to self-representation when the defendant has voluntarily and intelligently waived his right to counsel.

Must be given in order for summary court convictions to be used in the future for enhancement purposes.

Forfeiture

Requires Faretta v. California, 422 U.S. 806 (1975) warnings (or a record demonstrating the defendant was aware of disadvantages of proceeding pro se) and a finding by the judge that the waiver was knowing and intelligent. E.g., State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003)

Conduct

Waiver of right to counsel may be inferred from the defendant's conduct. State v. Roberson, 382 S.C. 185, 675 S.E.2d 732 (2009).

Roberson makes clear Faretta is irrelevant to waiver by conduct.

Examples where waiver was found

- Failed to appear at trial despite being advised of date at bond hearing, signing a form there containing the date, two Notices sent to last known address, familiarity with criminal court system. State v. Roberson, *supra*.
- Non-indigent defendant found to have waived after urged several times by judge to retain attorney, given additional time and access to a phone, case continued once, and on day of trial said brother was bringing a lawyer but did not name him nor make clear that one had been retained. State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978).

Examples where waiver was found

- Defendant was released on bond requiring his appearance at next call of General Sessions and at every term until case disposed of, appeared at preliminary hearing with his attorney, knew as did his attorney that case was coming up, knew he had a duty to stay in contact with his attorney and the court but failed to do so. State v. Cain, 277 S.C. 210, 284 S.E.2d 779 (1981).

Examples where waiver was found

- Defendant appeared at first day of term at which he was to be tried with a private attorney who withdrew when PD was appointed. Defendant missed two meetings with the PD, who then sent letter stating trial date and need to speak. Defendant scheduled third meeting with PD but failed, without explanation, to appear. When finally met, told PD he was again represented by private attorney, but per phone call with PD private attorney's office said did not represent. Defendant did not appear for trial and private lawyer's office again told solicitor he did not represent defendant, PD relieved after trial judge found defendant waived his right to counsel by his conduct. State v. Pride, 2007-UP-544 (Ct. App. filed Dec. 7, 2007)(original published opinion cited in State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007).

Examples where waiver was found

- Defendant was originally represented by retained counsel and had ample opportunities to meet with him until disagreement over payment, strategies, and "fundamental representation" led defendant to sign a consent to attorney's withdrawal indicating he wished to proceed pro se. He was aware of his duties and responsibilities, maintained contact with the court and the solicitor, filed a number of motions including two requests to produce, and his statements and conduct during preliminary proceedings showed familiarity with the legal system and with his options. However, defendant also engaged in dilatory tactics and necessitated continuances, etc., and ultimately did not appear for trial. State v. Fairey, *supra*.

Examples where waiver was not found

- Defendant was found not to have validly waived his right to counsel by conduct where his appointed counsel was relieved after defendant verbally threatened the lawyer and physically threatened him at the detention center until restrained by guards but defendant had not been warned of the consequences of his actions nor of the dangers of self-representation. State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996) *overruled in part by implication by* State v. Roberson, *supra*.

Examples where waiver was not found

Defendant who appeared for four or five roll calls and sought the appointment of counsel but was deemed not indigent despite claiming to be repaying a child support arrearage, was the subject of two Bench Warrants but was not picked up, whose family was given only 14 hours notice of the trial date, and who was never queried on the record regarding his rights, waiver, or given *Faretta* warnings and lacked a criminal past did not waive right to counsel when he failed to appear for trial. State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003).

Examples where waiver was not found

Counsel was relieved when defendant failed to appear at trial and he was convicted *in absentia*. Defendant appeared pro se next day for opening of sealed sentence, and trial court made no finding whether there had been a valid waiver of right to counsel. Remanded for determination whether there had been a knowing and voluntary waiver of right to counsel. State v. White, 305 S.C. 455, 409 S.E.2d 397 (1991).

Municipal Courts

§14-25-5: Establishment of Municipal Courts

- (a) The council of each municipality in this State may, by ordinance, establish a municipal court, which shall be a part of the unified judicial system of this State, for the trial and determination of all cases within its jurisdiction. The ordinance shall provide for the appointment of one or more full-time or part-time judges and the appointment of a clerk.
- (b) Any municipality establishing a municipal court pursuant to the provisions of this chapter shall provide facilities for the use of judicial officers in conducting trials and hearings and shall provide sufficient clerical and nonjudicial support personnel to assist the municipal judge.
- (c) Any municipality may prosecute any of its cases in any magistrate court in the county in which such municipality is situate upon approval by the governing body of the county.

