CHAPTER 23

Pleading and Trial

**SECTION 17‑23‑10.** Plea of autrefois acquit or convict.

 In any plea of autrefois acquit or autrefois convict it shall be sufficient for any defendant to state that he has been lawfully acquitted or convicted, as the case may be, of the offense charged in the indictment.

HISTORY: 1962 Code Section 17‑501; 1952 Code Section 17‑501; 1942 Code Section 1006; 1932 Code Section 1006; Cr. P. ‘22 Section 92; Cr. C. ‘12 Section 86; Cr. C. ‘02 Section 59; R. S. 58; 1887 (19) 829.

CROSS REFERENCES

Constitutional provision against compelling any person to be witness against himself, see SC Const, Art I, Section 12.

Constitutional rights against double jeopardy, see SC Const, Art I, Section 12.

Privilege against self‑incrimination, see Section 19‑11‑80.

Use of defendant’s testimony in criminal cases, see Section 19‑11‑50.

Library References

Criminal Law 289.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 502 to 504.

United States Supreme Court Annotations

Limitations under double jeopardy clause of Fifth Amendment upon state criminal prosecutions—Supreme Court cases. 25 L Ed 2d 968.

NOTES OF DECISIONS

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1. In general

Acquittal or conviction must be upon charge of same offense to sustain such plea. State v Thurston (1842) 27 SCL 382. State v Cassety (1844) 30 SCL 90. State v Risher (1844) 30 SCL 219. State v Nathan (1851) 39 SCL 219. State v Parish (1855) 42 SCL 322.

Cited in State v. Platt (S.C. 1930) 154 S.C. 1, 151 S.E. 206.

2. Constitutional issues

The provisions of the SC Const of 1895, Art 1, Section 17 (now Art 1, Section 12), differ from the Constitution of 1868, and as to what is “jeopardy” under it, see State v Stephenson (1899) 54 SC 234, 32 SE 305. State v Richardson (1896) 47 SC 166, 25 SE 220. State v M’Kee (1830) 17 SCL 651. State v M’Lemore (1835) 20 SCL 680. State v Briggs (1887) 27 SC 80, 2 SE 854. State v Syphrett (1887) 27 SC 29, 2 SE 624.

Such defense, under the SC Const of 1868, Art 1, Section 18 (now Art 1, Section 14), could not avail except where the defendant has been acquitted or convicted by a jury. State v Shirer (1884) 20 SC 392. State v Wise (1891) 33 SC 582, 12 SE 556.

Acquittal upon insufficient indictment is no bar to second indictment for same offense. State v Ray (1838) 24 SCL 1; State v Jenkins (1884) 20 SC 351. State v Brown (1890) 33 SC 151, 11 SE 641.

Where defendant was convicted on second count but a new trial granted, the whole case stood as though it had never been tried. State v Commissioners of Cross Roads (1836) 22 SCL 273. State v McGee (1899) 55 SC 247, 33 SE 353. State v Stephens (1880) 13 SC 285. State v Hamilton (1908) 80 SC 435, 61 SE 965, reh den 149 NC 353, 63 SE 6. State v Gillis (1906) 73 SC 318, 53 SC 487.

A defendant did not knowingly and intelligently waive his double jeopardy claim by pleading guilty pursuant to a favorable plea bargain where his attorney had erroneously advised him that the charge of assault and battery with intent to kill, which arose from the same incident of criminal domestic violence to which he had already pled guilty and been sentenced, did not provide a claim of double jeopardy. Jivers v. State (S.C. 1991) 304 S.C. 556, 406 S.E.2d 154.

As an indictment for larceny must allege the true name of the owner, an acquittal for stealing the fowls of A cannot be set up as former jeopardy for stealing the fowls of A’s wife. State v. Council (S.C. 1900) 58 S.C. 368, 36 S.E. 663.

In arson, the crime being against possession rather than against the ownership, the subject might be alleged as the property of either the owner or the possessor, and an acquittal would bar new indictment in the name of the other. State v. Copeland (S.C. 1896) 46 S.C. 13, 23 S.E. 980.

**SECTION 17‑23‑20.** Double jeopardy after trial in municipal or magistrates court.

 Whenever a municipal court or a magistrates court shall have acquired jurisdiction by reason of a person committing an act which is alleged to be in violation of a municipal ordinance and which is in violation of the criminal law of this State a conviction or an acquittal by the first court acquiring jurisdiction shall be a complete bar to a trial by another court for the same alleged unlawful act or acts.

HISTORY: 1962 Code Section 17‑502; 1952 Code Section 17‑502; 1942 Code Section 994; 1932 Code Section 994; 1928 (35) 1317.

CROSS REFERENCES

Constitutional rights against double jeopardy, see SC Const, Art I, Section 12.

Library References

Double Jeopardy 132.1, 187.

Westlaw Topic No. 135H.

C.J.S. Criminal Law Sections 308, 311, 318.

LAW REVIEW AND JOURNAL COMMENTARIES

Test expanded for when previous trial for lesser offense invokes double jeopardy bar to later prosecution. 39 S.C. L. Rev. 27, Autumn 1987.

United States Supreme Court Annotations

Habeas corpus, double jeopardy, mistrials, duty of judge to declare mistrial, see Renico v. Lett, 2010, 130 S.Ct. 1855, 559 U.S. 766, 176 L.Ed.2d 678.

Limitations under double jeopardy clause of Fifth Amendment upon state criminal prosecutions—Supreme Court cases. 25 L Ed 2d 968.

NOTES OF DECISIONS

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1. In general

Section 17‑23‑20 bars prosecution for an unlawful act when the defendant was previously tried for the same act in municipal or magistrate court. The statute is generally applied to prevent the prosecution of a greater offense after the defendant has been convicted or acquitted of a lesser offense involving the same unlawful act. State v. Clarke (S.C. 1990) 302 S.C. 423, 396 S.E.2d 827.

This section [Code 1962 Section 17‑502] was designed to modify or abrogate the rule that the same act may constitute two offenses, one against a municipality and one against the State, and that in the absence of some statutory prohibition a defendant may be prosecuted both in the municipal and in the State courts for committing the same unlawful act. State v. Butler (S.C. 1956) 230 S.C. 159, 94 S.E.2d 761. Criminal Law 29(4)

This section [Code 1962 Section 17‑502] prohibits double prosecution for an act constituting two or more offenses that are within the jurisdiction of inferior courts. State v. Butler (S.C. 1956) 230 S.C. 159, 94 S.E.2d 761.

2. Constitutional issues

Following vacation of defendant’s second‑degree murder conviction due to defendant’s breach of plea agreement, state’s prosecution of defendant for first‑degree murder does not violate double jeopardy, where agreement specified that it would be null and void if defendant refused to testify as required by agreement. Ricketts v. Adamson, U.S.Ariz.1987, 107 S.Ct. 2680, 483 U.S. 1, 97 L.Ed.2d 1. Criminal Law 273.1(2); Double Jeopardy 167

Double jeopardy did not bar a prosecution for the unlawful carrying of a pistol after the defendant had been tried for a traffic violation of changing lanes improperly, where a police officer had stopped the defendant’s vehicle and cited him for changing lanes improperly pursuant to Section 56‑5‑1900, and during the stop the officer observed a gun in a holster next to the driver’s seat and the defendant was also charged with unlawfully carrying a pistol pursuant to Section 16‑23‑20, since the offenses share no common elements of proof and did not arise from the same unlawful act. State v. Clarke (S.C. 1990) 302 S.C. 423, 396 S.E.2d 827.

3. Jurisdiction

An acquittal or conviction of a minor offense included in a greater offense would not bar prosecution for the latter, if the court in which acquittal or conviction was had was without jurisdiction to try the accused for the greater offense. State v. Butler (S.C. 1956) 230 S.C. 159, 94 S.E.2d 761.

Since the offense of assault and battery with intent to kill is beyond the jurisdiction of a municipal court, a conviction of violating an ordinance of a town for illegally firing a shotgun does not bar a subsequent prosecution for assault and battery with intent to kill for the same act. State v. Butler (S.C. 1956) 230 S.C. 159, 94 S.E.2d 761.

This section [Code 1962 Section 17‑502] neither expressly nor impliedly deprives municipal courts of jurisdiction to try offenders for violation of ordinance relating to alcoholic liquors. City of Spartanburg v. Gossett (S.C. 1955) 228 S.C. 464, 90 S.E.2d 645.

**SECTION 17‑23‑30.** Permitting second indictment and trial for same offense.

 If a person on his trial be acquitted upon the ground of a variance between the indictment and the proof or upon an exception to the form or substance of the indictment he may be arraigned again on a new indictment and tried and convicted for the same offense, notwithstanding such former acquittal.

HISTORY: 1962 Code Section 17‑503; 1952 Code Section 17‑503; 1942 Code Section 998; 1932 Code Section 998; Cr. P. ‘22 Section 84; Cr. C. ‘12 Section 78; Cr. C. ‘02 Section 51; G. S. 2451; R. S. 50.

CROSS REFERENCES

Constitutional rights against double jeopardy, see SC Const, Art I, Section 12.

Library References

Double Jeopardy 100.1.

Westlaw Topic No. 135H.

C.J.S. Criminal Law Sections 299 to 300.

LAW REVIEW AND JOURNAL COMMENTARIES

The Current Role of the Presumption of Innocence in the Criminal Justice System. 31 S.C. L. Rev. 357.

Evidence of Other Criminal Acts in South Carolina. 28 S.C. L. Rev. 125.

United States Supreme Court Annotations

Limitations under double jeopardy clause of Fifth Amendment upon state criminal prosecutions—Supreme Court cases. 25 L Ed 2d 968.

NOTES OF DECISIONS

In general 1

1. In general

For additional related cases, see State v Jenkins (1884) 20 SC 351; State v Brown (1890) 33 SC 151, 11 SE 641.

Where the trial judge directed a verdict of not guilty in favor of accused because of variance between proof and charge in the indictment, later on, when accused was indicted for the same offense, the accused’s plea of autrefois acquit was properly overruled within the provisions of this section [Code 1962 Section 17‑503]. State v. Gowan (S.C. 1935) 178 S.C. 78, 182 S.E. 159. Double Jeopardy 91(2)

Under this section [Code 1962 Section 17‑503], the holding on appeal from conviction of murder that the indictment without amendment was at fatal variance with proof on essential allegations as to place of death of deceased, and that amendment of indictment was improper, does not entitle defendant to be discharged from custody, but he may be held subject to order of court of general sessions. State v. Platt (S.C. 1930) 154 S.C. 1, 151 S.E. 206.

**SECTION 17‑23‑40.** Nolo contendere in misdemeanor cases.

 The defendant in any misdemeanor case in any of the courts of this State may, with the consent of the court, enter a plea of “nolo contendere” thereto and upon so doing such defendant shall be dealt with in like manner as if he had entered a plea of guilty thereto.

HISTORY: 1962 Code Section 17‑504; 1952 Code Section 17‑504; 1947 (45) 214.

CROSS REFERENCES

What constitutes a misdemeanor, see Section 16‑1‑20.

Library References

Criminal Law 275.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 519 to 530, 532.

NOTES OF DECISIONS

In general 1

1. In general

A plea of nolo contendere is for all practical purposes a plea of guilty, and leaves open for review only the sufficiency of the indictment and waives all other defenses. A court cannot hear testimony after accepting the plea to determine either the fact or degree of the defendant’s guilt because the plea admits all the elements of the offense charged. Any evidence taken after the plea has been accepted is merely to enable the court to determine the extent of the sentence. State v. Munsch (S.C. 1985) 287 S.C. 313, 338 S.E.2d 329.

Application for vacation of plea of nolo contendere to housebreaking was properly denied where, although there is no express provision for such a plea in felony cases, there is also no prohibition of such a plea in felony cases. Kibler v. State (S.C. 1976) 267 S.C. 250, 227 S.E.2d 199.

**SECTION 17‑23‑50.** Traverse of indictment is not a continuance.

 A traverse of any indictment shall not, in any court of criminal jurisdiction in this State, of itself operate to continue the case.

HISTORY: 1962 Code Section 17‑505; 1952 Code Section 17‑505; 1942 Code Section 981; 1932 Code Section 981; Cr. P. ‘22 Section 72; Cr. C. ‘12 Section 69; Cr. C. ‘02 Section 43; G. S. 2635; R. S. 43; 1871 (14) 534.

Library References

Criminal Law 589(1), 603.

Westlaw Topic No. 110.

C.J.S. Criminal Law Section 879.

RESEARCH REFERENCES

Forms

Am. Jur. Pl. & Pr. Forms Continuance Section 1 , Introductory Comments.

Am. Jur. Pl. & Pr. Forms Continuance Section 106 , Introductory Comments.

**SECTION 17‑23‑60.** Accused’s right to counsel, to produce witnesses and proofs, and to confront witnesses.

 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.

HISTORY: 1962 Code Section 17‑506; 1952 Code Section 17‑506; 1942 Code Section 996; 1932 Code Section 996; Cr. P. ‘22 Section 82; Cr. C. ‘12 Section 76; Cr. C. ‘02 Section 49; G. S. 2449; R. S. 48.

CROSS REFERENCES

Constitutional provisions pertaining to rights of accused to be heard by himself or by counsel, to have compulsory process to obtain witnesses and to be confronted with witnesses, see SC Const, Art I, Section 14.

Examination of witness concerning written statement made to a public employee, see Section 19‑1‑80.

Right of indigents to have counsel appointed, see Section 17‑3‑10 et seq.

Library References

Criminal Law 661, 662, 1710.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 339 to 340, 344, 915, 1019, 1486, 1514 to 1541, 1637 to 1640.

C.J.S. Rape Section 10.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Witnesses Section 2, Right of Accused to Compulsory Process.

LAW REVIEW AND JOURNAL COMMENTARIES

The Current Role of the Presumption of Innocence in the Criminal Justice System. 31 S.C. L. Rev. 357.

Dancing the Texas two‑step: What does Rothgery v. Gillespie County mean for the 6th Amendment right to counsel in South Carolina? Carla J. Patat, 60 S.C. L. Rev. 1013 (Summer 2009) .

Reconciling the South Carolina death penalty statute with the 6th Amendment. Thomas W. Traxler, Jr., 60 S.C. L. Rev. 1031 (Summer 2009).

United States Supreme Court Annotations

Accused’s right, under Federal Constitution’s Sixth Amendment, to compulsory process for obtaining witnesses in accused’s favor—Supreme Court cases. 98 L.Ed2d 1074.

Confrontation, admissibility of hearsay statements, indicia of reliability test, prior cross‑examination rule, watershed rule of criminal procedure, retroactivity to cases final on direct review, see Whorton v. Bockting, 2007, 127 S.Ct. 1173, 549 U.S. 406, 167 L.Ed.2d 1.

Confrontation Clause, affidavits, certificates of analysis identifying substance as cocaine, see Melendez‑Diaz v. Massachusetts, U.S.Mass.2009, 129 S.Ct. 2527, 557 U.S. 305, 174 L.Ed.2d 314, on remand 76 Mass.App.Ct. 229, 921 N.E.2d 108.

Confrontation clause, interrogation, emergency, see Michigan v. Bryant, U.S.Mich.2011, 131 S.Ct. 1143, 562 U.S. 344, 179 L.Ed.2d 93.

Confrontation, expert’s testimony that DNA profile in diagnostic lab’s report matched rape defendant’s DNA profile in state database did not violate Confrontation Clause, see Williams v. Illinois, U.S.Ill.2012, 132 S.Ct. 2221, 567 U.S. 50, 183 L.Ed.2d 89, dismissal of post‑conviction relief affirmed 397 Ill.Dec. 196, 41 N.E.3d 607, appeal denied 400 Ill.Dec. 390, 48 N.E.3d 677, appeal pending. Criminal Law 662.40

Counsel, counsel has duty to communicate to defendant formal plea offers that may have favorable terms and conditions, see Missouri v. Frye, U.S.Mo.2012, 132 S.Ct. 1399, 566 U.S. 133, 182 L.Ed.2d 379. Criminal Law 1920

Counsel, effective assistance, death penalty cases, failure to introduce mitigating evidence in order to exclude aggravating rebuttal evidence, prejudice, see Wong v. Belmontes, 2009, 130 S.Ct. 383, 558 U.S. 15, 175 L.Ed.2d 328, rehearing denied 130 S.Ct. 1122, 558 U.S. 1138, 175 L.Ed.2d 931, on remand 608 F.3d 1117.

Counsel, effective assistance, death penalty cases, failure to introduce mitigating evidence of mental health, family background or military service, habeas corpus relief, see Porter v. McCollum, 2009, 130 S.Ct. 447, 558 U.S. 30, 175 L.Ed.2d 398, on remand 593 F.3d 1275.

Counsel, effective assistance, death penalty cases, investigation of mitigating evidence of defendant’s background, see Bobby v. Van Hook, 2009, 130 S.Ct. 13, 175 L.Ed.2d 255.

Counsel, effective assistance, death penalty cases, reliance on American Bar Association standards announced after defendant’s trial, see Bobby v. Van Hook, 2009, 130 S.Ct. 13, 175 L.Ed.2d 255.

Counsel, effective assistance, penalty phase of capital murder trial, closing argument emphasizing gruesome nature of crime, prejudice, see Smith v. Spisak, 2010, 130 S.Ct. 676, 558 U.S. 139, 175 L.Ed.2d 595.

Counsel, fair trial after rejection of plea offer did not preclude prejudice from counsel’s legally incorrect advice during plea negotiations, see Lafler v. Cooper, 2012, 132 S.Ct. 1376, 566 U.S. 156, 182 L.Ed.2d 398. Criminal Law 1920

Counsel, invocation of right, muteness at preliminary hearing, court‑ordered appointment of counsel, subsequent interrogation, see Montejo v. Louisiana, U.S.La.2009, 129 S.Ct. 2079, 556 U.S. 778, 173 L.Ed.2d 955, rehearing denied 130 S.Ct. 23, 557 U.S. 949, 174 L.Ed.2d 606, on remand 40 So.3d 952, 2006‑1807 (La. 5/11/10).

Counsel, right to self‑representation, mentally ill defendants, competency to conduct trial, see Indiana v. Edwards, U.S.Ind.2008, 128 S.Ct. 2379, 554 U.S. 164, 171 L.Ed.2d 345, on remand 902 N.E.2d 821.

Effective assistance, guilty plea resulting in deportation, duty of counsel with regards to deportation risk, see Padilla v. Kentucky, 2010, 130 S.Ct. 1473, 559 U.S. 356, 176 L.Ed.2d 284.

Federal Constitutional right to confront witnesses—Supreme Court cases. 98 L Ed 2d 1115.

Fines, Apprendi rule requiring jury finding of facts increasing maximum punishment applies to criminal fines, see Southern Union Co. v. U.S., 2012, 132 S.Ct. 2344, 567 U.S. 343, 183 L.Ed.2d 318, on remand 942 F.Supp.2d 235. Fines 1.5; Jury 34(6)

Habeas corpus, counsel, effective assistance, see Wood v. Allen, 2010, 130 S.Ct. 841, 558 U.S. 290, 175 L.Ed.2d 738, rehearing denied 130 S.Ct. 1942, 559 U.S. 1032, 176 L.Ed.2d 405.

Habeas corpus, ineffective assistance of counsel in state collateral review proceeding may excuse procedurally defaulted federal habeas claim of ineffective assistance of trial counsel, see Martinez v. Ryan, 2012, 132 S.Ct. 1309, 566 U.S. 1, 182 L.Ed.2d 272, on remand 680 F.3d 1160. Habeas Corpus 406

Miranda warnings, right to counsel, voluntary waiver, effective assistance of counsel, see Berghuis v. Thompkins, 2010, 130 S.Ct. 2250, 560 U.S. 370, 176 L.Ed.2d 1098, rehearing denied 131 S.Ct. 33, 561 U.S. 1046, 177 L.Ed.2d 1123.

Right to counsel, attachment of right, appearance before magistrate judge, prosecutor’s knowledge of appearance, see Rothgery v. Gillespie County, Tex., 2008, 128 S.Ct. 2578, 554 U.S. 191, 171 L.Ed.2d 366, on remand 537 F.3d 716.

Right to counsel, defendant’s incriminating statement to jailhouse informant, admissibility to impeach inconsistent testimony at trial, see Kansas v. Ventris, 2009, 129 S.Ct. 1841, 556 U.S. 586, 173 L.Ed.2d 801, rehearing denied 129 S.Ct. 2853, 557 U.S. 929, 174 L.Ed.2d 570, on remand 289 Kan. 314, 212 P.3d 162.

Right to counsel, effective assistance, plea hearing, appearance via speaker phone, habeas corpus relief, see Wright v. Van Patten, 2008, 128 S.Ct. 743, 552 U.S. 120, 169 L.Ed.2d 583, on remand 281 Fed.Appx. 607, 2008 WL 2415909.

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1. In general

Presence of 4 uniformed, armed state troopers in courtroom, as supplement to state court’s security force, does not violate armed robbery defendant’s constitutional right to fair trial. Holbrook v. Flynn, 1986, 106 S.Ct. 1340, 475 U.S. 560, 89 L.Ed.2d 525.

There is no entitlement in criminal prosecutions to “hybrid representation,” which means representation that is partially pro se and partially by counsel. State v. Cabrera‑Pena (S.C.App. 2002) 350 S.C. 517, 567 S.E.2d 472, rehearing denied, certiorari granted, affirmed in part, remanded in part 361 S.C. 372, 605 S.E.2d 522. Criminal Law 1835

This section [Code 1962 Section 17‑506] and Section 979 of the 1942 Code, containing provisions similar to this section [Code 1962 Section 17‑506], were held to be in conformity with SC Const, Art 1, Section 18 (now Art 1 Section 14). State v. Grant (S.C. 1941) 199 S.C. 412, 19 S.E.2d 638, certiorari denied 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739.

