

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUL 26 2013

SC Court of Appeals

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Court of Appeals Appellate Case Tracking No. 2012-213281

City of Fort Mill,

Appellant,

vs.

Colin Duane Fitzgerald,

Respondent.

**MOTION TO CERTIFY CASE TO SUPREME COURT;
VACATE CIRCUIT COURT RULINGS;
REMAND FOR A NEW TRIAL; OR
ACCEPT JURISDICTION AND
GRANT EXTRAORDINARY RELIEF**

Appellant, through its undersigned counsel, moves pursuant to Rule 204, SCACR, for this Court to certify the above captioned case for review by the South Carolina Supreme Court or in the alternative accept the case and order extraordinary relief pursuant to Rule 245, SCACR, and section 14-3-310 of the South Carolina code. The undersigned further asks the Court to vacate all lower court rulings and remand this case for trial pursuant to the mistrial granted by the municipal court and discussed below. Accordingly, Appellant would respectfully show unto this Court as follows:

Procedural History

The appeal arises out of a conviction for Driving with an unlawful alcohol concentration (DUAC). Respondent was arrested for driving under the influence on October 9, 2011. His case proceeded to trial April 24, 2012. The City proceeded on the

charge of driving with an unlawful alcohol concentration (DUAC). Prior to trial in the Municipal Court for the City of Fort Mill, Respondent's counsel made several motions to dismiss the charges related to the failure to comply with section 56-5-2953 of the South Carolina Code (Supp. 2011). The Municipal Court, Judge Peter J. Lenzi, Jr., denied the motions. (See Return dated August 14, 2012 attached hereto as EXHIBIT A)

The jury convicted Respondent of DUAC. The jury, however, failed to find a breath alcohol concentration (BAC) in accordance with its duties under section 56-5-2933(L) of the South Carolina Code. The matter was brought to the Court's attention by Respondent's counsel. The Municipal Court did not enter a sentence for Respondent because the jury's determination is necessary to establish the range for sentencing after a conviction for DUAC. Instead, the trial court, *sua sponte*, granted a mistrial because the error was discovered after the jury was dismissed. (See Verdict attached hereto as EXHIBIT B).

On May 1, 2012, Respondent filed his Notice of Appeal and Appellant's Brief. He appealed the conviction, even though the Municipal Court had granted a mistrial. In his Notice of Appeal and Appellant's Brief, he claimed the Municipal Court erred in refusing to dismiss the case based on the failure of the City to comply with section 56-5-2953. Respondent failed to raise any issue related to the mistrial being granted by the Municipal Court. (See Notice of Appeal and Appellant's Brief attached hereto as EXHIBIT C).

The Honorable John C. Hayes, III, considered the appeal. Even though no issue related to the mistrial was before him, Judge Hayes ordered the mistrial be set aside as improvidently granted. Further, he remanded the case for sentencing according to the

verdict of the trial jury. (See Form 4 Order dated June 27, 2012 attached hereto as EXHIBIT D). The ruling occurred even though Respondent never requested the mistrial be set aside or the case remanded for sentencing.

According to the York County Clerk of Court's stamp, Respondent filed a second Notice of Appeal from the conviction on July 23, 2012.¹ (See Notice of Appeal filed July 23, 2012 attached hereto as EXHIBIT E). As before, Respondent raised three issues related to the videotape and lack of an affidavit in violation of section 56-5-2953(A) and (B). At the time he filed this second Notice of Appeal, Respondent still had not been sentenced by the Municipal Court. (See Return of Appeal dated July 27, 2012 attached hereto as EXHIBIT F). According to the Municipal Court's Return, no conviction existed and the case remained on the Jury Trial Docket.

Counsel for the City attended two hearings in an attempt to have Respondent sentenced, but neither resulted in a sentence. Subsequently, and without parties present or being in open court, the Municipal Court sentenced Respondent to a \$997 fine or 30 days in jail. The City learned about his sentencing only after the fact. (See Transcript of September 2012 hearing, pages 3-7, attached hereto as EXHIBIT G). The Department of Motor Vehicles received notice of the conviction on August 6, 2012. (See Uniform Traffic Ticket attached hereto as EXHIBIT H). The conviction as recorded by the DMV and as indicated on the ticket was for DUI, while at the trial, Respondent was convicted of DUAC.