Municipalities and Indigent Defense

Budget Proviso 61.12: If a municipality has or elects to have an optional municipal court system, it must provide adequate funds for representation of indigents. No public defender shall be appointed in any such court unless the municipality and the office of the circuit public defender have reached an agreement for indigent representation and no funds allocated to the commission shall be used to provide compensation for appointed counsel in municipal courts.

Municipalities and Indigent Defense Options

- Contract with the public defender
- Contract with a private attorney
- Do not sentence any defendants to jail time. Absolutely no imposition of jail sentences.
- Close the municipal court and negotiate an agreement with the county to have municipal cases tried in magistrate court.
- If you do not do one of the above options, the municipality is exposing itself to liability.

Chief Justice Beatty's Memo

Re: Sentencing Unrepresented Defendants to Imprisonment
September 15, 2017

Chief Justice Beatty's Memo – Sep. 15, 2017

It has continually come to my attention that defendants, who are neither represented by counsel nor have waived counsel, are being sentenced to imprisonment. This is a clear violation of the Sixth Amendment right to counsel and numerous opinions of the Supreme Court of the United States. All defendants facing criminal charges in your courts that carry the possibility of imprisonment must be informed of their right to counsel and, if indigent, their right to court-appointed counsel prior to proceeding with trial. Absent a waiver of counsel, or the appointment of counsel for an indigent defendant, summary court judges **shall not** impose a sentence of jail time, and are limited to imposing a sentence of a fine only for those defendants, if convicted. When imposing a fine, consideration should be given to a defendant's ability to pay. If a fine is imposed, an unrepresented defendant should be advised of the amount of the fine and when the fine must be paid. This directive would also apply to those defendants who fail to appear at trial and are tried in their absence.

I am mindful of the constraints that you face in your courts, but these principles of due process to all defendants who come before you cannot be abridged.

Main Points/Takeaways

- Defendants cannot be sentenced to jail time without being appointed, or waiving, counsel.
- Incarceration comes at a high cost for both the county/municipality AND the defendant.
- Defendant's ability to pay MUST be considered when imposing a fine.

Regular Traffic Offenses (NRVC Eligible)

If the Defendant fails to appear on his court date

If citation has been paid in full before the court date

- Case is disposed as Forfeit Bond
- Case is reported to DMV at the end of the day and reported to SLED at the end of the month

If citation has not been paid before court date

- Trial in absentia
  - REMINDER: State must still prove case. Defendant is not to be automatically found guilty solely because he did not come to court.
- If Defendant is found guilty, case is disposed as TIA Guilty Bench Trial
- Case is reported to DMV at the end of the day

If citation has not been paid before court date (cont.)

- Court generated NRVC and mails to Defendant
  - D pays NRVC before court sends the NRVC to DMV
    - Case is reported to SLED at the end of the month
  - If D does not pay, court sends NRVC to DMV and case is reported to SLED at the end of the month.
    - D pays and court gives D copy for DMV
    - D does not pay and DMV suspends license
      - D then pays and court gives D copy for DMV

Field Booking

If the Defendant fails to appear on his court date

Field Booking/Field Arrest

- Defendant is issued ticket and told to come to court on a specific day
- Defendant did not have a bond hearing
- If D does not appear, court can TIA defendant, but the sentence can only be a fine. No jail, no suspended sentence.
  - If court is not willing to do fine only, D MUST be rescheduled for another court date and informed of his right to counsel. No TIA.

Field Booking/Field Arrest Trial in Absentia

- REMINDER: State must still prove case. Defendant is not to be automatically found guilty solely because he did not come to court.
- If D is found guilty, the sentence is a fine only.
- Case is disposed in CMS. Disposition is sent to DMV and SLED
  - D notified of TIA via court Notice of Trial in Absentia
  - Case appears on public index as TIA – fine amount will be visible on public index
  - D can pay online, in person, mail – case is complete

After Field Booking/Field Arrest TIA

- D can request post-trial hearing on the merits of the case, the amount of the fine, and his right to STP.
- Notice of Trial in Absentia will inform D of these rights.
- D must contact the court to arrange a hearing to establish a payment plan.
- D will not be arrested or required to pay anything at this hearing.

