

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 22 2013

Appeal from Lexington County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2012-213137

SC Court of Appeals

THE STATE,

Respondent,

vs.

SIDNEY A. HURSEY, Jr. ,

Appellant.

MOTION TO DISMISS APPEAL

Respondent ("the State"), through its undersigned counsel, would respectfully move to dismiss the appeal from as an improper interlocutory appeal from an order denying immunity under the Protection of Person's and Property Act pursuant to State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). Respondent would show this Court the following:

I.

On November 24, 2009, the Appellant Sidney A. "Butch" Hursey, Jr. was arrested and charged with the murder of the decedent Michael Reese (hereinafter "decedent"). On November 8, 2011, counsel for the Appellant filed and served its Motion to Dismiss pursuant to the Protection of Person's and Property Act, S.C. Code § 16-11-410, et seq. The Appellant's motion was heard from December 5-12, 2011, before the Honorable R. Knox McMahon in the Lexington County Court of General Sessions. Appellant was represented by S. Jahue Moore, Esquire, and M.

5/1

Brooks Biediger, Esquire. Respondent was represented by Deputy Solicitors Shawn Graham, Esquire, and Rick Hubbard, Esquire.

During the hearing, counsel for the Appellant moved to suppress any and all evidence seized as a result of an invalid and unsigned search warrant on the property. On March 7, 2012, Judge McMahon issued his order denying both the motion to dismiss and the motion to suppress. Shortly thereafter, the Appellant moved the Court to reconsider. The Appellant's motion to reconsider was heard on August 12, 2012. On October 1, 2012, Judge McMahon issued his order denying the motion to reconsider.

On October 11, 2012, The Appellant filed his notice of appeal from the orders denying his motion to dismiss pursuant to the Protection of Persons and Property Act dated March 6, 2012 and October 10, 2012.

On June 14, 2013, the Appellant, through counsel S. Jahue Moore and M. Brooks Biediger made an Initial Brief of Appellant. In the brief, counsel raised the following issues:

- I. Whether the trial court erred in denying immunity pursuant to the "stand your ground" law in finding the Appellant did not reasonably believe his use of force was necessary to prevent death or great bodily injury?
- II. Whether the trial court erred when it determined the language "another applicable provision of law" in the immunity statute does not encompass the common law doctrines of self-defense and defense of habitation?
- III. Whether the trial court abused its discretion in admitting evidence seized pursuant to a search warrant when there was testimony the warrant was not signed by a judge before it was executed?

Initial Brief of Appellant, p. 1.

The matter is presently pending the filing of the Initial Brief of Respondent which is due September 13, 2013 pursuant to an order of this Court dated August 16, 2013.

13
13.

In South Carolina, the right to appeal is conferred by S.C. Code Ann. § 14-3-330. State v. Miller, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986). Ordinarily, an appeal may only be pursued after a party has obtained a final judgment or has otherwise satisfied the terms of Section 14-3-330. State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010); see Miller, 289 S.C. at 426, 346 S.E.2d at 705 (“In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute.”). In criminal cases, judgment for a criminal defendant is not final until a sentence is imposed. State v. Robinson, 287 S.C. 173, 174, 337 S.E.2d 204, 204 (1985); see Berman v. United States, 302 U.S. 211, 212 (1937) (“Final judgment in a criminal case means sentence. The sentence is the judgment.”). Thus, a criminal defendant may **not** appeal until **after** a sentence has been imposed. Parsons v. State, 289 S.C. 542, 542, 347 S.E.2d 504, 504 (1986).

III.

Yesterday, in State v. Isaac, the South Carolina Supreme Court instructed that an order denying a request for immunity from prosecution under the South Carolina Protection of Persons and Property Act does not fall within any category of orders that are immediately appealable under Section 14-3-330. State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). In reaching that conclusion, the Supreme Court explained that an order denying a request for immunity was not a final order and was not an interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. Id., (Shearouse Adv. Sh. No. 37 at 18-19). As a result, the Supreme Court held that “the denial of a request for immunity under the Act is not immediately appealable.” Id., (Shearouse Adv. Sh. No. 37 at 21).

IV.

In the case sub judice, Appellant is appealing from Judge McMahon's orders denying his motion to dismiss based upon request for immunity from prosecution. However, Appellant's case has not yet gone to trial, and Appellant has not yet been convicted or sentenced. See Wilson, 387 S.C. at 603, 693 S.E.2d at 926 (recognizing that the general rule is that a criminal defendant cannot appeal until he has been convicted and sentenced). Accordingly, Appellant's appeal is an improper interlocutory appeal from an order that is not immediately appealable and should be dismissed, and Appellant's case should be remanded for trial. See Isaac, (Shearouse Adv. Sh. No. 37 at 23) (instructing that the denial of a defendant's request for immunity pursuant to the South Carolina Protection of Persons and Property Act is not subject to immediate appeal, dismissing Isaac's appeal, and remanding for trial); see also State v. Hubbard, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) ("The appellants have not yet gone to trial. An appeal in a criminal case must attend the final judgment rendered on the indictment. No final judgment has occurred in this case and the order appealed from is interlocutory. Therefore, we dismiss the appeal and remand the case for trial." (citations omitted)).

WHEREFORE, Respondent prays that this Court will dismiss Appellant's notice of appeal and appeal as an improper interlocutory appeal from an order that is not immediately appealable; remand the case to the circuit court for trial; hold this appeal in abeyance pending a ruling on Respondent's motion; and grant such other and further relief as the Court may deem just and proper.

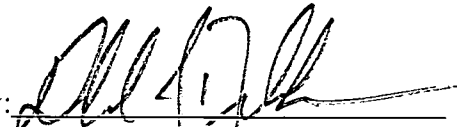
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA

M
X4

Senior Assistant Deputy Attorney General

By: 
Donald J. Zelenka

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

3
#5

August 22, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 22 2013

Appeal from Lexington County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2012-213137

SC Court of Appeals

THE STATE,

Respondent,

vs.

SIDNEY A. HURSEY, Jr. ,

Appellant.

PROOF OF SERVICE

I, Donald J. Zelenka, certify that I have served the within Motion to Dismiss Appeal on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

S. Jahue Moore, Esquire
Moore, Taylor and Thomas, P.A.
P. O. Box 5709
West Columbia, South Carolina 29171

I further certify that all parties required by Rule to be served have been served.
This 22nd day of August, 2013.



Donald J. Zelenka

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3601

August 22, 2013



RECEIVED

AUG 22 2013

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

August 22, 2013

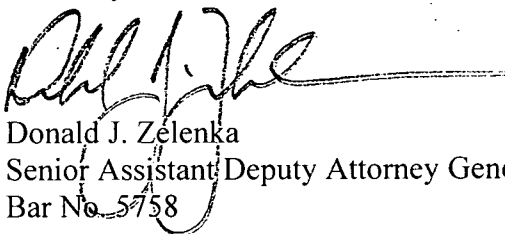
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RE: State v. Sidney A. Hursey – Appellate Case No. 2012-2213137

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Dismiss Appeal, along with proof of service, for filing in the above-referenced appeal.

Sincerely,



Donald J. Zelenka
Senior Assistant Deputy Attorney General
Bar No. 5758

DJZ/
Enclosures

cc: S. Jahue Moore, Esquire
S. C. Attorney General Office Victim Services
Honorable Donald V. Myers, Solicitor of the Eleventh Circuit.