

**RECEIVED**

**Mar 07 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA IN

THE COURT OF APPEALS

---

Appeal from Kershaw County  
Honorable Daniel McLeod Coble, Circuit Court Judge

---

Lower Court Case No. 2022-CP-2800351

---

IN THE MATTER OF THE CARE AND  
TREATMENT OF JEREMIAH JAMES POUGH,

APPELLANT

APPELLATE CASE NO. 2023-001950

---

RETURN TO MOTION TO REMAND

---

GARY H. JOHNSON  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

Appellant was found to be a sexually violent predator under the Sexually Violent Predator Act following a trial before the Honorable Daniel Coble and a jury from November 13 – 16, 2023. This appeal followed.

The state seeks a remand to allow the lower court to sign a written, interlocutory order on the reliability of portions of an expert witness' testimony. The state provides this Court with no context or authority supporting this request. The context of the unsigned (and assumingly unprepared) order was the trial court's decision to allow the state's expert to testify regarding plethysmograph testing of appellant (hereinafter PPG). Tr. 178, ll. 15 – 24.

In ruling on the admissibility of PPG testing in the present case, the trial court conducted a hearing outside the presence of the jury pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). The trial court made a detailed oral ruling referencing Council and the balancing required by Rule 403, SCRE. Tr. 178, l. 15 – 185, l. 10. While the trial court did request a written order be prepared by the state for the *appellant's counsel to review* that would summarize “essentially what I said”, no such order was ever prepared or presented before final judgment. Tr. 185, ll. 12 – 18.

Now comes the state, more than a year since the trial court's ruling and after both final judgment and the service of the notice of appeal, with a request to stay further proceedings and remand the matter for the preparation and signing of an interlocutory order that can have no bearing on the propriety of the court's ruling on the issue nor alter or change the record before this Court.

The nature of a Council hearing required a finding by the trial court that the “evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” Id., 335 S.C. at 20, 515 S.E.2d at 518. Any such a ruling is interlocutory in nature and not

immediately appealable. *See* S.C. Code Ann. § 14-3-330 (1991); State v. Looper, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) (holding a “party may appeal from a decision not amounting to a final judgment only where provided by statute.”); Stone v. Thompson, 426 S.C. 291, 294, 826 S.E.2d 868, 869–70 (2019) (An order involves the merits under § 14-3-330(1) when it finally determines some substantial matter forming the whole or part of a cause of action or defense.). In connection with the admission of evidence, a limited statutory allowance allows the state to appeal a pre-trial suppression of evidence “which significantly impairs the prosecution of a criminal case.” State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985). No such allowance is present here and the ruling on the admission of PPG evidence was interlocutory in nature.<sup>1</sup>

In addition, the non-existent proposed order would not have tolled the filing of the Notice of Appeal. “Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal.” Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999).<sup>2</sup> “The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” Elam v. S.C.

---

<sup>1</sup> The efficacy and accuracy of PPG testing has been addressed by our courts, and the reliability and appropriate use of PPG testing was an issue presented to the lower court and likely a significant issue for this Court to address during this appeal. *See* Matter of Bilton, 432 S.C. 157, 167, 851 S.E.2d 442, 446 (Ct. App. 2020) (“We simply hold, as noted above, that due process does not allow a testifying expert to be a pipeline for someone else's scientific work to be admitted into evidence without a baseline demonstration of reliability. We also note that nothing requires the State to seek the admission of PPG test results as evidence in these cases.”).

<sup>2</sup> “The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of ‘appellate’ jurisdiction over the case, but it does not affect the court's subject matter jurisdiction.” State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004).

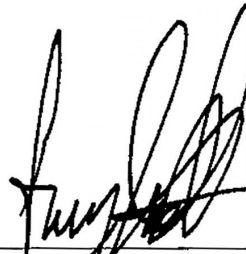
Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004). A timely “post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCPP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.” Elam., 361 S.C. at 15, 602 S.E.2d at 775; Rule 203, SCACR (“When a timely motion for judgment n.o.v. (Rule 50, SCRCPP), motion to alter or amend the judgment (Rules 52 and 59, SCRCPP), or a motion for a new trial (Rule 59, SCRCPP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.”).

Upon the filing of the notice of appeal, further proceedings at the trial court were stayed and the record was closed. *See* Rule 205, SCACR (Upon service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission, or tribunal from proceeding with matters not affected by the appeal.”). Under Rule 210(c), SCACR “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.” Also, “the appellate court will not consider any fact which does not appear in the Record on Appeal,” with limited exceptions. Rule 210(h), SCACR; *see State v. Hawes*, 423 S.C. 118, 128, 813 S.E.2d 513, 518 (Ct. App. 2018) (finding appellant abandoned argument regarding the admission of a crime scene video by failing to include it in the Record on Appeal).

**CONCLUSION**

Appellant respectfully objects to the attempt by the state to clean up an issue surrounding its failure to produce a written order covering the trial court’s decision in allowing PPG testimony. The opportunity for the state to produce such an order was before final judgment, while the trial court still had jurisdiction to review and approve such an order, not now with the issue ripe for appellate review following a timely notice of appeal. There is also a danger in such a late correction that may add material that was not presented to the trial court in connection to a critical ruling that would needlessly complicate the issues before this Court.<sup>3</sup>

Allowing the state to re-open the record below and supply the lower court with a written order on an interlocutory issue that has already been ruled upon on the record by the trial court would improperly open and supplement the record after final judgment and the motion to remand should be denied.

  
\_\_\_\_\_  
Gary H Johnson  
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of March, 2024.

---

<sup>3</sup> Any attempt by the state to deviate from the language already contained in the trial court’s ruling, including citation to authority not referenced by the trial court, would be subject to objection by appellant’s counsel creating additional problems requiring further hearings before the trial court or argument before this Court on the propriety of such deviations.

RECEIVED

Mar 07 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Kershaw County  
Honorable Daniel McLeod Coble, Circuit Court Judge

---

Lower Court Case No. 2022CP2800351

---

IN THE MATTER OF THE CARE AND  
TREATMENT OF JEREMIAH JAMES POUGH,

APPELLANT

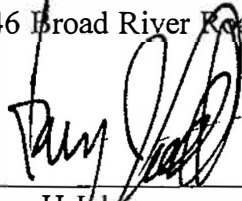
APPELLATE CASE NO. 2023-001950

---

CERTIFICATE OF SERVICE

---

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the return to motion to remand in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Jeremiah James Pough, at 4546 Broad River Road, Columbia, SC 29210, this 7th day of March, 2024.



---

Gary H Johnson  
Appellate Defender

ATTORNEY FOR APPELLANT

**From:** [Warren, Kaylynn](#)  
**To:** [Deborah Shupe](#)  
**Cc:** [Johnson, Gary](#); [SC - ELLISON SALLY](#)  
**Subject:** 2023-001950 In the Matter of the Care and Treatment of Jeremiah James Pough  
**Date:** Thursday, March 7, 2024 8:27:00 AM  
**Attachments:** [2023-001950 In the Matter of the Care and Treatment of Jeremiah James Pough Return to Motion to Remand.pdf](#)

---

Good Morning,

Attached for service in the above-referenced case is the Return to Motion to Remand which will be filed today, March 7, 2024, with the Court of Appeals via email filing.

Respectfully,  
Kaylynn

**Kaylynn Warren**

Administrative Assistant  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
(803) 734-1330