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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

*Appeal from Charleston County
Court of General Sessions*
The Honorable Bentley J. Price, Circuit Court Judge

The State,

Respondent,

v.

John Joseph Erb,

Petitioner.

Appellate Case No. 2023-001683

**MOTION TO DISMISS
(INTERLOCUTORY APPEAL)**

Appellant John J. Erb has improperly filed a notice of appeal from a General Sessions Order regarding a pending murder charge. It is well-established and has been “consistently held that a criminal defendant may not appeal until sentence is imposed.” *State v. Rearick*, 417 S.C. 391, 400, 790 S.E.2d 192, 196 (2016); *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) (“in the criminal context, a judgment is final when sentence is imposed”). The notice of appeal should be dismissed.¹ *Id.*

¹ Petitioner also filed with his notice a “Petition for Writ of Supersedeas” through which he apparently seeks to stay Judge Price’s order denying a request to declare an acquittal on the murder charge. This Court has requested a response which is to be filed on or before Monday, November 13, 2023. That petition should be dismissed for many reasons, but, for purposes of this motion, the State submits supersedeas fails in the absence of a properly filed notice of appeal. *See* Rule 241, SCACR. Consequently, the petition should be denied when the notice is dismissed.

1. Erb stood trial before a Charleston jury in September on the charge of murder, Indictment No. 2023GS103932. The Honorable Bentley Price presided. On September 21, 2023, the jury indicated a purportedly unanimous verdict and returned to the courtroom. The jury foreman indicated that the jury found Erb was not guilty of murder and guilty of manslaughter; however, upon request by the defense,² the jurors were polled, and one juror indicated that was not her vote. Thus, no finality was reached. Accordingly, the judge directed the jury return to the jury room for the possibility of further deliberations. (Attachment 1, at 4-5). The judge then had the juror who did not affirm the verdict return to the courtroom and inquired whether the juror would deliberate further. The juror indicated not just that deliberations would not be helpful but that her vote “was always not guilty, and I just wanted to get it over with because they were all in there screaming and yelling at me and I just - - I’ll never change my - - like, it’s not guilty. I’m sorry.” (Attachment 1, at 7). With the juror refusing to deliberate, and without unanimity in a verdict, Judge Price declared a mistrial.³ (Attachment 1, at 8). Erb did not object.

2. Erb subsequently attempted, under various theories, to have Judge Price declare a verdict of acquittal as to the murder charge. Judge Price denied relief and denied reconsideration by order filed on October 18, 2023. In his later formal order filed October 23, 2023, Judge Price expressly found that jeopardy had not attached and that he had declined to “enter a judgment on

² Polling is mandatory upon the defendant’s request. Indeed, “the denial of a defendant’s request for individual polling is reversible per se.” *State v. Wright*, 439 S.C. 101, 103, 886 S.E.2d 206, 207 (2023). It is not an empty process, but one by which the court must hold the jury to the requirement of unanimity. *State v. Linder*, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981) (“The trial judge must be satisfied that the verdict is unanimous.”).

³ *Blueford v. Arkansas*, 566 U.S. 599, 610 (2012) (in a case where a jury foreperson reported the jury’s unanimous not guilty vote on a murder charge, but disagreement on a lesser offense: “The jury in this case did not convict” the defendant “of any offense, but it did not acquit him of any either. When the jury was unable to return a verdict, the trial court properly declared a mistrial....”).

the ... charge.” (See Notice of Appeal, Appellate Case No. 2023-001683, October 23, 2023, Order, at 3). Erb attempts to appeal these orders. *Id.* Erb has not yet been tried and sentenced (though nothing prevents ongoing proceedings).⁴

3. “As Petitioner has not been convicted and sentenced, there has been no final judgment, and as no exception to the requirement of a final judgment is applicable under the facts of this case, Petitioner’s appeal is premature and must be dismissed.” *Looper*, 421 S.C. at 390, 807 S.E.2d at 206; see also *State v. Hubbard*, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) (“An appeal in a criminal case must attend the final judgment rendered on the indictment” or must be dismissed). Our Supreme Court has repeatedly found that “a criminal defendant may not appeal until sentence is imposed.” *State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 680 (2013) (citing *In re Lorenzo B.*, 307 S.C. 439, 439, 415 S.E.2d 795 (1992) (an order adjudicating a juvenile delinquent is not appealable until imposition of final judgment at the dispositional hearing); *Parsons v. State*, 289 S.C. 542, 542, 347 S.E.2d 504, 504 (1986) (denial of bail pending trial is not immediately appealable); *Miller*, 289 S.C. at 427, 346 S.E.2d at 706 (denial of a claim of double jeopardy is not immediately appealable); *State v. Washington*, 285 S.C. 457, 458, 330 S.E.2d 289, 289 (1985) (a conviction at a trial in absentia prior to imposition of sentence is not immediately appealable); *State v. Dingle*, 279 S.C. 278, 282, 306 S.E.2d 223, 225 (1983), *abrogated on other grounds*, *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d

