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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Trial Court Case No. 2022-CP-23-04923
Appellate Case No. 2023-001265

The State, Respondent,

v.

Michael Carl Zieminski, Appellant.

FINAL REPLY BRIEF OF APPELLANT

The Appellant respectfully submits his final brief in Reply to Respondent's Initial Brief.

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STATEMENT OF THE CASE

Respondent County improperly includes an argumentative misstatement of the Appellant Zieminski's arguments in its Statement of the Case and Facts. It further erroneously argues that some of the arguments (as it presents them) were raised for the first time. This will be addressed below in Appellant's Arguments.[1]

Appellant, Michael Zieminski, submits that the Statement of The Case in his Brief is correct: On September 1, 2022, the Appellant, Michael Zieminski (Michael) was convicted by a Magistrate's Court jury of three violations of a local ordinance regarding treatment of animals in Greenville County, S.C. Michael owned three dogs at the time of the charges. Michael was sentenced to $500.00 fines or 20 days in jail concurrent on each offense. Fees were added to the fines in the amount of $325.00 each. He timely filed a Notice of Intent to Appeal on September 7, 2022.

The Summary Court Judge (hereafter Magistrate) did not timely file a Return on Appeal as is required by Rule 18 of the Magistrate Court Rules and Section 18-7-60 of the S.C. Code of Laws, Annotated (1985). The Notice of Appeal to the Circuit Court was filed on September 7, 2022 and the Magistrate's Return was filed on June 9, 2023, Nine months later. Several documents from the Magistrate Court file were filed just before the hearing of the appeal in the Circuit Court. Further, the Magistrate Court failed to successfully record the proceedings so it was impossible for a transcript of testimony to be prepared.

[1] The County apparently failed to review Appellant's Reply Brief and Motion for Reconsideration in the Circuit Court.

The appeal to the Circuit Court was heard by the Honorable Lawton McIntosh on June 28, 2023, who denied the appeal by orders filed July 11, 2023 (Form 4), and July 20, 2023. Michael filed a Motion for Reconsideration on July 25, 2023, that was denied by an order filed on August 1, 2023, (Form 4).

STANDARD OF REVIEW

Please refer to the Standard of Review section of the Appellant's Brief to this Honorable Court.

ARGUMENT

Respondent misapprehends Appellant Michael Zieminski's appeal. He concedes that the record supplied by the Magistrate indicates that he did not raise Constitutional objections to his prosecution. Appellant, thus, is hamstrung and cannot raise the Constitutionality of the ordinance in this appeal. The inadequate and untimely Record on Appeal is simply one of several factors that made his prosecution unfair. And the key thrust of the Appellant's argument is that the Magistrate claims that the recording machine failed to record the trial, yet many months after the trial he apparently believes he remembers that no constitutional issues were raised. Appellant referenced in his Brief his constitutional arguments to simply prove that he had legitimate, persuasive arguments on Constitutional issues that were thwarted by the deficient record.

The Magistrate's participation in this case adversely and unfairly affected the entire adjudicatory framework established to protect a criminal defendant's Constitutional rights, as well as statutory and common law rights, that provides Appellant Michael Zieminski and others like him the opportunity to have their claims considered on

appeal. … "[An accused] must be granted an opportunity to present his claims to a court unburdened by any "possible temptation ... not to hold the balance nice, clear and true between the State and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927)." *Williams v. Pennsylvania,* 579 U.S. ___ , 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).

Regarding preemption, the Greenville County ordinances on animal cruelty makes it a "strict liability" crime; whereas, the State statute makes animal cruelty a crime that requires criminal intent. Since the intent requirements are different, this is a clear case of implied preemption. *Sandlands C & D, LLC v. Cnty. Of Horry*, 394 S.C. 451 at 467, 716 S.E.2d 280 at 288 (2011). This issue was raised in Appellant Zieminski's Reply Brief in the Circuit Court. (R. pp. 49-52) It is relevant that the South Carolina Legislature failed to outlaw unsanitary conditions for animals. S.C. Code Ann. § 47-1-40 (2023). That the State omitted this issue from its Code is an indication that attempting to proscribe cluttered conditions for animals is fraught with difficulties.

Respondent cites the firmly established law that when this Court addresses questions of statutory interpretation it should make a *de novo review*, giving no deference to lower courts' interpretations. [Resp. Brief, p. 4]. Interpretation of the County ordinance at issue is a necessary effort to understand Appellant's arguments. Essentially, the wording of the County Code gives an insufficient definition of "insanitary", but does make it a prerequisite before a finding is made that conditions are illegally insanitary, that the conditions are "conditions that endanger or pose a risk to an animal's health . . . ." Greenville County Code of Ordinances, § 4-11 Definitions. Thus, the ordinance requires that the prosecution provide a veterinary expert opinion on whether the condition of

Appellant's premises in this case was a threat to the health of the three dogs. The Respondent sidesteps this requirement by arguing that its chief witness was an experienced animal control officer; however, that officer clearly had no veterinary education.

