

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Case No. 2012-213281

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SEP 16 2013

S.C. Supreme Court

City of Fort Mill,

Appellant,

v.

Colin Duane Fitzgerald,

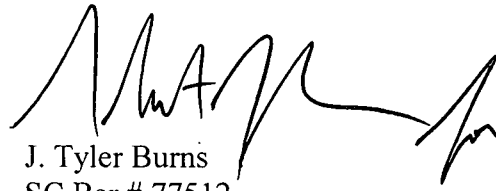
Respondent.

RESPONDENT'S MOTION TO RECONSIDER GRANT OF APPEAL

Respondent, through undersigned counsel, would respectfully move that this Court reconsider the Court's grant of appeal on grounds Respondent did timely file a reply to Appellant's Motion to Certify Case to the Supreme Court. Pursuant to Rule 262 SCACR, filing of such a response motion is effective upon deposit into the U.S. Mail, if properly addressed, with sufficient postage. Attached are copies of the Proof of Service, dated July 31, 2013, the U.S. Mail receipt proving sufficient postage, delivery confirmation on August 1, 2013 from the U.S. Mail, and the Respondent's Reply to Appellant's Motion as filed and served July 31, 2013. Respondent submits that this documentation shows that its response motion was effectively filed.

Respondent asks this Court to reconsider its grant of Appellant's motion and certification of the appeal for the above cited reasons.

September 9, 2013

A handwritten signature in black ink, appearing to read 'J. Tyler Burns', with a stylized flourish at the end.

J. Tyler Burns
SC Bar # 77512
Post Office Box 1297
Fort Mill, South Carolina 29716
(803) 579-4492
Fax: 803-548-7050

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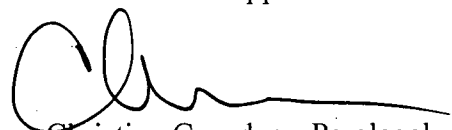
PROOF OF SERVICE

I, Christina Grundner, certify that I have served Respondent's Motion to Reconsider Grant of Appeal by depositing a copy of same in the United States mail, postage prepaid, addressed :

Mr. William Blich
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

I certify that this designation contains no matter which is irrelevant to this appeal.

September 9, 2013



Christina Grundner, Paralegal
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ROBERT J. REEVES +***

ARTHUR K. AIKEN +**

A. BEA HIGHTOWER +

J. TYLER BURNS +



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September 9, 2013

William Blitch, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

RE: City of Fort Mill v. Colin Duane Fitzgerald
Case Number: 2012-213281

Dear Mr. Blitch:

Please find enclosed herewith and served upon you, Respondent's Motion to Reconsider Grant of Appeal and Proof of Service in the above-captioned matter.

With kind regards I am,

Sincerely,

Chris Grundner
Paralegal to J. Tyler Burns

/cmg

Enclosures

cc: The Honorable Daniel E. Shearouse (with enclosures)
Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211

RECEIVED

SEP 16 2013

S.C. SUPREME COURT

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APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

S.C. Supreme Court

Case No. 2012-213281

City of Fort Mill,

Appellant,

v.

Colin Duane Fitzgerald,

Respondent.

RESPONDENT'S REPLY TO APPELLANT'S MOTION TO CERTIFY CASE
TO SUPREME COURT; VACATE CIRCUIT COURT RULINGS; REMAND
FOR A NEW TRIAL; OR ACCEPT JURISDICTION AND GRANT
EXTRAORDINARY RELIEF

Respondent, through undersigned counsel, would respectfully ask this Court to deny Appellant's Motion to Certify Case to the Supreme Court; Vacate Circuit Court Rulings; Remand for a new Trial; or Accept Jurisdiction and Grant Extraordinary Relief, as certification for review nor extraordinary relief is necessary or required to adjudicate the issues in this appeal.

Procedural History

This Appeal results from a conviction of Driving with an unlawful alcohol concentration (DUAC) under section 56-5-2933 of the South Carolina Code (Supp. 2011). Prior to trial, Respondent made several motions to dismiss the charge against the Respondent based on the

numerous violations and the City's failure to comply with the video recording statute, section 56-5-2953 of the South Carolina Code. All motions to dismiss raised by Respondent were denied.

Respondent was convicted by the jury, but the municipal Judge failed to have the jury make a finding of fact as to the Respondent's BAC level for sentencing purposes. Rather than impose a sentence within the range allowed by statute as required when there is no BAC level, the municipal Judge declared a mistrial. The municipal Judge did so without motion from either party. Respondent appealed this conviction.

The appeal was considered by the Honorable John C. Hayes, III, who set aside the mistrial and remanded the case for sentencing. The order of Judge Hayes was filed with Clerk of Court for York County on June 27, 2012. (Exhibit A). The Appellant filed no appeal of Judge Hayes' order.

The Clerk for the Fort Mill Municipal Court, Nancy Butler, sent notice to all parties via email that sentencing of the Respondent would occur on July 17, 2012.(Exhibit B). Respondent was sentenced on that day to a fine of \$997 or 30 days. (Exhibit C).

Appellant never appealed the ruling of Judge Hayes to set aside the mistrial. Instead, Respondent filed a second appeal which was heard before the Honorable Lee S. Alford. This second appeal was heard on September 7, 2012. At no point did the Appellant allege that Judge Hayes improperly set aside the mistrial.

