

RECEIVED

Feb 28 2023

SC Court of Appeals

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-000027

Derek Calhoun and Jacqueline Calhoun,.....Appellants,

vs.

State of South Carolina, by and through City of North Myrtle Beach,.....Respondent.

APPELLANTS' INITIAL BRIEF

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for the Appellants

s/Kenneth R. Moss

Kenneth R. Moss, Esquire, SC Bar No. 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903
KennethMoss@wwpemplaw.com

The Snyder Law Group
Co-Counsel for the Appellants
Richard L. Snyder, Esquire, SC Bar No. 105192
2510 Barrett Street, Columbia, SC 29201
Telephone No.: 980-297-9627
Email: rl@snyderlawgroupsc.com

TABLE OF CASES, STATUES, AND OTHER AUTHORITES

A. CASES	PAGE
<u>Bacot v. Deas</u> , 67 S.C. 245, 45 S.E. 171 (S.C. 1903)	6
<u>City of Sumter v. Owens</u> , 188 S.E. 192, 181 S.C. 540 (S.C. 1936)	9
<u>Saltz</u> , 346 S.Ct. at 136, 551 S.E.2d at 252	5
<u>State v. Amerson</u> , 311 S.C. 316, 428 S.E.2d 871 (1993).....	5
<u>State v. Asbury</u> , 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) (citing <u>State v. Amerson</u> , 311 S.C. at 320, 428 S.E.2d at 873)	5
<u>State v. Baccus</u> , 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)	5
<u>State v. Barnett</u> , 98 S.C. 422, 82 S.E. 795, 797 (1914).....	5
<u>State v. Breeze</u> , 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct.App.2008)	5
<u>State v. Franklin</u> , 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989)	5
<u>State v. Landis</u> , 362 S.C. 97, 606 S.E.2d 503 (Ct.App. 2004)	5
<u>State v. Parker</u> , 671 S.E.2d 619, 381 S.C. 68 (S.C. App. 2008)	5
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001)	5
<u>State v. Quattlebaum</u> , 338 S.C. 441, 527 S.E.2d 105 (2000)	5
<u>AGO 1987-64</u> (South Carolina Attorney General Opinions, 1987)	6
S.C. Code Ann. § 22-3-920.....	6
SC Code § 22-2-170.....	5
S.C. Code Ann. § 14-25-45	7
South Carolina Appellate Court Rule 220(c)	11
<u>South Carolina Summary Court Bench Book</u> , Section A(2)(g)	8

Opinion as to whether a municipal judge may sign arrest and search warrants at his or her residence which is located outside the boundaries of the municipality over which he or she has jurisdiction. (South Carolina Office of the Attorney General, 2013)8

Opinion concerning the right of an individual who receives a judgment or sentence in municipal court to obtain a transcript or tape recording of the proceeding for purposes of an appeal. (South Carolina Office of the Attorney General, 2012)8

Opinion requesting “...the opinion of the SC Attorney General on the maximum time limitation that a municipal court judge can impose conditions on suspended sentences.” (South Carolina Office of the Attorney General, 2002)9

Opinion questioning whether an individual charged with the offense of issuing a fraudulent check or any offense for which a uniform traffic ticket may be utilized is required to be brought in for a booking process whereby photographs and fingerprints are obtained. (South Carolina Office of the Attorney General, 2006).9

I. STATEMENT OF ISSUES ON APPEAL

- A. Did the lower Courts err in denying the Appellants’ Motion for Change of Venue.
- B. Did the lower Courts err in finding that S.C. Code Ann. §22-3-920 does not apply to municipal courts.
- C. Did the lower Court err in finding that Appellants’ affidavit submitted to the municipal court does not constitute sufficient grounds for either a change of venue or disqualification of the municipal judge when the issues were not before the Court on appeal.

II. STATEMENT OF THE CASE

This action is before this Court on appeal from Orders of the Horry County Court of Common Pleas, the Honorable Kristi F. Curtis presiding in Case No. 2022-CP-26-05002. Specifically, the action was before the Court of Common Pleas on appeal from Order of the North

Myrtle Beach Municipal Court, the Honorable Dean Mureddu Presiding in Case Nos. 18514EF, 2022-1850166173 & 20221850166174, in which Appellants' Motions for Change of Venue pursuant to S.C. Code Ann. § 22-3-920 were denied. The Municipal Court denied Appellants' timely filed motion and affidavits seeking a change of venue pursuant to SC Code §22-3-920. Oral arguments upon Appellants' affidavits, which the Municipal Court treated as defacto motions seeking change of venue, were scheduled and heard before the Honorable Dean Mureddu on August 03, 2022. The Municipal Court issued its oral decision denying said motions. It is also particularly noteworthy that the very same Municipal Court has taken inconsistent positions as to its duty to change venue under § 22-3-920 and the applicability of the statute to municipal courts.