STP – Scheduled Time Payments §17-25-350

In any offense carrying a fine or imprisonment, the judge or magistrate hearing the case **shall**, upon a decision of guilty of the accused being determined and it being established that he is indigent at that time, set up a **reasonable** payment schedule for the payment of such fine, taking into consideration the income, dependents and necessities of life of the individual.

§17-25-350 Continued

- Such payments shall be made to the magistrate or clerk of court as the case may be until such fine is paid in full.
- Failure to comply with the payment schedule shall constitute contempt of court; however, imprisonment for contempt may not exceed the amount of time of the original sentence, and where part of the fine has been paid the imprisonment cannot exceed the remaining pro rata portion of the sentence. **NOT APPLICABLE IN THIS SITUATION – THERE IS NO UNDERLYING JAIL TIME.**

§17-25-350 Continued

- No person found to be indigent shall be imprisoned because of inability to pay the fine in full at the time of conviction.
- Entitlement to free counsel shall not be determinative as to defendant's indigency.

Remedy for Nonpayment

- Not imprisonment! No issuance of a bench warrant!
- Refer the matter to the Department of Revenue/Set Off Debt
- Conversion of unpaid criminal fines, surcharges, assessments, costs, fees, and/or restitution to a civil judgment within one year of imposition of sentence -- §17-25-323(C)
  - Applicable for both magistrate and municipal courts
  - Procedure in the memos section of the Bench Book (Memo dated Nov. 18, 2013)

This procedure applies to:

- UTTs where D was not taken into custody and did not have a bond hearing
- Zoning violations
- Animal control
- City/county ordinance summonses
- Courtesy summonses

- If you want to incarcerate a D in one of the above situations, he must be rescheduled and informed of his right to counsel. No TIA unless D has waived counsel by conduct.

Custodial Arrests

If the Defendant fails to appear on his court date

Main Issue

- Defendants cannot be sentenced to jail time without being appointed, or waiving, counsel.
  - This procedure may provide the possibility of the defendant waiving his right to counsel by his conduct.

Bond Hearing

- The bond checklist has been updated
  - After the judge goes through the checklist with the Defendant, he will acknowledge receiving his rights on the checklist (initial/sign).
    - D can refuse to initial/sign, but it would still be considered receiving his right to counsel.
- If indigent, D will be given instructions on how to apply for counsel
- D will be given trial date
- D will be given new form "Information Regarding Your Constitutional Rights"

Trial Date – D Fails to Appear

- Options
  - Reschedule
  - Bench warrant for bond violation (§17-15-40)

Reschedule

- Preferred method
  - Policy underlying the Chief Justice's memo is to keep people out of jail unless their right to counsel is honored or waived
- D is sent the reschedule summons
- The summons informs D of possible TIA and waiver of right to counsel
- Gives D new court date

Bench Warrant for Bond Violation

- To be used in the judge's discretion
  - Consider whether D is danger to the community and/or charge carries mandatory jail sentence.
  - Policy underlying the Chief Justice's memo is to keep people out of jail unless their right to counsel is honored or waived
- Issued for bond violation for failure to appear
- Notify surety if applicable (§38-53-70)
- Bench warrant states D is to be brought before the judge within a reasonable time

Bench Warrants

- BW's sole purpose is to direct law enforcement to bring the D before the issuing court ASAP
- BWs has been amended to no longer contain any disposition/sentence
- BW is not a jail commitment

When D is Picked Up on BW

- If trial court is in session, take D before that judge
  - If not, bring D before bond judge within 24 hours of arrest
- At hearing:
  - Inform D of indigent right to counsel
  - Renew constitutional rights
  - Personally serve D with summons with new trial date
    - Coordinate with trial court to determine trial date – can be done through phone calls or email
  - Release on original bond if possible

Second Failure to Appear

- If D fails to appear a second time, TIA
  - Judge must determine on the record if:
    - D received proper notice of trial's time and place,
    - D was warned trial would proceed in his absence, AND
    - D waived right to counsel by conduct
- REMINDER: State must still prove case. Defendant is not to be automatically found guilty solely because he did not come to court.
- If D is found guilty, seal the sentence
- Case disposed of in CMS. No sentence or money appears on the public index

Sealed Sentence

- Notify D of TIA and sealed sentence by mail. D will have to come in to have sentence unsealed.
  - OR
- Issue BW to have D brought before the court for opening of sealed sentence.

State v. Smith, 276 SC 494, 280 S.E.2d 200 (1981)

- A sealed sentence does not become the judgment of the court until it is opened and read to the defendant.
- The authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion.
- It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.
- The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised.
  - It should be stated on what basis the discretion was exercised.