Appellant filed, with the Court of Appeals, a Motion to Hold this Appeal in Abeyance pending the outcome of State v. Philip Wesley Sawyer, Op. No. 2011-UP-263 (S.C. Ct. App. Filed June 7, 2011) currently before the South Carolina Supreme Court. The Court of Appeals denied Appellant's Motion to Hold Appeal in Abeyance. Appellant then filed a Motion to Vacate

Circuit Court Rulings; Remand for a New Trial; and Dismiss Appeal without Prejudice. The Court of Appeals issued an Order denying Appellant's Motion on June 20, 2013. (Exhibit D).

Merits

Appellant submits that this entire matter should be remanded for a new trial on the grounds that Respondent's appeal was premature. Appellant contends that Respondent was wrong to appeal, and Judge Hayes and Judge Alford were wrong in their rulings on those appeals. While at the same time, Appellant never actually appealed any of these erroneous rulings.

Appellant cites the case of State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009) as precedent that this Court has to vacate the ruling of Judge Hayes. However, there is a very great difference between Smith and this current appeal. In Smith, the State actually appealed the rulings from the Circuit Court and Court of Appeals. In that instance, the State believed that the Circuit Court and Court of Appeals erred in their respective rulings and the State followed the correct procedural measures to challenge those rulings. *Id.* But in Respondent's present appeal, Appellant never appealed or challenged either Circuit Court's authority to hear the matter or issue a ruling. Appellant left these matters completely uncontested at the time of its appeal to the Court of Appeals. (Exhibit E). If Appellant believed that Judge Hayes was without authority to set aside the mistrial, Appellant should have appealed that order. Instead Respondent was convicted, sentenced and then filed a new appeal, which at that point was timely and proper. As Appellant states in its motion "section 14-25-95 requires the party appealing to set forth the ground for appeal in Notice of Appeal." (Appellant's Motion to certify for review page 5.) If Appellant believed that Judge Hayes had erred, it should have raised that issue during the appeal

before Judge Alford. At the very least, Appellant should have at least raised the issue when it appealed Judge Alford's ruling to the Court of Appeals. Instead, Appellant only appealed the order of Judge Alford overturning the conviction for violation of section 56-5-2953. (Exhibit F). Appellant has yet to raise nor preserved for appellate review whether or not Judge Hayes erred in setting aside the mistrial. If Judge Hayes' order was erroneous, then it was the responsibility of the Appellant to say so and appeal that decision. Instead Appellant proceeded with sentencing in a case that Appellant now contends was a mistrial in which no sentence could have actually been imposed.

Appellant submits to this Court that Respondent's appeal was premature and in a sense interlocutory. However, Respondent was convicted by a jury and sentence was imposed, meeting the requirements of a timely appeal. Respondent, as well as Appellant were given notice of sentencing.(Exhibit B). Respondent was also given the option by the Court not to be present at sentencing, as per the Clerk of Court. The Respondent had notice of sentencing and exercised his choice not to be present. Therefore, Respondent's sentence is not null and void as submitted by Appellant.

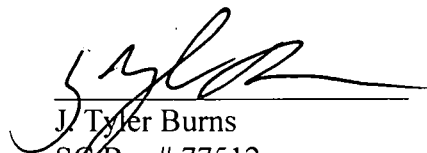
This case presents no "significant public interest or a legal principle of major importance" to warrant a grant of review by this Court. Rule 204 SCACR. There was nothing extraordinary about this case when Appellant filed its appeal before the Court of Appeals. There was no mention of the need for this Court to grant extraordinary relief until the Court of Appeals denied this same motion. To grant Appellant's motion for review of this case at this point would be interlocutory, a claim Appellant has raised concerning Respondent's appeal to the Circuit Court.

Judicial economy also cautions that this Court not grant review or extraordinary relief in

this appeal. To remand this case to the Municipal Court would solve none of the actual issues at the heart of this case. A new jury would be sworn, testimony would be given and a verdict rendered. But what is at contest in this appeal is matters of the law, not of fact. Remanding the case to the Municipal Court would do nothing to change the fact that the City of Fort Mill violated section 56-5-2953. Such a remand would instead require the waste of judicial resources only to bring all parties back to this same position. The true essence of this case is whether the charge against the Respondent should have been dismissed for the City's violation of section 56-5-2953. This is no issue that could be solved with a new jury, at a new trial, even if such an extraordinary measure was proper in this case.

WHEREFORE, for the above mentioned reasons, Respondent prays this Court deny Appellant's Motion to Certify Case to the Supreme Court or Accept Jurisdiction and Grant Extraordinary Relief.

July 31, 2013



J. Tyler Burns
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THE STATE OF SOUTH CAROLINA
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Lee S. Alford, Circuit Court Judge

Case No. 2012-213281

City of Fort Mill,

Appellant,

v.

Colin Duane Fitzgerald,

Respondent.

PROOF OF SERVICE

I, Norma Macias, certify that I have served Respondent's Reply to Appellants Motion to Certify Case to the Supreme Court; Vacate Circuit Court Rulings; Remand for a new Trial; or Accept Jurisdiction and Grant Extraordinary relief on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to :

Mr. William Blich
Office of the Attorney General
PO Box 11549
Columbia, SC, 29211

I certify that this designation contains no matter which is irrelevant to this appeal.

July 31, 2013

Norma Macias, Paralegal
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