Quoted in State v. Rasor (S.C. 1933) 168 S.C. 221, 167 S.E. 396, 86 A.L.R. 1237.

Cited in State v. Lyle (S.C. 1923) 125 S.C. 406, 118 S.E. 803.

The intrusion into the prisoner’s dock, the counsel’s place, the witness’ chair and the jury’s seats of a large number of persons, a part of a vast assemblage hostile to the prisoners, was calculated to terrify the prisoners, intimidate the witnesses, and overawe the jury, and was an interference with the rights of the accused under this section [Code 1962 Section 17‑506]. State v. Weldon (S.C. 1912) 91 S.C. 29, 74 S.E. 43, Am.Ann.Cas. 1913E,801.

2. Competence of defendant

Singleton standard to determine competency of capital murder defendant is: (1) whether the defendant can understand the nature of the proceedings, the crimes for which he was tried, and the reason for the punishment, and (2) whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1791

Medication may be administered without consent of defendant under compelling circumstances, such as where the medication is necessary to render a defendant competent to stand trial, although such a practice should be sparingly used with prior notice to defense counsel. State v. Law (S.C. 1978) 270 S.C. 664, 244 S.E.2d 302. Criminal Law 633.30

Defendant given psychotropic medication prior to trial was not unable to assist counsel and confront the witnesses against him because the medication changed his demeanor, emotional responses, ability to comprehend and communicate, where evidence demonstrated that the medications enabled the defendant to effectively exercise the rights he asserted he was denied. State v. Law (S.C. 1978) 270 S.C. 664, 244 S.E.2d 302.

Test of whether accused is competent to stand trial is whether, at the time of trial he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ‑ and whether he has a rational as well as a factual understanding of the proceedings against him. State v. Law (S.C. 1978) 270 S.C. 664, 244 S.E.2d 302. Mental Health 432

3. Right to counsel

South Carolina trial judge’s order that defendant in homicide trial not consult with his attorney during 15‑minute recess at conclusion of defendant’s direct testimony does not violate defendant’s right to counsel under federal constitution’s Sixth Amendment. Perry v. Leeke (U.S.S.C. 1989) 109 S.Ct. 594, 488 U.S. 272, 102 L.Ed.2d 624.

The trial court did not err in appointing a public defender to represent a defendant, despite the defendant’s claim that he was not given a reasonable amount of time to complete financial negotiations with private counsel, where the defendant had 5 months to secure private counsel and failed to do so, and the public defender assigned had conducted the original investigation and handled the defendant’s preliminary hearing. State v. Grandy (S.C. 1991) 306 S.C. 224, 411 S.E.2d 207.

Defendant’s right to counsel in sentencing hearing was denied when the trial judge and prosecuting attorney held a conference off the record outside the presence of, and over the objection of defense counsel, and cause would be remanded for resentencing with all proceedings on the record. State v. McGuinn (S.C. 1977) 268 S.C. 112, 232 S.E.2d 229.

4. Effective assistance of counsel—In general

To prove that counsel was ineffective, the applicant must show that counsel’s performance was deficient and that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different; a “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the trial. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1881

In order to prove trial counsel was ineffective, the applicant for post‑conviction relief (PCR) must show counsel’s performance was deficient and the deficient performance prejudiced the defense. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Criminal Law 1519(4)

To establish ineffective assistance of counsel, a postconviction relief (PCR) applicant must establish trial counsel’s performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the applicant to the extent that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769. Criminal Law 1519(3)

Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Matthews v. State (S.C. 2002) 350 S.C. 272, 565 S.E.2d 766. Criminal Law 1884

To prove ineffective assistance of counsel, the applicant must show trial counsel’s performance fell below an objective standard of reasonableness and, but for counsel’s errors, there is a reasonable probability the result at trial would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Matthews v. State (S.C. 2002) 350 S.C. 272, 565 S.E.2d 766. Criminal Law 1881

To establish a claim of ineffective assistance of trial counsel, a post‑conviction relief (PCR) applicant must show that: (1) counsel’s representation fell below an objective standard of reasonableness and, (2) but for counsel’s errors, there is a reasonable probability the result at trial would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Gilchrist v. State (S.C. 2002) 350 S.C. 221, 565 S.E.2d 281. Criminal Law 1519(4)

Mere disagreement between defendant and his counsel as to matter of trial tactics is not sufficient cause, itself, at least after trial has begun, to require trial court to replace or offer to replace court appointed counsel with another attorney at that time. State v. Jones (S.C. 1978) 270 S.C. 587, 243 S.E.2d 461. Criminal Law 1825

5. —— Pleas, effective assistance of counsel

Record did not indicate that defense counsel promised defendant three‑year sentence for guilty plea to malicious injury to personal property, assault and battery of high and aggravated nature (ABHAN), and pointing firearm, but even if counsel had so erroneously informed defendant, any misconception was cured at plea hearing when trial judge informed defendant of maximum penalties for each of his crimes, thoroughly questioned defendant’s understanding of consequences of pleading guilty, asked defendant if he understood that judge had not agreed to give him any particular sentence and if anyone else had promised him anything about his sentence, and defendant indicated he understood possible sentences, and answered that no one had made promises to him about his sentence. Burnett v. State (S.C. 2003) 352 S.C. 589, 576 S.E.2d 144, rehearing denied. Criminal Law 273.1(4)

Petitioner’s claim that counsel was ineffective for improperly advising him that he would be parole eligible was appropriate for post‑conviction relief (PCR), and was not claim that could only be resolved in Department of Corrections’ internal grievance system; petitioner’s understanding about his parole eligibility may have affected validity of the underlying plea, and an evidentiary hearing was warranted to determine if counsel was in fact ineffective. Coats v. State (S.C. 2003) 352 S.C. 500, 575 S.E.2d 557. Criminal Law 1519(8)

The defendant received effective assistance of counsel, even though his counsel had acquiesced in the solicitor’s misinterpretation of the section under which he was charged, where the misinterpretation was later dispelled, and the defendant accepted the plea bargain negotiated by his counsel after being fully informed of the consequences. Richardson v. State (S.C. 1993) 310 S.C. 360, 426 S.E.2d 795.

The defendant was effectively represented by counsel, even though his counsel continued to represent both him and his codefendant after the codefendant pleaded guilty, where (1) counsel had accepted both defendants’ mutual alibi defenses and had viewed their defenses as interdependent and co‑equal, (2) the defendant decided to plead guilty out of fear that the codefendant would testify against him, and (3) no evidence showed that counsel advised the defendant to plead guilty himself in order to obtain a more favorable consideration for the codefendant. Langford v. State (S.C. 1993) 310 S.C. 357, 426 S.E.2d 793.

The defendant was denied effective assistance by her counsel’s failure to distinguish between counterfeit and imitation narcotics offenses in advising her to plead guilty to possession of a counterfeit substance with intent to distribute where the drugs involved were imitation, rather than counterfeit, and it is not a criminal offense to merely possess imitation drugs. Murdock v. State (S.C. 1992) 311 S.C. 16, 426 S.E.2d 740. Criminal Law 1920

A defendant who pled guilty to a charge of voluntary manslaughter did not receive ineffective assistance of counsel, based on his counsel’s failure to advise him of the defense of accident, where the defendant (1) had entered the home of his victim armed with a weapon he intended to use to scare the victim, (2) shot into the wall to scare the victim, who was sleeping, and (3) shot the victim, who had awakened and grabbed for the gun, which went off during the struggle. Arnette v. State (S.C. 1992) 306 S.C. 556, 413 S.E.2d 803.

A defendant was denied the effective assistance of counsel where he negotiated a plea on a single forgery charge without his counsel’s participation and accepted an offer of a 4‑year cap on sentencing in exchange for his full cooperation, then was sentenced to 15 years on further charges based on statements he made, and his counsel told him that he had no legal recourse; based on the promise of leniency, the defendant’s statements were not voluntary, and thus his counsel erred by informing him that he had no recourse. Shirley v. State (S.C. 1991) 306 S.C. 241, 411 S.E.2d 215.

A defendant did not receive effective assistance of counsel when he pled guilty to 2 counts of second degree burglary and 2 counts of forgery where (1) the forgery warrants were sworn out 2 years before they were executed and defense counsel failed to discover that the prosecuting witness no longer wished to prosecute the charges; and (2) counsel failed to investigate the possibility of a double jeopardy defense in connection with one of the 2 burglary charges, based on the defendant’s prior conviction for an incident occurring at the same time and place as the burglary. Cobbs v. State (S.C. 1991) 305 S.C. 299, 408 S.E.2d 223.

A defendant was denied effective assistance of counsel when he was advised by his attorney to plead guilty to a charge of assault and battery with intent to kill arising from the same incident of criminal domestic violence to which he had already pled guilty and been sentenced, since the defendant had a viable double jeopardy claim and his defense was prejudiced. Jivers v. State (S.C. 1991) 304 S.C. 556, 406 S.E.2d 154. Criminal Law 1918

A defendant was denied effective assistance of counsel where his attorney advised him that he faced 50 to 100 years in prison if all 4 indictments against him stood, though the indictments contained overlapping and greater and lesser charges so that the defendant’s maximum sentencing exposure would have been a 7‑ to 25‑year sentence and a $50,000 fine for one count of trafficking in cocaine and a 25‑year sentence and a $50,000 fine for a second count of trafficking in cocaine, and the defendant testified that he would not have pled guilty had his attorney not misinformed him that he would face a potential life sentence if he proceeded to trial. Alexander v. State (S.C. 1991) 303 S.C. 539, 402 S.E.2d 484.

A defendant’s counsel was ineffective in advising the defendant to plead “guilty but mentally ill” to murder where counsel was fully aware that the State’s own psychiatrist had diagnosed the defendant as legally insane at the time of the crime, and failed to adequately apprise the defendant of the M’Naghten defense which, if established, would have relieved her of criminal responsibility. Davenport v. State (S.C. 1990) 301 S.C. 39, 389 S.E.2d 649. Criminal Law 1912

6. —— Trial strategy, effective assistance of counsel

Trial counsel was not required to obtain neuropsychological testing and neuroimaging to determine whether defendant suffered from mental impairments as part of death penalty defense in murder trial; counsel was required simply to investigate all reasonable mitigation evidence, there was no specific basis to argue that counsel should have realized further testing was warranted, and counsel’s investigation was not unreasonable. Stone v. State (S.C. 2017) 419 S.C. 370, 798 S.E.2d 561. Criminal Law 1960

Defense counsel cannot assert trial strategy as a defense to ineffective assistance claim for failure to object to comments which constitute an error of law and are inherently prejudicial. Matthews v. State (S.C. 2002) 350 S.C. 272, 565 S.E.2d 766. Criminal Law 1944

In a prosecution for murder, the defendant was not denied effective assistance by his counsel’s failure to present evidence that the defendant and victim had known each other and been romantically involved, in order to rebut the charge of kidnapping, where he never informed his counsel of the witnesses whose testimony he claimed corroborated his story; moreover, since the PCR judge found the witnesses’ testimony to be incredible, there was no evidence that the allegedly deficient performance would have prejudiced his defense. Drayton v. Evatt (S.C. 1993) 312 S.C. 4, 430 S.E.2d 517, rehearing denied, certiorari denied 114 S.Ct. 607, 510 U.S. 1014, 126 L.Ed.2d 572, rehearing denied 114 S.Ct. 1142, 510 U.S. 1159, 127 L.Ed.2d 451.

The defendant in a murder prosecution was denied effective assistance where his counsel failed to object to a malice charge which effectively shifted the burden of proof from the state to the defendant; however, such error was harmless and the defendant was not prejudiced where there was uncontradicted evidence of malice aforethought. Plyler v. State (S.C. 1992) 309 S.C. 408, 424 S.E.2d 477. Criminal Law 1948

The defendant was denied effective assistance of counsel by his counsel’s successful motion to dismiss a charge of receiving stolen goods where the removal of the non‑violent charge left the jury with the alternatives of convicting him of the violent crimes of robbery and kidnapping also charged and which were only supported by circumstantial evidence, or of acquitting him altogether. Banshee v. State (S.C. 1992) 308 S.C. 369, 418 S.E.2d 313, rehearing denied.

A probationer was denied the effective assistance of counsel where, at his probation revocation hearing, he flatly asserted that he was unable to pay the restitution which had been ordered because he was unemployed, yet the court revoked his probation without a judicial determination as to whether his failure to comply with the terms of his probation was willful. Nichols v. State (S.C. 1992) 308 S.C. 334, 417 S.E.2d 860.

The defendant failed to show that he was prejudiced by his counsel’s failure to request a mental examination, which might have formed the basis of an insanity defense or a determination that he was not competent to stand trial, where no evidence suggested that he was insane under the law at the time of the crime. Jeter v. State (S.C. 1992) 308 S.C. 230, 417 S.E.2d 594. Criminal Law 1912

Trial counsel’s failure to move for a directed verdict, on the ground that the evidence did not establish the corpus delicti of murder independent of the defendant’s extra‑judicial confession, did not constitute ineffective assistance of counsel where the decapitated body of the victim was found in a wooded area, the head was found 10 to 15 feet from the body with the lower jaw and neck area missing, and the forensic pathologist (1) could not determine a cause of death, (2) found no evidence of foul play, but (3) could not rule out strangulation; thus, the corpus delicti of murder was sufficiently established by circumstantial evidence. Brown v. State (S.C. 1992) 307 S.C. 465, 415 S.E.2d 811.

A defendant charged with distribution of cocaine received ineffective assistance of counsel when his counsel informed him that if he were to testify he could be cross‑examined on his 2 prior convictions where the convictions were for (1) simple possession of marijuana, which is not a crime of moral turpitude, and (2) assault and battery with intent to kill, which occurred 15 years earlier and might have been excluded for remoteness; counsel’s failure to seek a ruling on the admissibility of these offenses for impeachment resulted in the defendant’s choosing not to testify. Horton v. State (S.C. 1991) 306 S.C. 252, 411 S.E.2d 223. Criminal Law 1936

A defense counsel’s failure to object to the solicitor’s references to the defendant by his nickname, “Doc Holliday,” did not constitute ineffective assistance of counsel where the defendant’s counsel testified that he did not contemplate objecting to the use of the nickname since the defendant was well known locally by that name and no negative connotations arose at trial from use of the nickname, and thus counsel’s action was based upon informed professional strategy. Additionally, the trial counsel’s failure to insure the presence of an alibi witness did not constitute deficient performance nor did it prejudice the defendant where the trial counsel interviewed the witness a day or 2 before the trial, the witness appeared to be cooperative and therefore was not subpoenaed at that time, the trial was called suddenly, the trial counsel was unable to locate the witness in order to serve the subpoena, and another witness was located to testify to approximately the same evidence. Cherry v. State (S.C. 1989) 300 S.C. 115, 386 S.E.2d 624.

Whether charge during trial of ineffective assistance of counsel due to alleged lack of attorney‑client communication warrants immediate evidentiary hearing is matter concerning course and conduct of trial left largely to discretion of trial judge, and Supreme Court will not interfere unless it clearly appears rights of complaining party were prejudiced. State v. Allen (S.C. 1977) 269 S.C. 233, 237 S.E.2d 64. Criminal Law 1152.19(4); Criminal Law 1826

7. —— Evidence, effective assistance of counsel

In a prosecution for murder, the defendant was not denied effective assistance by his counsel’s failure to present evidence of his future adaptability to prison where an attempt to develop such evidence would have opened the door for the prosecution to review his earlier misconduct in prison. Drayton v. Evatt (S.C. 1993) 312 S.C. 4, 430 S.E.2d 517, rehearing denied, certiorari denied 114 S.Ct. 607, 510 U.S. 1014, 126 L.Ed.2d 572, rehearing denied 114 S.Ct. 1142, 510 U.S. 1159, 127 L.Ed.2d 451.

The defendant was not denied effective assistance by his counsel’s failure to interview the victim of the crimes with which he was charged, even though the victim later gave exculpatory testimony on behalf of the defendant at his postconviction relief hearing, where (1) such testimony was made years after the original incident, (2) the victim impact statement gave no indication of the exculpatory testimony, and (3) no proof was offered that the victim would have given the exculpatory information to the attorney at the time. Thornes v. State (S.C. 1993) 310 S.C. 306, 426 S.E.2d 764.

A trial counsel’s failure to call witnesses whose testimony could have supported his client’s defense did not constitute ineffective assistance where the counsel testified that he chose not to use these witnesses because they vacillated when offering their recollections to him, and where he did call the only witness whom he believed to be credible and supportive of the defense strategy. Stokes v. State (S.C. 1992) 308 S.C. 546, 419 S.E.2d 778, rehearing denied. Criminal Law 1924

The defendant was not denied effective assistance by her attorney’s failure to present expert witnesses to testify that her behavior was consistent with a claim of self‑defense and defense of others, despite her claim that she was afraid that the victim (a schizophrenic) would harm her or their family, where her own testimony showed that she was not in “imminent danger” when she shot him in the back 13 times as he relieved himself by the side of the road. Tate v. State (S.C. 1992) 308 S.C. 163, 417 S.E.2d 553. Criminal Law 1931

The defendant was denied effective assistance by his counsel’s failure to call, at trial, emergency medical personnel who would have testified that the victim (the defendant’s neighbor) had stated immediately after her attack that she did not know her assailant, since the victim was the sole witness to the attack and her credibility and identification of the defendant as her attacker were crucial to the state’s case. Thomas v. State (S.C. 1992) 308 S.C. 123, 417 S.E.2d 531. Criminal Law 1924

The defendant was not denied effective assistance by his counsel’s failure to make a motion in limine to determine whether solicitation was a crime of moral turpitude, since the PCR court later determined that solicitation was such a crime and thus a motion in limine would have been futile. Whitehead v. State (S.C. 1992) 308 S.C. 119, 417 S.E.2d 529. Criminal Law 1927

The defendant was not denied effective assistance by her counsel’s failure to present evidence of the complex psychological phenomenon known as “battered woman’s syndrome” in her trial for the murder of her husband while he slept, since the Supreme Court did not recognize the syndrome as relevant to a claim of self‑defense until 6 years after her trial. Robinson v. State (S.C. 1992) 308 S.C. 74, 417 S.E.2d 88, rehearing denied. Criminal Law 1922

A defendant was not denied the effective assistance of counsel by his counsel’s failure to cross‑examine a state’s witness on the terms of the witness’ plea agreement where the agreement involved the witness’ participation in the subject crime and was based on erroneous advice, but the defendant contended that such advice was the witness’ inducement for testimony; reasonably prudent counsel could not have known of the erroneous advice, and the record contained abundant evidence of the defendant’s guilt. Kirkpatrick v. State (S.C. 1991) 306 S.C. 359, 412 S.E.2d 389.

A defense counsel was not ineffective for failing to object to the introduction of a syringe found in his client’s pocket pursuant to a search at the police station where the syringe had not been disclosed by the solicitor in pretrial discovery as required, the defendant was charged with possession of crack cocaine with intent to distribute, and the defense counsel purposely failed to object to the introduction of the syringe in an attempt to show that, since a syringe was inconsistent with the use of crack cocaine, the crack cocaine was not the defendant’s. Fernandez v. State (S.C. 1991) 306 S.C. 264, 411 S.E.2d 426.

A defendant on trial for conspiracy, kidnapping, and criminal sexual conduct was not denied the effective assistance of counsel by his counsel’s failure to procure an expert on DNA and secretion analyses where the victim, who was being driven home by the defendant, was assaulted by the defendant and the co‑defendant, and at trial the co‑defendant was linked to the crime by DNA and secretion analyses, but DNA and secretion analyses were not used to link the defendant to the crime and the defendant’s counsel vigorously cross‑examined the state’s expert witness. Frasier v. State (S.C. 1991) 306 S.C. 158, 410 S.E.2d 572.

A defendant convicted of first‑degree criminal assault was denied the effective assistance of counsel where 3 witnesses mentioned the defendant’s prior criminal incarceration without his counsel requesting a curative instruction, a fourth witness mentioned the incarceration despite being warned not to, but her answer was merely stricken and counsel did not request a curative instruction, and no exceptions to the rule against the admission of other bad acts existed such that his testimony would have been admissible; however, the evidence of the defendant’s guilt was overwhelming, and thus there was no reasonable probability that the result of the trial would have been different had counsel’s performance not been deficient. Geter v. State (S.C. 1991) 305 S.C. 365, 409 S.E.2d 344.

In the absence of findings of fact, it was improper for the post conviction relief court (PCR) to deny a defendant’s motion for relief on his allegation of ineffective assistance of counsel where the defendant, who was convicted of 3 counts of assaulting a police officer and one count of resisting arrest, alleged that his trial counsel was ineffective in failing to object to the state’s numerous references to his criminal record and prior bad acts, and by failing to request a limiting instruction; Section 17‑27‑80 requires that the PCR court make specific findings of fact and conclusions of law. McCray v. State (S.C. 1991) 305 S.C. 329, 408 S.E.2d 241.

A defendant charged with receiving stolen goods was denied effective assistance of counsel where he had sought to suppress his statement that he had helped some friends pick up 20 VCR’s hidden in some bushes and had been given 3 in exchange for his help, and at the suppression hearing his counsel failed to pursue the issue of whether the statement was rendered involuntary by virtue of alleged threats made by the arresting officer, that if the defendant refused to give information about the VCR’s the officer would “keep putting charges on him,” even though the officer, while denying the threats, admitted that the defendant refused to sign an acknowledgment that his statement was voluntary. Dupree v. State (S.C. 1991) 305 S.C. 285, 408 S.E.2d 215.