Notification of Sealed Sentence by Mail

- D calls and sets up date for sentencing hearing
- State and V must be notified of date of hearing
- Judge that opens the sentence is the sentencing judge under the law.
- Sentence is opened/unsealed

When D is Picked Up on BW for Sentencing

- If trial court is in session, take D before that judge
  - If not, bring D before bond judge within 24 hours of arrest -- opening of sentence may be delayed a reasonable amount of time to notify state and allow V to attend court
- Open/unseal sentence
- IMPORTANT: If there is a victim in the case, victims' rights statutes must be complied with. V must be notified and has a right to be present.

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- Notwithstanding the limitations of §17-25-100 and §24-21-410, after a conviction or plea for an offense within a magistrate's jurisdiction the magistrate at the time of sentence may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate, including imposing or suspending up to 100 hours of community service, except where the amount of community service is established otherwise. (Littering/DUI)

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- The magistrate shall not order community service in lieu of a sentence for offenses under Title 50, for offenses under Section 34-11-90, or for an offense of driving under suspension pursuant to Section 56-1-460 when the person's driver's license was suspended pursuant to the provisions of Section 56-5-2990.
- The magistrate must keep records on the community service hours ordered and served for each sentence.

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- However, after a conviction or plea for drawing and uttering a fraudulent check or other instrument in violation of §34-11-60 within the magistrate's jurisdiction, at the time of sentence the magistrate may suspend the imposition or execution of a sentence only upon a showing of satisfactory proof of restitution.
- When a minimum sentence is provided for by statute, except in §34-11-90, the magistrate may not suspend that sentence below the minimum sentence provided, and penalties under Title 50 may not be suspended to an amount less than $25 unless the minimum penalty is a fine of less than that amount.

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- Nothing in this section may be construed to authorize or empower a magistrate to suspend a specific suspension of a right or privilege imposed under a statutory administrative penalty.
- Nothing in this section may be construed to give a magistrate the right to place a person on probation.

§14-25-75 Judge May Suspend Sentences

- Any municipal judge may suspend sentences imposed by him upon such terms and conditions as he deems proper including, without limitation, restitution or public service employment.

After Sentencing

- If after trial, D has a jail sentence suspended upon payment of fine and D does not pay fine, court must perform Bearden v. Georgia, 431 U.S. 660 (1973) analysis.

Bearden v. Georgia, 431 U.S. 660 (1973)

- Courts may not ordinarily incarcerate an individual for nonpayment of a court-ordered legal financial obligation **unless** the court:
  - Holds a hearing;
  - Makes a finding that the failure to pay was willful and not due to an inability to pay; and
  - Considers alternative measures other than imprisonment.
- We recommend issuing a Rule to Show Cause (RTSC must be personally served) to have the defendant brought before the court. At the hearing, the defendant must be given a meaningful opportunity to explain:
  - Whether the amount allegedly owed is incorrect;
  - The reason(s) for any nonpayment, including an inability to pay.

Bearden v. Georgia, 431 U.S. 660 (1973)

- In determining whether the individual has shown an inability to pay, you should consider not only whether his net income is at or below the current Federal Poverty Guidelines, but also whether any of his income is derived from needs-based, means-tested public assistance, whether he has dependents, and the necessities of life of the individual.
- Consideration should also be given to whether the individual is homeless, incarcerated, or resides in a mental health facility, whether there are permanent or temporary limitations on the individual's ability to earn more money, and whether the person owes other court-ordered legal financial obligations.
- Be sensitive to the fact that the individual may have a constitutional right to counsel if a deferred sentence is likely to be imposed or the inability to pay defense is difficult to develop or present.

Bearden v. Georgia, 431 U.S. 660 (1973)

- After hearing the evidence, you should make findings on the record that the individual received adequate prior notice of: the hearing date/time; that failure to pay fines and assessments was the issue; the defense of inability to pay; the opportunity to bring documents and other evidence of inability to pay; and that there was a meaningful opportunity to explain the failure to pay.
- **If** you determine that incarceration must be imposed, you should make findings regarding:
  - The financial resources relied upon to conclude the nonpayment was willful; and/or
  - Why alternative measures are not adequate to meet the State's interest in punishment and deterrence under the particular circumstances.

- Court forms have been updated and are available on sccourts.org and are on CMS

Questions?