⁴ See, e.g., *S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay further proceedings in the lower court.”); *State v. Dingle*, 279 S.C. 278, 282, 306 S.E.2d 223, 225 (1983) (“Since the order is not appealable until final judgment is rendered, the trial court had continuing jurisdiction over the subject matter of the case.”). Without strict acknowledgment that an interlocutory appeal does not transfer jurisdiction under Rule 205, SCACR, a party could override a circuit court’s determination on continuance or other denial of relief simply by serving and filing a notice of appeal for a matter that cannot be heard. Such unwarranted delay must be discouraged.

112 (1990) (an order committing the defendant to the Department of Mental Health is not immediately appealable); *State v. Hubbard*, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) (the denial of a motion to suppress evidence is not immediately appealable); *State v. Lockhart*, 275 S.C. 160, 161, 267 S.E.2d 720, 720 (1980) (an order transferring jurisdiction over a juvenile from family court to general sessions court is not immediately appealable); *State v. Parker*, 267 S.C. 317, 323, 227 S.E.2d 677, 679 (1976) (the denial of a motion to quash an indictment is not immediately appealable).”).

4. Further, the precise issue Erb desires to present is, at bottom, a double jeopardy inquiry. Our Supreme Court has expressly considered whether such claims could be raised in interlocutory fashion, prior to trial and sentencing, and has consistently decided they may not. *Rearick, supra*. See also *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) (“an order denying a double jeopardy claim is not immediately appealable”). Notably, our Court has also limited the availability of review by other means: “While the procedural bar ... may seem harsh, a defendant is neither denied a future appeal nor other remedies” and “may still challenge the denial of a motion to dismiss on double jeopardy grounds *via* (1) a petition for federal habeas corpus relief, or (2) a petition for this Court to issue an extraordinary writ.” *Rearick*, 417 S.C. at 405, 790 S.E.2d at 199. Erb has not availed himself of these remedies. But critically, Erb has shown no exception that would allow this interlocutory appeal to be heard.⁵

⁵ “Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within § 14–3–330.” See *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005)). There is nothing that indicates any aspect of the attempted appeal falls within Section 14-3-330. At any rate: “the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from...” S.C. Code Ann. § 14-3-330.

CONCLUSION

For all the above reasons, Respondent moves to dismiss the appeal.


Respectfully submitted,

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By: 
S.C. Bar No. 14244
ATTORNEYS FOR RESPONDENT

November 2, 2023
Columbia, South Carolina.

ATTACHMENT 1

State of South Carolina)
County of Charleston)
Circuit Court
202A1021000355

State of South Carolina)
vs.) Second Amended
John Joseph Erb) Transcript of Record

September 21, 2023
Charleston, South Carolina

B E F O R E:

The Honorable Bentley Price, Judge; and a jury.

A P P E A R A N C E S:

Timmy Finch, Solicitor
Attorney for the State

Benjamin A. Mack, Public Defender
Attorney for the Defendant

Kelly Borngen
Transcriber



1 THE BAILIFF: All jurors sitting present.

2 THE COURT: Thank you very much.

3 Mr. Foreman, it's my understanding you all have a
4 verdict.

5 THE FOREPERSON: We do.

6 THE COURT: Is it unanimous?

7 THE FOREPERSON: It is unanimous, Your Honor.

8 THE COURT: You'll hand it to the bailiff please. Thank
9 you, sir.

10 All right. As to indictment number 2023GS103932, as to
11 the charge of murder, we the jury unanimously find the
12 defendant not guilty.

13 As to the charge of voluntary manslaughter, we the jury
14 unanimously find the defendant guilty. Signed the foreperson,
15 dated September 21st, 2023.

16 Mr. Foreman, this indictment isn't for murder, and you
17 put guilty. Will you -- will you write the word manslaughter
18 on there please.