A defendant charged with criminal sexual conduct was deprived of the effective assistance of counsel where his counsel failed to subpoena a witness who would have testified that he saw the defendant leaving a lounge 15 minutes prior to the conclusion of the victim’s rape, counsel admitted that he would have called this witness if the witness had been present in the courtroom on the day of trial, and further admitted that “one more piece of evidence” might have made a difference in the verdict; thus, counsel’s representation fell below the objective standard of reasonableness. Martinez v. State (S.C. 1991) 304 S.C. 39, 403 S.E.2d 113. Criminal Law 1923

Although the performance of a murder defendant’s trial attorney was deficient in that he failed to object to the solicitor’s line of questioning improperly forcing the defendant to attack the veracity of a codefendant who had testified to the defendant’s knowledge of the codefendant’s intention to kill the victim, the defendant was not denied effective assistance of counsel because he was not unfairly prejudiced by the attorney’s performance, where the defendant admitted carrying a gun for “protection” which was evidence that the defendant expected a potentially violent situation, and the defendant’s own testimony indicated that he was aware that the codefendant was looking for the victim, that the codefendant as well as the defendant was armed, and that the victim would at least be “roughed up.” Thrift v. State (S.C. 1990) 302 S.C. 535, 397 S.E.2d 523.

A private individual’s search of the area under a lamp in her sister’s residence and her retrieval of a small amount of LSD did not violate constitutional restrictions, even though SLED agents had directed her to retrieve the LSD from under the lamp, where she had previously seen what appeared to be LSD under the lamp while visiting her sister and had contacted SLED to inform them of what she had seen. Thus, in the ensuing prosecution, the defendant’s counsel was not ineffective in failing to object to the admissibility of the seized contraband. Peters v. State (S.C. 1990) 302 S.C. 59, 393 S.E.2d 387.

8. —— Instructions, effective assistance of counsel

Record did not support judge’s finding, in postconviction relief proceeding involving claim of ineffective assistance of trial counsel in murder trial, that trial counsel had noted a continuing objection to jury instruction on malice on ground that the instruction unconstitutionally shifted burden of proof, although trial counsel had indicated after the erroneous instruction was given a second time that an objection had been made; only objection made by trial counsel prior to the instruction being given was one of “undue emphasis,” and counsel never objected to instruction on ground it shifted burden of proof. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1519(12)

For purposes of establishing ineffective assistance of counsel claim, defendant’s trial counsel was deficient, in prosecution for murder and assault and battery with intent to kill (ABIK), in failing to object to jury instructions that unconstitutionally shifted the burden of proof by stating that malice was presumed from use of a deadly weapon; counsel only objected to instructions on ground of “undue emphasis,” and did not object on ground that instructions shifted the burden of proof. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

There was reasonable likelihood that jury instructions that unconstitutionally shifted burden of proof, by stating that malice was presumed from use of deadly weapon, contributed to verdict finding defendant guilty of assault and battery with intent to kill (ABIK), rather than lesser included offense of assault and battery of a high and aggravated nature (ABHAN), and thus trial counsel’s failure to object to the instructions constituted ineffective assistance, although jury was instructed that state had burden of proving guilt beyond a reasonable doubt and that inference of malice was question for jury; evidence of malice with respect to assault charge was not overwhelming. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

Jury instructions that unconstitutionally shifted burden of proof by stating that malice was presumed from use of deadly weapon did not contribute to verdict finding defendant guilty of murder, and thus trial counsel’s failure to object to the instructions did not prejudice defendant as required for ineffective assistance of counsel claim, although jury was also instructed on voluntary manslaughter, and defendant indicated regret over killing victim; defendant acted without just cause or excuse in shooting victim when she refused to give him money and threatened him with a pair of scissors, and all of evidence showed that defendant acted with malice. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

Counsel performed deficiently by failing to object to instruction on assault and battery of a high and aggravated nature (ABHAN) as lesser included offense of assault and battery with intent to kill (ABIK), where the instruction, which suggested that legal provocation or absence of malice was an element of ABHAN, was erroneous under a Court of Appeals decision which had been published, and for which the Court of Appeals had denied the petition for rehearing, three to four months before defendant’s trial, though the Court of Appeals decision was not affirmed by the Supreme Court before defendant’s trial was completed. Hill v. State (S.C. 2002) 350 S.C. 465, 567 S.E.2d 847, rehearing denied. Criminal Law 1950

Trial counsels’ failure to object to trial judge’s response to jury’s question concerning result if jury failed to reach verdict on murder charges was deficient performance, for purposes of establishing ineffective assistance of trial counsel, where trial counsel could have anticipated that jury’s failure to reach verdict on any count in indictment would necessitate new trial only on particular count, not new trial of entire case, without objection from counsel, trial judge instructed jury that failure to reach verdict on murder charges would require new trial of entire case, and trial counsel offered no explanation why they failed to object, which precluded finding that lack of objection was trial strategy. Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769. Criminal Law 1951

There was reasonable probability that outcome of trial would have been different, but for trial counsels’ failure to object to improper jury instruction, that if jury did not reach verdict on murder charges, all murder and non‑murder charges would have to be retried, which established prejudice necessary to establish ineffective assistance of trial counsel, and which mandated retrial on murder charge, where jury may have convicted defendant of one count of murder and acquitted him of other count to avoid retrial of non‑murder charges as trial judge had instructed, and nothing distinguished defendant’s involvement, particularly intent, in murder for which he was convicted from murder for which he was acquitted. Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769. Criminal Law 1948

The defendant was denied effective assistance of counsel by his counsel’s rejection of the trial judge’s offer of an alibi charge where alibi was the sole theory of the defense and, based on the prosecutor’s summation remarks, the absence of the charge gave rise to a conclusion by the jury that it was impermissible for them to consider alibi as a defense. Riddle v. State (S.C. 1992) 308 S.C. 361, 418 S.E.2d 308, rehearing denied.

A defendant was not denied the effective assistance of counsel in a trial for murder where his counsel failed to request jury instructions on the defense of others and involuntary manslaughter, but the evidence showed that (1) the victim had swung a knife at the defendant, not at his brother standing nearby, and (2) the defendant then fired a gun at the victim, which was an act naturally tending to cause death or bodily harm. Bozeman v. State (S.C. 1992) 307 S.C. 172, 414 S.E.2d 144.

The failure of defense counsel to request self‑defense charges on ‘appearances’ and ‘retreat’ during a trial for voluntary manslaughter constituted ineffective assistance where the defendant had visited with the victim and both drank until intoxicated, the victim pulled out a gun during a dispute about the defendant’s son and threw the gun down pointing at the son, the defendant gave the gun back to the victim and started to leave, the defendant heard a gun shot, turned back, told his son to run, and tried to take the gun from the victim, whereupon the gun fired and the victim was shot. Battle v. State (S.C. 1991) 305 S.C. 460, 409 S.E.2d 400.

A defendant was denied effective assistance by his counsel, who failed to inform him that if he went to trial on a charge of grand larceny he could request a charge on the lesser offense of the use of a vehicle without permission, where the defendant, while intoxicated, had taken a car which had been left for servicing in his employer’s lot, and had totalled the vehicle, but had asserted at sentencing that he had merely been joyriding and planned to return the vehicle, and was sentenced to 10 years imprisonment on the charge of grand larceny of a vehicle. Kerrigan v. State (S.C. 1991) 304 S.C. 561, 406 S.E.2d 160.

In a prosecution for murder, the defendant was deprived of the effective assistance of counsel where the defense counsel failed to object to a mandatory presumption of malice charge to the jury; although such a charge is subject to a harmless error analysis, such an analysis is inappropriate where there is evidence from which the jury could find the defendant guilty of the lesser offense of voluntary manslaughter, since a charge creating a mandatory presumption of malice precludes manslaughter. The defense counsel was also ineffective in failing to request a charge instructing the jury that “if they had a reasonable doubt as to whether the appellant was guilty of murder or manslaughter, it was their duty to resolve that doubt in his favor, and find him guilty of the lesser offense,” where the offenses of murder and manslaughter were submitted to the jury. Carter v. State (S.C. 1990) 301 S.C. 396, 392 S.E.2d 184.

In a manslaughter prosecution, the defense counsel’s failure to object to the trial judge’s jury charge regarding a mandatory presumption of intent from the doing of an unlawful act, which was clearly erroneous as a burden‑shifting instruction on an element of the crime, constituted ineffective assistance of counsel where the critical dispute at trial was whether the defendant had the requisite intent to kill someone when he pulled a gun from his pocket, such that he should be convicted of voluntary rather than involuntary manslaughter. High v. State (S.C. 1989) 300 S.C. 88, 386 S.E.2d 463.

9. —— Statements of counsel, effective assistance of counsel

Defense counsel rendered ineffective assistance by failing to object to solicitor’s comments vouching for credibility of state’s witness during summation, although counsel claimed he did not object because he did not want trial judge to scold him in front of jury or give prosecution any more time to make their closing and trial judge had admonished counsel for wrongfully objecting during solicitor’s summation and granted additional time to solicitor’s closing, as counsel’s failure to object prejudiced his client in that jury was faced with a confusing, mass trial characterized by improperly admitted evidence, and evidence against defendant was not overwhelming. Matthews v. State (S.C. 2002) 350 S.C. 272, 565 S.E.2d 766. Criminal Law 1944

Prejudice clearly flowed from counsel’s erroneous failure to object to state’s opening statement vouching for credibility of witness’s credibility, warranting reversal of conviction for attempted robbery, as witness was state’s key witness and his credibility was crucial to government’s case, especially as defendant essentially presented a “mere presence” defense, such that believing witness was only way jury could convict defendant, and witness’s credibility was questionable in light of his admitted drug use at time of crime, his prior convictions, and his interest in providing favorable testimony for state to obtain leniency in his own case. Gilchrist v. State (S.C. 2002) 350 S.C. 221, 565 S.E.2d 281. Criminal Law 1166.10(1); Criminal Law 1944

The defendant was denied effective assistance where his trial counsel failed to object to the solicitor’s examination and closing argument comments which drew attention to the defendant’s refusal to permit a warrantless search of his automobile since the state cannot, through either evidence or argument, comment on an accused’s exercise of his constitutional rights. Simmons v. State (S.C. 1992) 308 S.C. 481, 419 S.E.2d 225. Criminal Law 1944; Criminal Law 1973; Criminal Law 2111

A defendant received ineffective assistance of counsel where at trial his counsel failed to object to a comment made by the trial judge, prior to the closing arguments and the charge on the law, that the jurors were free to talk about the case among themselves; despite counsel’s argument that his lack of an objection was trial strategy based on his not wanting to “give the jury the idea that something was being hidden,” premature deliberations would be inherently prejudicial. Gallman v. State (S.C. 1992) 307 S.C. 273, 414 S.E.2d 780.

A defendant who was indicted for burglary under Section 16‑11‑310, which mandated life imprisonment unless the jury recommended mercy, was denied effective assistance of counsel where his attorney failed to argue for mercy on his behalf, and the jury returned a verdict of guilty with no recommendation of mercy. Chubb v. State (S.C. 1991) 303 S.C. 395, 401 S.E.2d 159. Criminal Law 1519(11)

10. —— Appeal, effective assistance of counsel

A defendant charged with murder, but convicted of the lesser included offense of voluntary manslaughter, was denied the effective assistance of counsel where he was advised by his counsel that a successful direct appeal of his conviction could result in a murder conviction on retrial, since by convicting him of the lesser charge the jury was acquitting him of the murder charge, and thus double jeopardy would prevent a retrial for murder. Bozeman v. State (S.C. 1992) 307 S.C. 172, 414 S.E.2d 144.

A defendant on trial for conspiracy, kidnapping, and criminal sexual conduct was denied the effective assistance of counsel where he informed his privately obtained counsel that he desired to appeal his conviction and his counsel (1) timely filed a notice of intent to appeal, (2) informed the defendant that he needed funds to purchase a trial transcript to perfect the appeal, (3) was informed by the defendant that he could not afford the cost of the transcript, and (4) advised the defendant to try to qualify for indigent status and state‑provided appellate counsel, but took no further steps to perfect the appeal. Frasier v. State (S.C. 1991) 306 S.C. 158, 410 S.E.2d 572.

A second application for post conviction relief correctly stated a claim of ineffective assistance of counsel where the applicant alleged that he expressed a desire to seek review of the denial of his first application, but that his counsel failed to timely seek review; thus, the matter would be remanded for an evidentiary hearing on the sole issue of whether the applicant requested and was denied an opportunity to seek appellate review. Austin v. State (S.C. 1991) 305 S.C. 453, 409 S.E.2d 395. Criminal Law 1181.5(3.1)

11. Waiver of counsel

Doctrine of laches may be raised as defense to Austin postconviction relief claim that applicant’s counsel was ineffective for failing to seek review of denial of postconviction relief application. Whitehead v. State (S.C. 2002) 352 S.C. 215, 574 S.E.2d 200. Criminal Law 1668(9)

State waived right to raise defense of laches to defendant’s second postconviction relief application asserting Austin claim that his first postconviction relief counsel was ineffective for failing to seek review of denial of first postconviction relief application, despite defendant’s timely request, where State neither raised laches in its return to defendant’s second postconviction relief application, nor in State’s motion to dismiss such application. Whitehead v. State (S.C. 2002) 352 S.C. 215, 574 S.E.2d 200. Criminal Law 1668(9)

In cases in which laches is properly raised as defense to Austin postconviction relief claim that applicant’s counsel was ineffective for failing to seek review of denial of postconviction relief application, postconviction relief court shall hear evidence on defense at same time it hears applicant’s Austin claim on merits. Whitehead v. State (S.C. 2002) 352 S.C. 215, 574 S.E.2d 200. Criminal Law 1668(9)

Evidence was insufficient to support finding that defendant understood the dangers of self‑representation and knowingly and intelligently waived his right to counsel when he plead guilty to felony trafficking of cocaine and crack cocaine; although defendant had a private attorney when he was first charged, record indicated that plea judge never acknowledged that defendant did not have counsel with him at the plea hearing, and did not inquire about why defendant had relieved his counsel, or if he wished to have counsel present, nor, in the absence of counsel, did the judge advise defendant of the crucial elements of the charged offenses, of the possible penalties if the recommended sentence was not accepted by the plea judge, or ask questions to ensure defendant’s understanding of the consequences of his plea. Gardner v. State (S.C. 2002) 351 S.C. 407, 570 S.E.2d 184. Criminal Law 1753

When determining if an accused has a sufficient background to understand the dangers of self‑representation, the courts consider: (1) the accused’s age, educational background, and physical and mental health; (2) whether he was previously involved in criminal trials; (3) whether he knew the nature of the charges and of possible penalties; (4) whether he was represented by counsel before trial and whether that attorney explained to him the dangers of self‑representation; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand‑by counsel; (7) whether the accused knew he would be required to comply with rules of procedure at trial; (8) whether he knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether his waiver resulted from either coercion or mistreatment. Gardner v. State (S.C. 2002) 351 S.C. 407, 570 S.E.2d 184. Criminal Law 1751; Criminal Law 1760

Although the Sixth and Fourteenth Amendments guarantee that one brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment, this right may be waived. State v. Cabrera‑Pena (S.C.App. 2002) 350 S.C. 517, 567 S.E.2d 472, rehearing denied, certiorari granted, affirmed in part, remanded in part 361 S.C. 372, 605 S.E.2d 522. Criminal Law 1750

Specific inquiry by the trial judge expressly addressing the disadvantages of self‑representation is the preferred method of assessing whether defendant knowingly and intelligently seeks to waive his right to the assistance of trial counsel, but the ultimate test is not the advice that defendant receives from the trial judge but defendant’s level of understanding. State v. Cabrera‑Pena (S.C.App. 2002) 350 S.C. 517, 567 S.E.2d 472, rehearing denied, certiorari granted, affirmed in part, remanded in part 361 S.C. 372, 605 S.E.2d 522. Criminal Law 1773

When defendant requests the assistance of counsel once trial has begun, that request ordinarily should not be refused; however, there are times when the criminal justice system would be poorly served by allowing defendant to reverse his waiver of the assistance of trial counsel at the last minute, particularly where delay would result. State v. Cabrera‑Pena (S.C.App. 2002) 350 S.C. 517, 567 S.E.2d 472, rehearing denied, certiorari granted, affirmed in part, remanded in part 361 S.C. 372, 605 S.E.2d 522. Criminal Law 1755

A defendant was not sufficiently aware of the dangers of self‑representation to make an informed decision to proceed pro se, and therefore his waiver of counsel was not valid, where the defendant was mentally disturbed at the time of his guilty plea, he began receiving psychiatric treatment once he was incarcerated and was still undergoing treatment at the time of the post‑conviction relief hearing 3 years later, he exhibited little understanding of criminal proceedings at the post‑conviction relief hearing, and he testified that he had relied upon the solicitor’s advice at the plea hearing. Prince v. State (S.C. 1990) 301 S.C. 422, 392 S.E.2d 462.

The right to counsel was not properly waived by any of 6 defendants where the court briefly questioned 2 of the defendants, one of whom identified himself as spokesperson for the group, and spoke to the remaining 4 defendants only long enough to identify them, and while the judge elicited some information from the 2 defendants concerning their religion and family, the scope of inquiry ended there, falling far short of the standards for a knowing and intelligent waiver. Mullinax v. Garrison (S.C. 1988) 296 S.C. 370, 373 S.E.2d 471.

Once a defendant invokes his or her right to counsel at the initiation of adversarial judicial proceedings, the defendant is not deemed to waive his or her right to counsel at subsequent custodial interrogation unless he or she initiates the contact even if no request for counsel is made to the police. However, this rule does not apply to require the State to establish the waiver of the right to counsel when the defendant had invoked that right only for a different offense in a different jurisdiction. State v. Howard (S.C. 1988) 295 S.C. 462, 369 S.E.2d 132, certiorari denied 109 S.Ct. 3174, 490 U.S. 1113, 104 L.Ed.2d 1036, rehearing denied 110 S.Ct. 13, 492 U.S. 932, 106 L.Ed.2d 628, denial of habeas corpus affirmed 131 F.3d 399. Criminal Law 411.94

Defendant waived right to counsel where trial judge allowed defendant, a nonindigent, reasonable time to retain counsel and defendant did not give sufficient reasons for his failure to have counsel present, after having been urged several times to retain counsel. State v. Jacobs (S.C. 1978) 271 S.C. 126, 245 S.E.2d 606.

12. Production of witnesses and proofs

The exclusion of witness testimony does not violate a defendant’s constitutional right to present evidence so long as the evidence rules are not arbitrary or disproportionate to the purposes they are designed to serve. State v. Burgess (S.C.App. 2010) 391 S.C. 15, 703 S.E.2d 512, rehearing denied, certiorari denied, habeas corpus dismissed 2016 WL 1752777. Criminal Law 661

Defendant’s constitutional right to present a complete defense was not violated by trial judge’s exclusion of testimony of five witnesses who would have testified that the victims had been threatened over their drug debts in the months leading up to the murders; the evidence presented was mere conjecture and was not inconsistent with defendant’s guilt so as to be admissible as evidence of third party guilt. State v. Burgess (S.C.App. 2010) 391 S.C. 15, 703 S.E.2d 512, rehearing denied, certiorari denied, habeas corpus dismissed 2016 WL 1752777. Criminal Law 359

Trial court’s error in excluding defendant’s statement to witness that shooting was accidental was harmless, where admission of statement would have been cumulative, and there was overwhelming evidence of defendant’s guilt. State v. Golson (S.C.App. 2002) 349 S.C. 421, 562 S.E.2d 663, rehearing denied, certiorari denied, habeas corpus dismissed 2012 WL 909787. Criminal Law 1170(2)

Trial court erred in excluding defendant’s statement to witness that he and victim had been tussling over gun when it went off; defendant testified in his own defense, and thus, did not render himself unavailable as witness. State v. Golson (S.C.App. 2002) 349 S.C. 421, 562 S.E.2d 663, rehearing denied, certiorari denied, habeas corpus dismissed 2012 WL 909787. Criminal Law 410.71

Destruction of murder weapon before defense team could examine it did not require suppression of testimony regarding weapon or dismissal of indictments, where there was no bad faith in destruction of gun, bullets and documentation of microscopic comparison of bullets were still available to defense, and defendant was not prejudiced because gun was incriminating rather than exculpatory. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 2011

The state does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 2010

Evidence of prior act of violence by victim directed toward witness was admissible in murder prosecution as relevant to an essential element of defendant’s self‑defense claim, to prove defendant had a reasonable apprehension of violence from victim, where four months prior to victim’s death, victim held a double‑barreled shotgun to witness’s head for eighteen hours as he drove around the county accusing her of being involved in a drug trafficking scheme in his residence. State v. Day (S.C. 2000) 341 S.C. 410, 535 S.E.2d 431. Homicide 1054

Evidence that is not produced pursuant to general request for exculpatory material will not justify new trial unless it creates reasonable doubt about defendant’s guilt; where, prior to trial, defense counsel made motion for production of any favorable evidence including any physical evidence or test results which could be beneficial to his client and during trial, prosecution witnesses referred to existence of certain evidence which defendant had not seen and which was never offered for introduction, and after verdict, defendant moved for trial judge to request evidence at issue and examine it to see whether it would support motion for new trial, which was denied on ground that evidence would not change results of trial, case must be remanded so that court can evaluate evidence to determine whether evidence created reasonable doubt about guilt. State v. Goodson (S.C. 1979) 273 S.C. 264, 255 S.E.2d 679.

