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Feb 14 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
General Sessions Court

Bentley J. Price, Circuit Court Judge

Case No. 2023-001683

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH ERB,

PETITIONER.

PETITION FOR REHEARING

BENJAMIN A. MACK
Senior Assistant Public Defender

CAMERON J. BLAZER
Circuit Public Defender

Ninth Circuit Public Defender's
Office
101 Meeting Street, 5th Floor
Charleston, South Carolina 29401
(843) 958-1850

ATTORNEYS FOR APPELLANT

Introduction

On January 30, 2024, this Court issued an order denying John Erb’s petition for a writ of supersedeas. John Erb’s petition appealed the General Sessions Court’s refusal to grant his request for a writ of habeas corpus. This Court’s order dismissed the petition as an improper interlocutory appeal. In response, John Erb respectfully requests that this Court reconsider its order. Under Rule 221(a) of the South Carolina Appellate Court Rules (SCACR), a petition for reconsideration “shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221(a), SCACR. Accordingly, John Erb is entitled to this Court’s reconsideration of his petition for supersedeas. This Court’s order denying his petition fails to address his constitutional right to habeas corpus in South Carolina,¹ and his ability to assert the right under the SCACR.²

Analysis

John Erb is currently incarcerated at the Charleston County jail on an invalidated indictment for murder in violation of his constitutional right to habeas corpus. On September 21, 2023, a duly sworn jury found John Erb not guilty of murder at trial based on the facts alleged in his murder indictment. This was the only charge keeping Erb incarcerated without bond in the Charleston County jail before trial. However, Erb was not released from jail upon the jury’s verdict, and he remains there without bond and without any other pending charges. The trial

¹ The United States and South Carolina Constitutions state that “the privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it.” U.S. Const. art. I, § 9; S.C. Const. art. I, § 12. This constitutional provision has been codified and expanded by the South Carolina legislature to apply to “any person. . . detained for any crime,” S.C. Code Ann. § 17-17-10, and it requires the use of civil law when appealing “all final decisions rendered on applications for writs of habeas corpus.” S.C. Code Ann. § 17-17-140.

² Under civil law in South Carolina, a notice of appeal for supersedeas action “as a general rule. . . acts to automatically stay matters decided in the order, judgement, decree or decision on appeal,” and “[t]his automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court.” Rule 241, SCRAC.

court ordered *sua sponte* a mistrial based on the jury's inability to reach a consensus on the lesser included offense of voluntary manslaughter.

In response, Erb petitioned the General Sessions Court for a writ of habeas corpus, as the State docketed his retrial under the invalidated murder indictment for the week of November 6, 2023. The General Sessions Court denied Erb's petition for habeas corpus, and it removed his trial from the docket, upon Erb's filing of a petition for supersedeas before this Court. This Court requested memoranda on the double jeopardy issue at the root of John Erb's habeas corpus question after reviewing his petition for supersedeas and his reply to the State's motion to dismiss his petition. Now, the State intends to retry Erb on his invalidated murder indictment, based on this Court's denial of his petition for supersedeas. It has docketed the case for the week of May 27, 2024 – an action that lacks a sense of judicial economy and Erb's constitutional protection against unlawful incarceration.

This Court's order denying Erb's petition for supersedeas as interlocutory is based on the South Carolina Supreme Court's opinion in *State v. Rearick*, which requires a sentence to be imposed against a defendant before they can appeal their case in South Carolina. 417 S.C. 391, 398, 790 S.E.2d 192, 196, 2016. This Court's order also references the South Carolina Supreme Court's opinion in *State v. Miller*, which states, "[A]n order denying a double jeopardy claim is not immediately appealable." 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986). However, the *Rearick* and *Miller* opinions do not specifically address petitions for writs for habeas corpus in situations, like Erb's, where a trial jury and court have issued final rulings on a defendant's indictment and custody. The *Rearick* opinion only in passing suggests under the section heading "Other Remedies" that individuals, like Erb, file a habeas petition in federal court. *Rearick*, 417 S.C. at 405, 790 S.E.2d at 199-200. The suggested remedy in *Rearick*, seemingly upheld by this

