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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Jasper County
The Honorable Robert J. Bonds, Circuit Court Judge
Appellate Case Tracking Number 2022-001011

The State, Appellant,

vs.

Tommy Lee Brown, Respondent.

RESPONDENT'S REPLY IN OPPOSITION TO THE APPELLANT'S MOTION TO HOLD THIS APPEAL IN ABEYANCE

The Respondent respectfully Objects to the State's Motion to Hold this Appeal in Abeyance. The grounds for such Motion in Opposition are set forth herein below.

I. PROCEDURAL BACKGROUND:

The Respondent was arrested on October 23, 2015 and posted a $23,000.00 surety bond on October 26, 2015. The Respondent has remained subject to the terms and conditions of that bond for nearly eight (8) years. These indictments were placed on the trial roster, prepared by the State and approved by the Court, on: April 23, 2018; June 4, 2018; September 10, 2018; April 22, 2019; and, December 2, 2019. The Respondent did not object to the placement of his cases on the trial

roster nor made any motions to continue past those terms. These indictments were originally tried before a Jasper County jury on or about December 2, 2019. A mistrial was entered during that term of court after the jury could not reach a unanimous verdict. The Respondent retained undersigned counsel shortly after the trial court's declaration of a mistrial and filed a Petition to dismiss the indictments on the grounds that the trial court should have directed a verdict. That motion was denied by Judge Mullen. Over the seven-plus year span, the Respondent filed one Motion for Continuance from the May 24, 2022 term of court to the next term of Jasper County General Sessions to be held on July 19, 2022. [the only delay attributable to the Respondent, approximately seven weeks].

These captioned cases were placed on a proposed trial roster submitted by the State and approved by the trial court for the July 2022 term of General Sessions in Jasper County. A roster meeting was held via telephone conference with Judge Bonds on July 15 or 16, 2022. The Court set the Respondent's cases as number one (1) for trial commencing on July 19, 2022. The Respondent and undersigned counsel appeared on July 19, 2022 ready for trial as per the trial court's order. The Respondent was able to serve his witness with a subpoena for trial and confirmed her willingness to appear.

After the call of the case by the Court, the State orally moved for a continuance, ostensibly because it could not locate one of its witnesses to the accident.[1] The trial court denied the State's

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[1] Admittedly, the Respondent relies on notes and remembrances because the State has not provided the Respondent with a copy of the transcript. *See*, C-Track Entry 12/07/2022 (Email from Solicitor Musser to SCAG without copy to Respondent of Transcript)(Respondent avers that he is indigent and cannot afford a copy of the Transcript - undersigned counsel is representing the Respondent *pro bono* in this appeal).

oral Motion for a last minute continuance; due to the age of the case, the State's submission of the proposed trial roster, the roster meeting, no prior motion to continue by the State, and the Court setting the case number one for trial during the July 19, 2022 term of General Sessions Court in Jasper County. The State, *solely,* and in order to secure a continuance filed a Notice of Appeal on July 19, 2022 immediately after the trial court denied the State's Motion to Continue in a successful effort to divest the circuit court of jurisdiction. Due to the State's action, the trial was aborted. This appeal by the State follows.

II. FACTUAL BACKGROUND:

The Respondent is under indictment for Leaving the Scene of an Accident with Death and Leaving the Scene of an Accident with Serious Bodily Injury which is alleged to have occurred on October 23, 2015 on Highway 336 in Jasper County. One of the State's witnesses is an off-duty reserve police officer who claimed he witnessed, from about a mile away, the Respondent cross the center-line of the roadway. The witness further claims the Respondent forced the decedent and her passenger off the roadway resulting her vehicle striking a tree. The Respondent subpoenaed a Ms. Walker [for this trial] who was directly behind the decedent's vehicle. Ms. Walker had previously testified in the 2019 trial that the decedent just went off the road and did not see the Respondent cross the center-line at any time. The decedent, an elderly woman, tested positive for narcotic pain medication in her system. Ms. Walker knew the decedent and the Respondent because they all resided near each other. The off-duty reserve police officer in his personal vehicle caught up the respondent and forced him to pull over. The Respondent yielded and stopped for the off-duty officer about two miles from the accident.

