

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Case No. 2012-213281

City of Fort Mill,

Appellant,

v.

Colin Duane Fitzgerald,

Respondent.

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SC Court of Appeals

RESPONDENT'S REPLY TO APPELLANT'S MOTION TO HOLD APPEAL
IN ABEYANCE AND RESPONDENT'S MOTION TO DISMISS APPEAL
WITH PREJUDICE

Respondent, through undersigned counsel, would respectfully ask this Court to deny Appellants Motion to Hold Appeal in Abeyance and Dismiss this Appeal with Prejudice.

Appellant filed a Motion to Hold this Appeal in Abeyance pending the outcome of State v. Philip Wesley Sawyer, Op. No. 2011-UP-263 (S.C. Ct. App. Filed June 7, 2011) currently before the South Carolina Supreme Court. This Court denied Appellant's Motion to Hold Appeal in Abeyance. Appellant then filed a Motion to Vacate Circuit Court Rulings; Remand for a New Trial; and Dismiss Appeal without Prejudice. This Court issued an Order denying Appellant's Motion on June 20, 2013. (Exhibit B).

Respondent has previously replied to each of these motions when raised by the Appellant

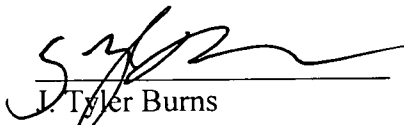
and this Court has already ruled on the Motion to Hold this Appeal in Abeyance. At this time, Respondent would renew all previous arguments already presented in response to the first motion. (Exhibit C).

Respondent would ask this Court to deny Appellant's second Motion to Hold in Abeyance as there is little reason to believe the Supreme Court will certify this appeal for review according to Rule 204, SCACR. This Appeal does not present "an issue of significant public interest or a legal principle of major importance." (Rule 204, SCACR). Respondent's reply to Appellant's Motion to the South Carolina Supreme Court is attached as Exhibit A. Respondent submits that this Court has already ruled not to hold this appeal in abeyance and Respondent would again ask this court to deny this motion.

On June 26, 2013, Appellant was advised that his initial brief and designation of matter were to be served within thirty (30) days. (Exhibit D). Appellant did not comply with this directive. As Appellant did not comply with serving its initial brief within 30 days of June 26, 2013, Respondent would move this Court dismiss this appeal with prejudice.

WHEREFORE, Respondent prays this Court deny Appellant's Second Motion to Hold Appeal in Abeyance and Dismiss this Appeal with Prejudice as Appellant has not complied with Rule 260, SCACR.

July 31, 2013



J. Tyler Burns
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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City of Fort Mill,

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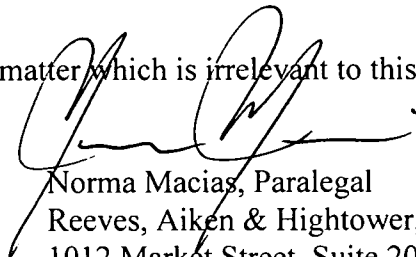
PROOF OF SERVICE

I, Norma Macias, certify that I have served Respondent's Reply to Appellant's Motion to Hold Appeal in Abeyance on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to :

Mr. William Blich
Office of the Attorney General
PO Box 11549
Columbia, SC, 29211

I certify that this designation contains no matter which is irrelevant to this appeal.

July 31, 2013



Norma Macias, Paralegal
Reeves, Aiken & Hightower, L.L.P.
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SC Court of Appeals

EXHIBIT A

THE STATE OF SOUTH CAROLINA
IN THE SUPRME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Case No. 2012-213281

City of Fort Mill,

Appellant,

v.

Colin Duane Fitzgerald,

Respondent.

RESPONDENT'S REPLY TO APPELLANT'S MOTION TO CERTIFY CASE
TO SUPREME COURT; VACATE CIRCUIT COURT RULINGS; REMAND
FOR A NEW TRIAL; OR ACCEPT JURISDICTION AND GRANT
EXTRAORDINARY RELIEF

Respondent, through undersigned counsel, would respectfully ask this Court to deny Appellant's Motion to Certify Case to the Supreme Court; Vacate Circuit Court Rulings; Remand for a new Trial; or Accept Jurisdiction and Grant Extraordinary Relief, as certification for review nor extraordinary relief is necessary or required to adjudicate the issues in this appeal.