Essentially, without expert testimony the jury was left to speculate on whether the mess in Michael Zieminski's house was indeed "insanitary." The U.S. Environmental Protections Agency has tremendous scientific resources to make determinations on whether substances threaten our health and those determinations often take many years, if not decades. Concentrations and exposure levels are big issues in those determinations. http//www.epa.gov Here lay jurors are asked to make the same type of determination with no expert guidance and no evidence of exposure, concentration levels or other essentials details.

Respondent's claim that the officer's ability to hold on to his job for several years makes him a substitute for a qualified expert in veterinary medicine is patently disingenuous. [Resp. Brief, p. 19, ln.7-9] That claim illustrates the very danger Appellant seeks to call to the attention of this Honorable Court: a juror will likely assume that such employment duration suffices for expertise, yet the language of the ordinance clearly calls for a medical determination on causation. Additionally, Respondent failed to adequately answer the argument made by Appellant that a veterinary medicine expert was needed, nor did he contest the holdings of the cases Appellant cited there. [App. Brief, p. 21] The County Code language required a showing that the conditions at issue caused or threatened harm to the health of the animals. Since no quantitative or qualitative measurements of any kind are required in the code and no measurements were taken by

the County, whether the conditions were in-fact unsanitary was completely left to the subjective, lay opinion of the animal control officer. (Greenville County Code, § 4-11) If this approach stands then there is no check on the power of the County to prosecute alleged crimes regarding sanitation of one's home when one owns animals.

The Greenville County animal ordinance is vague in a similar way that the City of Greenville code was vague in the case of *City of Greenville v. Bane*, which concerned the prosecution of a street preacher for violating a city ordinance prohibiting molesting or disturbing others. Finding the ordinance vague the South Carolina Supreme Court cited with approval this language from one of its earlier cases:

> The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards of adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional. *City of Greenville v. Bane*, 390 S.C. 303, 702 SE2d 112 (SC 2010), (quoting *City of Beaufort v. Baker*, 315 SC 146, 152, 432 S.E.2d 470, 473-74 (1983) (quoting *State v. Albert,* 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)).

The important nuance in this case and a distinction from the above-cited cases is that the County ordinance requires that the condition cause or threaten to cause medical harm. Thus, the vagueness in the definition could be remedied by proper expert testimony being offered by the prosecution. While this argument sounds like a constitutional 'void for vagueness' argument, it is really an argument that the language of the ordinance is crafted such that expert veterinary testimony is required in a case such as the one at bar.

Without such testimony to guide the judge and jury there is enormous room for speculation and widely differing opinions. "It is elementary that jury verdicts cannot rest upon surmise, speculation or conjecture." *Green v. United Ins. Co. of America*, 174 S.E.2d 400, 254 S.C. 202 (S.C. 1970)

Regarding the admission of the photo depicting an unnaturally intense red color of a medical wound on one of the dogs belonging to Appellant, the County introduced no evidence of a causal connection between the wound and alleged unsanitary condition of the house. The County case failed to even approach the standard of proof required in a civil negligence case, much less the higher criminal standard.[2]

> Before a plaintiff can recover in a negligence action, the plaintiff must prove, among other things, causation in fact. *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Id.

Thomas v. South Carolina Dept. of Highways and Public Transp., 465 S.E.2d 578, 320 S.C. 400 (S.C. App. 1995).

There was no evidence connecting anything in the house to the depicted injury, nor was there any veterinary testimony showing that it was harmful for that dog to be present in that house. Again there was no evidence about how frequently the dog visited the inside of the house or the duration of the visits.

This photo in this case is a classic example of evidence being prejudicial because the probative impact would lead the jury astray with its implication of causation that was not substantiated with cogent facts or expert testimony. The Appellant testified that the

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[2] In a criminal proceeding the burden of proof is much higher than the burden of proof in a civil proceeding. *Doe v. Doe*, 551 S.E.2d 257, 346 S.C. 145 (S.C. 2001).

dog was receiving veterinary care, but, alas, the skeletal record provided by the Magistrate denies him means to prove so on appeal.