After the real responding officers arrived, they determined that the Respondent was not under the influence of drugs or alcohol. The officers searched the Respondent's vehicle and found no evidence of any crime nor any evidence that the Respondent's vehicle contacted the decedent's vehicle. The Ridgeland police officers and Jasper County Sheriff's deputies, based solely on the off-duty reserve officer's account, arrested the Respondent.

The real officers determined that the Respondent was coming home from his place of employment. The real officers determined that the Respondent worked for approximately 20 years for "SODEXCO," which is a civilian contractor at the Marine Corps Recruit Depot at Parris Island, South Carolina.[2] The real officers were able to determine that the Respondent had no criminal record. Although, the officers took the contact information from Ms. Walker, an eye witness directly behind the decedent's vehicle, no officer ever interviewed her in connection with this investigation.

III. LAW/ANALYSIS:

The State's Motion to Hold [the] Appeal in Abeyance offers proof that the State filed a dubious appeal solely to gain a continuance to thwart the trial court's inherent power to control its docket. The State told the trial court it needed a continuance because it discovered that one of their witnesses, the off-duty reserve police officer, was vacationing in Europe and thus not available for trial that week of court. Miraculously, the State now proffers to this Court that it may be able to locate its' witness, thus rendering their appeal perhaps "moot." The State has begged off four times with leave of this Court to go outside of the rules of court from filing their Initial Brief and Record

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[2] The Respondent is seen in multiple body-cam videos wearing a "SODEXCO" uniform.

on Appeal. The State's proffered reason for the extensions was for "good cause shown." For ten (10) months the State has avoided prosecuting its' appeal seemingly in order to locate a witness in a case originating nearly eight years ago. The filing of this appeal rendered the trial court powerless to proceed. The State's position of requiring continuance by appeal is constitutionally untenable and likely to be repeated.

The State proffers in its' Motion, "[i]f the underlying issues are moot, the State will immediately move to withdraw the underlying appeal." Of course it will, the State got what it wanted; that is, a continuance in a nearly eight year old case that was set number one for trial on a roster submitted by the State and approved by the trial court. This begs the question, "what are the underlying issues?" The underlying issues on appeal are set forth herein below.

A. STATE V. LANGFORD:

"Rain, rain go to Spain: fair weather come again,"
- James Howell c. 1641.

In *State v. Langford,* 400 S.C. 421, 735 S.E.2d 471 (2012) the South Carolina Supreme Court reluctantly but undisputedly held Section 1-7-330 of the South Carolina Code of Laws (2005) unconstitutional. This statute, "which vests control of the criminal docket in the circuit solicitor," violates the separation of powers doctrine principle embodied in Article I, Section 8 of the South Carolina Constitution." "The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases." *Id.* at 429. (Quoting, *Williams v. Bordon's Inc.*, 274 S.C. 275,279, 262 S.E.2d 881, 883 (1980).

The grave matter of allowing the State to secure continuances against the sound discretion and rulings of the trial courts by filing dubious appeals is not only a mockery of the judicial process

and the judicial branch, but is also, "a matter of significant public interest," which must be addressed by the appellate courts. *Ex parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011). Here the State would have this Court believe that since it "may" now be able to secure one of its' witnesses for an upcoming trial "may" now render this matter as "moot." The constitutional power of a court to control its docket, "is not a grey area where some encroachment can be tolerated but rather a complete invasion into the court's domain." *Hagy v. Pruitt*, 331 S.C. 213, 222, 500 S.E.2d 168, 173 (Ct. App, 1998). Without question the State invaded and sought to thwart the trial court's inherent power to control its' docket by filing a questionable appeal solely to divest the trial court of its' power to control the docket submitted by the State.