Procedural History

This Appeal results from a conviction of Driving with an unlawful alcohol concentration (DUAC) under section 56-5-2933 of the South Carolina Code (Supp. 2011). Prior to trial, Respondent made several motions to dismiss the charge against the Respondent based on the

numerous violations and the City's failure to comply with the video recording statute, section 56-5-2953 of the South Carolina Code. All motions to dismiss raised by Respondent were denied.

Respondent was convicted by the jury, but the municipal Judge failed to have the jury make a finding of fact as to the Respondent's BAC level for sentencing purposes. Rather than impose a sentence within the range allowed by statute as required when there is no BAC level, the municipal Judge declared a mistrial. The municipal Judge did so without motion from either party. Respondent appealed this conviction.

The appeal was considered by the Honorable John C. Hayes, III, who set aside the mistrial and remanded the case for sentencing. The order of Judge Hayes was filed with Clerk of Court for York County on June 27, 2012. (Exhibit A). The Appellant filed no appeal of Judge Hayes' order.

The Clerk for the Fort Mill Municipal Court, Nancy Butler, sent notice to all parties via email that sentencing of the Respondent would occur on July 17, 2012.(Exhibit B). Respondent was sentenced on that day to a fine of \$997 or 30 days. (Exhibit C).

Appellant never appealed the ruling of Judge Hayes to set aside the mistrial. Instead, Respondent filed a second appeal which was heard before the Honorable Lee S. Alford. This second appeal was heard on September 7, 2012. At no point did the Appellant allege that Judge Hayes improperly set aside the mistrial.

Appellant filed, with the Court of Appeals, a Motion to Hold this Appeal in Abeyance pending the outcome of State v. Philip Wesley Sawyer, Op. No. 2011-UP-263 (S.C. Ct. App. Filed June 7, 2011) currently before the South Carolina Supreme Court. The Court of Appeals denied Appellant's Motion to Hold Appeal in Abeyance. Appellant then filed a Motion to Vacate

Circuit Court Rulings; Remand for a New Trial; and Dismiss Appeal without Prejudice. The Court of Appeals issued an Order denying Appellant's Motion on June 20, 2013. (Exhibit D).

Merits

Appellant submits that this entire matter should be remanded for a new trial on the grounds that Respondent's appeal was premature. Appellant contends that Respondent was wrong to appeal, and Judge Hayes and Judge Alford were wrong in their rulings on those appeals. While at the same time, Appellant never actually appealed any of these erroneous rulings.

Appellant cites the case of State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009) as precedent that this Court has to vacate the ruling of Judge Hayes. However, there is a very great difference between Smith and this current appeal. In Smith, the State actually appealed the rulings from the Circuit Court and Court of Appeals. In that instance, the State believed that the Circuit Court and Court of Appeals erred in their respective rulings and the State followed the correct procedural measures to challenge those rulings. *Id.* But in Respondent's present appeal, Appellant never appealed or challenged either Circuit Court's authority to hear the matter or issue a ruling. Appellant left these matters completely uncontested at the time of its appeal to the Court of Appeals. (Exhibit E). If Appellant believed that Judge Hayes was without authority to set aside the mistrial, Appellant should have appealed that order. Instead Respondent was convicted, sentenced and then filed a new appeal, which at that point was timely and proper. As Appellant states in its motion "section 14-25-95 requires the party appealing to set forth the ground for appeal in Notice of Appeal." (Appellant's Motion to certify for review page 5.) If Appellant believed that Judge Hayes had erred, it should have raised that issue during the appeal

before Judge Alford. At the very least, Appellant should have at least raised the issue when it appealed Judge Alford's ruling to the Court of Appeals. Instead, Appellant only appealed the order of Judge Alford overturning the conviction for violation of section 56-5-2953. (Exhibit F). Appellant has yet to raise nor preserved for appellate review whether or not Judge Hayes erred in setting aside the mistrial. If Judge Hayes' order was erroneous, then it was the responsibility of the Appellant to say so and appeal that decision. Instead Appellant proceeded with sentencing in a case that Appellant now contends was a mistrial in which no sentence could have actually been imposed.