Evidence of extrajudicial statements made by witness who was not a party and whose declarations were not binding as admissions was admissible only to impeach or discredit the witness, and was not competent as substantive evidence of the facts to which such statements related. State v. Gaines (S.C. 1978) 271 S.C. 65, 244 S.E.2d 539.

Judge was within discretion in refusing to admit as evidence in rape trial transcript of prosecutrix’s testimony at preliminary hearing, where stenographer making transcript testified that words were omitted from transcript 43 times due to inaudible quality of tape. State v. Lee (S.C. 1977) 269 S.C. 421, 237 S.E.2d 768.

No abuse of discretion found in denial of motion for severance where appellant sought severance on grounds that they desired to call co‑defendant to testify where record fails to show what testimony of co‑defendant would be and whether it would exculpate appellants, and where there is no showing defenses of co‑defendants were antagonistic. State v. Allen (S.C. 1977) 269 S.C. 233, 237 S.E.2d 64.

13. Confrontation of witnesses—In general

Co‑defendant’s redacted statement of the events of the carjacking, kidnapping, and assault, that did not mention defendant, along with curative instruction issued to jury, did not violate Confrontation Clause. State v. Garrett (S.C.App. 2002) 350 S.C. 613, 567 S.E.2d 523, rehearing denied, certiorari denied. Criminal Law 662.10

Admission of a statement made by a nontestifying codefendant and implicating the defendant violates the Confrontation Clause and is generally inadmissible; however, such a statement is admissible against the confessor in a joint trial if references to the codefendant are redacted so as not to implicate the codefendants. State v. Garrett (S.C.App. 2002) 350 S.C. 613, 567 S.E.2d 523, rehearing denied, certiorari denied. Criminal Law 422(1); Criminal Law 662.10

Defendants’ right of confrontation was violated by trial judge’s limiting cross‑examination on co‑conspirator witness’s potential sentence if convicted of same crimes as defendants, who were charged with first degree burglary, grand larceny, and possession of a firearm during the commission of a violent crime; while witness had neither agreed to a plea bargain nor pled guilty, the lack of a negotiated plea created a situation where witness was more likely to engage in biased testimony to obtain recommendation for leniency. State v. Mizzell (S.C. 2002) 349 S.C. 326, 563 S.E.2d 315. Criminal Law 662.7

Use of identification obtained after witness was hypnotized did not violate murder defendant’s right to confrontation, where witness’s identification of defendant at trial was consistent with his pre‑hypnotic description of assailant, identification was corroborated by evidence defendant possessed murder weapon at time of murders, defendant confessed to murders, witness’s responses to questions on cross‑examination gave no indication of being pre‑conditioned, and defendant presented expert testimony and fully argued unreliability of post‑hypnotic testimony to jury. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 662.65

Trial court’s refusal to allow co‑worker of armed robbery victim to use racial slur allegedly used by victim when victim stated, after identifying defendant in photo line‑up, that all blacks looked alike did not violate defendant’s confrontation rights, where defense emphasized in closing argument that it was not challenging victim’s honesty, but only accuracy of his memory, and evidence that victim used inflammatory racial slur was irrelevant to impeach victim’s memory. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 662.7

An officer, who had stopped and searched the car owned and driven by the defendant, should not have been permitted to testify that an informant had advised him that the defendant was engaged in distributing crack cocaine and “at times was in possession of a weapon” where the court had already ruled the stop and search of the vehicle was valid; since the issue of the validity of the stop and search was never before the jury, this testimony was inadmissable hearsay. State v. Dennison (S.C.App. 1991) 305 S.C. 161, 406 S.E.2d 383.

Admitting the testimony of a police officer that the defendant’s wife had “positively identified” the pocketbook used by a masked man in the armed robbery for which the defendant was on trial constituted a violation of the defendant’s right to be confronted with the witnesses against him. State v. Williams (S.C.App. 1985) 285 S.C. 544, 331 S.E.2d 354.

Party cannot impeach his own witness except when witness proves hostile or recalcitrant; witness may not be declared hostile except upon showing of both actual surprise and harm; absent evidence of surprise, trial judge erred in declaring state’s witness, hostile, over objection of counsel for defendants, after finding that testimony of witness at trial contradicted witness’ testimony at earlier preliminary hearing. State v. Bendoly (S.C. 1979) 273 S.C. 47, 254 S.E.2d 287.

Defense counsel may cross‑examine prosecution witness by questioning him about conflicting testimony given by him in another case, for purposes of impeachment, even though transcript of previous testimony is not available. State v. Owenby (S.C. 1976) 267 S.C. 666, 230 S.E.2d 898. Criminal Law 1170.5(1); Witnesses 390.1

This section [Code 1962 Section 17‑506] restates the constitutional right of a defendant to be confronted by the witnesses against him. State v. Smith (S.C. 1956) 230 S.C. 164, 94 S.E.2d 886.

A defendant cannot be denied the right to cross‑examine the witnesses against him. State v. Smith (S.C. 1956) 230 S.C. 164, 94 S.E.2d 886. Witnesses 266

Affidavits and depositions are inadmissible in evidence in a criminal case. State v. Smith (S.C. 1956) 230 S.C. 164, 94 S.E.2d 886. Criminal Law 662.30

14. —— Face‑to‑face, confrontation of witnesses

Sixth Amendment confrontation clause did not absolutely prohibit state from using one‑way closed‑circuit television for receipt of testimony by child witness in child abuse case, as face‑to‑face confrontation is not indispensable element of confrontation guarantee, and in narrow circumstances competing interest may warrant dispensing with confrontation at trial and word “confront” cannot simply mean face to face confrontation; statutory procedure insured reliability of evidence by subjecting it to rigorous adversarial testing and thereby preserved essence of effective confrontation; state’s interest in physical and psychological well being of child abuse victims may be sufficiently important to outweigh defendant’s right to face accusers in court in some cases. Maryland v. Craig, 1990, 110 S.Ct. 3157, 497 U.S. 836, 111 L.Ed.2d 666.

Videotaping of a 3‑year‑old criminal sexual assault victim’s testimony outside the defendant’s presence, and the playing of the videotape before the jury at trial, did not violate the defendant’s right of confrontation by denying him eye‑to‑eye contact with the witness, where: the trial judge, court reporter, solicitor, defense counsel, victim and her mother were present at the taping session; defendant, who was in a nearby room with a second attorney provided for him, was able to view the proceedings live over a closed circuit television monitor, and was afforded constant contact with defense counsel through headphones; defense counsel was permitted to cross‑examine without limitation; and the jury, through the videotape, was able to observe the victim’s appearance and demeanor throughout her testimony. State v. Cooper (S.C. 1987) 291 S.C. 351, 353 S.E.2d 451.

“Face‑to‑face” language in Section 17‑23‑60 does not prohibit the videotaping of a crime victim’s testimony under appropriate circumstances and conditions. State v. Cooper (S.C. 1987) 291 S.C. 351, 353 S.E.2d 451.

Personal presence of a witness is required so that accused may cross‑examine him. State v. Smith (S.C. 1956) 230 S.C. 164, 94 S.E.2d 886.

15. —— Error, confrontation of witnesses

Reversible error occurred when defendants’ right of confrontation was violated by trial judge’s limiting cross‑examination on co‑conspirator witness’s potential sentence if convicted of same crimes as defendants, who were charged with first degree burglary, grand larceny, and possession of a firearm during the commission of a violent crime, as witness was the only link placing defendants at the scene of the crime. State v. Mizzell (S.C. 2002) 349 S.C. 326, 563 S.E.2d 315. Criminal Law 1170.5(1)

The admission of an accomplice’s prior inconsistent statement as substantive evidence was reversible error where the accomplice refused to admit the statement imputed to him, thus denying the defendant effective cross‑examination in violation of his confrontation rights. State v. Pfirman (S.C. 1989) 300 S.C. 84, 386 S.E.2d 461. Criminal Law 405.19; Criminal Law 1169.7

A co‑defendant’s confession will no longer be considered reliable simply because some of the facts it contains “interlock” with the defendant’s own statement. The presumption of unreliability that applies to a co‑defendant’s statement will be overcome only if those portions of the statement concerning the defendant’s participation are “thoroughly substantiated” by the defendant’s own confession. On appeal, the same analysis is appropriate to determine whether any confrontation clause violation was harmless. State v. Howard (S.C. 1988) 295 S.C. 462, 369 S.E.2d 132, certiorari denied 109 S.Ct. 3174, 490 U.S. 1113, 104 L.Ed.2d 1036, rehearing denied 110 S.Ct. 13, 492 U.S. 932, 106 L.Ed.2d 628, denial of habeas corpus affirmed 131 F.3d 399.

In trial for escape, trial court committed reversible error in admitting, over defendant’s hearsay objection, bulletin listing wanted escapees; fact that witness testified he copied names of wanted persons from records purportedly showing that defendant escaped from custody did not render bulletin any more admissible. State v. Gilchrist (S.C. 1979) 273 S.C. 152, 255 S.E.2d 346. Criminal Law 419(12)

Although the trial judge improperly refused to allow cross‑examination of prosecution witness to show discrepancies from his testimony in a former trial on the ground that a transcript was not available, on the record in this case such refusal was harmless error not warranting reversal. State v. Owenby (S.C. 1976) 267 S.C. 666, 230 S.E.2d 898.

Assuming that testimony of detective concerning alleged admissions made by one codefendant in which other codefendants were implicated, where the codefendant did not testify, violated constitutional right of implicated codefendants to confront and cross‑examine the witnesses against them, such error was harmless beyond a reasonable doubt in light of overwhelming evidence of guilt. State v. Miller (S.C. 1976) 266 S.C. 409, 223 S.E.2d 774.

16. Continuance

The defendant was not entitled to a continuance of his trial on the ground of his counsel’s illness where (1) he was represented by 2 attorneys, only one of which was ill on the day his case was called for trial, (2) co‑counsel indicated that he was familiar with the facts of the case and had participated in the filing of pretrial motions, and (3) his counsel later joined the trial and participated in questioning witnesses and the presenting of legal arguments. State v. Hawkins (S.C.App. 1992) 310 S.C. 50, 425 S.E.2d 50.

Trial judge was within discretion in denying request for continuance based upon heavy case load of public defender, notoriety of case, and fact that public defender’s investigator suffered heart attack just prior to trial, where denial of motion did not deprive defendant of effective assistance of counsel. State v. Pendergrass (S.C. 1977) 270 S.C. 1, 239 S.E.2d 750.

17. Review

Defendant’s conviction for receiving stolen goods reversed where assistant solicitor referred to certain statements allegedly made by juveniles during investigation but which were not introduced in evidence implicating the defendant in the crime, on ground that a solicitor cannot rely in his closing argument on statements not in evidence. State v. Gaines (S.C. 1978) 271 S.C. 65, 244 S.E.2d 539.

An accused must be prejudiced by the admission of hearsay testimony in order to be entitled to a reversal on the ground of its admission, and the burden is upon him to satisfy the Supreme Court that there has been prejudicial error. State v. Smith (S.C. 1956) 230 S.C. 164, 94 S.E.2d 886. Criminal Law 1169.1(9)

**SECTION 17‑23‑80.** Manner by which persons who have been indicted may be convicted.

 No person indicted for an offense shall be convicted thereof unless by confession of his guilt in open court, by admitting the truth of the charge against him by his plea or demurrer, by the verdict of a jury accepted and recorded by the court or as provided in Section 17‑23‑40.

HISTORY: 1962 Code Section 17‑508; 1952 Code Section 17‑508; 1942 Code Section 997; 1932 Code Section 997; Cr. P. ‘22 Section 83; Cr. C. ‘12 Section 77; Cr. C. ‘02 Section 50; G. S. 2450; R. S. 49.

CROSS REFERENCES

Constitutional right to trial by jury, see SC Const, Art I, Section 14.

Interpreters for the deaf in certain proceedings, see Rules of Civil Procedure, Rule 43.

Library References

Criminal Law 272, 872, 892.

Indictment and Information 145.

Westlaw Topic Nos. 110, 210.

C.J.S. Criminal Law Sections 486 to 495, 505 to 518, 521 to 530, 533 to 542, 1878.

C.J.S. Indictments and Informations Section 250.

LAW REVIEW AND JOURNAL COMMENTARIES

The Current Role of the Presumption of Innocence in the Criminal Justice System. 31 S.C. L. Rev. 357.

Duty of the Trial Judge to Advise a Defendant of the Consequences of a Guilty Plea. 19 S.C. L. Rev. 261.

NOTES OF DECISIONS

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1. In general

Applied in Cousar v. State (S.C. 1967) 250 S.C. 47, 156 S.E.2d 331.

The defendant is entitled to trial by jury after demurrer to indictment is overruled. State v. Bardin (S.C. 1902) 64 S.C. 206, 41 S.E. 959.

2. Confessions

The voluntariness of a confession must be determined not only by the judge in voir dire or in camera examination, but also by the jury as an issue. Ex parte Cobb (D.C.S.C. 1977) 448 F.Supp. 886, affirmed 568 F.2d 774. Criminal Law 413.62

“Confession”, under South Carolina law, is restricted to an acknowledgment of guilt, and does not apply to a misstatement of fact from which guilt may be inferred. Ex parte Cobb (D.C.S.C. 1977) 448 F.Supp. 886, affirmed 568 F.2d 774.

3. Guilty pleas

Rule proscribing judicial participation in plea discussions was adopted as prophylactic measure, not one impelled by Due Process Clause or any other constitutional requirement. U.S. v. Davila, 2013, 133 S.Ct. 2139, 186 L.Ed.2d 139, on remand 749 F.3d 982. Constitutional Law 4590; Criminal Law 273.1(2)

Parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Randall v. State (S.C. 2004) 356 S.C. 639, 591 S.E.2d 608. Criminal Law 273.1(4)

Absence of the element of knowledge from the indictment charging accessory after the fact of murder rendered indictment deficient, and thus, trial court lacked subject matter jurisdiction to accept defendant’s guilty plea; unless the State could have proven that defendant knew he was helping a murderer avoid arrest, he could not be guilty of the offense. Hooks v. State (S.C. 2003) 353 S.C. 48, 577 S.E.2d 211. Criminal Law 273(4.1)

Failure of indictment charging accessory after the fact of murder to inform defendant of the element of presence rendered indictment insufficient, and thus, the trial court lacked subject matter jurisdiction to accept defendant’s guilty plea; pursuant to law in effect at time of defendant’s guilty plea to such offense, the State was required to prove that defendant was not at the scene when the crime occurred in order to be guilty of the offense. Hooks v. State (S.C. 2003) 353 S.C. 48, 577 S.E.2d 211. Criminal Law 273(4.1)

Trial court did not err in accepting defendant’s guilty plea to trafficking in cocaine, where trial court asked defendant and his attorney numerous questions to determine whether defendant freely and voluntarily decided to plead guilty. State v. Lopez (S.C.App. 2002) 352 S.C. 373, 574 S.E.2d 210. Criminal Law 273.1(4)

All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea. Rollison v. State (S.C. 2001) 346 S.C. 506, 552 S.E.2d 290. Criminal Law 273(4.1); Criminal Law 273.1(1)

The trial court did not have jurisdiction to add, as a new condition of probation, the imposition of restitution where as part of the plea bargain under which the defendant pleaded guilty the sentencing judge recognized and the defendant understood that there would be no restitution. State v. Rhinehart (S.C.App. 1993) 312 S.C. 36, 430 S.E.2d 536.

A plea agreement which called for the dropping of all other pending charges did not preclude the prosecution of the defendant on charges for a crime which had already been committed, but for which he was not arrested and indicted until after the agreement; the subsequent charges were not “pending” at the time of the agreement. Baughman v. State (S.C. 1993) 311 S.C. 547, 430 S.E.2d 505, certiorari denied 114 S.Ct. 549, 510 U.S. 991, 126 L.Ed.2d 450. Criminal Law 273.1(2)

The circuit court lacked the jurisdiction to accept the defendant’s plea of guilty to grand larceny where the indictment alleged that the property stolen had a value of more than $50, but the grand larceny statute in effect at the time the offense was committed required the value of the property allegedly stolen to exceed $200. Slack v. State (S.C. 1993) 311 S.C. 415, 429 S.E.2d 801. Larceny 23

The defendant received effective assistance of counsel, even though his counsel had acquiesced in the solicitor’s misinterpretation of the section under which he was charged, where the misinterpretation was later dispelled, and the defendant accepted the plea bargain negotiated by his counsel after being fully informed of the consequences. Richardson v. State (S.C. 1993) 310 S.C. 360, 426 S.E.2d 795.

Position set forth in ABA Standard 14‑3.3 (1980), with respect to participation of trial judge in plea bargain process prior to taking of actual plea, is sound. Harden v. State (S.C. 1981) 276 S.C. 249, 277 S.E.2d 692, certiorari denied 102 S.Ct. 518, 454 U.S. 970, 70 L.Ed.2d 388. Criminal Law 273.1(2)

Defendant was unduly coerced, as matter of law, to give up constitutional right to plead not guilty where trial judge stated defendant would receive substantial fine but no prison term if he pleaded guilty, and would be sentenced to at least one year in jail if he went forward with trial and was convicted. State v. Cross (S.C. 1977) 270 S.C. 44, 240 S.E.2d 514.

4. Alford plea

Defendant had adequate notice that his Alford plea had no significant distinction from a guilty plea, and thus defendant knew he had to comply with all sentencing orders and probations conditions; the trial court stated “If you enter your plea, even if you say it’s under Alford, you subject yourself to being sentenced just like you were pleading guilty straight up,” the court ordered defendant to successfully complete sex abuse counseling or face lifetime sex offender registration, and defendant failed to admit his guilt during counseling, resulting in his dismissal from the program and the imposition of a lifetime sex offender registration requirement. State v. Herndon (S.C. 2013) 403 S.C. 84, 742 S.E.2d 375. Sentencing and Punishment 1918

The death penalty may be imposed when the defendant pleads guilty without explicitly admitting his guilt pursuant to an Alford plea, since the primary concern is whether the plea was entered into freely and voluntarily. State v. Ray (S.C. 1993) 310 S.C. 431, 427 S.E.2d 171.

5. Conditional guilty plea

Defendant’s guilty plea, which was made while objecting to sentence of life without parole, was not an invalid, “conditional guilty plea” in prosecution for armed robbery, kidnapping, and assault and battery with intent to kill, since sentencing was separate issue from guilt and distinct phase of criminal process. Easter v. State (S.C. 2003) 355 S.C. 79, 584 S.E.2d 117. Criminal Law 273(4.1)

To be valid, guilty plea must be unconditional. Easter v. State (S.C. 2003) 355 S.C. 79, 584 S.E.2d 117. Criminal Law 273(4.1)

Defendant who gave birth to stillborn child and was charged with unlawful conduct towards child could not enter conditional guilty plea. State v. Peppers (S.C. 2001) 346 S.C. 502, 552 S.E.2d 288. Criminal Law 273(4.1)

6. Withdrawal of plea, guilty pleas

Defendant was not entitled to withdraw his guilty pleas to two counts of resisting arrest as a matter of right; guilty pleas were accepted by court, once state completed its recitation of facts, hearing entered sentencing phase, and no further ruling was required to accept guilty pleas, and thus, whether to allow defendant to withdraw his guilty pleas was a matter resting within sound discretion of the circuit court, and defendant could not withdraw his pleas as a matter of right. State v. Thomason (S.C.App. 2003) 355 S.C. 278, 584 S.E.2d 143. Criminal Law 274(2)

An accused is not permitted to speculate on supposed clemency of a judge and enter a plea of guilty with right to retract it if he finds that his expectation was not realized. State v. Thomason (S.C.App. 2003) 355 S.C. 278, 584 S.E.2d 143. Criminal Law 274(5)

Trial court did not abuse its discretion in denying motion of defendant, a Mexican national, to withdraw his guilty plea to trafficking in cocaine, due to State’s failure to comply with notification requirements of the Vienna Convention on Consular Relations and inform him of his right to contact the Mexican Consulate, where only specific prejudice defendant claimed to have suffered was that the Consulate might have provided him with a fluent Spanish interpreter, defendant repeatedly rejected the trial court’s offer at plea hearing to provide him with a translator, and record indicated defendant understood English and was able to communicate with his attorney and the trial court. State v. Lopez (S.C.App. 2002) 352 S.C. 373, 574 S.E.2d 210. Criminal Law 274(3.1); Treaties 13

7. Review

Defendant, who was a Mexican National, failed to preserve for appellate review issue of whether his guilty plea to trafficking in cocaine was not made freely and voluntarily because language and cultural barriers precluded him from understanding his rights under the American legal system in contrast with his rights under the legal system of Mexico, as the alleged error was not raised in trial court. State v. Lopez (S.C.App. 2002) 352 S.C. 373, 574 S.E.2d 210. Criminal Law 1031(4)

Defendant, who pled guilty to capital murder and then waived mitigation at the penalty phase, could waive appellate review, where there was no suggestion that defendant was not guilty or that his guilty plea was defective. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1788(2)

**SECTION 17‑23‑90.** Indictment and trial of persons committed for treason or felony; consequences of failure to indict.

