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Aug 05 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Common Pleas

The Honorable Debra McCaslin, Circuit Court Judge

Appellate Case No. 2024- 001212

THE STATE,.....Appellant,

v.

JOSHUA KENNETH BROOKINS,.....Respondent.

**RESPONDENT’S MEMORANDUM AS TO
APPEALABILITY IN THIS CAUSE**

THE CLOUD LAW FIRM, LLC

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ATTORNEY FOR RESPONDENT

COMES NOW Respondent, Joshua Kenneth Brookins, by and through his undersigned counsel, hereby respectfully submits this memorandum concerning appealability in this cause, and further states that this appeal should be dismissed because the ruling appealed is interlocutory and there are no exceptions to allow said ruling to be immediately appealed.

INTRODUCTION

On or about January 25, 2024, Respondent was indicted for Distribution of Fentanyl pursuant to S.C. Code § 44-53-370. Respondent's case was called for trial on July 15, 2024. On or about July 12, 2024, Respondent filed a motion in limine requesting the exclusion of any mention of the death of Johnathan Tedder ("Tedder"), or in the alternative, the circumstances surrounding the death and the cause of death. Respondent's argument for exclusion was relevance, lack of connection with the crime charged, and that the prejudicial effect of the evidence substantially outweighed its probative value under Rules 403 and 404 of the South Carolina Rules of Evidence.

On July 15, 2024, the circuit court ruled that evidence relating to the circumstances and cause of death was inadmissible because of the potential prejudicial effect. The circuit court took the matter under advisement as to excluding the mention of the death altogether, and the next morning, the circuit court ruled that any mention of the death was inadmissible for the same reasons as the prior ruling.

Immediately upon the circuit court's ruling, the State advised that it was appealing the ruling. Appellant filed an appeal in this Court on July 17, 2024. On July 30, 2024, this Court requested memorandum from the parties as to the issue of appealability in this cause.

ARGUMENT

I. Appellate jurisdiction is not proper in this case because the circuit court's ruling was interlocutory, not a final order, and thus, this Court should dismiss this appeal.

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993)). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). Generally, "[j]udgment in a criminal case is not final until sentence is imposed." *State v. Robinson*, 287 S.C. 173, 173, 337 S.E.2d 204, 204 (1985).

South Carolina courts have long held that "pre-trial rulings "on the admissibility of evidence are not final orders." See *S.C. Dep't of Transp. v. McDonald's Corp.*, 375 S.C. 90, 92, 650 S.E.2d 473, 474 (2007) ('A motion in limine is generally not considered a final order . . .').

In the current case, a jury was selected, but not sworn, and the trial concluded during pretrial motions. This appeal is nearly identical to the appeal filed in *State v. Hubbard*, with the exception that the appealing parties are reversed. *State v. Hubbard*, 290 S.E.2d 817, 277 S.C. 568 (1982). In *Hubbard*, the appellants moved to suppress evidence seized in a search of their residence in a pretrial motion; the circuit court denied the motion; and appellants immediately filed an appeal of the circuit court's ruling. The Supreme Court's decision in *Hubbard* simply states:

The appellants have not yet gone to trial. An appeal in a criminal case must attend the final judgment rendered on the indictment. *State v. McMillan*, 189 S.C. 444, 1 S.E.2d 626 (1939). No final judgment has occurred in this case and the order appealed from is interlocutory. *State v. Thomas*, 275 S.C. 274, 269 S.E.2d 768 (1980).

Therefore, we dismiss the appeal and remand the case for trial.

Hubbard, 290 S.E.2d 817, 277 S.C. 568.

As in *Hubbard*, this appeal was filed immediately after a pretrial ruling concerning the admissibility of evidence. The State advised the circuit court that it would not be moving forward with trial after the circuit court's ruling. Respondent and the jury were dismissed. Respondent was not convicted of any charge, nor sentenced. As such, there is no final order in this matter at the circuit court level. Since there is no final ruling, an appeal of the circuit court's pretrial ruling is premature.

As the Supreme Court stated in *State v. Byars*:

[W]e feel ourselves unable at this time to entertain a consideration of the questions now presented. This court is confined to a consideration of questions presented after a final judgment has been rendered. This is no new question to this court, for we have held that a final judgment is essential in the hearing of an appeal. The prisoner has never been sentenced. The sentence is a final judgment.

State v. Byars, 79 S.C. 174, 174, 60 S.E. 448, 448 (1908).

Based upon the foregoing, the circuit court's ruling concerning the admissibility of evidence is undoubtedly an interlocutory order, and thus, not immediately appealable. For this reason, this appeal should be dismissed.