Appellant submits to this Court that Respondent's appeal was premature and in a sense interlocutory. However, Respondent was convicted by a jury and sentence was imposed, meeting the requirements of a timely appeal. Respondent, as well as Appellant were given notice of sentencing.(Exhibit B). Respondent was also given the option by the Court not to be present at sentencing, as per the Clerk of Court. The Respondent had notice of sentencing and exercised his choice not to be present. Therefore, Respondent's sentence is not null and void as submitted by Appellant.


This case presents no "significant public interest or a legal principle of major importance" to warrant a grant of review by this Court. Rule 204 SCACR. There was nothing extraordinary about this case when Appellant filed its appeal before the Court of Appeals. There was no mention of the need for this Court to grant extraordinary relief until the Court of Appeals denied this same motion. To grant Appellant's motion for review of this case at this point would be interlocutory, a claim Appellant has raised concerning Respondent's appeal to the Circuit Court.

Judicial economy also cautions that this Court not grant review or extraordinary relief in

this appeal. To remand this case to the Municipal Court would solve none of the actual issues at the heart of this case. A new jury would be sworn, testimony would be given and a verdict rendered. But what is at contest in this appeal is matters of the law, not of fact. Remanding the case to the Municipal Court would do nothing to change the fact that the City of Fort Mill violated section 56-5-2953. Such a remand would instead require the waste of judicial resources only to bring all parties back to this same position. The true essence of this case is whether the charge against the Respondent should have been dismissed for the City's violation of section 56-5-2953. This is no issue that could be solved with a new jury, at a new trial, even if such an extraordinary measure was proper in this case.

WHEREFORE, for the above mentioned reasons, Respondent prays this Court deny Appellant's Motion to Certify Case to the Supreme Court or Accept Jurisdiction and Grant Extraordinary Relief.

July 31, 2013



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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Case No. 2012-213281

City of Fort Mill,

Appellant,

v.

Colin Duane Fitzgerald,

Respondent.

PROOF OF SERVICE

I, Norma Macias, certify that I have served Respondent's Reply to Appellants Motion to Certify Case to the Supreme Court; Vacate Circuit Court Rulings; Remand for a new Trial; or Accept Jurisdiction and Grant Extraordinary relief on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to :

Mr. William Blich
Office of the Attorney General
PO Box 11549
Columbia, SC, 29211

I certify that this designation contains no matter which is irrelevant to this appeal.

July 31, 2013

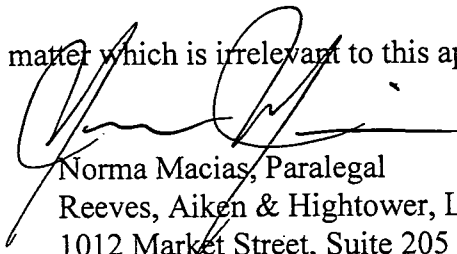

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EXHIBIT B

The South Carolina Court of Appeals

City of Fort Mill, Appellant,

v.

Colin Duane Fitzgerald, Respondent.

Appellate Case No. 2012-213281

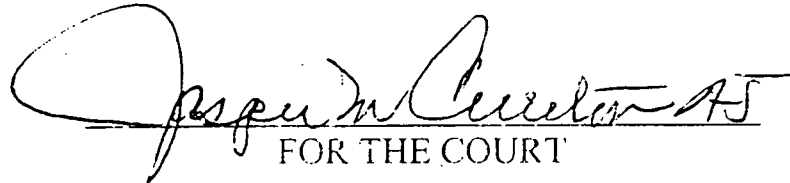
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JUN 21 2013 *WB*

ATTORNEY GENERAL

ORDER

After careful consideration, Appellant's motion to vacate the circuit court rulings, remand for a new trial, and dismiss the appeal without prejudice is denied.


FOR THE COURT

Columbia, South Carolina

cc:

James Tyler Burns

William M. Blich, Jr.

Alan McCrory Wilson

FILED

6/20/13 CA

EXHIBIT C



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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June 26, 2013

Mr. James Tyler Burns
Reeves, Aiken & Hightower
1012 Market St., Ste. 205
Ft. Mill SC 29708

Re: City of Fort Mill v. Colin D. Fitzgerald
Appellate Case No. 2012-213281

Dear Counsel:

Please be advised the initial brief of appellant and designation of matter are due to be served thirty (30) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: William M. Blicht, Jr.

EXHIBIT D

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Honorable Lee S. Alford, Circuit Court Judge

Appellate Case Tracking No. 2012-213281

The State,

Appellant,

v.