 If any person committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term to be brought to his trial shall not be indicted some time in the next term after such commitment, the judge of the circuit court shall, upon motion made in open court the last day of the term either by the prisoner or anyone in his behalf, set at liberty the prisoner upon bail, unless it appear to him, upon oath made, that the witnesses for the State could not be produced at the same term. And if any person committed as aforesaid, upon his prayer or petition in open court the first week of the term to be brought to his trial, shall not be indicted and tried the second term after his commitment or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

HISTORY: 1962 Code Section 17‑509; 1952 Code Section 17‑509; 1942 Code Section 1048; 1932 Code Section 1048; Cr. P. ‘22 Section 135; Cr. C. ‘12 Section 117; Cr. C. ‘02 Section 90; G. S. 2323; R. S. 90; 1679 (1) 119.

CROSS REFERENCES

Constitutional provision regarding treason, see SC Const, Art I, Section 17.

Person entitled to the benefit of the writ of habeas corpus, see Section 17‑17‑10.

Right of bail after conviction, see Sections 18‑1‑80, 18‑1‑90, 18‑3‑50.

Right of bail before conviction, see SC Const, Art I, Section 15.

Right to speedy trial, see SC Const, Art I, Section 14.

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Attorney General’s Opinions

South Carolina has not established specific period of time beyond which right to speedy trial is deemed violated. Whether accused’s right to speedy trial has been violated will depend upon individual circumstances in each case. Relief granted where accused has been denied right to speedy trial is dismissal of criminal charge. 1991 Op Atty Gen No 91‑36, p 95 (May 24, 1991) 1991 WL 474766.

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1. In general

The statutory reference to discharge merely indicates that a prisoner should be released without bail, not discharged from further prosecution. State v. Campbell (S.C. 1982) 277 S.C. 408, 288 S.E.2d 395.

This section applies only to statutory terms of court as scheduled by the General Assembly and not to special terms designated by the Chief Justice. Ex parte Attardo (S.C. 1978) 272 S.C. 1, 249 S.E.2d 771.

Defendant’s bare assertion of prejudice because principal witness moved to another state held insufficient to warrant lower court conclusion that defendant suffered actual prejudice, where defendant was neither incarcerated nor apparently unduly concerned about accusation against him, and had not shown that delay impaired his defense. State v. Waites (S.C. 1978) 270 S.C. 104, 240 S.E.2d 651.

Where initial preliminary hearing was canceled due to magistrate disqualifying himself after being contacted by both sides, and where defendant’s attorney agreed to continuance and stated he did not want case to come to trial, evidence was sufficient to warrant conclusion that defendant contributed to delay. State v. Waites (S.C. 1978) 270 S.C. 104, 240 S.E.2d 651.

Two year four month delay between arrest and preliminary hearing, while not dispositive of right to speedy trial issue, is sufficient to trigger Supreme Court’s review of other factors: reason government assigns to justify delay, when and how defendant has asserted right to speedy trial, and prejudice to defendant. State v. Waites (S.C. 1978) 270 S.C. 104, 240 S.E.2d 651. Criminal Law 577.10(1)

Right to speedy trial attached in September 1975, at time arrest warrants were served; not in November 1973, when warrants were issued. State v. Allen (S.C. 1977) 269 S.C. 233, 237 S.E.2d 64.

Judge’s overall broad supervision of solicitor’s authority to call cases in such order and in such manner as will facilitate efficient administration of solicitor’s official duties does not to extend to or justify dismissals where solicitor sought to enter nolle prosequi. State v. Ridge (S.C. 1977) 269 S.C. 61, 236 S.E.2d 401. Criminal Law 632(2)

Entering of nolle prosequi at any time before judge is empaneled and sworn is within discretion of solicitor; except where trial judge finds solicitor has acted corruptly, trial judge may not direct or prevent nolle prosequi at that time. State v. Ridge (S.C. 1977) 269 S.C. 61, 236 S.E.2d 401. Criminal Law 303.20

Court has no power to dismiss criminal prosecution except at instance of prosecutor in absence of statute authorizing court on own motion to order indictment or prosecution dismissed. State v. Ridge (S.C. 1977) 269 S.C. 61, 236 S.E.2d 401.

Cited in Ex parte Messervy (S.C. 1908) 80 S.C. 285, 61 S.E. 445.

As to bail refused while defendant is confined under sentence on plea of assault and battery, se Ex parte Jones (S.C. 1892) 36 S.C. 607, 15 S.E. 544.

It will be observed that the section makes two distinct and different provisions for the relief of persons committed to jail under a charge of treason or felony: First, that where a person so charged is not indicted during the term of the court next succeeding his commitment, he may apply, either in person “or by anyone in his behalf” to the judge of the circuit court for bail, which the judge is required to grant “unless it appears to him, upon oath made, that the witnesses for the State could not be produced at the same term.” The plain purpose of this provision was to give a person committed to jail for treason or felony the right to bail where he is not indicted ‑ that is, where an indictment is not presented to the grand jury at the first term after his commitment, unless it shall be made to appear to the satisfaction of the judge that the witnesses relied upon by the State to warrant the finding of the indictment cannot be procured at that term. The second provision of the section does, however, give the defendant the right to a discharge “from his imprisonment” where, upon his petition to be brought to trial, he “shall not be indicted and tried the second term after his commitment.” State v. Williams (S.C. 1892) 35 S.C. 160, 14 S.E. 309.

A prisoner must be discharged hereunder if not indicted and tried within two terms after his confinement. State v. Fasket (S.C. 1852) 5 Rich. 255.

As to transfer of cases to United States court, see State v. Smalls (S.C. 1878) 11 S.C. 262.

A prisoner, tried at the first term for horse stealing and mistrial had, is not entitled to discharge upon continuance by State at second term. State v. Spergen (S.C. 1822).

For additional related case, see Logan ads. State (S.C. 1814).

2. Requirement of demand

Request for preliminary hearing does not substitute as demand for speedy trial in weighing factor of when and how defendant asserted right to speedy trial. State v. Waites (S.C. 1978) 270 S.C. 104, 240 S.E.2d 651.

Defendant’s conduct in asserting rights held an important factor in reversing lower court order dismissing charges for failure to provide speedy trial where, apart from initial request for preliminary hearing, there was no record of actual demand for speedy trial, and where defendant, represented by counsel, waited approximately 28 months before claiming he had been denied right to speedy trial. State v. Waites (S.C. 1978) 270 S.C. 104, 240 S.E.2d 651.

Six month interval of delay between service of arrest warrants and trial fails to support claim that right to speedy trial was denied where appellants at no time demanded speedy trial, but, on contrary, obtained continuance, which amounts to waiver of right to speedy trial. State v. Allen (S.C. 1977) 269 S.C. 233, 237 S.E.2d 64.

3. Requirement of confinement

This section [Code 1962 Section 17‑509] applies only to those persons who are in actual custody. State v Williams (1892) 35 SC 160, 14 SE 309. State v Buyck (1804) 2 SCL 563, 3 SCL 460. Logan v State (1814) 5 SCL 415, 7 SCL 493. State v Holmes (1848) 34 SCL 272.

To entitle one to the benefit of the provisions of this section [Code 1962 Section 17‑509], it must appear that he is in actual confinement at the time he applies for his discharge. State v. Williams (S.C. 1892) 35 S.C. 160, 14 S.E. 309.

A person accused of forgery and admitted to bail is not entitled to his discharge from the prosecution at the second term. State v. Buyck (S.C. 1804).

**SECTION 17‑23‑100.** Right to object to charge or request additional charge out of presence of jury.

 In all cases tried before a jury, other than cases in a magistrates or municipal court, after the court has delivered to the jury a charge on the law in the case, the court shall temporarily excuse the jury from the presence of counsel and litigants in order to give counsel and litigants an opportunity to express objections to the charge or request the charge of additional propositions made necessary by the charge, out of the presence of the jury.

HISTORY: 1962 Code Section 17‑513.1; 1953 (48) 28.

CROSS REFERENCES

Constitutional provision regarding charge to jury, see SC Const, Art V, Section 21.

Giving opportunity to object to charge or request additional charge to the jury in civil actions, see Rules of Civil Procedure, Rule 51.

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1. In general

Applied in State v Campbell (1957) 230 SC 432, 96 SE2d 476, cert denied 354 US 914, 1 L Ed 2d 1427, 77 S Ct 1295. State v Richardson (1969) 253 SC 468, 171 SE2d 717, cert den 396 US 955, 24 L Ed 2d 421, 90 S Ct 427.

When a defendant is tried in absentia, the trial court should instruct the jury that the defendant’s failure to appear may not be construed as an admission of guilt (overruling State v Johnson, 213 SC 241, 49 SE2d 6 (1948)). State v. Jackson (S.C. 1990) 301 S.C. 49, 389 S.E.2d 654. Criminal Law 781(1)

The State was not required to elect between the charges of robbery and larceny since distinct criminal offenses may arise from a single act and, therefore, there was no error in the trial court submitting both charges to the jury. State v. Austin (S.C. 1989) 299 S.C. 456, 385 S.E.2d 830. Criminal Law 29(3)

Trial judge did not err in failing to advise defendant before arguments to jury what instructions to jury would be given, or in failing to discuss possible charges with counsel as related to some particular matter before arguments were made, where no inquiry as made of court and apparently no request made prior to summation. State v. Gates (S.C. 1977) 269 S.C. 557, 238 S.E.2d 680. Criminal Law 804(9)

Adoption of 1962 Code Section 17‑513.1 [1976 Code Section 17‑23‑100] nullifies line of cases holding that right to complain of error in the charge to the jury is non‑waivable; failure to take exception to error in, or omission from, charge, when given opportunity to do so under this section, amounts to waiver of any right to complain of charge on appeal. State v. Williams (S.C. 1976) 266 S.C. 325, 223 S.E.2d 38.

Failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge. State v. Armstrong (S.C. 1975) 263 S.C. 594, 211 S.E.2d 889. Criminal Law 1038.3

Cited in State v. Brooks (S.C. 1969) 252 S.C. 504, 167 S.E.2d 307.

Failure to object or request additional instructions constitutes waiver of right to fuller charge. State v. Hollman (S.C. 1958) 232 S.C. 489, 102 S.E.2d 873.

Failure to request additional charge or take exception at proper time would be overlooked in homicide prosecution where death penalty was involved. State v. Clinkscales (S.C. 1957) 231 S.C. 650, 99 S.E.2d 663.

This section [Code 1962 Section 17‑513.1] is sufficiently complied with where the opportunity for objection to the charge has been afforded at conclusion of main charge. Neither expressly nor impliedly does this section [Code 1962 Section 17‑513.1] require more than one opportunity for such objection, especially where there is no suggestion that the additional charge was erroneous or inadequate. State v. Jones (S.C. 1956) 228 S.C. 484, 91 S.E.2d 1.

A defendant may not reserve vices in his trial of which he has notice, taking his chances on a favorable verdict, and in case of disappointment, use the error to obtain another trial. State v. Burnett (S.C. 1954) 226 S.C. 421, 85 S.E.2d 744. Criminal Law 1030(1)

2. Right to remain silent

Error resulting from portion of trial court’s jury charge, which used the term “failure to testify” to refer to defendant’s choice to exercise his right to remain silent, did not warrant reversal; when viewed as a whole, trial court adequately charged the law regarding defendant’s right to remain silent and not to testify during his criminal trial, and defendant’s attorney was the one who requested the charge using the language “failure to testify.” State v. Adkins (S.C.App. 2003) 353 S.C. 312, 577 S.E.2d 460, rehearing denied, certiorari denied. Criminal Law 822(15); Criminal Law 1137(3)

3. Elements of offense

The trial judge was not required to define the offense of accessory after the fact in its jury instructions where the indictment did not charge the defendant with being an accessory after the fact, and the offense of accessory after the fact was not a lesser‑included offense of any of the offenses which were alleged in the indictment. State v. Good (S.C.App. 1992) 308 S.C. 308, 417 S.E.2d 640, rehearing denied, certiorari granted, affirmed 315 S.C. 135, 432 S.E.2d 463. Criminal Law 795(2.26); Criminal Law 795(2.40); Criminal Law 795(2.75); Homicide 1468; Indictment And Information 191(.5)

A jury was adequately instructed as to the mental state required for the offense of bribery where the trial court stated that “the defendant is charged with violating a statute which reads ‘whoever correctly gives to any officer, including police officers, any gift, or gratuity with the intent to influence such officer’s act or judgment on any matter which is pending before him shall be guilty of an offense.’” State v. Ferguson (S.C. 1990) 302 S.C. 269, 395 S.E.2d 182.

In a prosecution under Section 29‑7‑20 against a building contractor for failure to pay materialmen out of construction loan funds, it was error for the trial judge to instruct the jury that if it found that the defendant had commingled the funds and thereby failed to pay a materialman, he would be in violation of the statute, since “commingling” is not an element of the offense set forth in Section 29‑7‑20, and the instruction could have misled the jury to believe that it should convict the defendant if he had commingled construction loan funds. State v. Rothell (S.C. 1990) 301 S.C. 168, 391 S.E.2d 228. Criminal Law 814(5); Criminal Law 1172.6

In a prosecution under Section 45‑1‑50 for defrauding a keeper of a restaurant by obtaining food and “intentionally absconding without paying for it,” the trial court erred in failing to instruct the jury on the definition of “abscond” as used in the statute where the jury had questions concerning the wording of the statute. Section 45‑1‑50 applies only to situations where a patron obtains food from a restaurant and then attempts to avoid payment by departing in a secretive or clandestine manner and, therefore, it is essential that the definition of the word “abscond” be understood by the jury and that evidence of such secretive or clandestine behavior be presented by the State. State v. Snelgrove (S.C. 1989) 299 S.C. 290, 384 S.E.2d 705.

4. Evidence and burden of proof

The trial court in a prosecution for murder properly instructed the jury that an implication of malice could arise from the use of brutal force, even absent the use of a deadly weapon, where the cause of death was head injuries which were consistent with a severe beating administered with fists. State v. McLemore (S.C.App. 1992) 310 S.C. 91, 425 S.E.2d 752, rehearing denied, certiorari denied.

A jury instruction on reasonable doubt did not improperly require the defendant to furnish the jury with a reason to find him not guilty where the charge merely suggested that such doubt “may grow out of...the presence of certain evidence in the case having some reasonable relation to the question of guilt or innocence...” State v. McLemore (S.C.App. 1992) 310 S.C. 91, 425 S.E.2d 752, rehearing denied, certiorari denied.

The defendant was not entitled to the reversal of her conviction for distribution of crack cocaine on the ground that the trial judge refused to give an identification charge, even though the case involved a single witness identification, where the judge addressed the issue of identification in his alibi charge, and then went on to charge that the defendant did not have to prove alibi and that the state had to prove that she committed the crime beyond a reasonable doubt; although the better procedure would have been to instruct the jury on the burden of proving identity, under the circumstances the jury’s mind was focused on the proper issue. State v. Simmons (S.C. 1992) 308 S.C. 80, 417 S.E.2d 92, rehearing denied.

The trial court erred in refusing to give the limiting charge that evidence of a defendant’s prior convictions were admissible only for impeachment purposes where the defendant was charged with distributing crack cocaine, even though none of the convictions were for drug‑related offenses, because the jury might have concluded the defendant had criminal tendencies. State v. Bryant (S.C. 1992) 307 S.C. 458, 415 S.E.2d 806, rehearing denied. Criminal Law 673(5); Criminal Law 1168(2)

In a prosecution for driving under the influence, the trial court’s jury charge on the inferences to be drawn from breathalyzer results was not so unclear or ambiguous as to mislead the jury where the instructions allowed the jury to find that the defendant was not under the influence, or that he was under the influence of narcotics, or that he was under the influence of a combination of narcotics and alcohol. State v. Nathari (S.C.App. 1990) 303 S.C. 188, 399 S.E.2d 597.

In a capital case, failure to give a jury charge that evidence of prior convictions is admissible only for impeachment is error, even absent a request. State v. Brown (S.C. 1988) 296 S.C. 191, 371 S.E.2d 523. Criminal Law 824(8); Criminal Law 847

Judge was within discretion in refusing requested charge that jury take into consideration interest or bias of witness and observe his demeanor, where judge charged jury that they were the judge of witness’ credibility and could believe one witness against many or only portions of a witness’ testimony; appellants having failed to show prejudice resulting from judges decision. State v. Bamberg (S.C. 1977) 270 S.C. 77, 240 S.E.2d 639. Criminal Law 785(9)

Trial judge did not err in refusing requested instruction that prosecution’s proof must exclude every reasonable hypothesis except that of guilt, basic thrust of which was to law concerning circumstantial evidence, where judge had already covered reasonable doubt in charge, and rest of proposed charge was incomplete in that it did not define direct and circumstantial evidence nor state that only to extent State relies on circumstantial evidence must proof exclude every other reasonable hypothesis but guilt. State v. Simmons (S.C. 1977) 269 S.C. 649, 239 S.E.2d 656. Criminal Law 784(4); Criminal Law 814(17)

Additional charges to jury on law as to persons acting together in commission of offense might have been appropriate, but were not required, where it was implicit in charge given to jury that it must find appellant and co‑defendant were acting together and assisting each other in commission of robbery before conviction of appellant could be had. State v. Gates (S.C. 1977) 269 S.C. 557, 238 S.E.2d 680. Criminal Law 863(1)

Charge to jury held adequate where trial judge charged jury that co‑defendants’ guilty pleas were not evidence in case against appellant and that jury should weigh credibility of their testimony as they would other witnesses, and refused requested charge to effect that jury might consider any promises, threats, rewards, or hope of reward which have been held out to unsentenced co‑defendants in exchange for testimony. State v. Wright (S.C. 1977) 269 S.C. 414, 237 S.E.2d 764.

5. Presumptions

In determining whether unconstitutional burden‑shifting jury instruction in criminal case is harmless error, test is whether it appears beyond reasonable doubt that error did not contribute to verdict; judge’s error in instructing jury that malice may be implied or presumed from willful, deliberate, and intentional doing of unlawful act without just cause or excuse or from use of deadly weapon was not harmless, and error was not corrected by instruction that presumption is removed when circumstances surrounding use of deadly weapon are put in evidence. Yates v. Evatt (U.S.S.C. 1991) 111 S.Ct. 1884, 500 U.S. 391, 114 L.Ed.2d 432.

The jury charge in a murder prosecution did not improperly instruct the jury to presume malice from the defendant’s use of a shotgun where the charge used the word “implication” rather than “presumption,” and the charge clearly instructed the jury that the use of a deadly weapon was simply an evidentiary fact to be taken into consideration along with all the other evidence in the case. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied. Homicide 1392

In a prosecution for assault and battery with intent to kill, the trial judge’s charge on implied malice, which constituted an improper mandatory presumption, was harmless error where it was beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption in concluding that the defendant had acted with malice when he shot the victim who was in a defenseless position. Yates v. Aiken (S.C. 1989) 301 S.C. 214, 391 S.E.2d 530, certiorari granted 111 S.Ct. 41, 498 U.S. 809, 112 L.Ed.2d 18, reversed 111 S.Ct. 1884, 500 U.S. 391, 114 L.Ed.2d 432. Criminal Law 778(6); Criminal Law 1172.2

In a prosecution for murder on the theory of accomplice liability, the trial judge’s charge on implied malice, which constituted an improper mandatory presumption, was harmless error where it was beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption in concluding that the defendant’s accomplice had acted with malice in killing when he lunged at the victim with a knife upon her entry into a store in which the defendant and his accomplice were committing a robbery. Yates v. Aiken (S.C. 1989) 301 S.C. 214, 391 S.E.2d 530, certiorari granted 111 S.Ct. 41, 498 U.S. 809, 112 L.Ed.2d 18, reversed 111 S.Ct. 1884, 500 U.S. 391, 114 L.Ed.2d 432. Criminal Law 778(6); Criminal Law 1172.2

In a prosecution for felony driving under the influence, the trial court erred in instructing the jury pursuant to Section 56‑5‑2950(b) where the defendant’s blood alcohol level was not tested by a breathalyzer. However, such error was harmless beyond a reasonable doubt where the record evinced overwhelming evidence which supported the defendant’s conviction, and the trial judge modified his charge to indicate that the contested portion of Section 56‑5‑2950 would not rise to the level of a presumption. State v. Kinner (S.C. 1990) 301 S.C. 209, 391 S.E.2d 251.

In a prosecution under Section 16‑17‑495, a jury charge stating that the statutory language that keeping a child out of the state in violation of a custody order for a period in excess of 72 hours shall be prima facie evidence that the person charged intended to violate the court order at the time of the taking and that the presumption was rebuttable, was improper and the defendant was unfairly prejudiced by the erroneous charge because the evidence of her intent to violate the custody order was conflicting. State v. Neva (S.C. 1990) 300 S.C. 450, 388 S.E.2d 791. Criminal Law 772(6)

Presumption that person in possession of recently stolen goods is thief is reversible error where instruction does not include charge that such presumption is evidentiary fact to be taken into consideration along with other evidence and does not place burden on defendant to explain how he came into possession of such recently stolen goods. State ex rel. McLeod v. Rhoades (S.C. 1980) 275 S.C. 104, 267 S.E.2d 539.

Defendant not prejudiced by order of trial judge reopening case and admitting testimony of police officer who was present in court but had not testified, after defense counsel requested charge to jury in essence that presumption might be drawn that officer’s testimony would have been harmful to state’s case, where additional testimony given was merely corroborative and presented no new evidence. State v. Hammond (S.C. 1978) 270 S.C. 347, 242 S.E.2d 411.

6. Circumstantial evidence

Trial judge acted within discretion in denying requested instructions on circumstantial evidence where circumstantial evidence was merely corroborative of direct evidence of appellant’s involvement in crime. State v. Jenkins (S.C. 1978) 270 S.C. 365, 242 S.E.2d 420. Criminal Law 814(17)

Whether to instruct on circumstantial evidence is decision properly left to trial judge in case in which crimes and identity of perpetrators were established by direct evidence, and circumstances introduced were merely corroborative. State v. Simmons (S.C. 1977) 269 S.C. 649, 239 S.E.2d 656.