19 THE FOREPERSON: Yes.

20 THE COURT: All right. Thank you very much.

21 Any further polling from the State?

22 MR. FINCH: Not from the State, Your Honor.

23 THE COURT: From the defense?

24 MR. MACK: Judge, will you please poll the jury?

25 THE COURT: Absolutely. Ms. Ray (phonetic)?

1 THE DEPUTY CLERK: Ladies and gentlemen of the jury, I
2 will call out your juror number. And when I do, please raise
3 your hand. I will then ask you each two questions. Please
4 answer yes or no.

5 Juror No. 189? Is this your verdict?

6 JUROR NO. 189: It is.

7 THE DEPUTY CLERK: Is it still your verdict?

8 JUROR NO. 189: It is.

9 THE DEPUTY CLERK: Juror No. 283? Is this your verdict?

10 JUROR NO. 283: Yes.

11 THE DEPUTY CLERK: Is it still your verdict?

12 JUROR NO. 283: Yes.

13 THE DEPUTY CLERK: Juror No. 131? Is this your verdict?

14 JUROR NO. 131: Yes.

15 THE DEPUTY CLERK: Is it still your verdict?

16 JUROR NO. 131: Yes.

17 THE DEPUTY CLERK: Juror No. 59? Is this your verdict?

18 JUROR NO. 59: Yes.

19 THE DEPUTY CLERK: Is it still your verdict?

20 JUROR NO. 59: Yes.

21 THE DEPUTY CLERK: Juror No. 91? Is this your verdict?

22 JUROR NO. 91: Yes.

23 THE DEPUTY CLERK: Is it still your verdict?

24 JUROR NO. 91: Yes.

25 THE DEPUTY CLERK: Juror No. 268? Is this your verdict?

1 JUROR NO. 268: Yes.

2 THE DEPUTY CLERK: Is it still your verdict?

3 JUROR NO. 268: Yes.

4 THE DEPUTY CLERK: Juror No. 271? Is this your verdict?

5 JUROR NO. 271: Yes.

6 THE DEPUTY CLERK: Is it still your verdict?

7 JUROR NO. 271: Yes.

8 THE DEPUTY CLERK: Juror No. 67? Is this your verdict?

9 JUROR NO. 67: Yes.

10 THE DEPUTY CLERK: Is it still your verdict?

11 JUROR NO. 67: Yes.

12 THE DEPUTY CLERK: Juror No. 22? Is this your verdict?

13 JUROR NO. 22: Yes.

14 THE DEPUTY CLERK: Is it still your verdict?

15 JUROR NO. 22: Yes.

16 THE DEPUTY CLERK: Juror No. 290? Is this your verdict?

17 JUROR NO. 290: Yes.

18 THE DEPUTY CLERK: Is it still your verdict?

19 JUROR NO. 290: Yes.

20 THE DEPUTY CLERK: Juror No. 16? Is this your verdict?

21 JUROR NO. 16: Yes.

22 THE DEPUTY CLERK: Is it still your verdict?

23 JUROR NO. 16: No.

24 THE COURT: All right, ladies and gentlemen, you'll have
25 to return to the -- to the jury room.

1 (Whereupon, the jury exited the courtroom at 12:40 p.m.)

2 THE COURT: All right. Well, do we want to read him an
3 Allen charge?

4 MR. MACK: Judge, the difficulty here is now we've done a
5 split of the jury.

6 THE COURT: I know. That's what happens when you do the
7 polling. All right. Hang tight.

8 (Recess from 12:40:50 p.m. to 12:54:46 p.m.)

9 THE COURT: I ask to clear the courtroom. The only
10 people I need in here is the court reporter, the clerk, and
11 the lawyers.

12 We have to do that because I can't take you back there
13 because you'd have -- you have to stay in here. So that's why
14 I cleared them out.

15 All right. Where'd the bailiff go?

16 Will you go get the juror for me? The female?

17 THE BAILIFF: Yes, sir.

18 THE COURT: Please.

19 THE BAILIFF: Mm-hmm.

20 MR. MACK: Judge, may I ask what the plan is here?

21 THE COURT: I'm just going to ask her what she wants to
22 do. I mean, if she thinks it's futile and to continue to
23 deliberate, I'm going to declare a mistrial. If she says I
24 just lost it, I think I can talk to my friends, I just got to
25 see what she needs to do before I make a decision.

1 MR. MACK: Can I respectfully object to this?

2 THE COURT: Sure.

3 MR. MACK: I feel like it would be coercive of you

4 speaking to her and making her --

5 THE COURT: Well, have you --

6 MR. MACK: -- make a decision.

7 THE COURT: -- ever seen this before?

8 MR. MACK: Sorry?

9 THE COURT: I said, well, have you ever seen this before?

10 MR. MACK: I have not, Judge.

11 THE COURT: Okay then, neither have I. So we're all in

12 this together. Okay?