Appellants timely filed a Notice of Appeal from the Municipal Court on August 5, 2022. On December 1, 2022, the Court of Common Pleas heard oral arguments on this Appeal from the parties and their respective counsel. Also, before said Court were Exhibits and Affidavits filed by Appellants in support of their Motion for Change of Venue and this Appeal. After oral argument, on December 5, 2022, the Honorable Judge Kristi Curtis issued a Form 4 Order taking the matter under advisement. Then on December 12, 2022, the Honorable Judge Kristi F. Curtis issued a Form 4 Order dismissing Appellants' appeal and affirming the Municipal Court's Order. Specifically, Judge Curtis made the following findings "Respondent's appeal from the denial of his motion for a change of venue is DENIED. The decision of the municipal court is affirmed. I find that S.C. Code Ann. §22-3-920 does not apply to municipal courts. I further find that Respondent's affidavit submitted to the municipal court does not constitute sufficient grounds for either a change of venue or disqualification of the municipal judge." Thereafter, on December 21, 2022, Appellants timely filed a Motion to Reconsider the December 12, 2022 Order. On December 29, 2022, the Honorable Kristi F. Curtis issued two (2) Form 4 Orders, one which Denied

Appellants' Motion to Reconsider and a second which Affirmed the Municipal Courts' ruling and fixed clerical errors in the original December 12, 2022 Form 4 Order. Appellants timely filed a Notice of Appeal on January 6, 2023, transcripts of the proceedings were ordered, and then received on January 26, 2023.

III. STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct.App.2004). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct.App. 2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) (citing State v. Amerson, 311 S.C. at 320, 428 S.E.2d at 873); State v. Franklin, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989). "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." Saltz, 346 S.Ct. at 136, 551 S.E.2d at 252; State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct.App.2008); Miller, 375 S.C. at 378-79, 652 S.E.2d at 448." State v. Parker, 671 S.E.2d 619, 381 S.C. 68 (S.C. App. 2008).

"SC Code §22-2-170 provides expressly: "[m]agistrates shall have jurisdiction throughout the county in which they are appointed. Criminal cases shall be tried in the Jury Area where the offense was committed, subject to a change of venue, pursuant to the provisions of § 22-3-920..."

AGO 1987-64 (South Carolina Attorney General Opinions, 1987). “This court, in the recent case of the State v. Conkle and Others, 64 S.C. 372, 42 S.E. 173, has held that, when a party under the foregoing statutory provision has complied fully with its requirements, such party has the right to demand a change of venue therein secured; in other words, it is mandatory upon the magistrate to change the venue, and not discretionary. The statutory provision is mandatory upon all.” Bacot v. Deas, 67 S.C. 245, 45 S.E. 171 (S.C. 1903).

IV. ARGUMENT

A. **The lower Court erred in affirming the Municipal Court’s order denying the Appellants’ Motion for Change of Venue.**

Appellants believe that the findings in the lower Court’s Orders are in contradiction of South Carolina statutory and common law. S.C. Code Ann. § 22-3-920 states “[w]henever in a case in the court of a magistrate (a) either party in a civil case, after giving to the adverse party two days' notice that he intends to apply for a change of venue or (b) **the prosecutor or accused in a criminal case shall file with the magistrate issuing the warrant or summons an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate and setting forth the grounds of such belief, the papers shall be turned over to the nearest magistrate not disqualified from hearing the cause in the county, who shall proceed to try the case as if he had issued the warrant or summons.** But in counties in which magistrates have separate and exclusive territorial jurisdiction the change of venue shall be to another magistrate's district in the same county. One such transfer only shall be allowed each party in any case.” (*Bold and underlined emphasis Added*).

It is well settled law in South Carolina that “when a party under the foregoing statutory provision has complied fully with its requirements, such party has the right to demand a change of venue therein secured; in other words, it is mandatory upon the magistrate to change the venue,

and not discretionary. The statutory provision is mandatory upon all.” Bacot v. Deas, 67 S.C. 245, 45 S.E. 171 (S.C. 1903). An affidavit is sufficient and complies with § 22-3-920 if the facts stated within it were false, then the affidavit would form the basis for an indictment of perjury. See. State v. Barnett, 98 S.C. 422, 82 S.E. 795, 797 (1914); see also State v. Conkle, 64 S.C. 371, 42 S.E. 173 (1902). Therefore, if a Defendant submits an affidavit in support of a motion for change of venue that sets forth factual allegations, that if false would form a basis for perjury, then the affidavit is sufficient, and the judge must grant the motion. State v. Barnett, 98 S.C. 422, 82 S.E. 795, 797 (1914).