It is disingenuous for the County to argue that "there is no record of objections the Appellant claims to have made of the Court's ruling." [Resp. Brief, p. 16.] The fact is that the Magistrate included no objections in the Record, whether they were made by prosecution or defense. As Appellant argued in his Brief (p. 6) the Magistrate violated his duties under the law. Appellant is not to blame for the incomplete record.

Respondent's Brief fails to address the arguments and authority found in Appellant's Brief concerning the sparse record filed late by the Magistrate. [App. Brief, pp. 5–11.] Respondent fails to defend the Magistrate's negligence and malfeasance because there is no defense. Likewise, Respondent failed to refute the principle established in South Carolina jurisprudence that when issue preservation is unclear that the Court should address the merit of the issue and, likewise, failed to distinguish the case cited in Appellant's Brief. (p. 11) *Johnson v. Roberts*, 812 S.E.2d 207, 422 S.C. 406 (S.C. App. 2018).

Respondent failed to cite any authority for its arguments in Sections IV., and V., of its Brief, while citing only a statute in its argument at Section VI. Likewise, Respondent fails to cite any part of the Record in those sections. In Section V., Respondent attempts to throw the burden of proof back onto the Appellant by arguing, "While Appellant had the option of calling an expert witness to persuade the jury that allowing the dogs to live in extreme conditions in the Appellant's house were not a violation of the ordinance, that would have gone to the weight of the evidence." [Resp. Brief, p. 10] In a footnote in Section V. the Respondent goes further and makes an

inappropriate inference that Appellant's failure to call an expert was because none could be found, which is a direct violation of a criminal defendant's Right To Remain Silent and the prosecution's burden to prove its case, as well as being speculation not supported by the record. [Resp. Brief, p. 19]

Respondent failed to address Appellant's 8th Issue on Appeal, which was the apex that all the other arguments were climbing towards. While Appellant strongly asserts that all his arguments are sound, when they are taken in combination, as a whole, in the context of a real jury trial, the obvious conclusion is that the trial was "'manifestly a denial of fundamental fairness.' Id. at 325, 673 S.E.2d at 417." *Wilson v. S.C. Dep't of Motor Vehicles*, 419 S.C. 203, 796 S.E.2d 541 (S.C. App. 2017), citing "*Hipp v. S.C. Dep't of Motor Vehicles* , 381 S.C. 323, 324, 673 S.E.2d 416, 416 (2009).

The unfair attributes of the trial should not be considered in a vacuum and should be examined in light of the Magistrate's untimely and skeletal provision of a record and the Circuit Court's *sua sponte* errant claim that Appellant failed to follow procedural law.

The County disingenuously claimed in its Brief that Michael Zieminski, the Appellant, failed to raise the issue of serving the Attorney General previously. [Resp. Brief, p. 2, ln. 20-21] However, there was no opportunity to raise this issue except in Michael Zieminski's Motion for Reconsideration, which he did in paragraph 9 of that motion. (R. p. 58)

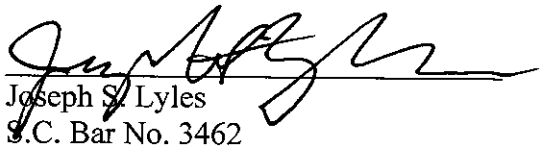
Additionally, Respondent claims that Appellant, Michael Zieminski, raised the rule of lenity for the first time on this appeal. However, it was raised in Appellant's Reply Brief filed in the appeal to Court of Common Pleas. (R. p. 49)

It is well established jurisprudence in South Carolina, as well as many other jurisdictions that an Appellate Court may right a wrong when it determines that a case lacks fundamental fairness. *Gibbs v. Burke*, 337 U.S. 773 (1949). See also, *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87 (S.C. 1990) (Coercive comments by the trail judge violated Defendant's Fifth Amendment right.) This case clearly lacks fundamental fairness for all the reasons explained above.

Accordingly, this Court should reverse the judgment of the Circuit Court and dismiss the verdicts in these three convictions.

Respectfully submitted,

September 9, 2024



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CERTIFICATE OF COUNSEL

I hereby certify that this Final Reply Brief complies with Rule 211(b), SCACR.

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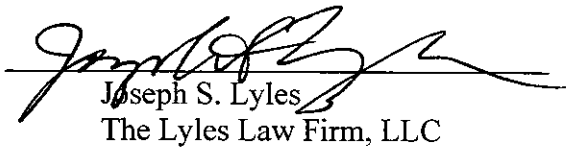

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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant on the Respondent by emailing a copy of it to its attorney of record, Christopher R. Antley, via **cantley@greenvillecounty.org**.

September 9, 2024

Pamela D. Helton, Legal Assistant

SWORN to before me this
9th day of September, 2024.

My commission expires 6/9/2025

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