Colin Duane Fitzgerald,

Respondent.

**RESPONDENT'S REPLY TO MOTION TO HOLD APPEAL IN
ABEYANCE**

Respondent, through its undersigned counsel, would respectfully ask this Court as follows:

This appeal arises out of the Respondent's conviction for Driving with and unlawful alcohol concentration (DUAC). At trial, Respondent timely moved for dismissal of the charge as stated in City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (S.C. 2007) for the failure of the arresting officer to provide a recording of the incident site in accordance with Section 56-5-2953 of the South Carolina Code of Laws (Supp. 2010). Also, the arresting officer failed to provide a sworn affidavit justifying his failure to produce a video of the incident site. The State presented no affidavit from the arresting officer, even after Respondent's motion to dismiss. The only video of the incident site provided by the State was the video from another officer, other than

the arresting officer, which contained no audio. The State also never produced an affidavit from this officer, who was not the arresting officer, justifying the lack of audio. The municipal court Judge denied Respondent's motion for dismissal on all grounds raised by Respondent. Respondent was convicted of DUAC by a jury.

Following conviction, Respondent timely appealed his conviction to the Circuit court. While hearing arguments, Respondent expressed to the circuit court Judge, Hon. Lee S. Alford, the Respondent's concern that the return provided by the municipal court was insufficient for the circuit court to rule on the appeal. Even though timely raised and preserved by Respondent, the return from the municipal court omitted many of the issues raised by Respondent during trial. The State presented its version of the procedural history of the case, including those motions and objections raised by Respondent at trial, which Respondent agreed to adopt as true and proceeded to argue on the case as presented by the State.

Respondent believes that the issues present in this appeal is sufficiently different from the issue in State v. Philip Wesley Sawyer, Op. No. 2011-UP-263 (S.C. Ct. App. Filed June 7, 2011) that the decision of the Supreme Court in Sawyer would not be determinative of the issues in this case. In Sawyer the issue is whether the lack of audio renders the video recording of the breath test site invalid under Section 56-5-2953. In this current appeal the issues go beyond lack of audio in that the State failed to provide any video of the incident site from the arresting officer as required by the Section 56-5-2953. State v. Landis, 362 S.C. 97; 606 S.E.2d 503 (Ct. App. 2004). Also, the arresting officer provided no affidavit as to why he failed to provide a video of the incident site. Even if the arresting officer had provided a sworn affidavit, such an affidavit would not have cured the violation of the videotaping statute because the City of Fort Mill was willfully refusing to


replace or repair the video recording equipment in the City's police cars. The State was clear that the City was not receiving funding to maintain the video recording equipment from the South Carolina Law Enforcement Division (SLED) and the video recording equipment in the arresting officer's car was not being properly maintained in an operable condition. Respondent believes that the circuit court correctly ruled that the City's failure to maintain its video recording equipment did not meet the requirements of the statute as held in Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (S.C. 2011). Finally, the current appeal is also different from Sawyer in that the Respondent did not move to suppress the video for failing to comply with the videotaping statute, but instead moved to dismiss the case as the only remedy available for such a violation. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (S.C. 2007)

The issues of this current appeal go beyond whether the video tape at the incident site contained audio and therefore go beyond the issues to be addressed in Sawyer. It is for these reasons that the Respondent asks this Court not to hold this appeal in abeyance.

WHEREFORE, Respondent prays that the Court not hold this matter in abeyance pending the outcome of State v. Phillip Wesley Sawyer, but rather proceeds to hear the issues presented in this current appeal.

February 7, 2013

Respectfully submitted,



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(803) 544-4443
Attorney for Respondent

ROBERT J. REEVES +♦♦♦

ARTHUR K. AIKEN +♦

A. BEA HIGHTOWER +

J. TYLER BURNS +



Reeves, Aiken & Hightower LLP

INJURY AND CRIMINAL ATTORNEYS

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PLEASE REPLY TO: Fort Mill

July 31, 2013

Via US Mail:

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

Re: City of Fort Mill vs. Colin Duane Fitzgerald
Court of Appeals Appellate Tracking No. 2012-213281

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Reply to Appellants Motion to Hold Appeal in Abeyance along with proof of service of filing in the above-mentioned appeal.

Sincerely,

J. Tyler Burns

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AUG 02 2013

SC Court of Appeals

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