13 MR. MACK: Right. And the objection I'm making comes

14 under State v. Taylor, which recently was handed down by the

15 Court of Appeals, 427 S.C. 208.

16 THE COURT: All right.

17 MR. MACK: Where they discourage giving Allen charges

18 once -- when we know the breakdown of the jury.

19 MR. FINCH: And Your Honor, for the State's position, I

20 was anecdotally told that this happened -- when this happened

21 previously, the justice sent them back and see if they can

22 deliberate. If it deadlocks after that and --

23 THE COURT: Yeah. That's what I'm going to see if it's

24 even -- if it's even worth it.

25 MR. FINCH: I think the State's position is if they are

1 just sent back to go and then give them some time to see if
 2 there's a deadlock or bring them all in and say continued,
 3 perhaps everybody from the jury, and they're all told to work
 4 together sort of, not an Allen charge specifically, but just
 5 that we're sending them back to deliberate and that if they
 6 reach an impasse then to just let us know it's a hung jury.
 7 And then I -- I will just say, my concern is if it's just the
 8 one juror.

9 THE COURT: All right. So you indicated that it was your
 10 verdict and then that it was not your verdict. Only one
 11 question is that is me allowing you a little bit more time to
 12 deliberate that it'd be futile.

13 JUROR NO. 16: Yes, sir. It was always not guilty, and I
 14 just wanted to get it over with because they were all in there
 15 screaming and yelling at me and I just -- I'll never change
 16 my -- like, it's not guilty. I'm sorry.

17 THE COURT: Bring them out.

18 THE BAILIFF: You just can stay here.

19 JUROR NO. 16: Yes, sir.

20 THE BAILIFF: I'll bring everybody else back.

21 THE COURT: You don't stay here. You can stand out
 22 there. You don't have to --

23 JUROR NO. 16: Okay. Thank you.

24 THE COURT: Yeah.

25 (Whereupon, the jury came into open court at

1 approximately 12:59 p.m.)

2 THE BAILIFF: All jurors present.

3 THE COURT: All right. Thank you so very much. Ladies
4 and gentlemen of the jury, I want to thank you for your time
5 and your effort and commend you for the effort that you've put
6 into this case. You all deliberated, as you're fully aware,
7 for five hours and 12 minutes, so that's a lot of work, a lot
8 of effort. But this is why we have a jury system. We have to
9 get 12 people to agree, and we weren't able to, so I'm going
10 to declare a mistrial.

11 So you all are free to go. I hope you have a wonderful
12 rest of your day. All right.

13 (Whereupon, the jury exited the courtroom at 1:00 p.m.)

14 THE COURT: All right. Thank you all for everything.
15 You all just need anything, just let us know.

16 MR. FINCH: Thanks, Judge.

17 THE COURT: All right. Have a good day.

18 (End of Transcript of Record)

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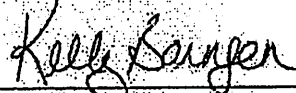
CERTIFICATE OF TRANSCRIBER

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2
3
4 State of South Carolina)
5 County of Charleston)

6 I, KELLY BORNGEN, a court-approved transcriber, do hereby
7 certify that the foregoing is a true, accurate and complete
8 Transcript of Record of the proceedings had and evidence
9 introduced in the trial of the captioned case, relative to
10 appeal, in the Court of General Sessions for Charleston
11 County, South Carolina, on the 21st day of September, 2023.

12 I do further certify that I am neither of kin, counsel,
13 nor interest to any party hereto.
14
15

16 October 4, 2023

17 

18 _____
19 Kelly Borngen, CDLI-290
20 Transcriber
21
22
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Nov 02 2023

SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
The Honorable Bentley J. Price, Circuit Court Judge

Appellate Case No. 2023-001683

THE STATE,

Respondent,

vs.

JOHN JOSEPH ERB,

Appellant.

CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Motion to Dismiss Appeal (Interlocutory Appeal), and Certificate of Service has been forwarded to Appellant's counsel, Benjamin A. Mack, Esquire and Cameton J. Blazer, Esquire via email today, November 2, 2023 to BMack@charlestoncounty.org and CBlazer@charlestoncounty.org.

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

This 2nd day of November, 2023.

s/ Angela Brown

Angela Brown
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General