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Dec 19 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
General Sessions Court
The Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2022-GS-23-02160

State of South Carolina.....Appellant,

vs.

John Joey Mello.....Respondent.

MEMORANDUM IN OPPOSITION OF APPEALABILITY

Appellant hereby filed this memorandum at the request South Carolina Court of Appeals Clerk of Court. The request for memorandum was received by Respondent’s trial counsel, Marcelo Torricos, on December 7, 2022.

RELEVANT PROCEDURAL HISTORY

1. The Defendant was granted sole custody of A.G. M. by the Honorable Thomas Hodges of the Greenville County Family Court by way of a Final Order on February 4, 2019 ¹ (2017-DR-23-3369).
2. The Defendant’s ex-girlfriend and biological mother of A.G.M., Christina Parcell, now deceased, was granted visitation rights by the same order.

¹ The order was signed by Judge Hodges on February 1, 2019 and clocked February 4, 2019.

3. According to the State, the Defendant violated S.C. Code § 16-17-495 when the Defendant departed from the United States to Italy with A.M. in October of 2020 and failed to return the child to Mrs. Parcell, for her court ordered visitation.
4. The Defendant was charged with Custodial Interference (S.C. Code § 16-17-495) on October 21, 2021, by the Greenville County Sherriff's Office.
5. On April 19, 2022, the Defendant was indicted by the Greenville County Grand Jury.
6. On May 5, 2022, the Defendant filed a motion wherein he sought (1) a pretrial determination that the biological mother did not meet the statutory requirement of "legal custodian" per S.C. Code § 16-17-495 and (2) a quashing of the indictment.
7. The parties appeared by the Court of General Sessions for a hearing on the motion on June 10, 2022.
8. On September 26, 2022, Circuit Court Judge Alex Kinlaw, Jr. issued a ruling denying the Defendant's motion to quash, but alternatively finding that the "victim" was a non-custodial parent and is not a victim per S.C. Code § 16-17-495.
9. October 4, 2022, the State improperly filed a motion for reconsideration per Rule 29 of the *South Carolina Rules of Criminal Procedure*.
10. On October 18, 2022, the Defendant filed a reply to the State's improperly filed motion for reconsideration.
11. On December 5, 2022, Judge Kinlaw issued a ruling denying State's motion for reconsideration.
12. On December 6, 2022, the State filed their notice of appeal.

13. On December 7, 2022, the Appellant and the Respondent received a letter stating that after a preliminary review, the ruling that the State is trying to appeal may not be appealable.

ARGUMENT IN OPPOSITION TO APPEALABILITY

I. The Court of Appeals does not have jurisdiction to hear this appeal because by filing an improper motion for reconsideration, the State missed its deadline to file its appeal.

14. Rule 29(a) SCRCP reads as follows:

RULE 29- POST TRIAL MOTIONS

(a) **Generally.** Except for **motions for new trials** based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the **imposition of the sentence**. In cases involving **appeals** from convictions in magistrate's or municipal court, post-trial motions shall be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal. The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.

15. As such, Rule 29(a) addresses three types of motions: (1) motions for new trial based on after discovered evidence, (2) post-trial motions made after the imposition of a sentence, and (3) post-trial motions concerning appeals to the circuit court from magistrate's or municipal court.

16. The State's motion does not fit into any of these three categories as this case has (1) not gone to trial, (2) no sentence has been imposed, and (3) there is no appeal pending.

17. As such, the State's motion for reconsideration was improperly filed as a Rule 29 motion and therefore, the motion did not toll/stay the deadline for the state to file its appeal to this court. As such, the State has missed its window to appeal, and the South Carolina Court of Appeals lacks jurisdiction to hear this matter. *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000) ("The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case)².

II. The State does not have the right to file this appeal on an interlocutory basis.

18. As this court knows, one fundamental aspect of appealability is that a party generally may only appeal final judgments. *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005); *Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163 (1996); *see* S.C. Code Ann. § 14-3-330(1). Unless an exception is specified by statute, non-final or interlocutory orders are not immediately appealable. *See Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004).

² If a party fails to meet a filing deadline, the appellate court has no authority or discretion to rescue the delinquent party by extending or ignoring the deadline because the appellate court lacks jurisdiction over the matter. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004); *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985); *see also Hill v. S.C. Dep't of Health & Env'tl. Control*, 389 S.C. 1, 698 S.E.2d 612 (2010); *First Carolina Nat'l Bank v. A&S Enters., Inc.*, 272 S.C. 339, 251 S.E.2d 762 (1979) (holding appellants' failure to serve their notice of appeal of the circuit court's judgment within the statutory period necessitated dismissal of their appeal for want of jurisdiction); *Burnett v. S.C. State Highway Dep't*, 252 S.C. 568, 167 S.E.2d 571 (1969) (stating that without a timely notice of appeal, the reviewing court has no jurisdiction)

19. Because the ruling that is being appealed was not final, an exception to the prohibition on interlocutory appeals must apply. The exception that the State is likely relying in the appeal of this matter is S.C. Code Ann. §14-3-330(2).
20. However, the ruling by Judge Kinlaw does not substantially affect the rights of the State to proceed in the prosecution on the Respondent. The State could continue the prosecution of the Defendant's conduct under a different statute or offense.
21. For this reason, and the reasons stated above, the Appellant respectfully requests that this court deem the matter unappealable.
22. Should the court determine that the State's appeal may proceed forward, the Appellant respectfully requests leave to argue against the appealability of this matter in brief.

Respectfully submitted,

BANNISTER, WYATT, AND STALVEY, LLC

s/Marcelo Torricos
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PROOF OF SERVICE

I certify that I have filed with the Court of Appeals and served Respondent’s Memorandum in Opposition of Appealability on Appellant’s attorney, Ryan Holloway, by email, rholloway@greenvillecounty.org, on December 19, 2022.

Respectfully submitted,

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