7. Presence

A trial judge committed reversible error in a trial for conspiracy and possession with intent to distribute crack cocaine where he advised the jury that a defendant’s mere presence or association with people who possess controlled substances is sufficient proof that the defendant himself possessed the controlled substance or was a member of a conspiracy, and he never retracted the incorrect statement, despite repeated requests by counsel to do so, even though he correctly instructed the law of mere presence in the remainder of the instruction. State v. Robinson (S.C. 1991) 306 S.C. 399, 412 S.E.2d 411. Criminal Law 823(10); Criminal Law 1172.4

The evidence presented at trial did not support a “mere presence” instruction in a prosecution for possession of cocaine where the evidence produced by the State tended to show that the defendant had exercised actual possession and control over the cocaine, and the defendant’s testimony was that the arresting police officers knew he was not involved and were framing him, not that he just happened by when someone dropped the bag of cocaine or that he was standing by while others used or possessed cocaine. State v. Lee (S.C. 1989) 298 S.C. 362, 380 S.E.2d 834.

8. Lesser‑included offenses

In first‑degree murder case, where trial court instructed on second‑degree murder but did not require jury to agree on single theory of first‑degree murder, defendant was not entitled as matter of due process to instruction on lesser included offense of robbery, where (a) jury had been instructed on lesser offense of second‑degree murder as alternative to either finding guilt of first‑degree murder or acquitting defendant, and (b) evidence would have supported second‑degree murder conviction; due process concern with eliminating distortion of fact‑finding process, which is created when jury is faced with all‑or‑nothing choice between murder and innocence, was not implicated. Schad v. Arizona, U.S.Ariz.1991, 111 S.Ct. 2491, 501 U.S. 624, 115 L.Ed.2d 555.

In a prosecution for murder, the trial court’s instruction that, if the jury had a reasonable doubt as to whether the defendant was guilty of murder, it should acquit him of murder and then consider the issue of manslaughter, was reversible error where the defendant requested and was entitled to a charge instructing the jury that it was their duty to resolve any doubt as to whether he was guilty of murder or manslaughter in favor of the lesser offense of manslaughter. State v. Gorum (S.C. 1993) 311 S.C. 332, 428 S.E.2d 884, rehearing denied. Criminal Law 798(.6); Criminal Law 1172.1(4.1)

The defendant was not entitled to a charge of involuntary manslaughter, since no legal provocation was shown, where he awoke the victim’s housemate in the middle of the night to demand alcohol, he attacked her when she refused to give him alcohol and in turn demanded the repayment of some money, and while attempting to aid the housemate, the victim fell to the ground and the defendant stabbed him 18 times. State v. Wells (S.C.App. 1992) 336 S.C. 223, 426 S.E.2d 814.

A defendant on trial for the murder of his stepmother was not entitled to a jury instruction on manslaughter, even though numerous psychiatrists testified that his stepmother subjected him to physical and emotional abuse throughout his childhood, where the stepmother was in the kitchen down the hallway from the defendant immediately before he shot and beat her to death, and there was no evidence of legal provocation. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied. Homicide 1457

The defendant was not entitled to a jury instruction that if there was a reasonable doubt as to whether he was guilty of murder or manslaughter in the shooting of his father, the jury was required to find him guilty of manslaughter, even though psychiatrists testified that he had shot his father to keep his father from interfering with his primary objective of killing his stepmother, where there was ample evidence of deliberation and premeditation, including hiding his shotgun, loading it, and lying in wait for his father. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied.

A defendant, charged with murder, was not entitled to a jury instruction on the lesser included offense of voluntary manslaughter where, after loading his pistol and firing one bullet to test it, he followed the victim (with whom he had been quarrelling) into a store, shot the victim through the heart, and then, while using vile language indicative of malice, shot the victim again in the back of the head. State v. Lowry (S.C.App. 1992) 309 S.C. 533, 424 S.E.2d 549, rehearing denied, certiorari granted, reversed 315 S.C. 396, 434 S.E.2d 272.

The trial court did not err in denying a defendant’s request for a jury charge on the crime of manslaughter as a lesser‑included offense of the crime of murder where, even though the evidence from the defendant showed that he didn’t harbor ill‑feelings toward the victim, there was no evidence showing that he killed the victim without malice; it is not error to refuse to submit a lesser included offense unless there is evidence tending to show that the defendant is only guilty of the lesser offense. State v. Hartley (S.C.App. 1992) 307 S.C. 239, 414 S.E.2d 182, certiorari denied.

A defendant charged with murder was entitled to have the jury instructed that if they had any reasonable doubt as to whether he was guilty of murder or voluntary manslaughter they should resolve their doubt in favor of the lesser offense where the defendant and his fiancee, the victim, had left a bar around closing time, had gotten into an argument which continued until they returned to their apartment, had gone to bed where they continued to quarrel and she continued to hit him, and he then reached under the bed, grabbed a buck knife and killed her. State v. Robinson (S.C. 1992) 307 S.C. 169, 414 S.E.2d 142.

The trial court did not err in refusing to charge the lesser included offense of simple assault and battery in a trial for assault and battery of a high and aggravated nature where the defendant (1) weighed 235 pounds to the victim’s 150 pounds, (2) followed the victim after the victim left the scene of their altercation, and (3) hit the victim, causing him to fall to the floor, and where the victim sustained a laceration to the back of his head, a blood clot, and hemorrhage of the brain, was in the hospital 10 days, was out of work for 6 weeks, and was left without a sense of smell; the evidence would not have permitted the jury to find the defendant guilty of the lesser charge. State v. Small (S.C.App. 1992) 307 S.C. 92, 413 S.E.2d 870.

A trial judge committed reversible error in refusing to instruct the jury that, if there was a reasonable doubt as to whether the defendant was guilty of the lesser offense of possession of crack cocaine or the greater offense of possession with intent to distribute crack cocaine, the doubt must be resolved in favor of the defendant. State v. Clifton (S.C.App. 1990) 302 S.C. 431, 396 S.E.2d 831, certiorari dismissed 305 S.C. 85, 406 S.E.2d 337. Criminal Law 1173.2(5)

A trial judge erred when he refused to charge the jury that if they had a reasonable doubt between murder and manslaughter, they had to resolve it in favor of the lesser offense. State v. Jackson (S.C. 1990) 301 S.C. 41, 389 S.E.2d 650. Criminal Law 798(.6)

Trial judge is required to charge jury on lessor—included offense if there is evidence from which jury could infer that defendant committed lessor offense rather than greater. State v. Pressley (S.C. 1987) 292 S.C. 9, 354 S.E.2d 777. Criminal Law 795(2.1)

Refusal to charge jury as to simple assault and battery was correct where defendant relied on defense of alibi, and there was no testimony tending to show him guilty of simple assault and battery. State v. Mallory (S.C. 1978) 270 S.C. 519, 242 S.E.2d 693.

Trial judge committed no error in refusing to charge simple assault and battery where appellant alleged he attacked police officer to prevent officer from hitting him with nightstick, since there was no evidence tending to show appellant was only guilty of lesser offense where appellant’s testimony, if believed, would totally exonerate him. State v. Brown (S.C. 1977) 269 S.C. 491, 238 S.E.2d 174. Assault And Battery 96(1)

Possibility jury might disbelieve State’s evidence as to circumstances of aggravation, and on remaining evidence find appellant guilt of lesser offense of simple assault and battery, will not entitle assailant to have lesser offense submitted to jury. State v. Foxworth (S.C. 1977) 269 S.C. 496, 238 S.E.2d 172. Assault And Battery 96(1)

Trial judge properly failed to charge simple assault and battery where all evidence introduced and admitted at trial pointed to guilt of assault and battery of high and aggravated nature, since there was no evidence tending to show assailant was only guilty of lesser included offense. State v. Foxworth (S.C. 1977) 269 S.C. 496, 238 S.E.2d 172.

Failure to request court to exclude voluntary manslaughter from charge when given opportunity to do so constitutes acquiescence in charge. State v. Allen (S.C. 1957) 231 S.C. 391, 98 S.E.2d 826. Criminal Law 1137(3)

9. Defenses

Trial court’s failure in capital murder trial to give requested instruction that State had burden of disproving self‑defense by proof beyond a reasonable doubt was reversible error, where defendant admitted to killing his victims and relied entirely on self‑defense at trial, and thus, defendant’s credibility and relative burdens of proof surrounding sole issue of self‑defense versus murder were central to case. State v. Burkhart (S.C. 2002) 350 S.C. 252, 565 S.E.2d 298, appeal after new trial 371 S.C. 482, 640 S.E.2d 450. Criminal Law 1173.2(3)

A jury instruction misstating the law of self‑defense amounts to an error of constitutional magnitude and is presumed prejudicial. State v. Burkhart (S.C. 2002) 350 S.C. 252, 565 S.E.2d 298, appeal after new trial 371 S.C. 482, 640 S.E.2d 450. Criminal Law 1163(4)

A defendant on trial for conspiracy, kidnapping, and criminal sexual conduct was entitled to a jury charge on the defense of coercion where he testified that, while driving the victim home, they were accosted by an armed man hidden in the back of the car, the gunman hit him on the side of the head with a weapon, and then pointed the weapon at either the defendant or the victim during the entire ordeal, which included forcing the defendant to assault the victim. Frasier v. State (S.C. 1991) 306 S.C. 158, 410 S.E.2d 572. Criminal Law 772(6)

The defense of entrapment is not available to a defendant with a predisposition, independent of government inducement and influence, to commit the crime with which the defendant is charged. Thus, in a prosecution for criminal conspiracy and distribution of crack cocaine arising out of the defendant’s delivery to an undercover agent of crack cocaine purchased by the defendant from a dealer with money supplied by the undercover agent, the defendant was not entitled to a jury instruction on the defense of entrapment where she was an admitted purchaser and regular user of crack cocaine, her own testimony showed that she participated in the drug buy expecting to share in the purchase, and she testified that the undercover agent gave her a portion of the crack cocaine. State v. Cooper (S.C.App. 1990) 302 S.C. 184, 394 S.E.2d 717. Criminal Law 569; Criminal Law 772(6)

A jury charge which requires a defendant to establish self‑defense by a preponderance of the evidence is erroneous. A defendant must merely produce evidence which causes the jury to have a reasonable doubt regarding his or her guilt. Dandy v. State (S.C. 1990) 301 S.C. 303, 391 S.E.2d 581.

Trial judge did not err in refusing to charge law on transferred self‑defense, where appellant wounded property owner and another individual in exchange of gunfire, regardless of viability of theory of transferred self‑defense in South Carolina, since law with respect to mutual combat obviated plea of self‑defense under facts of case which showed appellant returned with gun to property at least twice in spite of prior verbal abuse, threats, and gunshots. State v. Porter (S.C. 1977) 269 S.C. 618, 239 S.E.2d 641.

Trial judge’s instructions concerning insanity were irrelevant and should not have been given where defendant made no claim of insanity but claimed drunkenness sufficient to preclude possibility of his having formed specific intent to assault with intent to kill, but could not have been prejudicial to defendant, since plea of voluntarily drunkenness was not defense regardless of whether intent involved was general or specific. State v. Scott (S.C. 1977) 269 S.C. 438, 237 S.E.2d 886.

10. Sentencing

The trial court erred in denying a requested jury instruction, in a trial for murder in which the death penalty was being sought, that the jury’s recommendation would be accepted by the judge and the sentence imposed accordingly, where the trial judge did not convey to the jury the idea that its sentencing decision would be anything more than a recommendation. State v. Davis (S.C. 1991) 306 S.C. 246, 411 S.E.2d 220. Sentencing And Punishment 1789(7); Sentencing And Punishment 1789(9)

The jury instructions given by a trial court during the penalty phase of a capital murder prosecution were proper and did not impermissibly restrict the jury’s ability to consider all mitigating evidence by suggesting that only statutory mitigating circumstances were relevant, where the trial court instructed the jury that they could give a life sentence for any reason or for no reason at all and the court stated that the jurors could consider any mitigating circumstances otherwise authorized or allowed by law. Additionally, an instruction stating that the jury should not allow themselves “to be governed by sympathy, by prejudice, by passion, or by public opinion,” did not impermissibly imply that the jury could not consider “sympathy” in mitigation, where the instruction was given at the end of the penalty phase after the defendant had finished putting forth all of his evidence in mitigation, and a reasonable juror would simply not isolate the word “sympathy,” disregard all of the defendant’s evidence and all of the judge’s previous instructions, and refuse to consider mitigating evidence. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

In the sentencing phase of a capital case, the trial judge’s failure to specify that a finding of a mitigating circumstance need not be unanimous was not improper on the ground that it could have led jurors to erroneously conclude that such a finding must be unanimous, where the trial judge clearly charged the jury that it could consider any mitigating factor and could recommend a life sentence for no reason at all, and nothing in the charge insinuated that a life sentence could be given only upon a unanimous finding of a mitigating circumstance. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

A trial judge’s response to a jury’s parole eligibility question which did not specifically instruct the jury “not to consider parole,” but instructed that “life imprisonment is to be understood in its ordinary and plain meaning,” adequately instructed that parole was not a sentencing consideration. A “life imprisonment in its ordinary and plain meaning” charge necessarily precludes jury consideration of parole eligibility since being imprisoned for life and being paroled are mutually exclusive propositions. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Criminal Law 863(2)

It was not error for a court, during the sentencing phase of a capital murder trial, to refuse to charge the jury not to consider the deterrent effect of the death penalty. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

11. Aggravating circumstances

The statutory aggravating circumstance of physical torture, as defined in a trial judge’s charge, was not so broad as to violate the Eighth Amendment where the court’s charge defined physical torture as follows: “physical torture is the intentional infliction of serious, violent, horrible, or inhuman abuse upon the body of another before death. The instantaneous death of the victim does not constitute torture. Physical torture may include the malicious infliction of bodily harm to another by depriving him or her of a member of his or her body or by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member of his or her body, or the intentional and unmerciful prolonging of severe pain and abuse to the body of another, or the intentional unmerciful infliction of serious and extensive physical pain and abuse to the body of another.” State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546.

In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight; the aggravating circumstance is properly submitted if supported by any direct or circumstantial evidence. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Sentencing And Punishment 368.5

12. Charge on the facts

The trial court did not err in denying the jury charge requested by a defendant on trial for murder that if the jury determined that the defendant had no motive to murder the victim the jury should “duly consider” the absence of a motive in “weighing” the question of guilt; such an instruction would have been an impermissible charge on the facts. State v. Hartley (S.C.App. 1992) 307 S.C. 239, 414 S.E.2d 182, certiorari denied.

The trial court did not err in denying the jury charge requested by a defendant on trial for murder that the transcript taken as a whole indicated he had said that he had never touched the victim where the jury inquired during its deliberations into what he had testified to and requested to hear replayed only the solicitor’s cross‑examination of him; such an instruction would be impermissible as a charge on the facts. State v. Hartley (S.C.App. 1992) 307 S.C. 239, 414 S.E.2d 182, certiorari denied.

13. Plain meaning charge

The trial judge in a murder prosecution cured his erroneous denial of the defendant’s request for a “plain meaning” charge where he later properly answered the jury’s question regarding the possibility of parole by giving the “plain meaning” charge, from which a reasonable juror would have understood that life imprisonment meant life without parole. State v. Simmons (S.C. 1993) 310 S.C. 439, 427 S.E.2d 175, rehearing denied, certiorari granted 114 S.Ct. 57, 510 U.S. 811, 126 L.Ed.2d 27, reversed 114 S.Ct. 2187, 512 U.S. 154, 129 L.Ed.2d 133. Criminal Law 823(1)

14. Review

The failure of defendant to object or to request additional instructions, when opportunity is afforded, constitutes a waiver of any right to complain on appeal of errors in the charge. State v Hall (1969) 253 SC 294, 170 SE2d 379. State v Gerald (1973) 261 SC 392, 200 SE2d 243. State v Holland (1973) 261 SC 488, 201 SE2d 118.

Failure of counsel to make timely objection to charge renders question concerning such charge unavailable on appeal. State v Shea (1955) 226 SC 501, 85 SE2d 858. State v Anderson (1956) 229 SC 403, 93 SE2d 210. State v Collins (1959) 235 SC 65, 110 SE2d 270, cert den 361 US 895, 4 L Ed 2d 152, 80 S Ct 199.

The issue of a trial judge’s error in refusing to give an identification charge was preserved for review, despite the defendant’s failure to make a written request for any specific jury instruction, where the defendant had objected to the judge’s charge under Rule 20(b), SCRCrimP, on the ground that the trial court had made no charge on identification. State v. Simmons (S.C. 1992) 308 S.C. 80, 417 S.E.2d 92, rehearing denied.

Where, during defendant’s trial for murder, no objection was made to a jury instruction regarding the implication of malice from the use of a deadly weapon, the question would not be available for appellate review, pursuant to Section 17‑23‑100. State v. Bailey (S.C. 1983) 279 S.C. 437, 308 S.E.2d 795.

Supreme Court will not reverse case hereafter, civil or criminal, because trial judge fails to charge that where party fails to call witness who is present and who has relevant information to case, it is presumed that testimony, if presented, would be unfavorable to that party; while always proper for attorney to point out failure of party to call witness, such charge has no proper place in judge’s statement of law. State v. Hammond (S.C. 1978) 270 S.C. 347, 242 S.E.2d 411.

Failure to request an instruction when the trial judge gives counsel the opportunity to call attention to any omission in the charge constitutes a waiver of any right to complain on appeal of the alleged error. State v. Steadman (S.C. 1972) 257 S.C. 528, 186 S.E.2d 712.

**SECTION 17‑23‑110.** Circuit courts may grant new trials.

 All the circuit courts of this State shall have power to grant new trials in cases in which there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law of the United States.

HISTORY: 1962 Code Section 17‑514; 1952 Code Section 17‑514; 1942 Code Section 1030; 1932 Code Section 1030; Cr. P. ‘22 Section 120; Cr. C. ‘12 Section 99; Cr. C. ‘02 Section 72; G. S. 2652; R. S. 72.

Library References

Criminal Law 905 to 965.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 1912 to 1917, 1923 to 1930, 1932 to 1972, 1974 to 1982.

C.J.S. Homicide Sections 522 to 523.

LAW REVIEW AND JOURNAL COMMENTARIES

“New Trial” in “Handbook of South Carolina Trial and Appellate Practice,” 11 SCLQ, Supp, 107 (1959).

Attorney General’s Opinions

Magistrates may grant new trials in criminal cases for the same reasons that judges of other courts in this State usually grant new trials, but motions for new trials in magistrates’ courts must be made within five days of original judgments. 1968‑69 Op Atty Gen, No 2762, p 247 (November 13, 1969) 1969 WL 10757.

Notice of time and place for hearing new trial motions, as well as the grounds therefor, must be served upon prosecuting attorney, if any; if none, upon law‑enforcement officer who appeared as prosecuting witness. 1968‑69 Op Atty Gen, No 2762, p 247 (November 13, 1969) 1969 WL 10757.

NOTES OF DECISIONS

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1. In general

Power to grant new trial on questions of fact is lodged exclusively with circuit judge. State v Nance (1886) 25 SC 168; State v Haines (1892) 36 SC 504, 15 SE 555.

Judge’s conclusion as to new trial, when founded on facts at trial, is final. State v Tarrant (1884) 24 SC 593; State v Hayes (1904) 69 SC 295, 48 SE 251; State v Burris (1910) 85 SC 327, 67 SE 306; State v Porter (1908) 80 SC 450, 61 SE 1087; State v Knotts (1905) 70 SC 400, 50 SE 9.

The decision to grant a new trial is for the trial judge. Accordingly, the solicitor has no authority to enter into plea negotiations with regard to a charge for which a defendant has already been sentenced. State v. Johnson (S.C. 1985) 287 S.C. 171, 337 S.E.2d 204. Criminal Law 273.1(2); Criminal Law 911

The circuit courts are not only vested with the power to grant new trials, under and by virtue of the provisions of this section [Code 1962 Section 17‑514], but, likewise, as an incident to their original jurisdiction. State v. Williams (S.C. 1917) 108 S.C. 295, 93 S.E. 1006. Criminal Law 905

This section [Code 1962 Section 17‑514] does not make it the duty of the judge to grant a new trial; it only authorizes him to do so. State v. Hayes (S.C. 1904) 69 S.C. 295, 48 S.E. 251.

Judge cannot grant new trial at chambers. State v Chavis (1891) 34 SC 132, 13 SE 317. State v. Chavis (S.C. 1891) 34 S.C. 132, 13 S.E. 317.

Presence of prisoner at hearing of motion for new trial, see State v. Jefcoat (S.C. 1884) 20 S.C. 383.

Judge’s conclusion as to new trial is not final when founded on error of law. State v. David (S.C. 1881) 14 S.C. 428.

Circuit courts’ power to grant new trials should be liberally construed. Elmore v. Scurry (S.C. 1869) 1 S.C. 139.

2. Time for motion

This section [Code 1962 Section 17‑514] does not limit time within which motion must be made. State v Williams (1917) 108 SC 295, 93 SE 1006. Sams v Hoover (1890) 33 SC 401, 12 SE 8.

Wherever the motion is based on facts occurring at the trial or facts and circumstances immediately connected with the trial, the motion must be made before the adjournment of the term at which the trial was had, or before sentence or judgment, or upon a case made up and settled by the judge who tried the case. State v. Thompson (S.C. 1922) 122 S.C. 407, 115 S.E. 326.