Court with its dismissal of Erb's petition for supersedeas, potentially signaled the death knell for habeas doctrine in South Carolina. It also raised issues of federalism and appellate exhaustion in habeas matters identified by the United States Fourth Circuit Court of Appeals.³

Erb is confronted with the same issues as he requests this Court to reconsider its ruling on his petition for supersedeas. He is afraid that his case will be tried on May 27, 2024, by the General Sessions Court before he can exhaust his remedies on appeal in state court and file a habeas petition in federal court, as suggested in *Rearick*. This Court or the South Carolina Supreme Court could simply withhold their ruling on Erb's petition for rehearing or certiorari as he is kept in jail and retried for murder in violation of his constitutional protection against unlawful incarceration under habeas doctrine. Such an occurrence would prevent him from filing a habeas petition in federal court, and it would render his habeas question moot. It also could be a complete waste of judicial resources. If convicted at trial on May 27, 2024, this Court, or another, could order Erb a new trial on appeal based on a violation of his right to habeas corpus and protection against double jeopardy. As such, an answer from this Court to Erb's habeas question is merited, considering *Rearick*, for the purpose of judicial economy and as a shield against unlawful incarceration under the South Carolina Constitution.

In *State v. Rearick*, the South Carolina Supreme Court said that “[i]n South Carolina, a criminal defendant has no constitutional right to appeal. Rather the right to appeal is authorized by statute and appellate court rules of procedure.” 417 S.C. 391, 398, 790 S.E.2d 192, 196, 2016. The Court subsequently reiterated its point on statutory appeals in *Looper*, holding that “a party may appeal from a decision not amounting to a final judgment only where provided by statute” and that absent some specialized statute, the immediate appealability of an interlocutory or

³ See *Livingston v. Murdaugh*, 183 F.3d 300 (4th Cir. 1999); *Gilliam v. Foster*, 63 F.3d 287 (4th Cir. 1995).

intermediate order depended on whether it fell under S.C. Code Ann. § 14-3-330. 421 S.C. 384, 390-391, 807 S.E.2d 203, 206 (2017). The provisions of S.C. Code Ann. § 14-3-330, allow for, among other options, “the appeal of a final order affecting a substantial right made in any special proceeding.” S.C. Code Ann. § 14-3-330(3).

Our Supreme Court in *Rearick* outlined its history of denying interlocutory appeals in criminal cases. The Court used a historical timeline of holdings over the years as a reference point for an opinion that distinguishes itself from precedent created by the United States Supreme Court. In *Abney v. United States*, the United States Supreme Court held that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds was an appealable, final decision within the meaning of 28 U.S.C.S. § 1291. 431 U.S. 651.⁴ However, the South Carolina Supreme Court in *Rearick* affirmed and quoted a position it took in *State v. Miller*, determining that *Abney* had “no application to state court appeals.” 417 S.C. at 401, 790 S.E.2d at 197 (quoting 289 S.C. at 427, 346 S.E.2d at 706). The Court also states in *Rearick* that it reaffirmed *Miller* in *State v. Gregorie* when it said ““a criminal defendant claiming a double jeopardy violation is not exempt from the regular appealability requirements.”” *Id.* (quoting *Gregorie*, 339 S.C. 2, 4 n.1 528 S.E.2d 77, 78 n.1 (2000)).

John Erb’s situation is plainly not in line with the *Rearick* opinion’s opposition to interlocutory appeals in criminal court based on double jeopardy. Unlike the appellant in *Rearick*, Erb’s petition for a writ of supersedes, though rooted in a double jeopardy claim, is based on the vehicle of habeas doctrine – a longstanding constitutional concept in the United States and South Carolina. Erb’s right to habeas review on appeal, regardless of its roots in

⁴ Under 28 U.S.C.S. § 1291, “[t]he court of appeals (other than the United States Court of Appeals for the federal circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United State District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . .”

double jeopardy, transcends the South Carolina Supreme Court's history of statutorily denying interlocutory appeals in criminal cases. It is based on John Erb's constitutionally protected basic freedoms under habeas doctrine, and unlike the case precedent historically referenced in *State v. Looper*, his habeas petition is a post-trial prayer for relief based on his unlawful incarceration in light of a final and official jury verdict, not a pretrial motion or mistrial lacking finality.