The issue in this case, presumably, is whether the trial court abused its' discretion or committed an error of law in denying the State's oral Motion to Continue during trial in a years old case in which the State submitted to the court for approval, and in which the court did in fact approve under the auspices of *Langford*; *See also*, *Fields v. J. Higgens Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E,2d 80, 85 (2008). (An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support.") The mere fact that the State no avers that it "may"[3] have located a witness, or "may not" have located and secured a witness does not render "moot" this important constitutional issue about the executive branch's encroachment on the judiciary's inherent power to manage the cases on the docket. The

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[3] The State in its' Motion to Hold this Appeal in Abeyance does not provide a time-table of when it may learn from the State [solicitor] of when it has located its' witnesses, nor has it identified any witness it seeks to secure. The Respondent has a Sixth Amendment right to a speedy trial; is nearly eight years not enough? The State has asked, and been granted four continuances to file its Brief and file a Record on Appeal. The Respondent believes that the State never had any intention of pursuing this appeal beyond seeking a continuance by appeal.

issues in this case are of great public importance and likely to be repeated without guidance from the appellate courts.

B. CAPABLE OF REPETITION, YET EVADING REVIEW:

The State by virtue of this appeal has opened a Pandora's Box of tactical methods to circumvent the Constitution and court rules of this State as it applies to the court's management of the criminal docket. By filing an appeal, the State got exactly what it wanted: that is; a continuance in contravention of the trial court's ruling, in contravention of the trial court's discretion, sound judgment, and in contravention of *State v. Langford.* The Respondent does not concede that the mere belated finding of a witness renders the trial court's denial of a continuance of a docketed case as "moot." This case falls squarely within the exceptions to the "doctrine of mootness."

As our appellate courts have pronounced, "[t]here are, however, exceptions to the mootness doctrine." *Curtis v, State*, 345 S.C.557, 568, 549 S.E.2d591, 596 (2001). First, if the issue raised is capable of repetition but generally evading review, "the appellate court can take jurisdiction." *Id.* This case presents a textbook illustration of why that legal principle applies here. The filings of interlocutory appeals which divest trial courts of their "inherent" powers to control the General Sessions trial docket must be reviewed. This proposition is especially true in cases where it appears that the filing of an appeal has the effect of granting the State a continuance contrary to a trial court's ruling. The question which must be resolved here, and in future cases, is whether the trial court abused its' discretion or committed an error of law by denying the State's oral Motion to Continue made after the case was called by the court. *See, e.g., Fields v. J. Higgens Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E,2d 80, 85 (2008). (An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support.")

This Court's ruling would apply nearly equally to criminal defendants, the State, alleged victims and all parties summoned to appear before the trial courts of this State.

Next, this Court should consider whether the underlying question to be resolved is of important public interest. "[A]n appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of public interest," *Sloan v. Dep't. of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008). The manifest urgency here is the fact that the Respondent has been under indictment, bond restrictions and has daily anxiety caused by being under indictment for nearly eight years. Moreover, the Respondent has a Sixth Amendment right to a "speedy trial." The urgency to the Respondent is apparent, but there will be other citizens in the future that will find themselves in the same situation.

The public interest is manifest in any number of ways. First, the bench and bar need to know when and under what circumstances a trial court may exercise its' discretion to grant or deny motions to continue made during trial in criminal cases. Second, the public has a direct interest in the orderly administration of justice. Third, litigants, subpoenaed witnesses, interested parties and alleged victims will have a more predictable concept of courtroom management. The public at large and litigants need to have confidence in the criminal justice system. Gamesmanship, by any party in a criminal case must be checked by this Court.

Third, on the issue of mootness, our Courts have said, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Sloan v. Department of Transp.*, 365 S,C. at 303, 618 S.E.2d at 878. This Court can give the Respondent "effective" relief by affirming the trial court. Such a ruling would necessarily bar the prosecution

of the Respondent on Sixth Amendment grounds. Additionally, or in the alternative this Court can affirm and remand barring the Sstate from calling of then missing witnesses: i.e.; go back to square one as it was on July 19, 2022.