Where defendant’s counsel appointed by the court did not demand time in which to prepare defense because of the tense feeling running against defendant in the community, his failure to demand time for preparation did not preclude the court from granting a new trial on the ground that the defendant did not have a fair and impartial trial. State v. Thompson (S.C. 1922) 122 S.C. 407, 115 S.E. 326.

Motion for a new trial must be made at a time that will reasonably admit of the consideration of the motion before the day assigned for an electrocution, or at such time before such day as shall be prescribed by a rule of the Supreme Court. But even if the motion in such a case should be made at such time as will not admit of its consideration before the day fixed for the electrocution, the Supreme Court will nevertheless entertain it if the defendant shall, upon proper showing to the Governor, procure a temporary respite from the sentence thereby giving the court time in which to consider the preliminary motion. State v. Hawkins (S.C. 1922) 121 S.C. 290, 114 S.E. 538, 27 A.L.R. 1083.

A motion for a new trial upon after‑discovered evidence in a case in which the circuit court has not been deprived of its jurisdiction, by appeal or otherwise, should be made before the circuit court or judge. State v. Hawkins (S.C. 1922) 121 S.C. 290, 114 S.E. 538, 27 A.L.R. 1083. Criminal Law 950

If the case is pending in the Supreme Court, a motion should be made before that Court to suspend the appeal, in order that the motion for a new trial may be made before the circuit court or judge. State v. Hawkins (S.C. 1922) 121 S.C. 290, 114 S.E. 538, 27 A.L.R. 1083.

If the appeal has been concluded and the remittitur has been sent down, a motion should be made in the Supreme Court, and not elsewhere, for the defendant to be allowed to make the motion for a new trial; if the motion is shown to be meritorious, the Supreme Court will take proper steps to enable the defendant to make his motion for a new trial upon after‑discovered evidence before the circuit court, the only court that may hear such motions upon their merits. State v. Hawkins (S.C. 1922) 121 S.C. 290, 114 S.E. 538, 27 A.L.R. 1083.

3. Jury deliberations

In cases where jury prematurely deliberates without an invitation to do so by court, defendant must demonstrate that he or she was prejudiced by premature deliberations in order to be entitled to new trial. State v. Aldret (S.C. 1999) 333 S.C. 307, 509 S.E.2d 811, rehearing denied. Criminal Law 925(1)

If the trial court determines, after conducting hearing during trial on allegation of premature deliberations, that premature deliberations occurred and were prejudicial, such findings should be set forth on the record, and a new trial ordered. State v. Aldret (S.C. 1999) 333 S.C. 307, 509 S.E.2d 811, rehearing denied. Criminal Law 925(1); Criminal Law 1086.11

If the court is convinced premature deliberations did, in fact, occur, but finds it impossible to conduct an adequate posttrial inquiry due to the passage of time, a new trial may be ordered. State v. Aldret (S.C. 1999) 333 S.C. 307, 509 S.E.2d 811, rehearing denied. Criminal Law 925(1)

If an allegation of premature deliberations arises during trial, the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial; if requested by the moving party, the court may voir dire the jurors and, if practicable, tailor a cautionary instruction to correct the ascertained damage. State v. Aldret (S.C. 1999) 333 S.C. 307, 509 S.E.2d 811, rehearing denied. Criminal Law 868

If the fact of the premature deliberations does not become apparent until after the jury’s verdict, the trial court may consider juror affidavits on issue. State v. Aldret (S.C. 1999) 333 S.C. 307, 509 S.E.2d 811, rehearing denied. Criminal Law 957(3)

If the trial court finds juror affidavits on issue of whether premature deliberations occurred to be credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict; at such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations. State v. Aldret (S.C. 1999) 333 S.C. 307, 509 S.E.2d 811, rehearing denied. Criminal Law 959

If the court determines after postverdict evidentiary hearing that premature deliberations did not occur, or that they were not prejudicial, adequate findings should be made so that the determination may be reviewed. State v. Aldret (S.C. 1999) 333 S.C. 307, 509 S.E.2d 811, rehearing denied. Criminal Law 868

Where, on motion to suspend an appeal with leave to move in the circuit court for a new trial on the ground that one of the jurors had determined to convict defendant before the trial commenced, defendant presented affidavits that such juror after the trial declared his intention, before any evidence was offered, to convict defendant without respect thereto, and the state submitted an affidavit of the juror wherein he denied that he had made up his mind to convict before hearing the evidence, and stated that any remarks made about his conduct as juror were not serious, but were made in the course of jocular conversation, the issue of fact presented was such as to merit investigation by the circuit court, and the motion will be granted. State v. Foster (S.C. 1908) 80 S.C. 347, 61 S.E. 564.

Handing letter to juror without examining it or asking consent of counsel, see State v. Wine (S.C. 1900) 58 S.C. 94, 36 S.E. 439.

4. Errors during trial

And Supreme Court will not grant new trial where no errors alleged. State v Clark (1881) 15 SC 403. State v Reily (1810) 5 SCL 444; State v Wright (1814) 5 SCL 421.

Or where jury might well have convicted upon the evidence. State v M’Lendon (1849) 36 SCL 85; State v Prater (1887) 26 SC 198, 2 SE 108.

A defendant convicted of armed robbery was entitled to a new trial based on the wrongful exclusion of the out‑of‑court statements of 2 witnesses where the statements (1) were identical in detail to the in‑court testimony, (2) served to exculpate the defendant, and (3) contradicted the testimony of the victim, who was the sole witness; thus, the exclusion of these statements was not harmless. State v. Doctor (S.C. 1992) 306 S.C. 527, 413 S.E.2d 36.

A defendant convicted of criminal sexual conduct was not entitled to a new trial where he had appeared pro se before the trial court and the trial judge failed to make a finding that the defendant knowingly and intelligently waived his right to counsel; rather, the matter would be remanded to the trial court to make such a finding, and a new trial granted only if it were shown that the waiver was not knowing and intelligent. State v. Cash (S.C. 1991) 304 S.C. 223, 403 S.E.2d 632.

A defendant’s conviction was reversed and the case was remanded for a new trial where the trial judge erroneously deprived the defendant of an initial determination of the voluntariness of an incriminating statement before consideration by the jury as required by the due process clause of the Fourteenth Amendment. Remanding the case for a suppression hearing only, as suggested by the State, would be an inadequate remedy because the jury never considered the issue of voluntariness as required by state law. State v. Victor (S.C. 1989) 300 S.C. 220, 387 S.E.2d 248.

A defendant who was convicted of distribution of cocaine was entitled to a new trial because of improper and prejudicial comments by the trial judge where, during the defense counsel’s cross‑examination of the supervisor of the undercover drug operation concerning the relationship between an undercover agent and a confidential informant, the trial judge interrupted with comments which implied that there was a lesser relationship between the agent and the informant, thereby implying that it was less likely that the agent’s moral character was affected by the informant’s bad character, and the trial judge later interrupted the examination and stated that the defense counsel did not want to put the judge on the stand, making it clear to the jury that he felt that the defendant was guilty of the charges. State v. Campbell (S.C. 1988) 297 S.C. 24, 374 S.E.2d 668.

Where defendant’s counsel did not have time in which to prepare defense, because defendant was required to go to trial within less than four hours after arraignment with counsel appointed by the court, and where defendant’s material witnesses were reluctant to testify through timidity or fear, because of the tense feeling against defendant in the community, the court was warranted in granting a new trial on the ground that defendant was prevented from having a fair and impartial trial. State v. Thompson (S.C. 1922) 122 S.C. 407, 115 S.E. 326.

Where defendant’s material witnesses were reluctant to testify through timidity or fear, and because of the tense feeling against defendant in the community, the court was warranted in granting a new trial on the ground that defendant was prevented from having a fair and impartial trial. State v. Thompson (S.C. 1922) 122 S.C. 407, 115 S.E. 326. Criminal Law 916

Or where judge charged jury upon facts. State v. Norton (S.C. 1888) 28 S.C. 572, 6 S.E. 820.

Or where guilt is clear, though no motive for murder appears. State v. Whitman (S.C. 1866) 14 Rich. 113.

M., when arraigned made no motion to continue, but moved for and obtained a bench warrant for some witnesses. On Friday he united with W., and the other prisoners in moving for a continuance, on the same ground W. had taken the day before:‑ Held, that M. had waived his right to a copy of the indictment, but, nevertheless, the Court, under the circumstances, granted him a new trial, ex gratia. State v. Winningham (S.C. 1857) 10 Rich. 257.

Or where there is variance between testimony and material allegations of indictment. State v. Hamilton (S.C. 1882) 17 S.C. 462.

A prisoner has the right to cross‑examine a witness for the prosecution before he leaves the witness‑stand; and a refusal of such right is proper ground for a new trial. State v. McNinch (S.C. 1879) 12 S.C. 89.

The jury commissioner who assisted in drawing the petit jury that convicted the prisoner, was the husband of a fourth cousin of deceased. Held, no ground for granting a new trial. State v. McNinch (S.C. 1879) 12 S.C. 89, 1879 WL 4934, Unreported.

The jury commissioner was assisted in drawing the grand jury that found the bill of indictment, was the husband of a fourth cousin of deceased, held no ground for granting a new trial. State v. McNinch (S.C. 1879) 12 S.C. 89, 1879 WL 4934, Unreported.

W., one of five prisoners jointly indicted for murder, upon their arraignment on Thursday, the term being only for a week, said that he was not ready for trial, and insisted upon a continuance, on the ground that he was entitled to a copy of the indictment three days before the trial. His motion to continue was refused, and the five were tried on Friday and W. and M. were found guilty and the rest acquitted:‑On appeal, held, that what W. did, amounted to a demand of a copy of the indictment, and that he was entitled to a new trial ex debito justiciae. State v. Winningham, 1857, 10 Rich. 257, 1857 WL 3213, Unreported.

5. Arguments of counsel

To be entitled to a new trial for improper closing arguments, the test for the appellate court is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Crosby (S.C.App. 2001) 348 S.C. 387, 559 S.E.2d 352, rehearing denied, certiorari granted, reversed 355 S.C. 47, 584 S.E.2d 110. Criminal Law 1171.1(2.1)

Prosecutor’s three references, during summation, to assault and battery defendant by his nickname of “Cobra” were not so excessive and repetitious as to infect entire trial with unfairness and deprive defendant of due process of law, and did not warrant new trial, even though those references were undesirable. State v. Tubbs (S.C. 1999) 333 S.C. 316, 509 S.E.2d 815, rehearing denied. Constitutional Law 4629; Criminal Law 919(3)

6. Mistrial

Trial judge acted within his discretion, during murder trial, in denying mistrial after witness testified that defendant had called victim “from the jailhouse,” where witness’s statement was vague and provided no particulars regarding defendant’s connection, if any to the “jailhouse,” and it was not apparent from the statement whether defendant herself was incarcerated or was visiting someone else at the jail. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 867.12(9)

When considering the propriety of a solicitor’s closing argument, the trial court is vested with broad discretion, including the discretion to grant or deny the defendant’s mistrial motion. State v. Crosby (S.C.App. 2001) 348 S.C. 387, 559 S.E.2d 352, rehearing denied, certiorari granted, reversed 355 S.C. 47, 584 S.E.2d 110. Criminal Law 2195

A defendant convicted of entering a bank with the intent to steal was entitled to a mistrial where, after the judge had instructed the jury on the recommendation of mercy, the bailiff responded to the foreperson’s question regarding the effect of a mercy recommendation on the length of the defendant’s sentence, that the jury should not worry if they were deadlocked on the mercy issue, since the judge was fair; such response tended to lessen the jury’s sense of its responsibility. State v. Cameron (S.C.App. 1993) 311 S.C. 204, 428 S.E.2d 10, rehearing denied, certiorari denied.

Trial judge did not abuse discretion in not declaring mistrial as result of solicitor’s comment that jury would not find appellants in Sunday school, and that they hung out at 555 Club. State v. Bamberg (S.C. 1977) 270 S.C. 77, 240 S.E.2d 639.

Inability to cross‑examine State witness, when witness became incoherent during cross‑examination and had to be removed bodily from courtroom, did not warrant mistrial being declared where witness did not make in‑court identification of defendant, his testimony was not damaging to defense, and the trial judge instructed jury to disregard witness’ testimony. State v. Gardner (S.C. 1977) 269 S.C. 698, 239 S.E.2d 729. Criminal Law 867.14(1)

7. Verdict

New trial should be granted where there was no evidence on which to base verdict. State v Clardy (1906) 73 SC 340, 53 SE 493; State v Howard (1902) 64 SC 344, 42 SE 173.

A motion for new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice, or prejudice; in contrast, if the amount of the verdict is grossly excessive, so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute, rather than a new trial nisi remittitur. Clark v. South Carolina Dept. of Public Safety (S.C.App. 2002) 353 S.C. 291, 578 S.E.2d 16, rehearing denied, affirmed 362 S.C. 377, 608 S.E.2d 573. New Trial 162(1)

And new trial should not be granted where judge’s charge was humane, and there was no error in the verdict. State v Hammond (1850) 136 SCL 91.

8. After discovered evidence

In order to warrant the granting of a new trial on the ground of after‑discovered evidence it must appear: (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. State v Jones (1937) 185 SC 274, 194 SE 11; State v Clamp (1954) 225 SC 89, 80 SE2d 918.

Evidence that witness on former trial swears her testimony was not true is not newly discovered evidence. State v Adams (1906) 78 SC 523, 60 SE 658. State v Marks (1905) 70 SC 448, 50 SE 14. State v Workman (1892) 38 SC 550, 16 SE 770.

Judge has discretionary power to grant new trials on after‑discovered evidence. State v David (1881) 14 SC 428. State v Workman (1881) 15 SC 540. State v Anderson (1910) 85 SC 229, 67 SE 237. State v Nance (1886) 25 SC 168.

A defendant convicted of murder was not entitled to a new trial based on the discovery that he had a brain tumor at the time of the offense where his expert testified only that the tumor “may have” had an effect on his commission of the crime, and thus he failed to prove that the tumor had rendered the defendant legally insane. State v. South (S.C. 1993) 310 S.C. 504, 427 S.E.2d 666. Criminal Law 945(2)

Court erred in granting motion for new trial on ground of newly discovered evidence where evidence was conversation between solicitor and witness whereby witness was promised immunity or leniency in return for his testimony against defendant, where contents of alleged conversation was practically identical to statements by solicitor at pretrial conference in related trial that his office was not pursuing case against witness, at which trial court found that no promises of leniency had been made to witness. State v. Caskey (S.C. 1979) 273 S.C. 325, 256 S.E.2d 737, certiorari denied 100 S.Ct. 660, 444 U.S. 1012, 62 L.Ed.2d 641. Criminal Law 938(1)

While motion for new trial based on the after‑discovered evidence is addressed to sound discretion of trial judge, it may be granted only if movant shows that evidence upon which it is based is such as would probably change result if new trial was had, has been discovered since trial, could not by exercise of due diligence have been discovered before trial, is material to issue of guilt or innocence, and is not merely cumulative or impeaching. State v. Caskey (S.C. 1979) 273 S.C. 325, 256 S.E.2d 737, certiorari denied 100 S.Ct. 660, 444 U.S. 1012, 62 L.Ed.2d 641. Criminal Law 938(1)

Judge’s decision to deny motion for new trial was justified where after‑discovered inconsistency in investigator’s testimony could have been discovered by simple review of testimony given at preliminary hearing, could only be used to impeach investigator’s trial testimony, and it was improbable this inconsistency would change result if new trial were had. State v. Irvin (S.C. 1978) 270 S.C. 539, 243 S.E.2d 195.

To obtain new trial based on after‑discovered evidence, movant must show evidence (1) is such as would probably change result if new trial is had, (2) has been discovered since trial, (3) could not have been discovered before trial by exercise of due diligence, (4) is material to issue, and (5) is not merely cumulative or impeaching. State v. Irvin (S.C. 1978) 270 S.C. 539, 243 S.E.2d 195. Criminal Law 938(1)

Trial judge was within discretion, under facts of case and guidelines regarding after‑discovered evidence, in denying motion for new trial, based on recantation of testimony by two prosecution witnesses who stated that one was too inebriated to remember events. State v. Porter (S.C. 1977) 269 S.C. 618, 239 S.E.2d 641.

Trial judge was within discretion in refusing new trial upon basis of recantation of trial testimony by appellant’s codefendant, since judge had power to weigh credibility of newly discovered evidence offered in support of motion for new trial and recantation of testimony is ordinarily unreliable. State v. Wright (S.C. 1977) 269 S.C. 414, 237 S.E.2d 764.

Motion for new trial based on after‑discovered evidence is addressed to discretion of trial judge. State v. Deese (S.C. 1976) 266 S.C. 534, 225 S.E.2d 175. Criminal Law 911

When testimony given at hearing on motion for new trial based on after‑discovered evidence is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence. State v. Deese (S.C. 1976) 266 S.C. 534, 225 S.E.2d 175. Criminal Law 961

The rule is well settled that a motion for a new trial on the ground of after‑discovered evidence is addressed to the sound discretion of the trial court, and will not be reviewed unless there is abuse of that discretion, or unless the decision was influenced by an error of law. State v. Clamp (S.C. 1954) 225 S.C. 89, 80 S.E.2d 918. Criminal Law 1156(3)

It has been repeatedly held by the Supreme Court that denial of new trial for after‑discovered evidence, which intended only to impeach State’s witness or corroborate testimony in support of plea of alibi, is not error. State v. Clamp (S.C. 1954) 225 S.C. 89, 80 S.E.2d 918. Criminal Law 938(1)

As a rule, the courts do not look with favor upon motions for new trials on the ground of after‑discovered evidence, as there must be an end to litigation in any case. State v. Clamp (S.C. 1954) 225 S.C. 89, 80 S.E.2d 918. Criminal Law 938(1)

The granting or refusal of a motion for a new trial made upon the ground of after‑discovered evidence is largely within the sound discretion of the circuit judge and his decision thereon will not be disturbed in the absence of a showing of abuse of discretion, amounting to manifest error of law. State v. Strickland (S.C. 1942) 201 S.C. 170, 22 S.E.2d 417. Criminal Law 938(1); Criminal Law 1176

In the consideration of a motion for a new trial on after‑discovered evidence, the circuit judge is made the sole arbiter, and, however much the appellate court might differ with him, it is powerless to control the exercise of his discretion, unless the alleged after‑discovered evidence is so lacking in merit and falls so far short of the requirements as to such evidence that the judge’s granting a new trial upon it would amount to a clear abuse of his discretion, or unless he has committed error of law. State v. Hawkins (S.C. 1922) 121 S.C. 290, 114 S.E. 538, 27 A.L.R. 1083. Criminal Law 1156(3)

The right to a new trial on newly discovered testimony, when sufficient, is as fully settled and guaranteed by the law as any other, and this right cannot be lost because a new trial had once been refused upon facts wholly different from and not involving this newly discovered testimony. State v. Williams (S.C. 1917) 108 S.C. 295, 93 S.E. 1006. Criminal Law 912

When the Court can see, in the evidence of the prisoner, no sufficient reason to question his sanity, and he has had a fair trial, with all the humane allowances of the law, before a jury of his peers, it will not be justified in interfering with the finding. State v. Stark (S.C. 1847).

**SECTION 17‑23‑120.** Immediate disposition of certain misdemeanors or felonies; application to clerk.

 When any defendant is arrested upon a warrant charging a misdemeanor which is not within the jurisdiction of the magistrates court or, notwithstanding any other provision of law, when any defendant is arrested upon a warrant charging a felony, he may apply to the clerk of court of the county having jurisdiction of such case for an immediate disposition of the case and thereupon the clerk of court shall forward the arrest warrant to the solicitor of the judicial circuit.

HISTORY: 1962 Code Section 17‑510; 1952 Code Section 17‑510; 1942 Code Section 1022‑1; 1939 (41) 215; 1977 Act No. 206 Section 1.

CROSS REFERENCES

Pretrial intervention program for certain criminal cases, see Section 17‑22‑10 et seq.

What constitutes a misdemeanor, see Section 16‑1‑20.

Library References

Criminal Law 273(4.1).

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 510 to 511.

NOTES OF DECISIONS

In general 1

1. In general

Defendant who pled guilty to receiving stolen goods and was sentenced to eight years, would have his guilty plea vacated where he was indicted for housebreaking and larceny but pled guilty to receiving stolen goods, he was never indicted for receiving stolen goods, no presentment to the grand jury was made for receiving stolen goods, and no waiver of presentment was accomplished in accord with Sections 17‑23‑120 through 17‑23‑140. State v. Martin (S.C. 1982) 278 S.C. 256, 294 S.E.2d 345. Criminal Law 1187

**SECTION 17‑23‑130.** Immediate disposition of certain misdemeanors or felonies; waiver of presentment by grand jury and plea of guilty.

 Upon receipt by the solicitor of the warrant forwarded to him pursuant to the provisions of Section 17‑23‑120, he may forthwith prepare a formal indictment as now provided by law in such cases and shall return it to the clerk of court. The clerk of court shall then notify the sheriff or one of his duly authorized deputies to bring the defendant before the clerk at a time and place to be stated in the notice at which time the clerk shall have the defendant sign a waiver of the presentment by the grand jury and his plea of guilty; provided, that no plea shall be entered or made under this section except by and with the consent of the solicitor of the circuit after investigation by such solicitor.

HISTORY: 1962 Code Section 17‑511; 1952 Code Section 17‑511; 1942 Code Section 1022‑1; 1939 (41) 215; 1977 Act No. 206 Section 2.