¹ The date of service of this Notice of Appeal is questionable. The Notice of Appeal is stamped filed by the Clerk of Court for York County on July 23, 2012. The Certificate of Service which accompanies the Notice indicates it was not served on the City or the Municipal Court until July 30, 2012, even though the page listing the July 30 date is stamped by the Clerk as filed July 23.

A second hearing was held in circuit court before the Honorable Lee S. Alford. The hearing was held September 7, 2012. At the hearing, the City's attorney explained to the circuit court the circumstances under which Respondent was sentenced. Further, the parties argued the issues raised by Respondent's second Notice of Appeal and Brief.

After hearing argument, the circuit court issued an Order filed September 28, 2012, reversing the conviction and dismissing the case. The court found the lack of audio on the video recording, and the arresting officer's failure to provide an affidavit pursuant to Section 56-5-2953(B) to explain the lack of audio, necessitated dismissal of the charges. (See Order of the Circuit Court attached hereto as EXHIBIT I).

The City timely filed its Notice of Appeal from the circuit court's determination. The undersigned filed a Motion to Vacate the circuit court rulings and remand for a new trial in the Court of Appeals. (See Motion without exhibits attached hereto as EXHIBIT J). The motion was summarily denied by Order date June 20, 2013. (See Order of the Court of Appeals attached hereto as EXHIBIT K).

Merits

Any decisions of the circuit court have been without proper appellate jurisdiction and on interlocutory, unappealable rulings. As a result, neither Judge Hayes not Judge Alford had subject matter jurisdiction to entertain any issues related to this case and Judge Lenzi no longer had jurisdiction to impose sentence on Respondent. The rulings of Judge Hayes and Judge Alford should be vacated, along with the sentence imposed by Judge Lenzi. All these actions occurred subsequent to a mistrial being granted, which ended the case and set the parties back at the position they held prior to the trial.

First, a court's grant of a mistrial is not appealable. Section 14-25-95 of the South Carolina Code provides: "Any party shall have the right to appeal from the sentence or judgment of the municipal court to the Court of Common Pleas of the county in which the trial is held." In the instant case, because the Municipal Court granted a mistrial, there was no sentence or judgment in the case from which Respondent could appeal to the Court of Common Pleas. Respondent's appeal of May 1 was not from a judgment or sentence, but instead from the grant of a mistrial. As a result, the circuit court did not have jurisdiction to entertain the appeal. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 344, 713 S.E.2d 278, 284 (2011) (finding appellate jurisdiction conferred only when notice of appeal is filed with the municipal court "within ten days after sentence is passed or judgment rendered"); Keels v. Powell, 213 S.C. 570, 573, 50 S.E.2d 704, 705 (1948) (finding premature any appeal brought after a mistrial has been declared and finding Court did not have jurisdiction to hear appeal). Additionally, subject matter jurisdiction, defined by this Court as the "the power of a court to hear and determine cases of the general class to which the proceedings in question belong," may be raised at any time and may not be waived by the parties. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005).

Further, Respondent's Notice of Appeal and Appellant's Brief did not list as an issue on appeal anything related to the grant of the mistrial. Instead, Respondent attempted to appeal the denial of his motions to dismiss. Judge Hayes' Order only related to the grant of the mistrial, and, as a result, was on a basis not properly appealed to him. Section 14-25-95 requires the party appealing to set forth the ground for appeal in the

Notice of Appeal. As a result, Judge Hayes, without proper jurisdiction, ruled on issues not properly raised in the Notice on Appeal dated May 1.

Additionally, this case is similar to the case of Floyd v. Page, 124 S.C. 400, 117 S.E. 409 (1923). In Floyd, the parties were involved in a civil suit which ended in a mistrial. Both parties filed an appeal from the mistrial alleging the trial court erred in denying their respective motions for directed verdict. This Court stated:

The effect of the mistrial was to leave the parties litigant in *statu quo ante*, with the cause still pending for trial in the circuit court. The rulings of the trial judge in the court below having eventuated in no binding adjudication of the rights of the parties, the appeal is prematurely brought, and jurisdiction thereof may not be entertained.

Id. As in Floyd, the appeal to the circuit court was premature and Judge Hayes' Order should be declared null and void as he ruled without proper jurisdiction. Because his order required the sentencing to take place, any sentence given to Respondent is also null and void. The appeal to Judge Alford should then have not taken place and, as a result, the entire case should be remanded to the Municipal Court for a trial in which all issues raised by Respondent in the circuit court can be addressed by the Municipal Court.