It is clear from South Carolina Jurisprudence that it is obligatory for the Judge to grant the motion when the Defendant has complied with S.C. Code Ann. § 22-3-920. The Judge does not exercise discretion in whether or not to grant the motion but instead **must** grant the motion State v. Barnett. Here, Appellants have clearly complied with the subject provisions of 22-3-920 as will be more specifically argued below.

B. The lower Courts erred in finding that S.C. Code Ann. § 22-3-920 does not apply to municipal courts.

There is a plethora of authority in South Carolina that supports the Appellants’ position that § 22-3-920 applies to municipal courts and judges the same as it does to magistrates. S.C. Code Ann. § 14-25-45 expressly states “[e]ach municipal court shall have jurisdiction to try all cases arising under the ordinances of the municipality for which established. **The court shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates.** The court shall have the power to punish for contempt of court by imposition of sentences up to the limits imposed on municipal courts. The court shall have no jurisdiction in civil matters.” (*Bold and underlined emphasis added*). The South Carolina Judicial

Department has further stated in the Summary Court Bench Book that “[t]he powers and duties of a municipal judge are the same as those of a magistrate....” South Carolina Summary Court Bench Book, Section A(2)(g). Specifically, the Office of the Attorney General has opined that other provisions of Title 22 Chapter 3 apply to municipal Judges, “As for arrest warrants, § 22-3-710 provides that ‘[a]ll proceedings before magistrates in criminal cases shall be commenced under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue.’ **This section applies to municipal judges as well. See § 14-25-45 (“Each municipal court shall ... have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates”).**” (*Bold and underlined emphasis Added*.) *Opinion as to whether a municipal judge may sign arrest and search warrants at his or her residence which is located outside the boundaries of the municipality over which he or she has jurisdiction.* (South Carolina Office of the Attorney General, 2013). In applying a provision of Title 22, Chapter 3 the Attorney General opined that “[i]n light of the common law and statutory rule that municipal judges have the same duties and follow the same practices prescribed for magistrates in criminal cases, we advise municipal judges to ensure that witness testimony is taken in a manner consistent with section 22-3-790 in all cases where the right to use the services of a court reporter has not been exercised by either party pursuant to section 14-25-195.” *Opinion concerning the right of an individual who receives a judgment or sentence in municipal court to obtain a transcript or tape recording of the proceeding for purposes of an appeal.* (South Carolina Office of the Attorney General, 2012).

Once again, the Attorney General opined that the limitation on the amount of community service that magistrates may impose on a suspended sentence under § 22-3-800 is applicable to municipal judges. Specifically, “[w]hile this limitation does not appear in Section 14-25-75 which

grants municipal court judges the power to impose conditions on suspended sentences, Section 14-25-45 provides that "[t]he [municipal] court shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates." This Office has previously opined that constraints placed upon the sentencing powers of magistrates are also applicable to municipal court judges as the result of the provisions of Section 14-25-45. See OP. ATTY. GEN. DATED MARCH 27, 1995. Therefore, it would be the opinion of this Office that the constraints of Section 22-3-800 regarding community service hours are also applicable to municipal court judges." *Opinion requesting "...the opinion of the SC Attorney General on the maximum time limitation that a municipal court judge can impose conditions on suspended sentences."* (South Carolina Office of the Attorney General, 2002). As further clarified by the Attorney General, "Section 22-3-930..... Such provision is applicable to criminal and civil cases before a magistrate. Such provision is also applicable to municipal court judges inasmuch as S.C. Code Ann. § 14-25-45 states that the municipal court "...shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates." *Opinion questioning whether an individual charged with the offense of issuing a fraudulent check or any offense for which a uniform traffic ticket may be utilized is required to be brought in for a booking process whereby photographs and fingerprints are obtained.* (South Carolina Office of the Attorney General, 2006).

South Carolina common law further solidifies that § 22-3-920 applies to municipal judges the same as it does magistrates, due to § 14-25-45. The Supreme Court of South Carolina implicitly held that a motion for change of venue (i.e. § 22-3-920) applies to municipal judges in the case of City of Sumter v. Owens, 188 S.E. 192, 181 S.C. 540 (S.C. 1936). In City of Sumter the Supreme Court heard arguments as to the sufficiency of the affidavit submitted in support of the Defendant's

motion for change of venue based upon his belief that he could not obtain a fair trial. The Supreme Court in City of Sumter ruled that the affidavit in that case was insufficient as it did not have factual allegations. Thereby, the Supreme Court essentially held that a motion to change venue under § 22-3-920 applied to municipal courts and judges.