CROSS REFERENCES

Constitutional provision regarding presentment, see SC Const, Art I, Section 11.

Library References

Criminal Law 273(4.1).

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 510 to 511.

RESEARCH REFERENCES

Treatises and Practice Aids

Criminal Procedure, Second Edition Section 15.1(F), Waiver in Indictment and Limited‑Indictment Jurisdictions.

NOTES OF DECISIONS

In general 1

Guilty pleas 2

1. In general

Oral waiver of presentment was not sufficient to bestow subject matter jurisdiction on the trial court in the absence of an indictment; a written waiver was required. Odom v. State (S.C. 2002) 350 S.C. 300, 566 S.E.2d 528. Criminal Law 99

In the absence of an indictment, there must be a valid waiver of presentment for the trial court to have subject matter jurisdiction of the offense. Odom v. State (S.C. 2002) 350 S.C. 300, 566 S.E.2d 528. Criminal Law 99

The circuit court did not have subject matter jurisdiction to sentence the defendant on possession of a stolen vehicle charge where the defendant was indicted for grand larceny of a vehicle but signed a waiver on the bottom of an indictment for grand larceny. State v. McNeil (S.C.App. 1994) 314 S.C. 473, 445 S.E.2d 461.

A county court had subject matter jurisdiction over offenses committed in 2 other counties where the defendant had been indicted in one of these counties and, pursuant to a plea agreement, had waived presentment of the charges from the other county; although it is preferable that a waiver of the right to presentment be taken by the clerk of the county where the offense occurred, the failure to do so does not render the waiver invalid. State v. Evans (S.C. 1992) 307 S.C. 477, 415 S.E.2d 816.

2. Guilty pleas

Circuit Court lacked subject matter jurisdiction to accept guilty plea to offense of assault and battery of high and aggravated nature (ABHAN), where indictment charged defendant with offense of second‑degree lynching; ABHAN was not lesser‑included offense of second degree lynching and, because no indictment charging defendant with ABHAN was prepared, no valid waiver of presentment of charge to grand jury could occur, which was prerequisite to valid guilty plea. State v. Smalls (S.C.App. 2003) 354 S.C. 498, 581 S.E.2d 850, rehearing denied, certiorari granted, reversed 364 S.C. 343, 613 S.E.2d 754. Criminal Law 273(4.1)

Formal indictment is condition precedent to valid waiver of presentment of charge to grand jury, which is prerequisite to valid guilty plea. State v. Smalls (S.C.App. 2003) 354 S.C. 498, 581 S.E.2d 850, rehearing denied, certiorari granted, reversed 364 S.C. 343, 613 S.E.2d 754. Criminal Law 273(4.1); Indictment And Information 5

Two exceptions apply to the general rule that an indictment must sufficiently state the offense to confer jurisdiction on a court to accept a guilty plea: (1) if the defendant waives presentment, and (2) the charge to which the defendant pleads guilty is a lesser‑included offense of the crime charged in the indictment. Hooks v. State (S.C. 2003) 353 S.C. 48, 577 S.E.2d 211. Criminal Law 273(4.1); Indictment And Information 5

Trial court did not err in accepting defendant’s guilty plea to trafficking in cocaine, where trial court asked defendant and his attorney numerous questions to determine whether defendant freely and voluntarily decided to plead guilty. State v. Lopez (S.C.App. 2002) 352 S.C. 373, 574 S.E.2d 210. Criminal Law 273.1(4)

The circuit court had jurisdiction to accept the defendant’s guilty pleas because the defendant waived presentment in writing prior to the pleas. Plante v. State (S.C. 1994) 315 S.C. 562, 446 S.E.2d 437, rehearing denied. Criminal Law 273(4.1); Indictment And Information 196(3)

Defendant’s failure to sign waiver of indictment, as required by Sections 17‑23‑130 and 17‑23‑140, invalidate his guilty plea, where (1) he was indicted for kidnapping and robbery, and (2) after plea negotiations, State allowed him to plead guilty to assault and battery, rather than kidnapping, but did not present assault charge to grand jury. Phillips v. State (S.C. 1984) 281 S.C. 41, 314 S.E.2d 313.

Defendant who pled guilty to receiving stolen goods and was sentenced to eight years, would have his guilty plea vacated where he was indicted for housebreaking and larceny but pled guilty to receiving stolen goods, he was never indicted for receiving stolen goods, no presentment to the grand jury was made for receiving stolen goods, and no waiver of presentment was accomplished in accord with Sections 17‑23‑120 through 17‑23‑140. State v. Martin (S.C. 1982) 278 S.C. 256, 294 S.E.2d 345. Criminal Law 1187

A defendant who failed to properly execute waivers of indictment before properly pleading guilty to an indictment which had not been presented to the grand jury would have his guilty pleas vacated. Summerall v. State (S.C. 1982) 278 S.C. 255, 294 S.E.2d 344. Criminal Law 273(4.1)

**SECTION 17‑23‑140.** Immediate disposition of certain misdemeanors or felonies; appearance before judge and sentence.

 Upon the defendant’s signing the waiver of presentment and the plea of guilty the clerk of court shall deliver the indictment to the sheriff or one of his duly authorized deputies whose duty it shall be to appear before the resident judge of the circuit or presiding judge therein at some convenient time and place, having with him the defendant. And upon the defendant’s acknowledging his plea before the judge the judge shall sentence the defendant as though the indictment had been presented by the grand jury and the plea of the defendant taken at the regular term of the court of general sessions of the county in which the case arose. Provided, however, that in the event the defendant is charged with a felony, the acknowledgement by the defendant of his plea and the sentencing by the judge shall take place only in open court and shall not take place in chambers.

HISTORY: 1962 Code Section 17‑512; 1952 Code Section 17‑512; 1942 Code Section 1022‑1; 1939 (41) 215; 1977 Act No. 206 Section 3.

Library References

Criminal Law 273(4.1).

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 510 to 511.

LAW REVIEW AND JOURNAL COMMENTARIES

Sentencing. 24 S.C. L. Rev. 523.

NOTES OF DECISIONS

In general 1

1. In general

Formal indictment is condition precedent to valid waiver of presentment of charge to grand jury, which is prerequisite to valid guilty plea. State v. Smalls (S.C.App. 2003) 354 S.C. 498, 581 S.E.2d 850, rehearing denied, certiorari granted, reversed 364 S.C. 343, 613 S.E.2d 754. Criminal Law 273(4.1); Indictment And Information 5

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In the absence of an indictment, there must be a valid waiver of presentment for the trial court to have subject matter jurisdiction of the offense. Odom v. State (S.C. 2002) 350 S.C. 300, 566 S.E.2d 528. Criminal Law 99

Oral waiver of presentment was not sufficient to bestow subject matter jurisdiction on the trial court in the absence of an indictment; a written waiver was required. Odom v. State (S.C. 2002) 350 S.C. 300, 566 S.E.2d 528. Criminal Law 99

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Defendant’s failure to sign waiver of indictment, as required by Sections 17‑23‑130 and 17‑23‑140, invalidate his guilty plea, where (1) he was indicted for kidnapping and robbery, and (2) after plea negotiations, State allowed him to plead guilty to assault and battery, rather than kidnapping, but did not present assault charge to grand jury. Phillips v. State (S.C. 1984) 281 S.C. 41, 314 S.E.2d 313.

Defendant who pled guilty to receiving stolen goods and was sentenced to eight years, would have his guilty plea vacated where he was indicted for housebreaking and larceny but pled guilty to receiving stolen goods, he was never indicted for receiving stolen goods, no presentment to the grand jury was made for receiving stolen goods, and no waiver of presentment was accomplished in accord with Sections 17‑23‑120 through 17‑23‑140. State v. Martin (S.C. 1982) 278 S.C. 256, 294 S.E.2d 345. Criminal Law 1187

A defendant who failed to execute waivers of indictment before properly pleading guilty to an indictment which had not been presented to the grand jury would have his guilty pleas vacated. Summerall v. State (S.C. 1982) 278 S.C. 255, 294 S.E.2d 344.

**SECTION 17‑23‑150.** Immediate disposition of certain misdemeanors or felonies; powers of circuit judges.

 Except as otherwise provided in Section 17‑23‑140, as to such cases as are herein referred to in Sections 17‑23‑120 to 17‑23‑140 the circuit judges shall have the same powers at chambers as they have in open court.

HISTORY: 1962 Code Section 17‑513; 1952 Code Section 17‑513; 1942 Code Section 1022‑1; 1939 (41) 215; 1977 Act No. 206 Section 4.

Library References

Criminal Law 273(4.1).

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 510 to 511.

**SECTION 17‑23‑160.** Notice of right to preliminary hearing; form for request.

 When any person charged with a crime who is entitled to a preliminary hearing on such charges appears in person or by counsel in a hearing to set bond, he shall be notified by a magistrate orally and in writing of his right to such preliminary hearing. When a person is notified of his right to a preliminary hearing, he shall be furnished a simple form providing him an opportunity to request a preliminary hearing by signing and returning this form to the advising magistrate then and there or thereafter. Any person so notified who fails to timely request a preliminary hearing shall lose his right to such hearing.

HISTORY: 1980 Act No. 393, Section 2.

CROSS REFERENCES

Requirement that preliminary hearing be held, and time for requesting such hearing, see Section 22‑5‑320.

Library References

Bail 49(5).

Criminal Law 224 to 225.

Westlaw Topic Nos. 49, 110.

C.J.S. Bail; Release and Detention Pending Proceedings Sections 76, 78 to 80, 82 to 86, 94 to 98, 100 to 102.

C.J.S. Criminal Law Sections 457 to 458.

C.J.S. Indictments and Informations Section 82.

NOTES OF DECISIONS

In general 1

1. In general

Section 22‑5‑320 is unconstitutional, under Art V Section 7, since the statute acts to deprive the Court of General Sessions of its original concurrent jurisdiction over criminal cases without also granting exclusive jurisdiction of the same cases to the magistrates’ courts in that the statute authorizes a magistrate to hold a preliminary hearing only when the crime charged is “beyond his jurisdiction,” and the magistrate cannot possess the “exclusive jurisdiction” required by Art V Section 7 in a matter that is “beyond his jurisdiction.” The striking of Section 22‑5‑320 renders meaningless and void the remainder of the statutes which set out procedures incident to the holding of a preliminary hearing (Sections 22‑5‑310 through 22‑5‑360) and, in addition, Section 17‑23‑160, which provides for notification of the right to request a preliminary hearing. State v. Keenan (S.C. 1982) 278 S.C. 361, 296 S.E.2d 676.

**SECTION 17‑23‑162.** Presence of affiant or arresting officer to testify at preliminary hearing.

 The affiant listed on an arrest warrant or the chief investigating officer for the case must be present to testify at the preliminary hearing of the person arrested pursuant to the warrant.

HISTORY: 2000 Act No. 394, Section 6.

Library References

Criminal Law 234.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 467 to 469.

Attorney General’s Opinions

Discussion of the practice of police officers signing other officer’s warrants. S.C. Op.Atty.Gen. (November 2, 2015) 2015 WL 7293601.

**SECTION 17‑23‑165.** Attorney appearing at preliminary hearing not obligated to continue representation.

 The appearance by an attorney on behalf of a defendant in a preliminary hearing shall not in and of itself obligate that attorney to continue the representation of that defendant beyond the preliminary hearing.

HISTORY: 1980 Act No. 393, Section 1A.

CROSS REFERENCES

Requirement that preliminary hearing be held, and time for requesting such hearing, see Section 22‑5‑320.

Library References

Criminal Law 232.

Westlaw Topic No. 110.

C.J.S. Criminal Law Section 349.

**SECTION 17‑23‑170.** Admissibility of evidence concerning battered spouse syndrome; foundation; notice; lay testimony.

 (A) Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self‑defense, defense of another, defense of necessity, or defense of duress. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions. This testimony is not admissible when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

 (B) Expert opinion testimony on the battered spouse syndrome shall not be considered a new scientific technique the reliability of which is unproven.

 (C) Lay testimony as to the actions of the batterer and how those actions contributed to the facts underlying the basis of the criminal charge shall not be precluded as irrelevant or immaterial if it is used to establish the foundation for evidence on the battered spouse syndrome.

 (D) The foundation shall be sufficient for the admission of testimony on the battered spouse syndrome if the proponent of the evidence establishes its relevancy and the proper qualifications of the witness.

 (E) A defendant who proposes to offer evidence of the battered spouse syndrome shall file written notice with the court before trial.

HISTORY: 1995 Act No. 7, Part I Section 15.

Library References

Criminal Law 474.4(3), 484, 629(1), 629(11).

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 592, 595, 598, 630, 1447, 1449.

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S.C. Jur. Criminal Domestic Violence Section 13, Battered Spouse Syndrome.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Criminal Law. 45 S.C. L. Rev. 127 (Autumn, 1993).

NOTES OF DECISIONS

In general 1

1. In general

Defendant’s expert’s testimony regarding battered wife syndrome should have been admitted, in prosecution for murder, although trial court refused to allow testimony because it conflicted with defendant’s own testimony that she did not know her attacker/victim at time she fired gun, where defendant’s defense at trial was self‑defense, defendant testified to pattern of past abuse perpetrated by victim, and court charged jury on self defense; precisely because defendant’s testimony conflicted with her own defense, and proffered expert testimony was relevant to explain this conflict, jury was entitled to consider testimony. State v. Grubbs (S.C.App. 2003) 353 S.C. 374, 577 S.E.2d 493, rehearing denied, certiorari denied. Criminal Law 474.4(3)

**SECTION 17‑23‑175.** Admissibility of out‑of‑court statement of child under twelve; determination of trustworthiness; notice to adverse party.

 (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out‑of‑court statement of a child is admissible if:

 (1) the statement was given in response to questioning conducted during an investigative interview of the child;

 (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);

 (3) the child testifies at the proceeding and is subject to cross‑ examination on the elements of the offense and the making of the out‑of‑court statement; and

 (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

 (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:

 (1) whether the statement was elicited by leading questions;

 (2) whether the interviewer has been trained in conducting investigative interviews of children;

 (3) whether the statement represents a detailed account of the alleged offense;

 (4) whether the statement has internal coherence; and

 (5) sworn testimony of any participant which may be determined as necessary by the court.

 (C) For purposes of this section, a child is:

 (1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and

 (2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.

 (D) For purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.

 (E)(1) The contents of a statement offered pursuant to this section are subject to discovery pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

 (2) If the child is twelve years of age or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve.

 (F) Out‑of‑court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:

 (1) the necessary visual and audio recording equipment was unavailable;

 (2) the circumstances surrounding the making of the statement;

 (3) the relationship of the professional and the child; and

 (4) if the statement possesses particularized guarantees of trustworthiness.

 After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

HISTORY: 2006 Act No. 342, Section 8, eff July 1, 2006 and 2006 Act No. 346, Section 2, eff July 1, 2006.

Editor’s Note

2006 Act No. 342, Section 1, provides as follows:

“This act may be cited as the ‘Sex Offender Accountability and Protection of Minors Act of 2006’.”

Library References

Infants 1697, 1740.

Westlaw Topic No. 211.

C.J.S. Rape Sections 82 to 86.

C.J.S. Sodomy Sections 8 to 12.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Evidence Section 87, Circumstances Where Statement is Not Hearsay.

NOTES OF DECISIONS

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1. In general

Trial court did not abuse its discretion in admitting victim’s forensic interview and allowing jurors to use transcript of audio portion of interview, even though victim’s statement in video was not clearly audible, in prosecution for lewd act upon a child; court demonstrated that it understood the purpose of statute governing admission of out‑of‑court statements of children when it explained to jurors that they needed to “listen and watch” and “decide what was said and done on the video, not what the transcript is.” State v. White (S.C.App. 2016) 416 S.C. 135, 784 S.E.2d 695. Criminal Law 438(8); Criminal Law 858(1)

The sole purpose of a forensic interviewer’s jury testimony in a sexual abuse case involving a minor is to lay the foundation for the introduction of the videotaped interview, and the questioning must be limited to that subject; there is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted, because this type of testimony, which establishes the “particularized guarantees of trustworthiness,” necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the defendant’s arrest, the charges, and the trial, thus impermissibly bolstering the minor’s credibility. State v. Anderson (S.C. 2015) 413 S.C. 212, 776 S.E.2d 76, rehearing denied. Criminal Law 444.16

Admission of recording of interviews between forensic examiner and nine‑year‑old victim upon allegations of criminal sexual conduct did not improperly bolster victim’s testimony at trial for committing a lewd act on a minor, where statutory conditions required for admission of recording were satisfied, examiner never stated he believed victim and gave no indication regarding victim’s credibility, and examiner offered testimony for sole purpose of laying proper foundation for admission of recording. State v. Perry (S.C.App. 2014) 410 S.C. 191, 763 S.E.2d 603, rehearing denied, certiorari denied. Witnesses 414(1)

Statutory conditions required for admission of DVD recording of child victim’s forensic interview were met in prosecution for criminal sexual conduct (CSC) with a minor; defendant was afforded the opportunity to cross‑examine victim while victim was on the stand, defendant did not argue he was prohibited by any rule of law from examining victim about the elements of the offense or the making of the out‑of‑court statement during his cross‑examination of victim, but, instead, he simply maintained that his cross‑examination of victim was not effective because the State failed to first place the DVD into evidence. State v. Hill (S.C.App. 2011) 394 S.C. 280, 715 S.E.2d 368. Criminal Law 438(8); Infants 1740(4); Sex Offenses 241

Child sexual abuse victim’s prior consistent out‑of‑court hearsay statement was admissible; statement was given in response to questioning conducted during investigative interview of child, recording of statement was preserved, child testified at proceeding and was subject to cross‑examination on elements of offense and making of out‑of‑court statement, and court found, in hearing conducted outside presence of jury, that totality of circumstances surrounding making of statement provided particularized guarantee of trustworthiness. State v. Russell (S.C.App. 2009) 383 S.C. 447, 679 S.E.2d 542, habeas corpus denied 2016 WL 234986, appeal dismissed 670 Fed.Appx. 146, 2016 WL 6543493, rehearing en banc denied. Infants 1740(5); Sex Offenses 241

Statutory amendment providing for admission of videotaped interviews of child sexual abuse victims was an addition to the existing statutory scheme, and therefore savings clause accompanying the enactment of amendment did not prohibit the application of amendment to defendant’s pending sex offense prosecution; amendment did not repeal or amend existing law. State v. Bryant (S.C.App. 2009) 382 S.C. 505, 675 S.E.2d 816, rehearing denied, certiorari denied. Criminal Law 13.2

2. Constitutional issues

Statute permitting a videotaped forensic interview of an alleged child abuse victim to be played before a jury did not arbitrarily allow an alleged victim to testify, so as to deprive a defendant of his due process right to a fair trial, where defendant extensively cross‑examined the minor as to prior inconsistent statements given during the videotaped interview, and during closing statements, argued those inconsistencies damaged the minor’s credibility. State v. Legg (S.C. 2016) 416 S.C. 9, 785 S.E.2d 369. Constitutional Law 4671; Infants 1661

Statutory provision that permitted the admission of child’s videotaped forensic interview at defendant’s trial on the charge of first degree criminal sexual conduct with a minor did not violate the Sixth Amendment’s Confrontation Clause, even though defendant did not have the opportunity for contemporaneous cross‑examination of the child, and would have had to recall the child as an adverse witness in order to examine her about the videotaped statement; the child testified in open court and defendant’s right to the opportunity for effective cross‑examination was satisfied during the child’s actual trial testimony. State v. Anderson (S.C. 2015) 413 S.C. 212, 776 S.E.2d 76, rehearing denied. Criminal Law 662.40

Statute allowing an out‑of‑court statement of a child under 12 years old to be admissible under certain circumstances does not violate the ex post facto laws, as statute is not penal in nature but merely authorizes the introduction of new evidence, and statute does not alter substantial personal rights. State v. Stahlnecker (S.C. 2010) 386 S.C. 609, 690 S.E.2d 565. Constitutional Law 2812; Criminal Law 419(1)

Statutory amendment providing for admission of videotaped interviews of child sexual abuse victims was procedural in nature, and therefore application of amendment to defendant’s pending sex offense case to allow admission of videotape did not violate the ex post facto clause; admission of the videotape did not change the quantum of evidence against the defendant and it did not change the required elements of the crime. State v. Bryant (S.C.App. 2009) 382 S.C. 505, 675 S.E.2d 816, rehearing denied, certiorari denied. Constitutional Law 2812; Criminal Law 14

3. Review

Trial objection regarding victim’s out‑of‑court statement to sex crimes investigator was based on alleged constitutional violations, and thus defendant did not preserve for appeal arguments that statement constituted impermissible hearsay, that it was unduly prejudicial because it was inconsistent with victim’s trial testimony, or that the state failed to comply with statute allowing for such testimony. State v. Stahlnecker (S.C. 2010) 386 S.C. 609, 690 S.E.2d 565. Criminal Law 1043(3)

Defendant failed to preserve for appellate review claim that child’s videotaped interview was improperly admitted because its probative value was significantly outweighed by its prejudicial effect; at trial, defendant argued videotape lacked probative value because it was cumulative of child’s trial testimony, but on appeal, defendant argued videotape was prejudicial because child was seen drawing card for his mother and “playfully interacting with counselor,” thereby stirring emotions of the jurors. State v. Russell (S.C.App. 2009) 383 S.C. 447, 679 S.E.2d 542, habeas corpus denied 2016 WL 234986, appeal dismissed 670 Fed.Appx. 146, 2016 WL 6543493, rehearing en banc denied. Criminal Law 1043(3)