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Judge denies defense motions as Abernathy trial date nears

By **DAVE FOPAY, Staff Writer**
dfopay@jg-tc.com

CHARLESTON — Fire investigators had the right to enter a woman's burned home, even before they had a warrant, so evidence found there can be used in the trial of the man accused of beating her.

Circuit Judge Gary Jacobs made that ruling Wednesday after a motion from Jason A. Abernathy's attorneys asked that the search of the house be declared illegal.

Jacobs didn't go along with defense attorney Mark Wykoff's argument that the investigation of Gina Giberson's house should have ended as soon as an Illinois State Fire Marshal's Office search dog found indications of accelerants.

The Illinois Supreme Court has ruled that dogs' findings aren't the same as searches, but can be used to show cause to obtain a search warrant, as happened in the case of the fire at Giberson's home, Jacobs said. Before the warrant was issued, the fire department and the state fire marshal had the legal duty to go into the house to try to find out what caused the fire, he added.

Wykoff and co-defense counsel Monroe McWard wanted to bar any evidence gathered in the burned home from being used at Abernathy's trial on a charge of aggravated domestic battery. Abernathy, 34, is accused of beating Giberson with a baseball bat at her home at 211 Fourth St. in Charleston on Oct. 16, 2007, and the house was destroyed by fire the same day.

Wykoff argued there had to be some reason to enter the home after the fire was extinguished and cited legal precedents outlining that requirement. However, Jacobs agreed with State's Attorney Steve Ferguson that the difference in those cases was that fire investigators left and returned, while the Charleston Fire Department personnel were at the scene until the end of the investigation at Giberson's home.

Jacobs also disagreed with Wykoff's argument that Abernathy had a right to privacy

because he had been living with Giberson and might have still had property there. Charleston Fire Chief Kris Phipps and others testified Wednesday that they understood that the house was Giberson's, and police were told that Giberson kicked out Abernathy a few days before, Jacobs noted.

Abernathy's trial is scheduled to begin Dec. 8, and Wednesday's hearing was for Jacobs to address pending motions. The judge set another hearing for Dec. 1 for any final trial preparations.

The defense attorneys plan to use self defense for Abernathy. If they can show Abernathy was justified in harming Giberson because he was defending himself, he could be acquitted of the charge even if evidence shows he did hurt her.

Abernathy claimed he knocked Giberson against a table after she first tried to hit him with the bat. Evidence at earlier hearings indicated that doctors said Giberson suffered several head injuries that were not consistent with falling against a table.

In another ruling Wednesday, Jacobs denied a defense motion to keep any reference of Abernathy possibly starting the fire out of his trial, though Abernathy hasn't been charged with arson.

Jacobs said Ferguson can show the gap of time between when the fire occurred and when Abernathy brought Giberson to Sarah Bush Lincoln Health Center, and will be able to argue to the jury that it might indicate that he returned to set the fire to cover up the crime.

Abernathy is jailed without bond. The aggravated domestic battery charge would normally carry a possible sentence of three to seven years if there is a conviction, but a prison sentence of six to 30 years would be required for Abernathy because of his criminal record.

Contact Dave Fopay at dfopay@jg-tc.com or 348-5733.