There can be no question that an appellate decision here will affect future events and guide state prosecutors as to the limits of their power over the judiciary. An appellate decision here will give guidance to future trial courts on the exercise of their discretion and the limits of that discretion. This pronouncement of law would benefit the State, criminal defendants, witnesses, law enforcement agencies, the public at large and alleged victims equally. This case must not be held in abeyance.

C. VIOLATION OF RESPONDENT'S RIGHT TO A SPEEDY TRIAL:

The State's dilatory actions in this case are patent and excessive. The Respondent was arrested on October 23, 2015. The Respondent and his wife have lived for over seven years with the specter of a potential 25 year prison sentence and permanent revocation of his driver's license. The Respondent has faithfully appeared in court over the many years, and yet managed to keep his civil service employment at the Marine Corps Depot. On July 19, 2022, the Respondent appeared in court, as required and was ready for trial. Undersigned counsel was ready, the Respondent's witness was subpoenaed and willing to appear. The State made no Motion to Continue until after the trial court called the case during the term of court.

The Sixth Amendment to the United States Constitution provides, in part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." *See also*, S.C. Constitution. Article I, Section 14. The main goals of this right are to prevent undue incarceration,[4]

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[4] Respondent admits that he has not been in jail for the whole time, however, he has been under restrictive bond conditions for nearly eight years.

minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense." *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978); *See, also, State v, Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012). There are no inflexible rules to determine whether or not a defendant's 6th Amendment rights have been violated. *Id.* If, however, the right has been violated, "dismissal of the charges 'is the only possible remedy.'" *Barker v. Wingo*, 407 U.S. 514, 519 (1972); *State v. Hunsberger*, 418 S.C. 335, 794 S.E.2d 368 (2016).

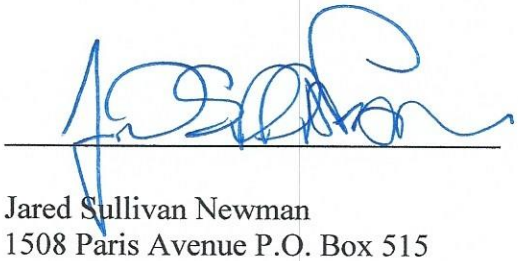
The time clock for assessing the violation of the right to a speedy trial begins at arrest. *United States v. McDonald*, 456 U.S. 1, 6 (1982); *See also, State v, Langford, supra.* One factor to be assessed in the 6th Amendment "Speedy Trial" analysis is the complexity of the case. *Id.* This case is a simple "eye-witness" case. No forensics were involved, no lab tests, no accident reconstruction experts, no scientific evidence or the like was needed by either side to this case. This legal analysis weighs heavily against the State in assessing delays for trial in a 6th Amendment context. "Depending on the nature of the charges . . . courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652, n. 1 (1992)(Quoted with approval in *Langford, supra*), This case is going on eight years, in a small county. [Jasper County ranks 33rd of South Carolina's 46 counties in population].

"A deliberate attempt by the State to delay the trial as a ameans of impairing the accused's ability to defend himself 'should be weighed heavily against the government,'" *Langford, supra*, at 482.

IV. CONCLUSION:

The Respondent objects to the State's Motion to hold this appeal in abeyance for the reasons stated. Further, the Respondent objects to the dismissal of the appeal brought by the State.

Respectfully submitted,



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May 24, 2023.

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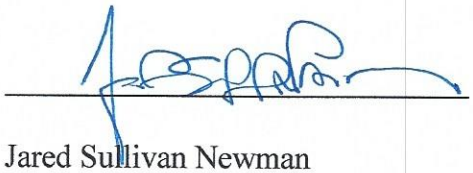
PROOF OF SERVICE

I, Jared Sullivan Newman, certify that I have served Respondent's **RESPONDENT'S REPLY IN OPPOSITION** by emailing a copy of the same to Appellant's counsel of record, William M. Blitch, Jr., Esquire, at his primary email address provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.

This 25th day of May, 2023.



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