In addition, if a party is not entitled to appeal an order of the lower court, any ruling on appeal should be deemed null and void. In State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009), this Court vacated an opinion of the Court of Appeals because the Court found the State did not have a right to appeal the underlying order of the lower court. Id. at 169, 679 S.E.2d at 182. Under this precedent, this Court should vacate the ruling of Judge Hayes, and all subsequent rulings, because Respondent did not have the right to appeal from the grant of a mistrial. Any ruling by the circuit court would be null and void just as the ruling in Smith.

Also, the appeal brought before Judge Alford was premature and should have been dismissed. The Notice of Appeal was filed with the court on July 23, 2012. On July 27, 2012, the Municipal Court indicated his belief there was no conviction as a result of the mistrial being granted. Respondent had not been sentenced by July 23, 2012, and so the requirement of section 14-25-95 that an appeal lie only from a sentence or a final judgment had not been met. Finally, based on the information from the DMV, it appears the sentence was not sent to them until August 6, which based on information and belief is approximately when the City's attorney learned a sentence had been issued. As a result, the appeal was not from a final conviction and should not have been heard. Respondent never filed an amended Notice of Appeal to indicate the conviction was final after sentencing. Accordingly, Judge Alford was without proper jurisdiction under section 14-25-95 to hear the appeal and his ruling should be vacated and the case remanded for a new trial pursuant to the mistrial entered by the Municipal Court.

As a final matter, the sentence itself is invalid, null and void and should be vacated. The sentence was not issued in open court with either party present. Further, it was issued in violation of Respondent's right to be present at all important stages of a case. This State has long held that sentences of a convicted defendant must be passed in open court and with the defendant present. See State v. Chancellor, 32 S. C. Law (1 Strob.) 347 (Ct. App. 1847). Additionally, sentences not rendered in open court have been declared null and void. See State v. Nathans, 49 S.C. 199, 27 S.E. 52, 62 (1897). Finally, this Court recently reiterated the need for having an oral pronouncement of a sentence in open court with the defendant present. In Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010), the Court found an oral pronouncement made with the defendant

present superseded a later written sentence because the safeguard of having the sentence made in open court without the defendant present was not followed in making the written sentence. As a result, in this case, the sentence issued by the Municipal Court with no parties present, and without any hearing being conducted in open court, should be vacated.

Accordingly, based on the foregoing, the City believes this Court needs to accept jurisdiction of this case in order to vacate orders of the lower court and a sentence imposed by the municipal court, all of which have occurred without jurisdiction of those courts to take the actions taken. The City asks this Court to vacate the rulings of Judge Hayes and Judge Alford as well as the sentence imposed by the Municipal Court. All were made after the grant of a mistrial which had the effect of vitiating the prior trial and proceedings and setting the parties back in the position of awaiting trial. Further, both orders of the circuit court were issued without proper appellate jurisdiction as neither involved an appeal from a final conviction and sentence as required under 14-25-95. Finally, the sentence imposed was null and void because it was not done in open court with the parties present. As a result, all orders subsequent to the grant of a mistrial by the Municipal Court should be vacated and this case remanded for a new trial.


WHEREFORE, Appellant prays the Court hold this matter in abeyance until ruling on the underlying motion; certify the case for consideration by this Court or in the alternative accept jurisdiction and grant extraordinary relief given the facts and procedural history of this case; vacate the orders of Judge Hayes and Judge Alford from the circuit court; vacate the sentence issued by the Municipal Court; remand for a new

trial based on the grant of a mistrial by the Municipal Court; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
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ATTORNEYS FOR APPELLANT

July 26, 2013

STATE OF SOUTH CAROLINA
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City of Fort Mill,

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the Motion To Certify Case To Supreme Court; Vacate Circuit Court Rulings; Remand For A New Trial; Or Accept Jurisdiction And Grant Extraordinary Relief on Respondent by depositing a copy of same in the United States mail, postage prepaid, addressed to:

J. Tyler Burns, Esquire
1012 Market Street Suite 205
Fort Mill, South Carolina 29708

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

This 26th day of July, 2013.

Ellen R. DuBois

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SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

July 26, 2013

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of a Motion To Certify Case To Supreme Court; Vacate Circuit Court Rulings; Remand For A New Trial; Or Accept Jurisdiction And Grant Extraordinary Relief along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: ~~Jenny A. Kitchings, Clerk SC Court of Appeals~~
J. Tyler Burns, Esquire
Victim Services

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