Here, it is clear from the extensive authority cited in the preceding paragraphs that § 22-3-920 does apply to municipal courts and judges the same as it does magistrates by operation of § 14-25-45. The Supreme Court of South Carolina settled this issue in 1936 in City of Sumter v. Owens, by ruling on an appeal from the City of Sumter's Municipal Court. There, the Municipal Judge denied a Defendant's motion for change of venue based on the sufficiency of the Defendant's affidavit in support of said motion. The South Carolina Attorney General has further enshrined the Supreme Court's holding by issuing numerous opinions that the powers and duties under Title 22 Chapter 3 of the South Carolina Code of Laws apply to municipal judges the same as it does magistrates. Specifically, the Attorney General has opined that Sections 22-3-930, 22-3-800, 22-3-790, and 22-3-710 all apply to municipal courts by operation of § 14-25-45. Respectfully, the lower Courts have not cited any authority to support their findings that § 22-3-920 does not apply to municipal courts or judges.

Therefore, Appellants respectfully request this Court overturn the lower Court's Orders, based on the overwhelming weight of the authority in support of Appellants' position that § 22-3-920 applies to municipal courts and judges.

C. The lower Court erred in finding that Appellants' affidavits submitted to the municipal court does not constitute sufficient grounds for either a change of venue or disqualification of the municipal judge, when the issue was not before the Court on appeal.

It is clear that the lower court erred in finding that appellants' affidavits in support of their motion for change of venue were insufficient. "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." South Carolina Appellate Court Rule 220(c). "In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001); *State v. Wood*, 362 S.C. 520, 608 S.E.2d 435 (Ct.App.2004). This court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000); *State v. Amerson*, 311 S.C. 316, 428 S.E.2d 871 (1993); *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct.App. 2004).

The trial court made no findings as to the sufficiency of the affidavits when they were presented to the court. Therefore, it can be said that the trial court implicitly found that the affidavits were sufficient. The trial court simply found that 22-3-920 did not apply to municipal courts and that finding was appealed to the lower court, nothing about the sufficiency of the affidavits was part of the record on appeal before the lower court. Thus, the lower court erred in affirming the trial court's order upon grounds that did not appear on the record, as required by Rule 220(c). Respectfully, Appellants ask that the lower court's finding as to such be overturned. If this court does not find it error to make such finding as to the sufficiency of the appellants' affidavits when not before the court, the lower court's finding as to sufficiency still must be overturned on the merits.

It is clear from the record in this case as well as the statutory and common law of South Carolina that Appellants filed sufficient affidavits in support of their motion for change of venue. The law requires that the Defendant moving for change of venue must submit an affidavit alleging facts as to why he/she may not obtain a fair trial and the facts contained therein, if false, would

support a basis for perjury. It is further settled that when a sufficient affidavit is filed it is mandatory that the magistrate or municipal judge must grant the motion to change venue. Here, Appellants have clearly filed affidavits with facts that, if false, would form a basis for perjury. Here, Appellants filed affidavits in support of their motion for change of venue, in which they allege that “that the City Attorney and the Mayor of the City of North Myrtle Beach have taken a personal interest in the outcome of my case, as has been indicated to me in direct conversations between us...” Appellants further alleged “based upon my direct conversations with Public Safety officers of North Myrtle Beach and with the City Attorney for North Myrtle Beach that the City Attorney was directly involved in the decision to issue me a citation and was personally involved in giving either direct or relayed orders to North Myrtle Beach Public Safety personnel because stopping my company and I were a ‘top priority for the city’.”

Here, it is clear that if Appellants allegations, that based on their direct conversations with Public Safety Officers of the City of North Myrtle Beach and the City Attorney that stopping their company was a top priority, were false, then they said statements could form a basis for perjury. Furthermore, if Appellants factual allegations that the Mayor and City Attorney have taken a personal interest in their case were false, said allegations could form a basis for perjury. Therefore, it is clear from the Appellants’ affidavits in support of their motions for change of venue that the factual allegations contained therein are sufficient to comply with § 22-3-920 and thus it is mandatory for the municipal judge to grant the motion.

V. CONCLUSION

For all the foregoing reasons, the lower Courts erred in denying Appellants’ Motion to Change Venue pursuant 22-3-920, in finding that 22-3-920 does not apply to municipal courts; and in finding that finding that Appellants' affidavits submitted to the municipal court does not

constitute sufficient grounds for either a change of venue or disqualification of the municipal judge, when the issue was not before the Court on appeal. Accordingly, Appellants respectfully request that the lower Courts' Orders be overturned.

Respectfully submitted,

Wright, Worley, Pope, Ekster & Moss, PLLC
Attorneys for the Appellants

s/Kenneth R. Moss

Kenneth R. Moss, Esquire, SC Bar No. 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: 843/ 281-9901/ Fax: 843/ 281-9903
KennethMoss@wwpemplaw.com

The Snyder Law Group
Co-Counsel for the Appellants

s/ Richard L. Snyder

Richard L. Snyder, Esquire, SC Bar No. 105192
2510 Barrett Street, Columbia, SC 29201
Telephone No.: 980-297-9627
Email: rl@snyderlawgroupsc.com

February 25, 2023