II. Appellate jurisdiction is not proper in this case because the circuit court's ruling does not fit within a statutory exception permitting an appeal from an interlocutory order.

The right to appeal an interlocutory order arises under statute. *State v. Wilson*, 387 S.C. 597, 599-603, 693 S.E.2d 923, 924-26 (2010). "The State may appeal a pretrial order if the order is appealable under section 14-3-330 of the South Carolina Code. *Id.* at 600, 693 S.E.2d at 924.

Absent an exception to the final judgment rule, appealability is determined by a final judgment and an aggrieved party. *State v. Gregorie*, 339 S.C. 2, 3, 528 S.E.2d 77, 78 (2000); *see also* Rule 201, SCACR.

The exceptions to the final judgment rule are outlined in S.C. Code § 14-3-330, which states, in pertinent part:

The following types of judgments, decrees, and orders are directly appealable: (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in . . . general sessions, . . . and final judgments in such actions . . . ; (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action,. . .

S.C. Code Ann. § 14-3-330.

An interlocutory order is immediately appealable under subsection (1) if it involves the merits. "An order 'involves the merits,' . . . and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). "The phrase 'involving the merits' is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." *Id.*, 369 S.C. at 7, 630 S.E.2d at 467-68.

In this case, the circuit court's pretrial ruling did not determine the underlying matter with finality, and as such, is not appealable under S.C. Code Ann. § 14-3-330(1).

"An interlocutory order is immediately appealable under subsection (2)(a) if it affects a substantial right and the appellant cannot seek review of the current order in an appeal from the final judgment. *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995). "The provisions of section 14-3-330 'have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed.'" *Hagood*, 362 S.C. 191 at 196, 607 S.E.2d 707 at 709.

In South Carolina, the State may immediately appeal an interlocutory order "granting the 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). Under S.C. Code Ann. § 14-3-330(2), an order affecting a substantial right "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. *See* S.C. Code Ann. § 14-3-330(2)(a).

In this case, Respondent was charged with distribution of fentanyl. Under the crime charged, the elements to be proved are: (1) the substance involved was in fact fentanyl; (2) Respondent had possession of the fentanyl; and (3) Respondent distributed the fentanyl. Respondent was never charged with any crime concerning the death of Tedder.

Respondent first contends that the facts of this case are distinguishable from those cases permitted to be appealed under S.C. Code Ann. § 14-3-330(2), because the mention of a death under a distribution charge cannot significantly impair the prosecution of a case when death is not an element of the crime charged and there is no evidence directly relating the distribution to the death. That State had no evidence concerning the actual date of the alleged distribution of fentanyl from Respondent and had no evidence connecting recovered fentanyl from the death investigation to Respondent. The State argued it needed to admit the death because fentanyl overdose was the cause of death, but again, the State failed to present any evidence to the circuit court that connected

the death with the crime charged and to show why the evidence of death was more probative than prejudicial.

Second, Respondent contends that the facts of this case are distinguishable, as the State had self-incriminating Facebook messages and a video confession from Respondent to law enforcement that the circuit court ruled admissible, albeit with redactions concerning prior wrongs and the mention of death. These messages and confession supplied the State with ample evidence to present a case against Respondent. In the video confession, Respondent fully admitted to providing fentanyl to Jonathan, and any redactions would not have affected the actual language of his confession. Further, fentanyl was handed over by a family member to the coroner on scene and it was alleged that the fentanyl was found in Tedder's wallet. Although Respondent planned to argue against its admissibility, the circuit court's ruling did not preclude the State from offering the recovered fentanyl into evidence. With the confession and fentanyl, with the lab report confirming the substance was in fact fentanyl, the State had all evidence necessary to meet the elements of the crime charged. Based upon the availability of this evidence, the circuit court's ruling of excluding any mention of Tedder's death did not substantially impair the State's ability to try the case and the State had enough evidence to complete the trial and appeal after a final judgment was rendered, if necessary.

For all the foregoing reasons, the circuit court's ruling does not meet any statutory exception allowing the interlocutory ruling to be immediately appealable.

CONCLUSION

Based upon the foregoing, Respondent respectfully submits that the circuit court's ruling was interlocutory, as the ruling was not final, and no statutory exception exists to allow said ruling to be appealed before a final judgment was rendered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 5, 2024, she served a copy of Respondent’s Memorandum Concerning Appealability by mail upon the person below by depositing the same in the custody of United States Postal Service, with proper postage affixed, and addressed as follows:

Austin Newman Smith, Esquire
1675 York Highway #1A
York, South Carolina 29745

s/ Jennifer M. Cloud, Esq.

Jennifer M. Cloud, Esq.
The Cloud Law Firm, LLC

ATTORNEY FOR RESPONDENT