Furthermore, the laws on habeas review on appeal, delineated in S.C. Code Ann. § 17-17-10 and S.C. Code Ann. § 14-3-330, are the types of "specialized statute[s]" referenced in *State v. Looper* that create an exception to the law on appellate review because any other interpretation of the law would unconstitutionally render habeas review meaningless in South Carolina, under *Looper*. Finally, even if the statutory law on habeas review with its foundation in the United States and South Carolina Constitutions, does not meet the appealability exception created in *Looper*, then the General Sessions Court's denial of John Erb's habeas petition can still be appealed under the law on appellate review in S.C. Code Ann. § 14-3-330, because the lower court's denial is "a final order affecting a substantial right made in [a] special proceeding" placing in the balance under habeas doctrine, Erb's constitutional right to life and liberty.

Conclusion

This Court should reconsider its denial of John Erb's petition for a writ of supersedeas and grant him a writ of habeas corpus because the General Sessions Court failed to recognize the finality of the jury's not guilty verdict at his trial when it denied Erb's habeas petition. The jury's decision and the General Sessions Court's denial of Erb's petition for habeas corpus based on it should be treated as an exceptional circumstance under *Rearick* and habeas doctrine. It makes Erb an aggrieved party illegally wallowing in jail without bond or habeas relief in state court awaiting his retrial date on an invalidated murder indictment.

Respectfully Submitted,

Benjamin A. Mack

Benjamin A. Mack
Senior Assistant Public Defender
Charleston County Public Defender's Office

February 14, 2024

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The State of South Carolina,.....Respondent,
v.

John Joseph Erb,.....Petitioner.

The undersigned certifies that John Erb's Petition for Rehearing has been submitted electronically to the parties named here below.

February 14, 2024


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Attorney for the Appellant

Cc via email:

- The Honorable Deadra Jefferson, Administrative Judge, General Sessions Court
- Melody Brown, South Carolina Attorney General's Office
- Scarlett Wilson, Ninth Circuit Solicitor's Office
- Timothy Finch, Ninth Circuit Solicitor's Office
- James Milone, Charleston County Clerk of Court

Benjamin A. Mack

From: Benjamin A. Mack
Sent: Wednesday, February 14, 2024 5:06 PM
To: mbrown@scag.gov
Cc: Scarlett Wilson; Timothy Finch; James M. Milone; Jefferson, Deadra L. Secretary (Chanda C. Sheppard); Jefferson, Deadra L. Law Clerk (Jacqueline Venezia)
Subject: State v. John Erb - Appellate Case No.: 2023-001683
Attachments: Erb, John - Appeal - Petition for Rehearing.pdf

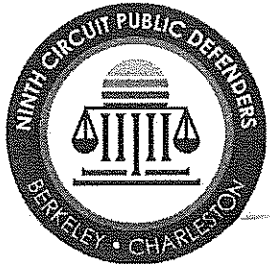
Hi Melody,

Attached is a petition for a rehearing associated with John Erb's appeal.

Later today, I intend to file a copy with the SC Court of Appeals.

Sincerely,

Ben

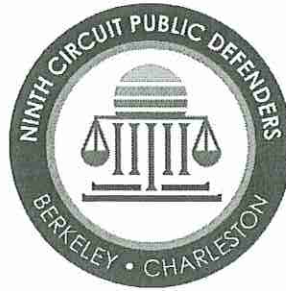


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February 14, 2024

Catherine Harrison, Deputy
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *State of South Carolina v. John Joseph Erb, Appellant*
Appellate Case No.: 2023-001683

Dear Ms. Harrison,

The enclosed documents are being sent to you by Appellant John Erb in response to the Order issued by The South Carolina Court of Appeals filed on January 30, 2024. Pursuant to the Order, I have enclosed for filing with the Court of Appeals a Petition for Rehearing.

Sincerely,

Benjamin A. Mack
Attorney for the Appellant

Copied:

The Honorable Deadra Jefferson, Administrative Judge, General Sessions Court
Melody Brown, South Carolina Attorney General's Office
Scarlett Wilson, Ninth Circuit Solicitor's Office
Timothy Finch, Ninth Circuit Solicitor's Office
James Milone, Charleston County Clerk of Court

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